

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 June 2024

DOCKET NUMBER: AR20230013138

APPLICANT REQUESTS:

- an upgrade of his under other than honorable conditions discharge
- a video/telephonic appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Personal Statement
- Certificate of Achievement, 27 July 1990
- Certificate of Service, 29 March 1991
- DA Form 638-1 (Recommendation for Award (for Other Than Valor) of Army Achievement Medal (AAM), Army Commendation Medal (ARCOM), and Meritorious Service Medal (MSM), 3 June 1991
- DA Form 4980-18 (AAM Certificate), 25 July 1991
- Certificate of Achievement, 16 August 1991
- Certificate of Achievement, August 1991
- AAM Certificate, 16 October 1991
- DA Form 638-1, 29 October 1991
- AAM Certificate, 30 October 1991
- Presidential Physical Fitness Award, undated
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 3 March 1993

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 had been a model Soldier until he returned from Desert Storm. He became more impulsive and aggressive. He was a platoon leader in basic training, and he was placed on the lead tank at his duty station. After serving in Desert Storm, he began to act out. His discharge was for a criminal act that was later reduced to a misdemeanor. It has been over 30 years, but it was not until he went to counseling and became more responsible that he realized that he had been suffering from post-traumatic stress disorder (PTSD).

b. He was arrested for carrying a concealed weapon, which was later reduced to a third-degree misdemeanor but by the time it was reduced he had already been discharged. He was the passenger in a car and sleep at the time. The driver saw the police and placed the gun under his seat. The gun was legally registered to him. The officer stated that the gun should have been in the trunk or glove box. The military sent his first sergeant down with dispatch papers for him to sign. This was after serving in Desert Storm.

3. The applicant provides:

a. A certificate of achievement for being selected by his peers as the recipient of the Professionalism Award with Company A, 2nd Battalion, 13th Armor Regiment, Fort Knox, KY from 16 April 1990 through 27 July 1990. He contributed the most in his platoon toward teamwork, fellowship, and esprit de corps.

b. A certificate of service dated 29 March 1991, in recognition of faithful and exemplary performance of duty with the Victory Division during Operation Desert Shield/Desert Storm.

c. DA Form 638-1 dated 3 June 1991, which shows the applicant was recommended for the AAM for assisting with uploading tanks for deployment in the middle east.

d. AAM certificate, dated 25 July 1991, which shows he was awarded the AAM for meritorious service as a loader during Operation Desert Shield/Storm. He distinguished himself by his professional attitude and untiring efforts which resulted in the overwhelming success of the unit.

e. A certificate of achievement dated 16 August 1991, for completing the combat lifesavers course.

f. A certificate of achievement dated August 1991, for his superior performance and physical endurance demonstrated by his completion of a 10-mile fun run.

g. AAM certificate, dated 16 October 1991, which shows he was awarded the AAM for meritorious achievement.

h. DA Form 638-1 dated 29 October 1991 and an AAM certificate dated 30 October 1991, which shows he was awarded the AAM for meritorious achievement for attaining 1st place in the Tanker O.C. Event.

i. He was awarded the Presidential Physical Fitness Award in recognition of his outstanding physical achievement and exceptional dedication to the ideal of a sound mind in a strong body.

4. A review of the applicant's service record shows:

a. He enlisted in the Regular Army on 10 April 1990.

b. Court-martial charges were preferred against the applicant on 9 April 1992. His DD Form 458 (Charge Sheet) shows he was charged with stealing a RCA, 15-inch, color television valued at \$250.00, and an RCA video cassette recorder valued at \$625.00.

c. DD Form 2329 (Record of Trial by Summary Court-Martial) shows a preliminary proceeding occurred on 9 April 1992, and the summary court-martial gave the applicant a copy of the charge sheet and informed him of his rights. On 14 April 1992, at the trial proceedings, after receiving a reasonable time to decide, the applicant did not object to trial by summary court-martial. The applicant was not represented by counsel.

1) The summary court-martial convicted the applicant of the following charge: Article 121, one specification of larceny of a television on or about 5 January 1992 and one specification of larceny of a VCR on or about 5 January 1992.

2) He was found guilty, and the court sentenced him to be reduced to private (PVT/E-1), to forfeiture of \$261.00 pay, to perform hard labor without confinement for 45 days, and 60 days restriction, which was adjudged on 14 April 1992. The sentence was approved and duly executed on 21 April 1992.

d. An Arrest and Booking Report, dated 17 July 1992, shows the applicant was charged with auto theft and careless driving.

e. A disposition notice dated 4 August 1992, which shows the Assistant State Attorney reviewed the evidence and declined to prosecute the applicant for the charge of grand theft. No further action was taken in the matter.

f. An Arrest and Booking Report, dated 30 August 1992, shows he was charged with carrying a concealed firearm and possession of crack cocaine.

g. On 21 September 1992, the State Attorney's Office changed/corrected the Booking Report, and he was charged with carrying a concealed firearm and the charges for possession of cocaine were dropped.

h. On 25 September 1992, the applicant pled guilty and negotiated his sentence. He pled guilty to carrying a concealed weapon, with time served.

i. On 27 October 1992, he was counseled for misconduct off post; carrying a concealed weapon. He was informed that he was being considered for elimination from the Army under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), chapter 14.

j. The applicant underwent a mental status evaluation on 4 November 1992 for the purpose of being discharged for misconduct. The Division Social Worker noted that the evaluation was based on clinical interview and his medical records. Based upon evaluation, he was psychiatrically cleared for any administrative action deemed necessary by the command.

k. On 8 November 1992, he underwent a medical examination for the purpose of separation and the doctor stated he was qualified for separation.

l. On 6 January 1993, the applicant's immediate commander notified the applicant of his intent to initiate separation actions against him under the provisions AR 635-200, Chapter 14-12c, by reason of commission of a serious offense. The commander listed the following reasons for the proposed action: civil conviction in September 1992, summary court-martial in April 1992, as well as his charge of carrying a concealed weapon. The commander informed the applicant that he was recommending he receive an under other than honorable conditions discharge, and he explained his rights.

m. On 6 January 1993, the applicant requested a conditional waiver for separation under the provisions of AR 635-200, Chapter 14-12c. The applicant acknowledged he was advised by his consulting counsel of the basis for the contemplated action to separate him, and its effects; of the rights available to him; and the effect of any action he took in waiving his rights. He waived consideration of his case by an administrative separation Board, contingent upon receiving a characterization of service or description of separation no less than a general, under honorable conditions. He stated he was making the request of his own free will and had not been subject to any coercion by any person. He understood that if the separation authority refused to accept his conditional waiver that his case would be heard before an administrative separation Board. In that case:

1) He requested personal appearance before an administrative separation Board.

2) He waived representation by legal counsel.

3) He understood that his willful failure to appear before the administrative separation Board by absenting himself without leave would constitute a waiver of his right to a personal appearance before the Board.

n. On 6 January 1993, the applicant's immediate commander formally initiated separation under the provisions of AR 635-200, Chapter 14, paragraph 14-12c, and recommended the applicant service be characterized as under other than honorable conditions.

o. The intermediate commanders recommended approval of the separation with an under other than honorable conditions discharge.

p. On 17 February 1993, the applicant unconditionally waived his right to an administrative separation board.

q. On 22 February 1993, the Staff Judge Advocate, Fort Stewart, GA stated the applicant's misconduct warranted separation from the U.S. Army with an under other than honorable conditions discharge and recommended that the Commanding General sign the endorsement separating the applicant with an under other than honorable conditions discharge and bar him from the installation for a period of five years.

r. On 22 February 1993, the separation authority approved the recommended discharge, directed the applicant be issued an under other than honorable conditions discharge, and stated he would not be transferred to the Individual Ready Reserve.

s. The applicant was discharged on 3 March 1993. His DD Form 214 shows he was discharged under the provisions of AR 635-200, paragraph 14-12c, by reason of misconduct – commission of a serious offense. His service was characterized as under other than honorable conditions. He completed 2 years, 10 months, and 3 days of active service. His DD Form 214 shows he had lost time from 22 December 1992 to 11 January 1993. This form also shows in:

- Item 13 (Decorations, Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized): Army Service Ribbon, Southwest Asia Service Medal with two bronze service stars, Kuwait Liberation Medal, Army Lapel Button, and the Expert Marksmanship Qualification Badge (pistol and grenade)
- Item 26 (Separation Code): JKQ

- Item 27 (Reenlistment Code): RE-3

5. Regulatory guidance states when an individual is discharged under the provisions of Chapter 14, AR 635-200 for misconduct, an under other than honorable conditions characterization of service is normally appropriate. However, the separation authority may direct a general discharge if such is merited by the Soldier's overall record.

6. There is no indication the applicant applied to the ADRB for review of his discharge processing within the Board's 15-year statute of limitations.

7. In reaching its determination, the Board can consider the applicant's petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

8. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) characterization of service. He contends he experienced Posttraumatic Stress Disorder (PTSD) that mitigates 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 10 April 1990, 2) the applicant earned numerous medals, awards and ribbons during his service most notably to include the Southwest Asia Service Medal with two bronze service stars and the Kuwait Liberation Medal, 3) DA Form 2-1 shows the applicant served in Saudi Arabia from 27 August 1990 through 30 March 1991, 4) on 09 April 1992, the applicant was convicted by a summary court-martial of Article 121, one specification of larceny of a television and VCR that occurred on 05 January 1992, 5) the applicant was arrested on 17 July 1992 for auto theft and careless driving to which the Assistant State Attorney declined to prosecute the applicant for the charge, 6) on 25 September 1992, the applicant pled guilty to carrying a concealed weapon, 7) the applicant underwent a Mental Status Examination on 08 November 1992 as part of his consideration for separation and was cleared for any administrative action deemed necessary by his command, 8) his medical examination conducted on 08 November 1992 also indicated he was cleared for separation, 9) the applicant was discharged on 03 March 1993 under the provisions of Army Regulation (AR) 635-200, paragraph 14-12c by reason of misconduct-commission of a serious offense. In the initial notification of reasons for separation, his commander noted the reasons as civil conviction in September 1992, summary court-martial in April 1992, as well as his charge of carrying a concealed weapon.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. The

electronic military medical record (AHLTA) was not reviewed as it was not in use during the applicant's time in service. No civilian behavioral health (BH) records were provided for review. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. An in-service Mental Status Examination completed on 08 November 1992 as part of his separation processing indicated that he met retention standards and was cleared for administrative action as deemed appropriate by his commander. His medical physical conducted on 08 November 1992 also cleared him for separation and item number 42, psychiatric, was documented as normal on clinical evaluation. No other in-service medical records were available for review.

d. A review of JLV was void of medical information. The applicant is not service-connected through the VA for any medical or BH conditions. Of note, the applicant's UOTHC discharge renders him ineligible for VA services and therefore there are no records available through the VA.

e. The applicant is petitioning the Board requesting an upgrade of his UOTHC discharge. He contends his misconduct was related to PTSD following his deployment to Saudi Arabia. A review of records was void of any BH diagnosis or treatment history for the applicant during or after service and he provided no medical documentation supporting his assertion of PTSD.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends that his misconduct was related to PTSD.

(2) Did the condition exist or experience occur during military service? Yes, per the applicant's assertion.

(3) Does the condition experience actually excuse or mitigate the discharge? No. The applicant contends his misconduct was related to PTSD and, per liberal guidance, his assertion is sufficient to warrant the Board's consideration. A review of the records was void of any BH diagnosis or treatment history for the applicant during or after service and he provided no medical documentation supporting his assertion of PTSD. Despite a lack of medical evidence, a review of the applicant's military service record reflects a high-performing Soldier with no indication of previous misconduct prior to his deployment to Saudi Arabia. As such, the BH Agency Advisor can reasonably conclude that there was a change in the applicant's behavior given his impeccable service record prior to deployment and his misconduct following his return from Saudi Arabia. Per liberal guidance, a change in behavior is considered as possible evidence of a mental health condition and would otherwise provide a basis of support for medical mitigation. Specific to the misconduct that resulted in the applicant's discharge, theft and carrying a

concealed weapon are not in keeping with the natural sequelae and trajectory of PTSD. PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right and wrong, as such, BH medical mitigation is not supported.

**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 request, supporting documents, evidence in the records, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was separated for misconduct with the commander citing a conviction by civil court for possession of cocaine and carrying a concealed weapon. The Board found no error or injustice in the separation proceedings and designated characterization of service assigned during separation. The Board noted the applicant provided his in-service achievements to support his request. The Board concluded the characterization of service the applicant received upon separation was appropriate.

2. 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:

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. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Chapter 14 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, or absences without leave. 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 considered appropriate. However, the separation authority may direct a general discharge if such is merited by the Soldier's overall record.

b. An honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier'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.

c. A general discharge is a separation from the Army under honorable conditions. When authorized, it is used for a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

d. A discharge under other than honorable conditions is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, homosexuality, security reasons, and for the good of the service.

3. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes), in effect at the time, provided that enlisted Soldiers separated under the provisions of AR 635-200, paragraph 14-12c for Misconduct – commission of a serious offense would receive a separation code of "JKQ."

4. Army Regulation 601-210 (Active and Reserve Components Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment and processing into the

Regular Army, U.S. Army Reserve, and Army National Guard. Table 3-1 provides a list of RE codes.

- RE code "1" applies to Soldiers completing their term of active service, who are considered qualified for enlistment if all other criteria are met.
- RE code "2" is no longer in use but applied to Soldiers separated for the convenience of the government, when reenlistment is not contemplated, who are fully qualified for enlistment/reenlistment.
- RE code "3" applies to Soldiers who are not considered fully qualified for reentry or continuous service at time of separation, whose disqualification is waivable; they are ineligible unless a waiver is granted.
- RE code "4" applies to Soldiers separated from last period of service with a non-waivable disqualification.

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 DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole, or in part, to: mental health conditions, including PTSD; TBI; sexual assault; sexual harassment. Boards were directed 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. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for that misconduct which led to the discharge.

6. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records 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. This guidance does not mandate relief but provides standards and principles to guide Boards in application of their equitable relief authority.

a. 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.

7. Section 1556 of Title 10, United States Code, 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.

8. 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 ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that 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//