

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 4 November 2024

DOCKET NUMBER: AR20240002714

APPLICANT REQUESTS: an upgrade of his general, under honorable conditions discharge to honorable.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:  
DD Form 149 (Application for Correction of Military 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 his mental stability was bad in 1984 and 1985, and it is time for him to get his records upgraded to honorable.
3. A review of the applicant's service record shows:
  - a. The applicant enlisted in the Regular Army on 17 July 1984. The highest grade he held was private first class (PFC)/E-3.
  - b. A DA Form 4856-R (General Counseling Form), which shows he received an initial counseling on 25 October 1984 by his platoon leader, explaining what was expected of a Soldier in 2nd platoon.
  - c. DA Form 4187 (Personnel Action), shows the applicant's duty status changed on the following dates:
    - Present for Duty (PDY) to Absent Without Leave (AWOL) – 13 November 1984
    - AWOL to PDY – 23 November 1984
  - d. He was counseled for the following:

- 18 March 1985 – failure to replace basic issue items (BII) as ordered to do so
- 12 June 1985 – tested for and received his Expert Infantryman Badge
- 3 July 1985 – job performance for the month of June 1985; needed to pay more attention to detail when working on his assigned vehicle, needed to keep up with his tools, put more effort into cleaning his personal equipment, and show more enthusiasm when given an order
- 25 July 1985 – failure to show up to the motor pool and assist in getting BII and track ready for inspection, importance of following instructions, and performance of his duties
- 1 August 1985 – monthly performance counseling for month of July 1985; due to equipment failure during gunnery it was difficult to evaluate his performance and abilities in the field. His appearance in garrison met the established standards.

e. On 5 September 1985, he accepted nonjudicial punishment (NJP) under summarized Article 15, Uniform Code of Military Justice (UCMJ), for disobeying a lawful order, to wit: DD Form 689 (Individual Sick Slip) “Quarters 24 hours,” on or about 30 August 1985. His punishment included 10 days restriction and 10 days extra duty.

f. DA Form 4833 (Commander’s Report of Disciplinary or Administrative Action), which shows the applicant committed the offense of public intoxication on 14 September 1985, and he was orally reprimanded.

g. On 20 September 1985, he accepted NJP under Article 15, UCMJ, for breaking restriction on or about 13 September 1985. His punishment included reduction to the rank/grade of private/E-2 (suspended until 20 December 1985), forfeiture of \$150.00 for one month (prorated over a period of 3 months), and 14 days of extra duty. The suspension of the punishment of reduction to pay grade of E-2 (suspended until 20 December 1985) was vacated and the unexcused portion of the punishment was ordered duly executed. The vacation was based on the following offense: possession of alcohol in the field on 17 October 1985.

h. The applicant was counseled for the following:

- 26 September 1985 – monthly job performance; he demonstrated that he had the ability and intelligence to be an outstanding Soldier. He needed to improve on his personal appearance and maintain his barracks area.
- 21 October 1985 – possession of alcohol in the field on 17 October 1985

i. On 23 October 1985, the applicant’s immediate commander recommended summary court-martial charges against the applicant for violation of Article 134 (possession of alcohol) and Article 92 (violating a lawful regulation).

j. On 23 October 1985, after consulting with legal counsel and being fully advised of his legal rights and other consequences of his decision, the applicant acknowledged that he understood his rights and voluntarily decided to consent to trial by Summary Court-Martial.

k. DD Form 2329 (Record of Trial by Summary Court-Martial), shows a preliminary proceeding was held on 24 October 1985, the summary court-martial gave the applicant a copy of the charge sheet and informed him of the following:

(1) The charge had been referred to a summary court-martial for trial and the date of the referral.

(2) The identity of the convening authority.

(3) The name of the accuser.

(4) The general nature of the charge.

(5) His right to object to trial by summary court-martial.

(6) His right to inspect the allied papers and available personnel records.

(7) The names of the witnesses who could be called to testify and any evidence the summary court-martial expects to introduce into evidence.

(8) His right to cross-examine witnesses and have the summary court-martial cross-examine on his behalf.

(9) His right to call witnesses and produce evidence with the assistance of the summary court-martial, if necessary.

(10) That during the trial the summary court-martial would not consider any matters, including statements previously made by the applicant to the summary court-martial, unless admitted in accordance with the Military Rules of Evidence.

(11) His right to testify on the merits or to remain silent, with the assurance that no adverse inference would be drawn by the summary court-martial from such silence.

(12) If any findings of guilty were announced, his right to remain silent, to make an unsworn statement, oral or written or both, and to testify and to introduce evidence in extenuation or mitigation.

(13) The maximum sentence he could be adjudged if he was found guilty of the offense alleged.

(14) His right to plead guilty or not guilty.

l. At the trial proceeding held on 29 October 1985, the applicant did not object to the trial by summary court-martial and he was not represented by counsel.

m. Before a summary court-martial on 29 October 1985, at Fort Hood, TX, the applicant pled not guilty and was found guilty of the charges. The court sentenced him to reduction to pay grade E-1, forfeiture of \$412.00 per month for one month, and restriction to the limits of the battalion area for a period of 2 months. The sentence was adjudged on 29 October 1985.

n. On 12 November 1985, the applicant accepted NJP under Article 15, UCMJ, for on or about 5 November 1985, failing to go at the time prescribed to his appointed place of duty, to wit: formation and disobeying a lawful order from a noncommissioned officer. His punishment included forfeiture of \$100.00 per month (suspended until 12 May 1986) and "CCF (CATIII)" for 30 days.

o. He underwent a mental status evaluation on 4 December 1985. The examiner noted that he had the mental capacity to understand and participate in the proceedings and met the retention requirements of chapter 3, Army Regulation (AR) 40-501 (Standards of Medical Fitness).

p. A report of medical examination and a report of medical history were completed on 4 December 1985. It was determined that the applicant was qualified for chapter.

q. On 5 December 1985, the applicant's immediate commander notified him of his intent to initiate separation actions against him under the provisions of AR 635-200 (Personnel Separations – Enlisted Personnel), chapter 13, paragraph 2, subparagraph 3, 4, and 5, for unsatisfactory performance, and advised him of his rights.

r. On 5 December 1985, the applicant acknowledged notification of the proposed separation under the provisions of AR 635-200, chapter 13, and its effects; of the rights available to him. He acknowledged that he was provided the opportunity to consult with legal counsel. He elected not to waive his rights. He elected to submit statements in his own behalf. He understood he may expect to encounter substantial prejudice in civilian life if a general discharge under honorable conditions was issued to him. He further understood that he would be ineligible to apply for enlistment in the United States Army for a period of 2 years after discharge.

s. On 5 December 1985, the applicant's immediate commander-initiated separation under the provisions of AR 635-200, chapter 13. The commander stated the specific factual reasons for the recommended action was the applicant's performance had not improved despite continued efforts to rehabilitate him. He was a detriment to the moral and discipline to the unit and any other unit to which he may be assigned to in the future. He noted the applicant was enrolled in the Drug and Alcohol Program in November 1985.

t. A memorandum dated 10 December 1985, shows the Assistant Staff Judge Advocate reviewed the summary court-martial of the United States v. Private D\_ [applicant] and concluded the sentence was legal.

u. On 11 December 1985, the separation authority approved the discharge and directed the applicant be issued an under honorable conditions (general) discharge and not be transferred to the Individual Ready Reserve. He waived the rehabilitative transfer.

v. The applicant was discharged on 20 December 1985. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of AR 635-200, chapter 13, for unsatisfactory performance, in the rank/grade of private/E-1, and his service was characterized as under honorable conditions. He completed 1 year, 4 months, and 24 days of net active service during the covered period. He had lost time from 13 November 1984 to 22 November 1984. This form also shows in:

- Item 13 (Decorations, Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized): Army Service Ribbon and the Marksman Marksmanship Badge (rifle and hand grenade)
- Item 24 (Separation Code): JHJ
- Item 27 (Reenlistment Cde): RE-3, 3B, and 3C

4. The pertinent Army regulation in effect at the time provided discharges under the provision of AR 635-200, chapter 13, who are separated because of unsatisfactory performance will be characterized as honorable or under honorable conditions as warranted by their military record.

5. There is no evidence indicating he applied to the Army Discharge Review Board for an upgrade of his discharge within that board's 15-year statute of limitations.

6. 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.

7. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to his characterization of service from under honorable conditions (general) to honorable. He contends he experienced an undiagnosed mental health condition, including PTSD, that mitigates his misconduct.

b. 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:

- The applicant enlisted into the Regular Army on 17 July 1984.
- The applicant was AWOL in November 1984 and received several counselings between March and August 1985. In September 1985 he received NJP for disobeying a lawful order and breaking restrictions. At a summary court-martial on 29 October 1985, he was found guilty of violation of Article 134 (possession of alcohol) and Article 92 (violating a lawful regulation), and in November 1985 he accepted NJP for failing to be at his appointed place of duty and disobeying a lawful order. On 5 December 1985, the applicant's immediate commander-initiated separation under the provisions of AR 635-200, chapter 13.
- The applicant was discharged on 11 December 1985 and completed 1 year, 4 months, and 24 days of net active service.

c. Review of Available Records: The Army Review Board Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts mental health was a factor in his discharge. A Report of Mental Status Evaluation dated 4 December 1985 showed that the applicant met retention standards and had the mental capacity to understand the proceedings. A Report of Medical History and a Report of Medical Examination dated 4 December 1985 showed that the applicant did not endorse any psychiatric symptoms. There was insufficient evidence that the applicant was diagnosed with a psychiatric condition while on active service.

d. The Joint Legacy Viewer (JLV), which includes medical and mental health records from DoD and VA, was also reviewed and showed no history of mental health related treatment or diagnoses.

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

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts he had an undiagnosed mental health condition at the time of the misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition while on active service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of military medical and mental health records revealed no documentation of any mental health condition(s) while on active service. There is insufficient evidence, beyond self-report, that the applicant was experiencing a mental health condition while on active service. However, the applicant contends he had a mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

#### 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 record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant's petition, available military record and medical review, the Board in concurrence with the advising opinion of the Agency Behavioral Health Advisor, that there is insufficient evidence to support that the applicant had a condition or experience that mitigates his misconduct.

#### Kurta Questions:

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an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

2. The Board found that the applicant's record had insufficient evidence of in-service mitigating factors to outweigh the established pattern of misconduct. Furthermore, the applicant provided no evidence of post-service achievements or character references for the Board to consider in a clemency determination. The applicant's service record showed multiple instances of misconduct throughout his enlistment period of 1 year, 4 months, and 24 days of net active service, including lost time from 13 November 1984 to 22 November 1984.

3. Additionally, the applicant was discharged for unsatisfactory performance and received an under honorable conditions (General) characterization of service. The Board concurred that this discharge status remained appropriate, as the applicant did not meet the Army's standards for acceptable conduct and duty performance required for an Honorable discharge. Therefore, the Board denied relief.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
XX	XXX	XXX	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 (AR) 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, set forth the basic authority for the separation of enlisted personnel.
  - a. An honorable discharge is a separation with honor. 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. It is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.
  - c. Chapter 13 provides commanders will separate a member for unsatisfactory performance when it is clearly established that:

(1) In the commander's judgment, the member will not develop sufficiently to participate satisfactorily in further training and/or become a satisfactory Soldier.

(2) The seriousness of the circumstances is such that the member's retention would have an adverse impact on military discipline, good order, and morale.

(3) It is likely that the member will be a disruptive influence in present or future duty assignments.

(4) It is likely that the circumstances forming the basis for initiation of separation proceedings will continue or recur.

(5) The ability of the member to perform duties effectively in the future, including potential for advancement or leadership, is unlikely.

(6) The member meets retention medical standards (AR 40-501).

3. AR 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, chapter 13 for unsatisfactory performance would receive a separation code of "JHJ."

4. AR 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//