

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 25 June 2024

DOCKET NUMBER: AR20230012637

APPLICANT REQUESTS: an upgrade of his under honorable conditions (general) discharge to an honorable discharge.

APPLICANT'S SUPPORTING DOCUMENT 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 (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, in effect, his discharge should be upgraded due to the fact he was suffering from anxiety and depression at the time of his misconduct. The challenges of Basic Combat Training, Advance Individual Training, and family issues he was experiencing at the time made it difficult for him to adjust to being a Soldier.
3. The applicant enlisted in the Regular Army on 26 August 1997 for a period of 3 years in the rank/grade of private (PV1)/E-1. Upon completion of initial entry training, he was awarded military occupational specialty 77F (Petroleum Supply Specialist) and assigned to a unit at Fort Hood, TX.
4. The applicant was counseled on five occasions between 9 July 1998 and 17 August 1998. He was repeatedly advised that continued misconduct could result in disciplinary action. He was counseled for the following offenses:
  - failing to report at the time prescribed to his appointed place of duty (three times)
  - lack of responsibility, initiative, and organization skills (three times)
  - failing to report to his appointed place of duty at all (twice)
5. On 19 August 1998, the applicant accepted summarized nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for failing to go at the time prescribed to his appointed place of duty on or about

17 August 1998. His punishment consisted of 7 days extra duty and 7 days restriction to the barracks.

6. The applicant was counseled on four occasions between 20 August and 14 September 1998. He was repeatedly advised that continued misconduct could result in disciplinary action. He was counseled for the following offenses:

- failing to report at the time prescribed to his appointed place of duty
- failing to report to his appointed place of duty at all (3 times)
- failing to respond to corrective training and disciplinary action
- lack of motivation and discipline
- failing to maintain a proper military appearance

7. On 14 September 1998, the applicant accepted NJP under the provisions of Article 15, of the UCMJ for wrongfully using marijuana between 2 May 1998 and 2 June 1998. His punishment consisted of reduction to E-1; forfeiture of \$242.00; 14 days extra duty; and 14 days restriction.

8. The applicant was counseled on three occasions between 15 September 1998 and 21 September 1998. He was repeatedly advised that continued misconduct could result in disciplinary action and/or discharge. He was counseled for the following offenses:

- failing to report at the time prescribed to his appointed place of duty (1)
- lack of responsibility, initiative, and organization skills (1)
- failing to report to his appointed place of duty at all (2)
- being drunk on duty
- underage drinking

9. On 22 September 1998, an administrative flag was imposed upon the applicant to prevent him from receiving favorable personnel actions because he was pending adverse action.

10. On 5 October 1998, the applicant accepted NJP under the provisions of Article 15, of the UCMJ for being found drunk on duty and failing to go at the time prescribed to his appointed place of duty. His punishment consisted of forfeiture of \$463.00 pay per month for two months (suspended, to be automatically remitted if not vacated before 3 January 1999); 45 days extra duty; and 45 days restriction.

11. The applicant underwent a command-directed mental status evaluation on 20 October 1998. It was determined that he had the mental capacity to understand and participate in proceedings. He was cleared for any administrative action deemed appropriate by command.

12. On 2 November 1998, the applicant's immediate commander informed the applicant that he was initiating action to separate him under the provisions of provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), paragraph 14-12c, for misconduct-commission of a serious offense. The specific reasons for this action were the applicant's receipt of three NJPs and several negative counseling statements. The applicant's commander informed him he was recommending that he receive an under honorable conditions (general) characterization of service. The applicant acknowledged receipt of the notification on the same date.

13. The applicant consulted with counsel and was advised of the rights available to him. He requested to be represented by counsel and to submit a statement in his own behalf.

14. On 7 November 1998, the applicant's defense counsel submitted a memorandum to the applicant's separation authority wherein he contended:

a. Pursuant to Army Regulation 635-200, Chapter 1-18, a Soldier must receive adequate counseling and rehabilitative measures before separation action is initiated under the provisions of the regulation. For minor disciplinary infractions or a pattern of misconduct under paragraph 14-1 2a and b, the counseling must include at a minimum: the reason for counseling, that separation action may be initiated if the behavior continues; the type of discharge that could result from the possible separation action and the effect of each type of discharge. Army Regulation 635-200, paragraph 1-18 b(2). Although the applicant was being discharged under the provision of paragraph 14-12c, it was apparent from the discharge packet that separation was based on a pattern of misconduct and not a serious incident of misconduct. Consequently, counseling must conform to the requirements of paragraph 1-18.

b. The applicant was not counseled regarding the type of discharge he could receive or the effect of the types of discharge prior to initiation of the action. Therefore, he should be allowed to remain in the service and given a reasonable opportunity to improve his performance and conduct.

c. Additionally, two of the incidents for which the applicant was being discharged involved the use of alcohol or illegal drugs. However, he had not been command referred to the Army Drug and Alcohol Prevention and Control Program (ADAPCP) and he was not aware that he could voluntarily enroll in the program.

15. The applicant's immediate commander formally recommended approval of the applicant's separation and issuance of a general discharge.

16. The command's trial counsel submitted a memorandum to the separation authority wherein she contended:

a. The separation action initiated against the applicant, under the provisions of Army Regulation 635-200 Chapter 14, paragraph 14-12c were proper and the counseling requirements of Chapter 14-12b were not applicable.

b. Army Regulation 635-200, paragraph 14-12c provides that "abuse of illegal drugs is serious misconduct." Although paragraph 14-12c, states that "a single drug abuse offense may be combined with one or more minor disciplinary infractions of incidents of other misconduct and processed for separation under a or b above," such action is not mandatory and the decision to proceed under paragraph 14-12b rests within the discretion of the chain of command.

c. Furthermore, although it was alleged that the applicant had not been command referred to ADAPCP, such is not a requirement for processing separation under paragraph 14-12c.

17. On 20 November 1998, the applicant's intermediate commander concurred with the recommendation for approval with the issuance of general, under honorable conditions discharge.

18. On 23 November 1998, the separation authority approved the recommended separation and directed the applicant's service be characterized as general, under honorable conditions.

19. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged on 18 December 1998 in the grade of E-1, under the provisions of Army Regulation 635-200, paragraph 14-12c(2), due to Misconduct with Separation Code "JKK" and Reentry Code "4." His service was characterized as under honorable conditions (General). He was credited with completion of 1 year, 3 months, and 23 days of net active service. He did not complete his first full term of service.

20. On 14 November 2023, a staff member of the Case Management Division, Army Review Boards Agency (ARBA), requested the applicant provide medical documents that support his conditions of anxiety and depression. To date, the applicant has not responded.

21. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition.

22. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under honorable conditions (general) characterization of service. He contends he experienced

mental health conditions that mitigate his misconduct. 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 26 August 1997; 2) The applicant was counseled on five occasions between 9 July-17 August 1998 for various misconduct to include failing to report on time and lacking responsibility; 3) On 19 August 1998, the applicant accepted summarized nonjudicial punishment (NJP) for failing to go at the time prescribed on time; 4) The applicant was counseled on four occasions between 20 August-14 September 1998 again for failing to report on time, and failing to respond to corrective action, lacking motivation, and failing to maintain a proper military appearance; 5) On 14 September 1998, the applicant accepted NJP for wrongfully using marijuana; 6) The applicant was counseled on three occasions between 15 September-21 September 1998 for failing to report on time, lacking responsibility, being drunk on duty, and underage drinking; 7) On 5 October 1998, the applicant accepted NJP for being found drunk on duty and failing to go at the time prescribed to his appointed place of duty; 8) The applicant was discharged on 18 December 1998, Chapter 14-12c(2), due to Misconduct. His service was characterized as under honorable conditions (General).

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

c. The applicant asserts he was experiencing mental health conditions while on active service, which mitigates his misconduct. There is insufficient evidence the applicant reported or was diagnosed with a mental health disorder while on active service. The applicant underwent a Mental Status Evaluation as part of his chapter proceedings on 20 October 1998. It was determined that he had the mental capacity to understand and participate in proceedings. He was cleared for any administrative action deemed appropriate by command.

d. A review of JLV provided insufficient evidence the applicant has been diagnosed with a mental health condition. The applicant 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.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant asserts he experienced a mental health condition which 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 misconduct? No, there is insufficient evidence beyond self-report the applicant was experiencing a mental health condition, while he was on active service. The applicant did engage in various forms of misconduct that could be identified as avoidant or erratic behavior and natural sequelae to some mental health conditions. However, the presence of misconduct is not sufficient evidence of the presence of a mental health condition. Yet, the applicant contends he was experiencing a mental health condition or an experience that mitigates his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

#### BOARD DISCUSSION:

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 request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The applicant was discharge due to misconduct, commission of a serious offense. He received a general, under honorable conditions discharge after completing 1 year and 3 months of active service. The Board found no error or injustice in the separation processing. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the advising official. The Board concurred with the medical official's finding insufficient evidence to support the applicant had a condition or experience that mitigates his misconduct. Also, the applicant provided no evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination. Based on a preponderance of evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

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.

[REDACTED]

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[REDACTED] [REDACTED]

[REDACTED]

[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 three 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 three-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, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

3. Army Regulation 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 that 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. It is not an investigative body.

4. Army Regulation 635-200 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. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part to 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//