

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 November 2024

DOCKET NUMBER: AR20240003552

APPLICANT REQUESTS:

- an upgrade of his general, under honorable conditions discharge to honorable.
- a video/telephonic appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Eyewitness Statement
- Five Department of Veterans Affairs (VA) Letters
- Employee Performance Evaluations

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 he was assaulted by military police and sustained physical injuries to his lower back, head, and mental health injuries. After years of therapy, counseling, medication, support from family, and veteran friends he finally found the courage to address this issue.

3. The applicant provides:

a. The eyewitness stated that he and his roommate were at [REDACTED] when two females waved them down. Ms. [REDACTED] and the roommate began discussing how she preferred to be treated during sexual intercourse. Later, Ms. [REDACTED] accused the roommate of raping her. It was subsequently discovered that Ms. [REDACTED] was employed by the Criminal Investigation Division (CID). The roommate was arrested, and the eyewitness recalled that the applicant had previously warned them about Ms. [REDACTED], as she had accused the applicant of rape in the past.

o The eyewitness then went to the applicant's room and asked him to come to the CID office to recount what Ms. ■ had told him regarding her sexual preferences. Initially, the applicant refused but, recognizing the seriousness of the situation, agreed to explain what Ms. ■ had previously conveyed to him, including her allegations of rape.

o Upon arrival at the CID office, the officer appeared disinterested and asked the applicant what he had to say. The applicant detailed his experience with Ms. ■ and her expressed sexual desires. During the applicant's statement, the officer accused him of lying. When the applicant responded, the officer shouted, "What! What did you say?" and called the applicant a liar. The applicant, waving his hand, stated, "I am not the one under arrest," and began to walk down the stairs.

o The officer then charged after the applicant and pushed him down the stairs. As the applicant fell to the bottom, other officers arrived on the scene with the impression that the applicant was resisting arrest. The officer who had been speaking with the applicant struck him to keep him on the floor. The eyewitness yelled, "Do not do anything! I see everything!" One officer held the applicant's arm and placed a knee on his neck while handcuffing him, while another officer pinned the applicant's back with his knee and feet.

o Once detained, the applicant was taken to ■ and placed in a holding cell. The 1SG was contacted, and the applicant was subsequently released without charges. The 1SG and the eyewitness observed that the applicant's eye was swollen, and he complained of numbness in his right hand as well as pain in his neck, back, and head. The 1SG advised the applicant to go to the hospital and follow up with sick call the next morning.

b. On 15 February 2005, the VA letter states the applicant has been evaluated and pain clinic, and neurosurgery clinic. His chronic lower back pain is currently being controlled with oral medications. He may eventually require neurosurgical repair of the herniated disc.

c. On 16 January 2008, the VA letter states the applicant has been treated at the VA facilities for a variety of medical/mental health problems. The VA records indicate that the applicant has been diagnosis for knee pain, chronic back pain, herniated disc, post-traumatic stress disorder (PTSD), panic attacks, mood disorder secondary to medical condition and anxiety disorder.

d. On 14 February 2008, the VA letter states the applicant's current mental status and request the applicant be reevaluated for his PTSD.

e. On 16 November 2016, the VA diagnosed the applicant with severe obstructive sleep apnea hypopnea syndrome.

f. On 12 December 2023, a VA letter of summary shows the applicant is 100% totally and permanently disabled.

g. On or about 1 July 1998 to on or about 30 June 2017, the employee performance evaluation's shows his work performances over 19 years.

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

a. He enlisted in the Regular Army on 13 August 1991.

b. The service record includes the applicant's medical evaluation for the purpose of administrative separation which indicated he was generally in good health. The applicant was marked qualified for service.

- Standard Form (SF) 88 (Report of Medical Examination) dated 27 May 1994
- SF 93 (Report of Medical History) dated 27 May 1994

c. On 27 June 1994, he accepted nonjudicial punishment for on or about 3 March 1994, the applicant unlawfully struck ██████ in the head several times. On or about 10 May 1994 he showed disrespect to a superior commissioned officer. His punishment included reduction to private (PVT)/E-1 and forfeiture of \$461.00 per month for two months.

d. On 25 October 1994, he accepted nonjudicial punishment for one specification of willful and wrongful damage by hitting and kicking a BMW on or about 7 August 1994 and one specification of wrongful use of marijuana, a controlled substance, between on or about 17 June 1994 and 17 July 1994. His punishment included reduction to E-1 and forfeiture of \$416.00 per month for two months, suspended for 6 months.

e. The applicant's immediate commander notified the applicant of his intent to separate him under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 14-12c, for commission of a serious offense. The reason for his proposed action was for the applicant receiving two company grade Article 15's for assault and disrespect and a field grade Article 15 for assault and disrespecting an officer. The immediate commander recommended the applicant receive a general discharge. On 10 August 1994 the applicant acknowledged of receipt.

f. On 10 August 1994, after consultation with legal counsel, he acknowledged:

- the rights available to him and the effect of waiving said rights
- he understood if the recommendation for separation is approved, he can receive a general discharge

- he elected to submit matters on his own behalf
- he will be ineligible to apply for enlistment for a period of 2 years after discharge

g. The immediate commander-initiated separation action against the applicant under the provisions of AR 635-200, Chapter 14-12c, for commission of a serious offense. The commander recommended a general, under honorable conditions discharge. The intermediate commander recommended approval and that any further counseling and rehabilitation requirements.

h. The separation authority approved the discharge recommendation for separation under the provisions of AR 635-200, Chapter 14, paragraph 14-12c for commission of a serious offense. He would be issued a general, under honorable conditions characterization of service.

i. On 10 April 1995, he was discharged from active duty with a general, under honorable conditions characterization of service. His DD Form 214 shows he completed 3 years, 7 months, and 28 days of active service with no lost time. His narrative reason for separation listed as "Misconduct."

5. On 4 September 2024, the U.S. Army Criminal Investigation Division (CID) provided information for the processing of this case. CID conducted a search of the Army criminal files indexes regarding the applicant's claims regarding Victim of Assault and no records were found.

6. On 2 June 1998, the Army Discharge Review Board (ADRB) reviewed the applicant's discharge processing but found it proper and equitable. The ADRB denied his request for an upgrade of his discharge.

7. By regulation AR 635-200, action will be taken to separate a Soldier for misconduct when it is clearly established that despite attempts to rehabilitate or develop him or her as a satisfactory Soldier, further effort is unlikely to succeed.

8. By regulation (AR 15-185), an applicant is not entitled to a hearing before the ABCMR. Hearings may be authorized by a panel of the ABCMR or by the Director of the ABCMR.

9. 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.

## 10. 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 (EMR – AHLTA and/or MHS Genesis), 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 10 April 1995 discharge characterized as under honorable conditions (general). On his DD 149, he has indicated that PTSD and Other Mental Health conditions are issues related to his requests. He states:

“I was assaulted by Military Police and sustained Physical Injuries (Lower Back and Head) and Mental Health Injuries (Depression and PTSD).”

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 13 Augst 1991 and was discharged on 10 April 1995 under the separation authority provided by paragraph 14-12c of AR 635-200, Personnel Separations – Enlisted Personnel (17 September 1990): Commission of a serious offense.

d. The applicant received an Article 15 on 27 June 1994 for unlawfully striking M.S. in the head several times and for disrespect toward a superior commissioned officer. He received a second Article 15 on 14 October 1994 for damaging a BMW 520 by hitting and kicking the vehicle and wrongful use of marijuana.

e. The applicant's company commander informed the applicant of his initiation of action to separate him under paragraph 14-12c of AR 635-200 for several of the above noted UCMJ violations. This separation action was subsequently approved by the commander of the 7th Corps Support Group with the directive he receive a General Discharge Certificate.

f. No probative medical documentation was submitted with the application and his period of service predates the EMR.

g. JLV shows he has been awarded multiple a VA service-connected disability rating for 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? YES: His PTSD has been service connected by the VA.

(3) Does the condition or experience actually excuse or mitigate the discharge? Partially: As there is a nexus between PTSD with difficulty with authority figures and self-medicating with alcohol and/or drugs, the condition mitigates the act of disrespect toward a commissioned officer and his misuse of marijuana. However, the condition does not interfere with one's ability to distinguish between right and wrong and act in accordance with the right and therefore cannot mitigate his UCMJ violations of assault and willful damage of private property.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the violent nature of the misconduct leading to the applicant's separation and the findings below outlined in the medical review:

(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? YES: His PTSD has been service connected by the VA.

(3) Does the condition or experience actually excuse or mitigate the discharge? Partially: As there is a nexus between PTSD with difficulty with authority figures and self-medicating with alcohol and/or drugs, the condition mitigates the act of disrespect toward a commissioned officer and his misuse of marijuana. However, the condition does not interfere with one's ability to distinguish between right and wrong and act in accordance with the right and therefore cannot mitigate his UCMJ violations of assault and willful damage of private property.

the Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant's characterization of service.

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.

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. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a (Honorable Discharge) states 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. Paragraph 3-7b (General Discharge) states a general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a member

whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 14 of the regulation states action will be taken to separate a Soldier for misconduct when it is clearly established that despite attempts to rehabilitate or develop him or her as a satisfactory Soldier, further effort is unlikely to succeed.

2. 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.

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

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, on 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. 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.

6. 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.

//NOTHING FOLLOWS//