

IN THE CASE OF: [REDACTED]

BOARD DATE: 14 August 2024

DOCKET NUMBER: AR20230014951

APPLICANT REQUESTS:

- an upgrade of his characterization of service from Under Honorable Conditions (General) to Honorable
- appear before the Board via video/telephone.

APPLICANT'S SUPPORTING DOCUMENT CONSIDERED BY THE BOARD:

DD Form 214 (Certificate of Release or Discharge from Active Duty)

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 he is requesting an upgrade of his discharge so he can be entitled to receive more benefits. He had a medical profile that stipulated he should stay off his feet but was ordered to stand in formation and conduct field training.

3. The applicant enlisted in the Regular Army on 7 April 2000 for a period of 3 years. Upon completion of training, he was awarded military occupational specialty 11B (Infantryman) and assigned to a unit at Fort Benning, GA. He was advanced to private/E-2 on 7 October 2000, the highest rank he held.

4. DA Forms 4856 (Developmental Counseling Form) show the applicant was counseled on divers occasions between 5 October 2000 and 11 January 2001. He was repeatedly advised that conduct of this nature could result in disciplinary action under the Uniform Code of Military Justice (UCMJ) and/or the initiation of action to have him administratively separated. His infractions included:

- Failure to utilize his chain of command
- Disrespect toward a noncommissioned officer (NCO) on four occasions
- Disobeying a direct order

- Failure to be at prescribed place of duty on three occasions
- Failure to inform his chain of command of his whereabouts
- Failure to follow orders
- Dereliction of duty
- Threatening an NCO
- Conduct unbecoming a Soldier

5. On 3 February 2001, the applicant was arrested by military police and charged with the following offenses.

- Driving under the influence (DUI) of Alcohol (Refusal)
- Failure to submit to a State administered chemical Test
- Unlicensed Driver
- Failure to drive on roadway laned for traffic

6. On 5 February 2001, company grade nonjudicial punishment was imposed upon the applicant under the provisions of Article 15, of the UCMJ for without authority, failing to go at the time prescribed to his appointed place of duty, on or about 3 January 2001. His punishment consisted of reduction to E-1, forfeiture of \$243.00 pay for one month, extra duty for 14 days, and restriction for 14 days.

7. DA Forms 4856 show the applicant was counseled on divers occasions between 9 February and 21 February 2001 for the following reasons:

- Arrest and charges on 3 February 2001
- Suspension/revocation of On-Post driving privileges for 1 year
- Failure to report to his appointed place of duty at the time prescribed
- Failure to report to his appointed place of duty

8. On 1 March 2001, an administrative letter or reprimand (LOR) was imposed upon the applicant for his 3 February 2001 arrest for DUI and refusal to take a lawfully requested test. Prior to deciding where the LOR would be filed, the imposing authority afforded the applicant an opportunity to submit matters in his defense. The applicant submitted a statement, wherein he contended he should not be punished because he was trying to help a fellow Soldier who was far too drunk to drive home. He apologized for his conduct and stated he was aware of the seriousness of the offense because his brother was killed in an automobile accident by a drunk driver. After reviewing the written reprimand and the applicant's response the imposing authority directed the LOR be placed permanently in the applicant's Official Military Personnel File.

9. DA Forms 4856 show the applicant was counseled on divers occasions between 3 March and 17 May 2001 for the following reasons:

- Failure to be at his appointed place of duty on two occasions
- Being absent without leave on 8 March 2001
- Missing movement
- Recommendation for Summary Court-Martial

10. A DA Form 4430 (Department of the Army Report of Result of Trial) shows the applicant was tried by Summary Court-Martial on 17 July 2001.

a. He pled guilty and was found guilty of the following offenses:

- Being disrespectful in language toward an NCO
- Four Specifications of failure to repair
- Going from his appointed place of duty

b. His sentence included forfeiture of \$695.00 pay for one month and confinement for 30 days.

11. On 12 September 2001, the applicant's immediate commander notified the applicant of his intent to initiate action to separate him under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 14, for commission of a serious offense. The specific reasons for this action were the applicant's numerous counseling for DUI, failure to report, and disrespect. He was advised that he was being recommended for an Under other than Honorable Conditions Discharge. The applicant acknowledged receipt of the proposed separation notification on the same date.

12. On 12 September 2001, the applicant's immediate commander formally recommended his separation prior to the expiration of his term of service under the provisions of Army Regulation 635-200, paragraph 14-12c by reason of commission of a serious offense.

13. On 12 September 2001, the applicant acknowledged that he was advised of the reasons for separation and of the rights available to him. He consulted with counsel and submitted a conditional election of rights, wherein he elected to waive consideration of his case by an administrative separation board conditioned upon his receipt of a general discharge. He elected not to submit statements in his own behalf.

14. On 26 November 2001, the applicant's chain of command recommended approval of his conditional request.

15. On 28 November 2001, the separation authority approved the conditional request and recommended discharge. He directed the applicant be discharged with an Under Honorable Conditions (General) characterization of service.

16. Orders and the applicant's DD Form 214 show he was discharged on 9 January 2002, under the provisions of Army Regulation 635-200, paragraph 14-12c, by reason of Misconduct, with separation code "JKQ" and reentry code "3." His service was characterized as Under Honorable Conditions (General). He was credited with completion of 1 year, 9 months, and 3 days of net active service this period. He did not complete his first full term of service.

17. The applicant petitioned the Army Discharge Review Board (ADRB) for relief. On 17 November 2014, the applicant was informed that after careful consideration of his military records and all other available evidence, the ADRB determined that he was properly and equitably discharged and denied his petition.

18. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition. By regulation, an applicant is not entitled to a hearing before the Board.

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, 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 9 January 2002 discharge characterized as under honorable conditions (general). He states: "I am not entitled to all my benefits."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD 214 shows he entered the regular Army on 7 April 2000 and was discharged under honorable conditions (general) on 9 January 2002 under the separation authority provided by paragraph 14-12c of AR 635-200, Personnel Separations – Enlisted Personnel (1 November 2000): Commission of a serious offense. It does not list a period of service in a hazardous duty pay area.

d. At a trial by summary court martial on 17 July 2001, the applicant was found guilty of 5 specifications of failure to repair (FTR) and one specification disrespectful in language toward an NCO.

e. On 12 September 2001, his company commander informed the applicant of his initiation of action to separate him under paragraph 14-12c of AR 635-200:

“Under the provisions of AR 635-200, Chapter 14, Paragraph 12c, I am initiating action to separate you for Commission of a Serious Offense – Soldier has numerous counselings for DUI, FTR, and disrespect. Soldier also received 30 days confinement.

f. The commander of 3<sup>d</sup> Brigade, 3<sup>d</sup> Infantry Division (Mechanized) approved the company commander’s separation action on 28 November 2001 and directed the applicant “be issued a General Discharge Certificate.”

g. Review of his records in JLV shows he has a single VA service-connected disability rating of 10% for limited motion of the right ankle. He has been diagnosed with non-service-connected PTSD.

h. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? YES: PTSD

(2) Did the condition exist or experience occur during military service? NO: The condition is not connected to his military service.

(3) Does the condition or experience actually excuse or mitigate the discharge? N/A

#### 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 offense (DUI, FTR, disrespect, and confinement). As a result, his chain of command initiated separation action against him for misconduct. He received a general discharge. 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 finding insufficient evidence to support that 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.

8/14/2024

X 

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CHAIRPERSON



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. The ABCMR may, in its discretion, hold a hearing. 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.

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 (PTSD); 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. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

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//