

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 October 2024

DOCKET NUMBER: AR20240002655

APPLICANT AND HIS REPRESENTATIVE REQUESTS:

- an upgrade of his under other than honorable conditions discharge to under honorable conditions (General)
- a personal appearance before the Board via video or telephone

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

- DD Form 149 (Application for Correction of Military Record)
- Mental Health Service Record

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 in effect that when he entered the Army, he suffered from mental health issues, notably a chemical imbalance, which was the result of a head injury as a child. He did his best to be a good soldier, and his discharge has nothing to do with his service, but with a civilian court conviction. At the time he was charged with theft, he knew little about the law and was very confused about what he should do. His mental health further limited his ability to understand the situation. His wife was pregnant, and he had an attorney who said he should plead guilty, and he "would be home before noon." This was untrue, but he trusted him and paid the consequences, both with his criminal record and his discharge from the Army. He continues to suffer from mental health issues, but his Army service is something he would like to be able to look back on with pride. While he was aware of the fact, he received an Other Than Honorable Discharge, he was unaware that he could request that it be upgraded. He spoke to one service officer in the past couple of years who did not actually follow through on requesting the upgrade. It was suggested he make another attempt, so he is doing so now.

3. The applicant provides: medial document from Mental Health Services for Clark and Madison Counties, INC, which has protected health information (PHI) and has been stamped confidential.

4. On 6 March 2024, ARBA Security Manager states, this case should be processed as any other case received by the Agency. As with any other case, the information should be treated confidentially. Care should be taken to ensure that the supporting documents provided by the applicant are disclosed to only those individuals authorized to view them, and who also have a need to know.

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

a. He enlisted in the Regular Army on 19 June 1980.

b. On 18 July 1980, he accepted nonjudicial punishment for failure to be at his place of duty on or about 15 July 1980.

c. On 18 February 1981, he accepted nonjudicial for absent from unit on or about 2 February 1981. His punishment included reduction to private (PVT)/E-1 and forfeiture of \$100 (suspended for 60 days), 7 days correctional custody facility (CCF) (suspended for 60 days)

d. A DA Form 2627 (Record of Processing's Under Article 15, UCMJ) shows, the suspension of the punishment, a forfeiture of \$100 a month for one month and seven days CCF, proposed against the applicant was vacated. The unexecuted portion of the punishment will be duly executed.

e. On 22 June 1981, the Adjutant General notified the applicant that he has be recommended for discharge under Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel) provisions of paragraph 14-12a, conviction by civil court. The applicant was advised of his rights:

- He may appear in person before a board
- He may be represented by council at all open proceedings of the board
- he may be represented by either appointed council or by reasonable available military council of his choice or civilian council at his own expense
- He may submit any answers, dispositions, sworn or unsworn statement, affidavit or certificate, or stipulation.
- He may request appearance before the board of any witness who testimony on his behalf.

f. A DA Form 1574-2 (Report of Proceedings by Investigation Officer/Board of Officers) dated 10 July 1981, shows, the board found there was substantial evidence at

that time to ask for discharge by means of conviction by civil court. The board recommended the applicant to be discharged from the military service because of misconduct by reason of conviction by civil court and he be issued an Other Than Honorable Conditions Certificate.

g. Orders Number 158-3, dated 14 August 1981, discharged the applicant from active duty with an effective date of 18 August 1981.

h. On 18 August 1981, he was discharged from active duty with an other than under honorable conditions characterization of service. His DD Form 214 shows he completed 8 months, and 13 days of active service with 162 days of lost time. He was assigned separation code JKB and the narrative reason for separation listed as "Misconduct – conviction by civil court, with reentry code 3. It also shows he was awarded or authorized: Army Service Ribbon

6. There is no evidence the applicant has applied to the Army Discharge Review Board for review of his discharge within that board's 15-year statute of limitations.

7. By regulation (AR 635-200), An individual will be considered for discharge and his case initiated and processed through the chain of command to the general court-martial convening authority when it is determined when initially convicted by civil authorities, or action is taken which is tantamount to a finding of guilty, of an offense for which the maximum penalty under the Uniform Code of Military Justice is death or confinement for one year or more

8. 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.

#### MEDICAL REVIEW:

1. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available records in the Interactive Personnel Electronic Records Management System (iPERMS), the Health Artifacts Image Management Solutions (HAIMS) and the VA's Joint Legacy Viewer (JLV). The applicant requests discharge upgrade from Under Other Than Honorable Conditions. He contends that Other Mental Health condition is related to his request. He endorsed having preexisting mental health issues due to a head injury sustained in childhood.

2. The ABCMR ROP summarized the applicant's record and circumstances surrounding the case. The applicant enlisted in the Army Reserve 20May1980. He was in active service from 19Jun1980 to 18Aug1981. His MOS was 62B, Constructors

Equipment Repairer. His time in service was approximately 8 and a half months. The record did not show foreign service. He was discharged under provisions of AR 635-200 para 14 due to misconduct by reason of conviction by civil court. Apparently, his civilian court conviction was due to a theft charge.

3. The following chronology was compiled largely from Army personnel record and the 10Jul1981 Report of Proceedings by Investigation Officer/Board of Officers narrative: The applicant received a GED in 1979. He entered active service June 1980. The following month, on 15Jul1980 he failed to report to his place of duty. He had hernia surgery in October (1980) followed by one-month convalescent leave. He was absent without leave 06Nov1980 thru 09Nov1980 and then he was on profile for back pain approximately from November 23 to December. He was absent from the unit on 02Feb1981. He was arrested on 09Mar1981 by civilian authorities for theft and confined 09Mar1981 to 18Aug1981. As a result of the theft charge, he was convicted and sentenced to two to five years in the state correctional institution.

4. The applicant submitted a list of diagnoses from Mental Health Services for Clark & Madison Counties which included the following mental health and substance use diagnoses: Schizophrenia Disorder, Unspecified; Generalized Anxiety Disorder; Cannabis Abuse/Dependence Uncomplicated; Cocaine Abuse, Uncomplicated; and Alcohol Dependence, Uncomplicated. He also submitted a list of medications which included the following psychotropic agents (prescribed in November and December 2023): Trazadone, Prozac and Invega. No clinic notes/evaluations were submitted.

5. In the 23Feb2022 SAS Surgery and Vein Specialist Office Visit (found in JLV) the claimant was being seen for right inguinal hernia surgery consultation. He reported having had left groin surgery while in the service. The history included Schizophrenia diagnosis since May 2012. In addition, he reported a history of PTSD during this visit (without mention of stressor), Anxiety and Back Arthritis. And finally, he reported that he had been involved in a car accident age 7 necessitating a blood transfusion after going through the windshield of the car.

6. The applicant contends that mental health symptoms while in service contributed to his theft offense and impaired his ability to avoid a civilian court conviction and ultimately avoid a punitive military discharge. He stated that his mental health issues stemmed from a head injury in childhood. There were no service treatment records that were available for review. The applicant did not deploy. He did not report a head injury or other exacerbating event while in service and one was not found in available records. This is a preexisting condition which has not been determined to have been aggravated by military service; therefore, Liberal Consideration is not required.

7. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? No. The available medical record did not show that TBI, mental health condition as a residual of TBI, PTSD or other mitigating condition or experience had been diagnosed.

(2) Did the condition exist, or did the experience occur during military service? No. The available medical record did not show that TBI, a mental health condition as a residual of TBI, PTSD or other mitigating condition or experience related to military service had been diagnosed.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. While a head injury sustained from crashing through a windshield can certainly result in traumatic brain injury; documentation to support TBI residuals was not submitted and cannot be presumed so remote from the event. The applicant obtained a GED prior to entry into service. His aptitude area scores met entry standards. The available medical record did not show that TBI, a mental health condition as a residual of TBI, or PTSD had been diagnosed. The record showed the applicant was discharged due to his civilian conviction of theft. Beyond his self-report, there was no evidence that the applicant was experiencing a mental health condition or residuals of TBI while in active service. Therefore, there was insufficient medical evidence to support a nexus between Schizophrenia diagnosed in 2012 or his self-report of PTSD in a 2023 clinical visit or his self-report of head injury age 7 or other medical condition experienced while in service; and the civil theft offense conviction for which he was discharged. Although the applicant contends that mental health symptoms while in service contributed to his theft offense and impaired his ability to avoid a civilian court conviction and ultimately avoid a punitive military discharge; he stated that mental health symptoms were the result of a childhood head injury. This is a preexisting condition not shown to have been aggravated during military service. Liberal Consideration is not required.

#### 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 conviction by civil court. 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 no documentation to support his request, including post-service achievements or letters of reference to support clemency. The Board noted the applicant's contention

of a mental health issue/condition from childhood; however, reviewed and concurred with the medical advisor's review finding the issue/condition to be pre-existing and not shown to have been aggravated during military service and does not mitigate his misconduct. Based on a preponderance of the evidence, the Board concluded that 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.

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 15-185 (Army Board for Correction of Military Records), currently in effect, 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. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. The ABCMR may, in its discretion, hold a hearing (sometimes referred to as an evidentiary hearing or an administrative hearing) or request additional evidence or opinions. 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.

3. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, provided the authority for separation of enlisted personnel upon expiration term of service, prior to ETS, and the criteria governing the issuance of honorable, general, and undesirable discharge certificates.

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. A characterization of under honorable conditions may be issued only when the reason for separation specifically allows such characterization. It will not be issued to Soldiers solely upon separation at expiration of their period of enlistment, MSO, or period for which called or ordered to active duty.

4. 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 (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 based on equity, injustice, or clemency grounds, BCM/NRs 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.

5. The acting Under Secretary of Defense for Personnel and Readiness provided clarifying guidance on 25 August 2017, which expanded the 2014 Secretary of Defense memorandum, that directed the BCM/NRs and DRBs to give liberal consideration to veterans looking to upgrade their less-than-honorable discharges by expanding review of discharges involving diagnosed, undiagnosed, or misdiagnosed mental health conditions, including PTSD; traumatic brain injury; or who reported sexual assault or sexual harassment.

6. Title 10 (Armed Forces), U.S. Code, section 1556 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.

//NOTHING FOLLOWS//