

IN THE CASE OF: [REDACTED]

BOARD DATE: 29 March 2024

DOCKET NUMBER: AR20230010638

APPLICANT REQUESTS: an upgrade of his under honorable conditions (general) characterization of service and an appearance before the Board via video or telephone.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record), with self-authored statement
- DD Form 214 (Certificate of Release or Discharge from Active Duty), for the period ending 8 March 1996
- Certificate of Search, Office of [REDACTED] County Clerk, [REDACTED] dated 1 May 2023
- statements of support, dated 7 May 2023 to 16 May 2023 (11)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), Section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant states:

a. He was mentally abused and neglected by his stepmother, and physically abused by his stepmother and older brother. His stepmother and father had a baby when he was 10 years old. When they went to his father's ball games or league bowling events, he and his older brother were expected to sit there and do and say nothing. While his younger brother and other kids were learning how to interact with others, he was not learning any social skills.

b. After his discharge from the Army, he started drinking heavily with occasional drug use. On 21 April 2013, he had his last drink. He started a new life. He genuinely cares for and empathizes with others. He has learned to forgive. He no longer carries around what his stepmother and brother did to him. He treats people with respect, helps those in need, and obeys the law.

c. He is not attempting to deflect blame for his actions. He takes full responsibility. He is not the same selfish and immature kid anymore. His discharge reflected his life back then, but it does not anymore; 27 years with a general discharge with the word "misconduct" on it is enough of a punishment for the mistakes he made.

3. The applicant enlisted in the Regular Army on 22 July 1992 for a 4-year period. Upon completion of initial entry training, he was awarded military occupational specialty 62E (Heavy Construction Equipment Operator). The highest rank he attained was specialist/E-4.

4. He was formally counseled, on 31 May 1995, for refusing to participate in training, leaving the area without being released, and disrespecting four noncommissioned officers (NCOs), on 18 May 1995.

5. The applicant accepted non-judicial punishment, under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) on 4 August 1995, for being disrespectful in language towards and disobeying an order from his superior NCO, on or about 18 May 1995. His punishment consisted of reduction to private first class/E-3, forfeiture of \$244.00 pay, and 14 days of extra duty and restriction.

6. He was formally counseled on four occasions between 22 November and 1 December 1995. Areas of emphasis covered in the counseling included, but are not limited to:

- failure to report on-time for formation on three occasions
- disrespecting an NCO
- changing his attitude

7. The applicant underwent a medical examination on 4 December 1995. The relevant Standard Form (SF) 93 (Report of Medical History) and corresponding SF 88 (Report of Medical Examination) show he reported being unsure about his health, with a history of dizziness or fainting, head injury, pain or pressure in his chest, cramps in his legs, indigestion, recurrent back pain, and frequent trouble sleeping. The examining provider determined he was physically qualified for separation.

8. He underwent a mental status examination on 6 December 1995. The examining provider determined he was mentally responsible and psychiatrically cleared him for any administrative actions deemed appropriate by the command.

9. The applicant accepted non-judicial punishment, under the provisions of Article 15 of the UCMJ on 3 January 1996, for failing to go at the time prescribed to his appointed place of duty and disobeying a lawful order from his superior NCO, on or about

22 November 1995, and for failing to go at the time prescribed to his appointed place of duty, on or about 27 November 1995. His punishment consisted of reduction to private/E-1, forfeiture of \$425.00 pay per month for two months, and 45 days of extra duty.

10. The applicant's immediate commander notified the applicant on 19 January 1996 of his intent to initiate separation action against him under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 14, paragraph 14-12b, for patterns of misconduct. The commander noted the applicant's multiple instances of disrespect to an NCO and failure to be at his appointed place of duty as reasons for the proposed separation action. The applicant acknowledged receipt on that same date.

11. On 25 January 1996, the applicant consulted with legal counsel and acknowledged he had been advised of the basis for the contemplated separation action. He acknowledged understanding that he may expect to encounter substantial prejudice in civilian life if an under honorable conditions (general) discharge were issued to him, and further acknowledged that he may be ineligible for many or all benefits as a Veteran under Federal and State laws, and he could expect to encounter substantial prejudice in civilian life as a result of the issuance of an under other than honorable conditions discharge. He declined to submit a statement in his own behalf.

12. On 26 January 1996, the applicant's immediate commander formally recommended his separation, prior to the expiration of his term of service, under the provisions of AR 635-200, paragraph 14-12b, by reason of patterns of misconduct. He further recommended the issuance of an under honorable conditions (general) characterization of service. The intermediate commander concurred with the recommendation.

13. The separation authority approved the recommended separation on 23 February 1996, waived the rehabilitative transfer requirements, and directed the issuance of an under honorable conditions (general) characterization of service.

14. The applicant was discharged on 8 March 1996, under the provisions of AR 635-200, paragraph 14-12b, by reason of misconduct. His DD Form 214 confirms his character of service was under honorable conditions (general), with separation code JKA and reentry code RE-3. He was credited with 3 years, 7 months, and 17 days of net active service. He was awarded or authorized the following:

- Army Good Conduct Medal
- National Defense Service Medal
- Army Service Ribbon
- Sharpshooter Marksmanship Qualification Badge with Rifle Bar (M-16)
- Sharpshooter Marksmanship Qualification Badge with Grenade Bar

15. The applicant provides the following:

a. A Certificate of Search, from the Office of ██████████ County Clerk, ██████████ ██████████ dated 1 May 2023, shows the Deputy Clerk conducted a ten year search (2013 to 2023) for criminal records regarding the applicant. No records were found.

b. In statements of support from friends, family, supervisors, and co-workers, dated 7 May to 16 May 2023, the authors attest to the applicant's strong moral character. He has provided a stable, supportive home for his family. He is hard-working and dependable at work. He has grown as a man since his discharge and is proud of his military service. He joined alcoholics anonymous, led group meetings, and supported his peers. He is a responsible and productive member of society.

16. Regulatory guidance provides when an individual is discharged under the provisions of AR 635-200, Chapter 14, the separation authority may direct a general discharge if such is merited by the Soldier's overall record. Characterization of service as honorable is not authorized unless the Soldier's record is otherwise so meritorious that any other characterization clearly would be inappropriate.

17. The Board should consider the applicant's overall record in accordance with the published equity, injustice, or clemency determination guidance.

#### MEDICAL REVIEW:

1. The applicant is applying to the ABCMR requesting an upgrade of his under honorable conditions (general) characterization of service. He contends he was experiencing mental health conditions that mitigate his misconduct.

2. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following: 1) The applicant enlisted in the Regular Army on 22 July 1992; 2) The applicant accepted nonjudicial punishment or was counseled multiple times between May 1995-January 1996 for refusing to train, disrespectful behavior, bad attitude, not following orders, and not reporting on time; 3) The applicant's was discharged on 8 March 1996, Chapter 14-12b, by reason of misconduct. His character of service was under honorable conditions.

3. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and available military service and medical records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical documentation was provided for review.

4. The applicant noted mental health conditions as a contributing and mitigating factor in the circumstances that resulted in his separation. There is insufficient evidence the

applicant reported or was diagnosed with a mental health condition while on active service. The applicant underwent a Mental Status Exam as part of his separation proceedings on 6 December 1995. He was not diagnosed with a mental health condition and was cleared for administrative action. A review of JLV provided insufficient evidence the applicant has been diagnosed with a service-connected mental health condition or has been awarded any service-connected disability.

5. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence to support the applicant had condition or experience that mitigates his misconduct. In addition, there is insufficient evidence surrounding the events which resulted in the applicant's discharge to provide an appropriate opinion on possible mitigation as the result of mental health condition or experience.

6. Kurta Questions:

a. Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant reports experiencing a mental health condition while on active service, which mitigates his misconduct.

b. Did the condition exist, or experience occur during military service? Yes, the applicant reports experiencing a mental health condition while on active service.

c. Does the condition experience actually excuse or mitigate the discharge? No, there is insufficient evidence beyond self-report the applicant was experiencing a mental health condition while on active service. The applicant did engage in erratic and avoidant behavior, which can be a sequelae to some mental health conditions, but this is not sufficient to establish a history of a condition during active service. However, the applicant contends he was experiencing a mental health condition that mitigates his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

#### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered.

2. The minority voted to grant partial relief by upgrading the applicant's narrative reason for separation to Secretarial Authority and leaving his under honorable condition (general) characterization of service unchanged. The minority determined, based on the evidence of record, the applicant earned and deserves his general characterization of

service; however, upgrading his narrative reason for separation would recognize his post service accomplishments.

3. The majority determined his post service accomplishments merit upgrading his character of service to honorable.

4. The applicant's request for a personal appearance hearing was carefully considered. However, in this case, the evidence of record and independent evidence provided by the applicant was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	■	■	GRANT FULL RELIEF
■	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by voiding his DD Form 214 ending 8 March 1996, and reissuing him a new DD Form 214, showing his characterization of service was upgraded by this Board to honorable.

6/6/2024

X [REDACTED]

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CHAIRPERSON  
[REDACTED]

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, USC, Section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. Title 10, USC, Section 1556, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the ARBA be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.
3. AR 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation provides the ABCMR may, in its discretion, hold a hearing. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.
4. AR 635-200, in effect at the time, sets forth the basic authority for the separation of enlisted personnel.
  - a. Paragraph 3-7a provides that an honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.
  - b. Paragraph 3-7b states a general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.
  - c. Chapter 14 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions (a pattern of misconduct consisting solely of minor military disciplinary infractions), a pattern of misconduct (consisting of discreditable involvement with civil or military authorities or conduct prejudicial to good order and discipline). Action will be taken to separate a

member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter; however, the separation authority may direct a general discharge if merited by the Soldier's overall record.

5. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder; traumatic brain injury; sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences.

6. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and BCM/NRs regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, Boards shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

//NOTHING FOLLOWS//