

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 August 2024

DOCKET NUMBER: AR20230015074

APPLICANT REQUESTS:

- Upgrade of his under honorable conditions (general) discharge, based on disability
- 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 letter

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 at the time of his misconduct, he had reenlisted for a different military occupational specialty. He knows for a fact that race played a role in the circumstances of his punishment. He had never been disciplined before and had several awards for good conduct. He was on his way to a great career. His punishment was unjust. He has a 100 percent (%) disability rating for service connected injuries.
3. On his DD Form 149, the applicant notes post-traumatic stress disorder (PTSD) issues are related to his request.
4. On 11 October 1984, the applicant enlisted in the Regular Army. Upon completion of training, he was awarded military occupational specialty 43E (Parachute Rigger). He reenlisted on 4 March 1988, for 4 years.
5. The applicant received formal counseling on 25 April 1988, for lying to his supervisor.

6. On 25 April 1988, the applicant accepted non-judicial punishment (NJP) under 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 25 April 1988. His punishment included 14 days restriction and forfeiture of \$219.00.

7. The applicant received additional counseling on 11 May 1988, for missing accountability formation.

8. On 16 May 1988, the applicant accepted NJP under Article 15 of the UCMJ, for failing to go at the time prescribed to his appointed place of duty, on or about 25 April 1988; wrongful appropriation of a government vehicle, on or about 23 April 1988; disobeying a lawful order from a noncommissioned officer, on or about 27 April 1988; and failing to go at the time prescribed to his appointed place of duty, on or about 11 May 1988. His punishment included oral admonition, reduction to E-2, forfeiture of \$380.00 pay per month for two months, and 45 days extra duty and restriction.

9. The applicant's commander notified him on 13 June 1988, that he was initiating actions to separate him under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), paragraph 14-12b, for a pattern of misconduct. As the specific reasons, his commander cited the applicant's multiple NJPs.

10. On 15 June 1988, 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 he was issued an under honorable conditions (general) discharge. He elected to submit a statement in his own behalf; however, the available record is void of his statement.

11. The applicant's commander formally recommended his separation under the provisions of Army Regulation 635-200, paragraph 14-12b, for a pattern of misconduct.

12. On 14 July 1988, the separation authority approved the recommended discharge and directed issuance of an under honorable conditions (general) discharge.

13. The applicant was discharged on 9 August 1988. He was credited with 3 years, 9 months, and 29 days of net active service this period. His DD Form 214 (Certificate of Release or Discharge from Active Duty) contains the following entries in:

- Item 24 (Character of Service) – Under Honorable Conditions (General)
- item 25 (Separation Authority) – AR [Army Regulation] 635-200, PARA 14-12b
- item 26 (Separation Code) – JKM
- item 27 (Reenlistment Code) – 3, 3C
- item 28 (Narrative Reason for Separation) – Misconduct – Pattern of Misconduct

14. Additionally his DD Form 214 shows he was awarded or authorized the:

- Army Service Ribbon
- Overseas Service Ribbon
- Expert Badge with M16 Rifle Bar
- Expert Badge with Hand Grenade Bar
- Riggers Badge
- Parachutist Badge
- Army Good Conduct Medal
- Humanitarian Service Medal
- Army Superior Unit Award
- Army Achievement Medal

15. The applicant petitioned the Army Discharge Review Board requesting upgrade of his under honorable conditions (general) discharge. On 1 October 1997, the Board voted to deny relief and determined his discharge was both proper and equitable.

16. The applicant's DD Form 214 does not show his continuous honorable active service period information that is required for members who honorably served their first term of enlistment [see Administrative Notes].

17. 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.

18. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under honorable conditions (general) discharge. He contends he experienced PTSD, which is related to his request for an upgrade. 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 11 October 1984; 2) On 16 May 1988, the applicant accepted NJP, for failing to go at the time prescribed to his appointed place of duty; wrongful appropriation of a government vehicle; disobeying a lawful order from a noncommissioned officer; and again failing to go at the time prescribed to his appointed place of duty on another date; 3) The applicant was discharged on 9 August 1988, Chapter 14-12b, for a pattern of misconduct. His service was characterized as Under Honorable Conditions (General).

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

c. The applicant contends on his application that PTSD is related to his request for an upgrade. In addition, he reported in his personal statement that he also believes racial prejudice also impacted his discharge. There is insufficient evidence the applicant reported experiences of racial discrimination, while on active service. In addition, there is insufficient evidence the applicant reported or was diagnosed with a mental health condition including PTSD while on active service.

d. A review of JLV provided evidence the applicant began to engage with the VA in 2014 primarily for physical concerns and assistance for homelessness. In 2016, he underwent a Compensation and Pension Evaluation for physical concerns, and he was awarded service-connected disability for these physical concerns. Later in 2020, the applicant began to report symptoms related to PTSD. However, he has consistently been diagnosed with depression related to current stressors and service-connected physical concerns. In 2023, he was awarded service-connected disability for Major Depression (50% SC).

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to support the applicant had a condition or experience that partially mitigates his misconduct.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, there is sufficient evidence the applicant has been diagnosed with service-connected depression, predominately related to his current stressors and secondary to his physical concerns. The applicant reports experiencing PTSD and racial discrimination while on active service. There is some evidence the applicant had been diagnosed by a provider at the VA on a few occasions with PTSD, but he has most consistently been diagnosed with Major Depression.

(2) Did the condition exist or experience occur during military service? Yes, the applicant reports experiencing PTSD and racial discrimination while on active service, which mitigates his misconduct.

(3) Does the condition experience actually excuse or mitigate the misconduct? Partially. There is sufficient evidence beyond self-report the applicant was experiencing a mental health condition, while on active service. At this time, there is insufficient evidence that mental health condition fit the full criteria of PTSD. The applicant has been diagnosed with service-connected depression related to current stressors and his physical concerns. However, he did report experiencing some symptoms of depression at the time of his active service. There is a nexus between depression and his misconduct not showing up on time and not following an order. Avoidant/erratic behavior such as this is often a natural sequela to depression or racial discrimination.

However, there is no nexus between depression or racial discrimination and his misconduct of wrongful appropriation of a government vehicle: 1) this type of misconduct is not a part of the natural history or sequelae of depression or racial discrimination; 2) Depression and racial discrimination does not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing a mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration her contention is sufficient for the board's consideration.

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 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.

a. Discharge Upgrade: Grant. The evidence shows the applicant exhibited a pattern of misconduct as evidenced by his multiple NJPs for misconduct ranging from minor misconduct of failure to report to the more serious misconduct of wrongfully appropriating a vehicle. As a result, her chain of command initiated separation action against him for pattern of misconduct and he was separated with a general, under honorable conditions 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 sufficient evidence to support that the applicant had a condition or experience that mitigates his misconduct. Based on this finding, the Board determined that an honorable characterization of service is appropriate under published DoD guidance for liberal consideration of discharge upgrade requests. The Board further determined that such upgrade did not change the underlying reason for his separation and thus the narrative reason for separation and corresponding codes should not change.

b. Disability: Deny. The Board found no probative evidence the applicant had a mental or physical health 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 additional medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or

rating prior to his discharge. Therefore, the Board determined a disability separation is not warranted.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
█	█	█	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant DD Form 214 for the period ending 9 August 1988, as follows:

- Character of Service: Honorable
- Separation Authority: No Change
- Separation Code: No Change
- Reentry Code: No Change
- Narrative Reason for Separation: No Change

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to a disability separation.

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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 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR.
 - a. Paragraph 2-9 states 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.
 - 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.
4. Army Regulation 635-8 (Separation Processing and Documents) provides: for Soldiers who have previously reenlisted without being issued a DD Form 214 and are separated with any characterization of service except "Honorable, enter Continuous Honorable Active Service From" (first day of service for which DD Form 214 was not issued) until (date before commencement of current enlistment). Then, enter the specific periods of reenlistment as prescribed above.
5. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the separation codes to be entered on the DD Form 214. At the time, this regulation prescribed the separation code "JKM" is the appropriate code to assign

Soldiers separated under the provisions of Army Regulation 635-200, for misconduct – pattern of misconduct.

6. Army Regulation 635-200 sets forth the requirements for the administrative 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. 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.

7. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Navy Records (BCM/NR), on 3 September 2014, to carefully consider the revised 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.

8. 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.

9. 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//