

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 November 2024

DOCKET NUMBER: AR20240002958

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions discharge to under honorable conditions (General).

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Statement
- DA Form 4856 (General Counseling Form), 8 May 1992
- Three Dishonored Check Notifications, 12 July 1992, 13 July 1992, and 14 July 1992
- Memorandum Subject: Notification of Indebtedness, 9 October 1992
- Five Character Letters

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:

a. His ability to serve was impaired because of marital problems (infidelity and parties). His spouse wrote bad checks for which he was disciplined. He felt like he was discriminated against by some of his Caucasian superiors. He originally elected to have a board of officers hearing during his separation process; however, one of the officers he felt discriminated against was on the board so he felt he had no chance. He feels today's standard someone would have investigated the accusations of discrimination and racism without being afraid of retaliation from superiors and he would have had a fair chance in his military career.

b. After his discharge, he went through depression due to not having a permanent home which led to him staying with different people. He has three biological children and an adoptive son. He and his wife became foster parents. He has worked for the

same employer for 23 years. He lists other mental health as an issue/condition related to his request.

3. The applicant provides:

a. DA Form 4856, dated 29 April 1992, which shows the applicant was counseled for a dishonored check.

b. Copies of the three dishonored checks, which show, in pertinent part, three checks dated between 12 and 14 July 1992 that were all returned on 23 July 1992, each in the amount of \$150.00.

c. A Memorandum Subject: Notification of Indebtedness, dated 9 October 1992, which shows a check in the amount of \$20.14 presented 11 August 1992 to the Fort Ord Commissary was not honored by his financial institution because of insufficient funds.

d. Character letters that attest to the applicant being a good colleague and an excellent leader who displays the utmost professionalism and integrity. He exceeded expectations in his work duties. He is a friend with deep love and respect for his family and youth. He is loyal with unwavering dedication and strong moral values. He is organized, efficient, extremely competent, and has an excellent rapport with everyone. He has excellent communication skills and would be a valuable asset to any organization. He is devoted to duty, teamwork and is very patient with the clarity of mind that enables growth. He is trustworthy.

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

a. DD Form 4 (Enlistment/Reenlistment Contract-Armed Forces of the United States) reflects he enlisted in the Regular Army on 14 November 1989.

b. DA Form 2627 (Record of Proceedings under Article 15, Uniform Code of Military Justice (UCMJ)) shows the applicant accepted nonjudicial punishment on 4 April 1991, for being disrespectful to a superior commissioned officer on or about 23 March 1991. His punishment consisted of reduction to private (PVT)/E-2 (suspended), forfeiture of \$197.00 pay (suspended), extra duty for 14 days and restriction for 14 days.

c. DA Form 2627 shows the applicant accepted nonjudicial punishment under Article 15 of the UCMJ on 7 October 1992 for willfully disobeying an order on or about 24 September 1992 and wrongfully appropriating a two-quart canteen of a certain value, the property of the United States Government on or about 21 September 1992. His punishment consisted of reduction to PVT/E-1 (suspended), forfeiture of \$392.00 (suspended), extra duty for 30 days and restriction for 30 days.

d. DA Form 3822-R (Report of Mental Status Evaluation), dated 10 November 1992, shows the applicant had the mental capacity to understand and participate in the proceedings, was mentally responsible, and was psychiatrically cleared for any administrative action deemed necessary by command.

e. The Urinalysis Custody and Report Record, dated 9 December 1992, shows a positive result for tetrahydrocannabinol (THC) next to the applicant's SSN.

f. The applicant's immediate commander notified him on 17 December 1992 he was initiating action to separate him under the provisions of Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel), Chapter 14-12b, for a pattern of misconduct. The reasons for the proposed action were that the applicant had a long history of misconduct while being in the unit. This will not be tolerated in today's Army and recommended the applicant receive an under other than honorable conditions discharge. The applicant acknowledged receipt.

g. The applicant consulted with legal counsel on 17 December 1992 and was advised of the basis for the proposed separation under the provisions of AR 635-200, Chapter 14, for patterns of misconduct and the procedures and rights that were available to him.

(1) He requested personal appearance before an administrative separation board.

(2) He acknowledged that he may expect to encounter substantial prejudice in civilian life if discharged under honorable conditions (general). He further understood that, as the result of issuance of a discharge under other than honorable conditions, he may be ineligible for many or all benefits as a veteran under both Federal and State laws.

(3) He elected to submit statements in his own behalf; however, the statement is not available for review.

h. The applicant's immediate commander formally recommended the applicant be separated from the Army on 7 January 1993. The commander's reason for a pattern of misconduct and testing positive on the last unit urinalysis for the use of marijuana. His chain of command recommended approval that the rehabilitative transfer requirements be waived.

i. The separation authority approved the recommended discharge action under the provisions of AR 635-200, Chapter 14 on 7 January 1993 and directed that the applicant's service be characterized as under other than honorable conditions.

j. The Staff Judge Advocate recommended the applicant be separated from the Army on 18 February 1993. His reasons for the recommendation were the applicant's positive urinalysis test and Article 15s. His chain of command recommended approval that the rehabilitative transfer requirements be waived.

k. The applicant elected to withdraw his request for a Board of Officers on 3 March 1993 and waived his right to such a board.

l. The applicant was discharged on 7 April 1993. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of AR 635-200, paragraph 14-12b, for misconduct-pattern of misconduct, with separation code JKM and reentry code 3. His service was characterized as under other than honorable conditions. He completed 3 years, 4 months, and 24 days of active service. He was awarded or authorized the:

- Army Service Ribbon
- Sharpshooter Marksmanship Qualification Badge with Rifle Component Bar
- Expert Marksmanship Qualification Badge with Grenade Component Bar

5. By regulation, Soldiers are subject to separation under Chapter 14, for misconduct-pattern of misconduct. A discharge under other than honorable conditions is normally appropriate under this chapter. However, the separation authority may direct a general discharge if such is merited by the Soldier's overall record.

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

#### 7. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his general, under honorable conditions discharge. He contends he experienced mental health conditions that mitigates his misconduct. 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 14 November 1989; 2) The applicant accepted nonjudicial punishment (NJP) on 4 April 1991 for being disrespectful to a superior commissioned officer; 3) The applicant accepted nonjudicial punishment (NJP) on 7 October 1992 for willfully disobeying an order and wrongfully appropriating a two-quart canteen, the property of the United States Government; 4) There is evidence the applicant tested positive for THC on a urinalysis on 09 December 1992; 5) The applicant was discharged on 7 April 1993, Chapter 14-12b, for pattern of misconduct. His service was characterized as under other than honorable conditions.

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

c. The applicant asserts he was experiencing mental health conditions while on active service, which mitigates his misconduct. There is insufficient evidence the applicant reported or was diagnosed with a mental health condition, while on active service. On 10 November 1992, he underwent a mental status evaluation. The applicant was not diagnosed with a mental health condition, and he was psychiatrically cleared for any administrative action deemed necessary by command.

d. A review of JLV was void of mental health documentation for the applicant, and the applicant does not receive any service-connected disability for a mental health condition.

e. Based on the available information, it is the opinion of the Agency Medical Advisor that there is insufficient evidence to support 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 misconduct? Yes, the applicant asserts he experienced a mental health condition which mitigates his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced a mental health condition that mitigates his misconduct while on active service.

(3) Does the condition or experience actually excuse or mitigate the misconduct? No, there is insufficient evidence beyond self-report the applicant was experiencing a mental health condition, while he was on active service. The applicant did engage in various minor misconduct including use of illegal substance which could be a natural sequelae to some mental health conditions. However, the presence of repeated misconduct including substance use is not sufficient evidence of the presence of a mental health condition. Yet, the applicant contends he was experiencing a mental health condition or an experience that mitigates his misconduct, and per Liberal Consideration his contention alone 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 request 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 request, available military records and medical review, the Board concurred with the advising official finding insufficient evidence to support the applicant had a condition or experience that mitigates his misconduct.

2. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the misconduct of drug use, writing bad checks and stealing. The Board applauds the applicant's post service achievements of 23 years with his current employer and character letters attesting to his work ethic, giving back to his community and his character of a husband and father. The Board recognized under liberal consideration, the applicant's self-reporting that he was experiencing a mental health condition, while he was on active service. Although the applicant did engage in various minor misconduct including use of illegal substance which could be a natural sequelae to some mental health conditions. In agreement with the advising official the applicant's continued misconduct is not sufficient for the existence of a mental health condition. Therefore, the Board denied relief.

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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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, 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 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 established policy and prescribed procedures for separating members for misconduct. Specific categories included minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, or absences without leave. Action would be taken to separate a member for misconduct

when it was clearly established that rehabilitation was impracticable or was unlikely to succeed. A discharge under other than honorable conditions was normally considered appropriate. However, the separation authority could direct a general discharge if merited by the Soldier's overall record.

3. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) 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 UOTHC 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.

4. 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; 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.

5. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and Service BCM/NRs on 25 July 2018 [Wilkie Memorandum], 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 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 grounds.

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//