

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 15 May 2024

DOCKET NUMBER: AR20230011368

APPLICANT REQUESTS:

- an upgrade of his under honorable conditions discharge to honorable due to behavioral health issues at the time
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Indiana Wesleyan University (IWU) transcripts
- Indiana University (IU) transcripts
- DD Form 214 (Certificate of Release or Discharge from Active Duty) for the period ending 15 February 1989

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, 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, in effect, he is requesting an upgrade of his under honorable conditions discharge to honorable. Both he and his wife, who was pregnant at the time had not yet adjusted to military life. She used to threaten him with a divorce constantly which caused his mental state to be inadequate. From the stress of the language school, his unhappy wife, and his maladjustment to military life, he made the decision to become overweight which resulted in his separation from the Army. He was given a one-way bus ticket home, for him and his wife and, he has never recovered from the whole experience. He prays that the Board will allow his discharge to be upgraded to an honorable one.
3. The applicant provides:

a. IU transcript dated 10 June 2023, reflects that he had a total of 133 credit hours, with a grade point average (GPA) of 3.93.

b. IWU transcript dated 11 June 2023, reflects that he had a total of 42 credit hours, with a grade point average (GPA) of 3.54.

4. The applicant's record reflects the following:

a. DD Form 4 (Enlistment/Reenlistment Document-Armed Forces of The United States) shows he enlisted in the Regular Army on 18 November 1987 for four years.

b. On 13 June 1988, the applicant's commander received a memorandum from the Silas B. Hays Army Community Hospital regarding the applicant's missed appointment, causing a monetary loss to the clinic and a loss for others to have an appointment in his place.

c. DA Forms 4856 (General Counseling Form) show he was counseled for:

- 28 June 1988: Failure to keep or cancel a medical appointment
- 4 August 1988: Failure to report

d. A memorandum for record (MFR) dated 16 November 1988, shows the applicant was informed by his superior to return an overdue movie to the local video store and to provide proof. The next day the Soldier stated he returned it, but he left his receipt at home to which the supervisor advised him that he would need to see it by the end of the day. The supervisor waited and even attempted to call the applicant but without success.

e. DA Forms 4856 show he was counseled for following additional issues:

- 18 November 1988: Disobeying a lawful order
- 23 November 1988: Writing a check without having sufficient funds
- 7 December 1988: Failure to report

f. DA Form 2627 (Record of Proceedings Under Article 15, UCMJ) dated 16 December 1988, shows the applicant received non-judicial punishment under the provisions of Article 15, Uniform Code of Military Justice (UCMJ) for disobeying a lawful order, violation of Article 91, to wit: in that he failed to return two video tapes, a lawful order given by his noncommissioned officer, in which he failed to do. He was found guilty and received punishment of reduction in grade to private (PVT)/E1. He did not appeal.

g. Report of Unfavorable Information for Security Determination dated 27 December 1988, reflects the recommendation for the revocation of his security clearance. This request was due to the applicant's series of financial problems, lack of judgement, and a careless attitude towards others that was incompatible with the Army standards.

h. DA Form 3822-R (Report of Mental Status Evaluation) dated 28 December 1988, shows he underwent a mental status evaluation as part of a Chapter 13 elimination process. The report further shows he had the mental capacity to understand and participate in board proceedings; he was mentally responsible; met retention requirements of Army Regulation 40-501 (Standards of Medical Fitness), Chapter 3; and showed the following:

- He had normal behavior
- He was fully alert
- He was fully oriented
- His mood or affect was unremarkable
- His thinking process was clear
- His thought content was normal
- His memory was good
- Soldier is cleared for any administrative action deemed appropriate by Command

i. His commanding officer initiated separation under the provisions of AR 635-200, Chapter 13, for failure to repair and numerous financial problems, with a general discharge. After consulting with legal counsel on 12 January 1989, for his separation action and its effects of the rights available to him, and the effect of any action taken by him in waiving his rights. He further acknowledged:

- he could consult with consulting counsel as his military counsel and/or civilian counsel at no expense to the government
- to obtain copies of documents of this separation
- he was advised he could submit any statements he desired in his own behalf

j. In a personal statement, he further clarifies his case, in effect, that any further service in the Army was not in his best interest. His family was the most important to him at the time and given that his wife had not adapted to the military life, and continuously threaten him with divorce, as she was opposed to him continuing to serve. He attempted to buy his wife's love, but that only resulted in financial issues and debt which only created more problems at home and in his military career. He several missed formations due to him simply trying to convince his wife to stay with him.

k. On 12 January 1989, he was barred from reenlistment due to his Article 15, his debt, and for not being at his appointed place of duty.

l. DA Forms 4856 show he received the following additional counseling statements for:

- 20 January 1989: Failure to pay debt
- 2 February 1989: Disobeying lawful orders

m. On 26 April 2000, the separation authority directed that the applicant be separated from the Army with a characterization of General Under Honorable Conditions. He also ordered the applicant be transferred to Individual Ready Reserve (IRR).

n. DD Form 214 for the period ending 15 February 1989, shows he was discharged with an under honorable conditions (general) discharge, due to unsatisfactory performance, pursuant to Army Regulation 635-200, Chapter 13. He received a separation code of "LHJ" and a reenlistment code of "3". He completed 2 years, 2 months, and 28 days of net active service this period.

5. The applicant does not provide any documents to support his claims of other mental health issues.

6. Due to the applicant's claim of other mental health issues, the case is being forwarded to the behavioral health staff at the Army Review Boards Agency.

7. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under honorable conditions (general) discharge to honorable. He contends he experienced mental health conditions that mitigates his misconduct.

b. 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 18 November 1987; 2) From June-December 1988, the applicant was counseled multiple times for financial problems, not following orders, being disrespectful, and not reporting on time; 3) The applicant was discharged on 15 February 1989, Chapter 13- due to unsatisfactory performance with an under honorable conditions (general) discharge.

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

d. The applicant asserts he was experiencing mental health problems due to marital problems while on active service, which mitigates his misconduct. There is insufficient evidence the applicant ever reported or was diagnosed with a mental health condition while on active service. On 28 December 1988, applicant underwent a mental status evaluation as part of administrative separation proceedings. He was not diagnosed with a mental health condition, and he was cleared for any administrative action deemed appropriate by Command. A review of JLV provided insufficient evidence the applicant has been diagnosed with and or treated for service-connected any mental health condition by the VA. He also does not receive any service-connected disability.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a condition or experience that mitigates his misconduct.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant asserts he experienced a mental health condition that mitigates his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced a mental health condition that mitigates his misconduct while on active service.

(3) 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. Also, there is no nexus between his reported mental health condition and the applicant's financial misconduct in that: 1) this type of misconduct is not a part of the natural history or sequelae of the applicant's reported mental health conditions; 2) the applicant's reported mental health conditions does not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing a mental health condition or an experience that mitigated 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 not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency

determinations requests for upgrade of his characterization of service. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding insufficient evidence to support the applicant had a condition or experience that mitigates his misconduct. The opine noted there is no nexus between his reported mental health condition and the applicant's financial misconduct.

2. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the numerous counts of misconduct. The Board noted the applicant post service achievements of completion of his degree; however, the applicant provided no character letters of support for the Board to weigh a determination. The applicant was discharged for unsatisfactory performance and was provided an under honorable conditions (General) characterization of service. The Board agreed that the applicant's discharge characterization is warranted as he did not meet the standards of acceptable conduct and performance of duty for Army personnel to receive an Honorable discharge. Therefore, the Board denied relief.

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record 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 evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.



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, U.S. Code, 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. Army Regulation 635-8 (Separation Processing and Documents). The DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of REFRAD, retirement, or discharge. The DD Form 214 is not intended to have any legal effect on termination of a Soldier's service.
3. Army Regulation 601-210 (Active and Reserve Components Enlistment Program) provides that an RE code is not upgraded unless it was administratively incorrect when originally issued.
 - a. RE code "1" applies to personnel who have completed their obligated term of active service and are considered qualified to reenter the U.S. Army if all other criteria are met.
 - b. RE code "3" applies to personnel who are not considered fully qualified for reentry or continuous service at time of separation, but whose disqualification is waivable. They are ineligible unless a waiver is granted.

c. RE code "4" applies to personnel separated from last period of active-duty service with a nonwaivable disqualification.

4. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities for separating Soldiers from active duty and the separation codes to be entered on the DD Form 214. The separation code is an administrative code used to designate the narrative reason for separation. The SPD/RE Code Cross Reference Table included in the regulation establishes that RE code "3" is the proper code to assign members separated with separation code "LHJ" for Soldiers who are discharged under the provisions of Army Regulation 635-200, Chapter 13, by reason of unsatisfactory performance. The SPD Code/RE Code Cross Reference Table shows that a Soldier assigned the separation code "LHJ" will be assigned RE code "3."

5. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

a. 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. Chapter 13 provides that a Soldier may be separated when it is determined that he or she is unqualified for further military service because of unsatisfactory performance. The service of Soldiers separated because of unsatisfactory performance will be characterized as honorable or under honorable conditions as warranted by their military records.

6. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to carefully consider the revised PTSD criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged under other than honorable conditions and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

7. The acting Under Secretary of Defense for Personnel and Readiness provided clarifying guidance on 25 August 2017, which expanded the 2014 Secretary of Defense memorandum, that directed the BCM/NRs and DRBs to give liberal consideration to veterans looking to upgrade their less-than-honorable discharges by expanding review of discharges involving diagnosed, undiagnosed, or misdiagnosed mental health

conditions, including PTSD; traumatic brain injury; or who reported sexual assault or sexual harassment.

8. The Under Secretary of Defense for Personnel and Readiness issued guidance to Service Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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.

9. Title 10, U.S. Code, section 1556 requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (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.

10. Army Regulation 15-185 (Army Board for Correction of Military Records) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. The ABCMR may, in

its discretion, hold a hearing (sometimes referred to as an evidentiary hearing or an administrative hearing) or request additional evidence or opinions. 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.

//NOTHING FOLLOWS//