

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 August 2024

DOCKET NUMBER: AR20230014106

APPLICANT REQUESTS:

- upgrade of his under honorable conditions (general) discharge
- personal appearance before the Board.

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

- DD Form 149 (Application for Correction of Military Record)
- Self-authored e-mail

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 he grew up as an orphan; he loved having structure in his life. He joined during wartime, completed his training, and had over 180 days of service time. He waited for new orders that never came. He ended up with lung issues from the gas chamber. He was blindsided when he learned his 91J military occupational specialty (MOS) only needed two people. No other medical MOS had that stipulation; he was bullied out of his career choice. He lost out on all his Veterans Affairs benefits.
3. On his DD Form 149, the applicant notes other mental health and reprisal/whistleblower issues are related to his request.
4. The applicant enlisted in the U.S. Army Reserve (USAR) on 2 May 1991.
5. He entered active duty on 16 May 1991, for the purpose of completing initial entry training. However, his service record shows he neither completed training nor was awarded a MOS.

6. On 12 August 1991, the applicant received non-judicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ) for disobeying a lawful order by wearing civilian clothing during the first four weeks of training and missing bed check, on or about 27 June 1991. His punishment included forfeiture of \$162.00, and eight days extra duty and restriction.

7. A memorandum by Commander, 187th Medical Battalion, Academy Brigade Academy of Health Sciences, Fort Sam Houston, TX, on 8 October 1991, noted the applicant failed to qualify for his MOS training assignment. He was determined to be trainable and recommended for a second MOS.

8. On 8 November 1991, the applicant received NJP under Article 15 of the UCMJ for absenting himself from his place of duty, on or about 18 October 1991; and disobeying a lawful order by forcing his way into a bay without authorization, on or about 23 October 1991. His punishment included an oral reprimand, forfeiture of \$175.00 pay for one month, and 14 days extra duty and restriction.

9. On 18 November 1991, the applicant underwent a mental status evaluation. He was psychiatrically cleared to participate in all administrative proceedings deemed appropriate by the command.

10. On 5 December 1991, the applicant underwent a medical examination. He was deemed medically qualified for administrative separation.

11. Court-martial charges were preferred against the applicant on 19 December 1991, for violations of the UCMJ. His DD Form 458 (Charge Sheet) shows he was charged with one specification of striking his superior noncommissioned officer in the face, on or about 13 December 1991.

12. Before a summary court-martial on 20 December 1991, at Fort Sam Houston, TX, the applicant was found guilty of one specification of assaulting a noncommissioned officer. The court sentenced him to forfeiture of \$500.00 and 15 days confinement. The sentence was approved on the same date.

13. The applicant's commander notified him on 14 February 1992, that he was initiating actions to separate him under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), paragraph 14-12c, for commission of a serious offense. As the specific reasons, his commander cited the applicant's summary court-martial conviction.

14. The applicant acknowledged that he had been advised by counsel of the contemplated separation action, the possible effects of the discharge, and the rights available to him. He indicated he understood he could expect to encounter substantial

prejudice in civilian life if a general discharge under honorable conditions were issued to him. He submitted a statement in his own behalf stating he was not guilty of the incident, and he tried his best. He said an honorable discharge would help him upon his return to civilian life.

15. The applicant's commander formally recommended his separation under the provisions of Army Regulation 635-200, paragraph 14-12c, for commission of a serious offense.

16. Consistent with the chain of command's recommendation, the separation authority approved the recommended discharge on 24 February 1992, and directed issuance of a General Discharge Certificate.

17. The applicant was discharged on 5 March 1992. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms he was discharged under the provisions of Army Regulation 635-200, paragraph 14-12c, for misconduct – commission of a serious offense. His service was characterized as under honorable conditions (general). He was assigned Separation Code JKQ and Reentry Code 3. He completed 9 months and 20 days of net active service this period.

18. Having previous service in the USAR, the applicant enlisted in the Army National Guard (ARNG) on 26 July 1996.

19. The applicant's record is void of a separation packet containing the specific facts and circumstances surrounding his discharge processing. However, a memorandum from the Plans/Actions Branch Chief, Commonwealth of PA, Department of Military Affairs, the Adjutant General, Annville, PA on 11 February 1997, noted the applicant was being discharged for erroneous enlistment under the provisions of National Guard Regulation 600-200 (Enlisted Personnel Management), paragraph 8-26t.

20. On 22 February 1997, the applicant was discharged from the ARNG under the provisions of National Guard Regulation 600-200, paragraph 8-26t. His service was uncharacterized.

21. On 2 April 2024, the ABCMR staff requested that the applicant provide medical documents to support his other mental health issues. He was advised that he could contact the doctor that diagnosed him or his Veterans Affairs regional office for assistance. The applicant responded by email stating that he would not be bullied, and his medical documents were already in his military records.

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

23. 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, and 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 an upgrade of his 5 March 1992 discharge characterized as under other than honorable conditions. He claims to have acquired "black lung [disease] from gas chamber."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD 214 shows the former USAR Soldier entered active duty on 16 May 1991 and was discharged on 5 March 1992 under the separation authority provided by paragraph 14-12c of AR 635-200, Personnel Separations – Enlisted Personnel (26 May 1989): Commission of a serious offense. The behavioral health aspects of this case have been addressed by a behavioral health advisor in a separate advisory. This advisory will address the remaining medical issue. The applicant underwent a physical examination 5 December 1991. A nodule seen on this CXR was evaluated by CT. Based upon the CT, the radiologist stated it measured 1.0 x 1.0 x 1.5, was probably benign, and recommended a follow-up CT scan in 6 months.

d. At summary court-martial on 20 December 1991, the applicant was found guilty of assaulting a noncommissioned officer.

e. On 14 February 1992, the applicant's company commander informed him of the initiation of separation action under paragraph 14-12c of AR 635-200 on 29 May 1992 for this conviction.

f. The brigade commander approved his separation on 24 February 1992.

g. JLV shows the nodule was noted on chest radiographs in 2005 and a CT scan was recommended, but that study is not in the record. The applicant has no diagnosed pulmonary conditions on his medical problem list.

h. There is no evidence the applicant had a medical condition which would have then contributed to or would now mitigate his multiple UCMJ violations; or that would have failed the medical retention standards of chapter 3, AR 40-501, Standards of Medical

Fitness, and been a cause for referral to the DES prior to separation. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of her office, grade, rank, or rating prior to separation.

i. It is the opinion of the ARBA medical advisor that neither a discharge upgrade nor a referral to the Disability Evaluation System is warranted.

BEHAVIORAL HEALTH 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 Other Mental Health Issues that mitigates his misconduct. The applicant also marked reprisal/whistleblower on his DD Form 149 application. 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 U.S. Army Reserves (USAR) on 02 May 1991. He entered active duty on 16 May 1991 for the purposes of completing initial entry training; however, his service record shows he neither completed training nor was awarded an MOS, 3) the applicant received an Article 15 on 12 August 1991 for disobeying a lawful order by wearing civilian clothing during the first four weeks of training and missing bed check, 4) the applicant failed to qualify for his MOS training assignment though was determined to be trainable and recommended for a second MOS, 5) the applicant received an Article 15 on 08 November 1991 for absenting himself from his place of duty and disobeying a lawful order by forcing his way into a bay without authorization, 6) On 20 December 1991, the applicant was found guilty by a summary court-martial of one specification of assaulting a noncommissioned officer, 7) the applicant was notified by his commander of his intent to separate him under the provisions of Army Regulation (AR) 635-200, paragraph 14-12c, for commission of a serious offense, citing the applicant's summary court-martial conviction as the reason, 8) the applicant was discharged on 05 March 1991 under the provisions of AR 635-200, paragraph 14-12c, for misconduct-commission of a serious offense, 9) the applicant enlisted in the Army National Guard (ARNG) on 26 July 1996, 10) the applicant's record is void of the specific facts and circumstances regarding his discharge processing but a memorandum dated 11 February 1997 notes that he was being discharged for erroneous enlistment under the provisions of National Guard Regulation 600-200, paragraph 8-26t. He was discharged from the ARNG on 22 February 1997.

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. MEDCHART and 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. The applicant did not have any records

in MEDCHART. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. On 18 November 1991, the applicant underwent an in-service mental status evaluation at the request of his commander. The provider documented that there was no evidence of disease or defect of psychiatric significance or of sufficient severity to warrant disposition through medical channels. It was documented that the applicant had the mental capacity to understand and participate in proceedings, was mentally responsible, and was cleared for administrative action deemed appropriate by command. On 5 December 1991, the applicant underwent a medical examination. The purpose of the examination was documented as 'Under 40 ETS/Chapter, Chapter 3 AR 40-501.' Item number 42, psychiatric, was documented as normal on clinical evaluation. He was medically cleared for separation.

d. The applicant has VA health records in JLV from 03 February 2005 through 07 December 2005 though is void of any BH-related documentation. The record is void of any BH documentation and shows the applicant is not service-connected for any conditions. His primary eligibility through the VA is documented as 'humanitarian emergency.'

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence that the applicant had a condition or experience during his time in service that mitigated his misconduct. However, he contends his misconduct was related to Other Mental Health Issues, and, per liberal guidance, his assertion is sufficient to warrant the Board's consideration.

f. Kurta Questions:

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

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

(3) Does the condition or experience actually excuse or mitigate the discharge? No. However, he contends his misconduct was related to Other Mental Health Issues, 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 Other Mental Health Issues. In absence of documentation supporting his assertion there is insufficient evidence to establish his misconduct was related to or

mitigated by Other Mental Health Issues and insufficient evidence to support an upgrade based on BH medical mitigation.

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 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 evidence shows the applicant committed a serious misconduct (conviction by a court-martial for assaulting an NCO). As a result, his chain of command, initiated separation action against him. He received an under honorable conditions discharge (general) after completing nearly 10 months of active service. The Board found no error or injustice in his separation processing. The Board also considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewing official. The Board concurred with the medical official's determination that there is insufficient evidence that the applicant had a condition or experience during his time in service that mitigated his misconduct. Also, the applicant provided insufficient evidence of post-service achievements or letters of reference in support of a clemency determination. Therefore, based on a preponderance of available evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

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, Section 1556, requires the Secretary of the Army to ensure that an applicant seeking corrective action by ARBA be provided with a copy of any correspondence and communications (including summaries of verbal communications)

to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

3. Army Regulation 15-185 (ABC MR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABC MR.

a. Paragraph 2-9 states the ABC MR 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.

b. The ABC MR 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 ABC MR. The Director or the ABC MR may grant a formal hearing whenever justice requires.

4. 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. 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 (Separation for Misconduct) established policy and prescribed procedures for separating members for misconduct. It states that action will be initiated to separate a Soldier for misconduct when it was clearly established that rehabilitation was impracticable or unlikely to succeed. Paragraph 14-12c (Commission of a Serious Offense) applied to commission of a serious military or civil offense, if the specific circumstances of the offense warrant separation and a punitive discharge is, or would be, authorized for the same or a closely related offense. First time offenders below the grade of sergeant, and with less than 3 years of total military service, may be processed for separation as appropriate.

5. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR), on 3 September 2014, to carefully consider the revised Post-Traumatic Stress Disorder (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.

6. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD, traumatic brain injury, sexual assault, or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences.

7. 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//