

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 June 2024

DOCKET NUMBER: AR20230012308

APPLICANT REQUESTS:

- physical disability separation from the Army National Guard (ARNG) in lieu of honorable administrative discharge due to homosexual conduct
- personal appearance before the Board

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

DD Form 149 (Application for Correction of Military Record)

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:
 - a. He was injured in the line of duty (LOD) in July 1995. He was unable to drill due to his injury and rather than give him a medical discharge, he was put in the Individual Ready Reserve (IRR) until his contract was up.
 - b. He was accused of being gay, which he is not. Whoever did the paperwork to switch him to the IRR stated that homosexual misconduct was the reason. He was married at the time and never exhibited any homosexual acts. He is a Christian and to have this on his record is a disgrace.
 - c. He believes this false information was an act of retaliation against him for not drilling due to his LOD injuries sustained in 1995. He never saw his records until 2021, and they support a decision to revise his discharge to medical.
 - d. His application notes his request is related to sexual harassment/sexual assault.

3. A DD Form 4 (Enlistment/Reenlistment Document) shows the applicant enlisted in the ARNG on 31 March 1993 for a period of 8 years.
4. A DD Form 214 (Certificate of Release or Discharge from Active Duty) shows the applicant enter active duty training (ADT) on 13 July 1993, for one station unit training (OSUT) and was honorably released from ADT and transferred back to his ARNG unit on 22 October 1993, due to completion of period of ADT. He was awarded the Military Occupational Specialty (MOS) 11B (Infantryman) and credited with 3 months and 10 days of net active service this period.
5. Headquarters, 2nd Battalion, 175th Infantry Regiment (Fifth Maryland) Orders 12-2, dated 5 July 1995, ordered the applicant to annual training (AT) at Fort A.P. Hill, VA, for the period from 15 July 1995 through 29 July 1995.
6. A witness statement, shows the unnamed witness saw a rappelling demonstration and rehearsal on 21 July 1995, wherein the applicant performed the rappel and movement to the prone position. While he did not witness the injury itself, as the S-1, he can verify the applicant reported to the medics for treatment of an injury to his right knee.
7. Multiple Standard Forms 600 (Chronological Record of Medical Care) show:
 - a. The applicant was evaluated and treated on 21 July 1995, for a right knee injury. He stated while training, he was running and fell, striking his right knee. A second note on the same date further shows a repelling injury to the right knee. His knee didn't bother him immediately, but it now has become swollen with some tenderness. He denied difficulty waking. He was assessed with a right knee contusion and the plan shows rest, ice, compression, and elevation (R.I.C.E.).
 - b. He was again seen on 23 July 1995 for follow-up/reevaluation of the right knee. He indicated pain when fully extended, acute swelling, pain with walking long distance. He was assessed with a severe contusion and taking Motrin.
 - c. He was again seen for follow-up On 25 July 1995, for his right knee contusion and effusion. Pain was diminishing and he was starting to bear weight on it. There was no medial, lateral, or anteroposterior (AP) instability in the knee. The impression shows right knee contusion status post drainage at effusion with no significant re-accumulation The plan was to increase weight bearing gradually, continue elastic wrap, aspirin, icing and follow-up in 4 days.
8. A DA Form 2823 (Sworn Statement), written and signed by the applicant on 25 July 1995, shows on 21 July 1995, he was a member of the demonstration team for Bosslift '95. His job was to fly by helicopter to observation point 2, land, jump off, and run out 10

meters, then drop down into the prone position. When he went into the prone position after the run, he felt his knee hit either the ground or a rock; he was unsure which. Since there was a crowd and they were the first exhibition, he drove on and finished his demonstration before tending to his knee. Afterward, it swelled and bothered him more before seeing a medic.

9. A Disability Counseling Statement shows the applicant was counseled by Staff Sergeant (SSG) M_____ on 25 July 1995, regarding his eligibility for continuance of pay and allowances while disabled from an injury, aggravation, illness, or diseases incurred in the LOD.

10. Two additional Standard Forms 600 show:

a. The applicant was again seen for follow-up to his right knee contusion on 29 July 1995. He had been taking 400 milligrams (mg) Motrin, using an ACE wrap, and reported overall improvement and that the swelling had diminished considerably. There was no significant effusion or warmth over joint, mild tenderness just medial to patella, and no medial, lateral, or AP instability. The impression was status post knee contusion, status post drainage large effusion, doing well. The plan was to increase activity gradually as tolerated with a walking plan 3 times per week, building up gradually to 5 times per week, with Motrin as needed and follow-up at next drill.

b. On 17 September 1995, he requested evaluation of his right knee pain resulting from his rappelling injury on 20 July 1995. He had presented for treatment on 21 July 1995, with large right knee effusion, which was drained. The effusion was orange in color, but not frankly bloody. He improved overall, but his recovery has plateaued for the past 6 weeks. He has slight stiffness and persistent pain. He feels "sand" in his knee when climbing steps and his job requires hours of prolonged standing per day, which makes his symptoms worse. His right knee had warmth but no redness and slight swelling; ok active and passive range of motion; no medial, lateral, or AP instability. Positive for crepitation (grating or crackling sound or sensation) of patella on flexion extension which is not present on the left. The impression shows rule out chondromalacia (softening of the kneecap cartilage) patella. The plan shows Ibuprofen 400 mg, orthopedic consultation, and R.I.C.E.

11. A DA form 2173 (Statement of Medical Examination and Duty Status) shows:

a. The applicant was examined on 21 July 1995, after incurring a right knee contusion and effusion during a demonstration for BossLift '95 at Fort A.P. Hill, VA, when he fell while running and hit his knee, which was witnessed by over 200 people.

b. On 15 December 1995, the unit Adjutant signed the form indicating a formal LOD investigation was not required and that his injury was considered to have been incurred in the LOD.

12. Multiple memoranda show an LOD Investigation was submitted for State approval on 17 January 1996, and the injury was approved as in the LOD on 19 January 1996.

13. The applicant's available service records do not contain a DA Form 3349 (Physical Profile) or any other documentation showing he was issued a permanent physical profile rating or was diagnosed with a condition that warranted entry into the Army Physical Disability Evaluation System (PDES) or failed retention standards and/or was unfitting.

14. The complete facts and circumstances surrounding the applicant's discharge from the ARNG are unknown as his discharge packet, to include notification of discharge initiation and approval, are not in his available service records for review.

15. State of Maryland, Military Department Orders 129-060, dated 20 August 1997, honorably discharged the applicant from the ARNG and assigned him to the U.S. Army Reserve (USAR) Control Group (Reinforcement) effective 20 August 1997, under the provisions of National Guard Regulation 600-200 (Enlisted Personnel Management) paragraph 8-27h.

16. A National Guard Bureau (NGB) Form 22 (Report of Separation and Record of Service) shows the applicant was honorably discharged from the ARNG on 20 August 1997, under the provisions of National Guard Regulation 600-200, paragraph 8-27h, due to homosexual conduct. He was credited with 4 years, 4 months, and 20 days of net service and transferred to the USAR Control Group (Reinforcement) for completion of his remaining statutory obligation of 2 years, 6 months, and 11 days.

17. U.S. Army Reserve Personnel Command Orders D-05-122433, dated 1 May 2001, honorably discharged the applicant from the USAR Control Group (Reinforcement) effective the date of the orders.

18. The ABCMR requested sanitized copies of Law Enforcement Reports from Department of the Army, Criminal Division. A search of the Army criminal file indexes revealed no Sexual Assault/Sexual Harassment records pertaining to the applicant.

19. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the

Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, the Army Aeromedical Resource Office (AERO), and/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting a change in his separation authority and, in essence, a referral to the Disability Evaluation System (DES). He states in part:

“I was injured in July 1995 (line of duty). I was unable to drill due to my injury. Rather than give me a medical discharge, I was put on IRR [Individual Ready Reserve] until my contract was up. I was accused of being gay, which I am not.”

c. The Record of Proceedings details the applicant’s military service and the circumstances of the case. The applicant’s Report of Separation and Record of Service (NGB Form 22) for the period of Service under consideration shows the former drilling Guardsman enlisted in the Army National Guard on 31 March 1993 and was honorably discharged from the Maryland Army National Guard (MDARNG) on 20 August 1997 under the provisions of paragraph 8-27h of NGR 600-200, Enlisted Personnel Management (1 February 1990): Homosexual Conduct.

d. Contemporaneous documentation shows the applicant injured his left knee on 2 July and right knee on 21 July 1995. Both injuries were diagnosed as contusions for which he was treated conservatively. A 15 December 1995 Statement of Medical Examination and Duty Status and subsequent approval memorandum dated 19 January 1996 shows the right knee injury was determined to have occurred in the line of duty.

e. There is no evidence the applicant had any duty incurred medical condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, there was no cause for referral to the Disability Evaluation System. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

f. Specifically, there is no evidence either injury became a duty limiting condition. In addition, paragraph 2-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (13 December 1985) states:

“The mere presence of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the member reasonably may be expected to perform because of his or her

office, grade, rank, or rating, given due consideration to his or her availability for worldwide deployment under field conditions.”

g. Review of his records in JLV shows the applicant has been awarded multiple VA service-connected disability ratings, including somatization disorder (70%), left knee prosthesis (30%), and right knee prosthesis (30%). However, the DES compensates an individual only for service incurred medical condition(s) which have been determined to disqualify him or her from further military service. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

h. It is the opinion of the ARBA medical advisor that neither a change in his separation authority nor a referral of his case to the DES is warranted.¹

BOARD DISCUSSION:

1. The Board determined 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.

2. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The applicant served in the ARNG from 31 March 1993 to 20 August 1997, with entry on active duty for training from 13 July to 22 October 1993. His available service records do not contain any documentation showing he was issued a permanent physical profile rating or that he was diagnosed with a condition that warranted entry into the Army Physical Disability Evaluation System (PDES) or failed retention standards and/or was unfitting. He was discharged from ARNG on 20 August 1997, due to homosexual conduct, and ultimately from the USAR on 1 May 2001. The Board reviewed and agreed with the medical reviewer's finding no evidence the applicant had any duty incurred medical condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, there was no cause for referral to the Disability Evaluation System. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge. Based on the available evidence, the Board determined neither a change in his separation authority nor a referral of his case to the DES is warranted.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	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.

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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. Title 10, U.S. Code, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in

chapter 61 and in accordance with DOD Directive 1332.18 (Discharge Review Board (DRB) Procedures and Standards) and Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an Military Occupational Specialty (MOS) Medical Retention Board; and/or they are command-referred for a fitness-for-duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and Physical Evaluation Board (PEB). The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

c. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of his or her office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

3. Army Regulation 635-40 establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

a. Disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted

and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

b. Soldiers who sustain or aggravate physically-unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

4. Army Regulation 40-501 provides information on medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures. Soldiers with conditions listed in chapter 3 who do not meet the required medical standards will be evaluated by an MEB and will be referred to a PEB as defined in Army Regulation 635-40 with the following caveats:

a. U.S. Army Reserve (USAR) or Army National Guard (ARNG) Soldiers not on active duty, whose medical condition was not incurred or aggravated during an active duty period, will be processed in accordance with chapter 9 and chapter 10 of this regulation.

b. Reserve Component Soldiers pending separation for In the Line of Duty injuries or illnesses will be processed in accordance with Army Regulation 40-400 (Patient Administration) and Army Regulation 635-40.

c. Normally, Reserve Component Soldiers who do not meet the fitness standards set by chapter 3 will be transferred to the Retired Reserve per Army Regulation 140-10 (USAR Assignments, Attachments, Details, and Transfers) or discharged from the Reserve Component per Army Regulation 135-175 (Separation of Officers), Army Regulation 135-178 (ARNG and Reserve Enlisted Administrative Separations), or other applicable Reserve Component regulation. They will be transferred to the Retired Reserve only if eligible and if they apply for it.

d. Reserve Component Soldiers who do not meet medical retention standards may request continuance in an active USAR status. In such cases, a medical impairment incurred in either military or civilian status will be acceptable; it need not have been incurred only in the line of duty. Reserve Component Soldiers with non-duty related medical conditions who are pending separation for not meeting the medical retention

standards of chapter 3 may request referral to a PEB for a determination of fitness in accordance with paragraph 9–12.

5. Title 10, U.S. Code, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent. Title 10, U.S. Code, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30 percent.

6. National Guard Regulation 600-200 (Enlisted Personnel Management) prescribes the criteria, policies, procedures, and responsibilities to recruit, enlist, reenlist or extend, provide initial entry training, assign, promote, appoint and reduce in grade, bar to extension or immediate reenlistment, select and appoint to and from Command Sergeant Major, and to separate from service enlisted Soldiers in the Army National Guard of the United States (ARNGUS).

a. Paragraph 8-26 (Discharge from State ARNG and/or Reserve of the Army), in effect at the time, provides the reasons, applicability, codes, and board requirements for administrative discharges from the Reserve of the Army, the State ARNG only, or both. All Soldiers will be notified of a commander's recommendation for their involuntary discharge.

b. Paragraph 8-26h shows to refer to Army Regulation 135-178 (ARNG and Reserve - Enlisted Administrative Separations), chapter 10, for discharge for homosexual conduct. A discharge board is required unless the Soldier waives it. RE Code 4.

c. Paragraph 8-27 (State ARNG Discharge) in effect at the time, lists reasons for discharge from the state ARNG not listed in paragraph 8-26 or Army Regulation 135-178. Soldiers will be notified of recommendations for involuntary discharges and afforded a reasonable opportunity to provide a written response for consideration by the separation authority. Characterization of service will be per applicable State codes.

d. Paragraph 8-27h provides for discharge at the request of the Soldier not to be discharged from the Reserve of the Army status in order to become a member of the USAR. RE Code 1 or 3, as applicable.

7. Under Secretary of Defense for Personnel and Readiness memorandum, dated 20 September 2011, subject: Correction of Military Records Following Repeal of Section 654 of Title 10, U.S. Code, provides policy guidance for Service Discharge Review Boards (DRB's) and Service Boards for Correction of Military/Naval Records (BCM/NR's) to follow when acting on applications from former service members discharged under Don't Ask, Don't Tell or prior policies.

a. This memorandum states that, effective 20 September 2011, Service DRB's should normally grant requests in these cases to change the:

- narrative reason for discharge to "SECRETARIAL AUTHORITY"
- separation program designator (SPD) code to "JFF"
- character of service to honorable
- RE code to an immediately-eligible-to-reenter category (not applicable to officers)

b. For the above upgrades to be warranted, both of the following conditions must have been met:

- the original discharge was based solely on Don't Ask, Don't Tell or a similar policy in place prior to enactment of Don't Ask, Don't Tell
- there were no aggravating factors in the record, such as misconduct

8. 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.

9. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR.

a. Paragraph 2-11 states applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

b. 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.

//NOTHING FOLLOWS//