

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 December 2024

DOCKET NUMBER: AR20240004323

APPLICANT REQUESTS: an upgrade of his character of service from under honorable conditions (general) to honorable.

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

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States), 6 February 2024
- DA Form 2-1 (Personnel Qualification Record)
- DA Form 3634-1 (Inpatient Treatment Record Cover Sheet)
- Medical Documentation, from 24 April 1984 to 2 May 1984

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, he enlisted under a deferred sentence as advised by his recruiter, which he states was not fraudulent. While serving he had no disciplinary action, and he had an honorable discharge due to a medical condition.
3. The applicant enlisted in the Regular Army on 2 November 1983, for a 4-year period. He was awarded the military occupational specialty of 12B (Combat Engineer). The highest rank he attained was private/E-2.
4. On 24 February 1984, the Department Investigative Service completed a report of investigation on the applicant, which shows he pled guilty to three charges of burglary of the 2nd degree. The charges were on 23 January 1981, breaking into a trailer court office and taking stereo equipment, a beer barrel, and a shotgun, on 24 January 1981, entering a gas station with intent to commit theft, and on 24 January 1981 attempting to enter a school to commit theft. He was given a five-year deferred sentence, placed on five-year probation, and was to make restitution to the court for the damages and stolen property.

5. On 11 April 1984, the applicant's command was informed of his fraudulent enlistment in accordance with Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel) Chapter 7 (Defective Enlistment and Inductions) and his command was requested to initiate action for retention or separation in accordance with AR 635-200, Chapter 7, no later than 2 May 1984.
6. A DA Form 268 (Report for Suspension of Favorable Actions) shows on 16 April 1984 the applicant was pending elimination under the provisions of AR 635-200, Chapter 7.
7. A DA Form 3822-R (Report of Mental Status Evaluation) shows on 23 April 1984, the applicant was found mentally capable and responsible to understand and participate in board proceedings.
8. Medical documentation, dated 24 April 1984, shows the applicant was admitted to the hospital on 24 April 1984 with complaint of pain in the back and the inability to move his lower extremities. He stated he and five or six other Soldiers were horsing around near the barracks when he and a fellow Soldier climbed onto the roof of the barracks, and he jumped into a nearby tree. In attempting to descend the tree, he caught hold of a branch that fractured and he fell to the ground. He fell from approximately 15-20 feet in the air and landed on his buttock. He was picked up by the hospital ambulance and brought to the Emergency Room shortly after his fall.
9. On 30 April 1984, the applicant was notified by the Line of Duty Investigation Officer, a line of duty investigation was being conducted on him for facts and circumstance concerning his injury or disease which occurred on 23 April 1984 [sic], this line of duty was to determine whether his injury or disease was incurred in the line of duty.
10. On 10 May 1984, the line of duty investigation determination was finalized. The applicant's case was determined to be not in the line of duty due to his own misconduct. The applicant was given a copy of the line of duty investigation and acknowledged receipt on 11 May 1984.
11. On 10 May 1984, the applicant was notified by his commander of the intent to initiate separation actions against him under the provisions of AR 635-200, paragraph 7-17b (Fraudulent Entry – Incident of fraudulent entry). The applicant acknowledged receipt of the proposed action on 11 May 1984.
12. On 11 May 1984, the applicant's immediate commander formally recommended the applicant for separation under the provisions of AR 635-200, paragraph 7-17b. Further adding the reasons for the proposed action were the applicant's concealment of civilian conviction for second degree burglary resulting in a five-year probation, convicted on 16 March 1981.

13. On 14 May 1984, the applicant's intermediate commander recommended approval of the applicant's separation in accordance with AR 635-200, Chapter 7. Further recommending the applicant receive a under honorable conditions (general) character of service.

14. The applicant consulted with counsel on 15 May 1984 and acknowledged that he had been advised of the basis for the contemplated actions to separate him under the provisions of AR 635-200, Chapter 7, and its effects; the rights available to him; and the effect of any action taken by him in waiving his rights. He requested consideration and a personal appearance before an administrative board and requested consulting counsel whether military or civilian. [He acknowledged he was not entitled to have his case heard by a board of officers if he had less than 6 years total time in service]. He further understood he may encounter substantial prejudice in civilian life.

15. The separation authority approved the recommended discharge under the provisions of AR 635-200, paragraph 7-17b, on 29 May 1984, further directing issuance of an under honorable condition (general) discharge.

16. The applicant was discharge on 17 July 1984, under the provisions of AR 635-200, paragraph 7-17b(3) (Concealment of conviction by civil court), for fraudulent entry, in the grade of E-2. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he received an under honorable conditions (general) character of service, with separation code of JDA, and reenlistment code of RE-3. He served 8 months and 16 days of net active service.

17. The applicant additionally submits medical documentation to include his operation report, dated from 24 April 1984 through 2 May 1984 showing his hospitalization occurred on 24 April 1984 due to falling out of a tree. On 26 April 1984, his report shows he was taken to the operating room for his spinal fracture, following surgery he was transferred to the Intensive Care Unit. He was recommended unfit for duty, and it was recommended for his case to be referred to a Physical Evaluation Board for final disposition.

18. The Board should consider the applicant's statement in accordance with the published equity, injustice, or clemency determination guidance.

19. 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 (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART)

application, and/or 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 ADRB requesting a change in his separation authority and/or a discharge upgrade. He states he had an honorable discharge due to a medical condition.

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 for the period of Service under consideration shows he entered the Regular Army on 2 November 1983 and was separated under honorable conditions (general) on 17 July 1984 under authority provided by paragraph 7-17b of AR 635-200, Personnel Separations – Enlisted Personnel (1 October 1982): Incident of fraudulent entry.

d. A 24 February 1984 Report of Investigation shows the applicant had been involved in and pled guilty to multiple criminal acts carried out prior to his enlistment in 1984:

“Records of Marshall County District Court, Marshalltown, IA, disclosed that [Applicant], fully identified above, was charged with two counts of Burglary 2nd Degree for breaking into the gas station and trailer court, and one count of Theft Third Degree for possession or control of the property of another (stereo equipment, beer barrel and shotgun) on 6 Feb 81. [Applicant] pled not guilty to all charges on 9 Feb 81 when the arraignment was held.

On 23 Feb 81, [Applicant] pled guilty to all charges. On 16 Mar 81, [Applicant] was given a five-year deferred sentence and placed on five years probation and was to make restitution to the court for the damages and stolen property. [Applicant] was given his final discharge from probation on 10 Mar 83.”

e. All potential favorable personnel actions for the applicant were suspended on 16 April 1984: “Service member pending elimination under the provisions of Chapter 7 (Fraudulent Enlistment) AR 635-200.”

f. The applicant completed his pre-separation mental status evaluation on 23 April 1984. The provider documented a normal examination opining he had the mental capacity to understand and participate in the proceedings, he was mentally responsible, and met the retention requirements of AR 40-501, Standards of Medical Fitness.

g. The applicant sustained a spine fracture with a spinal cord injury in a 15–20-foot fall after jumping from a roof to a tree and then falling from the tree on 24 April 1984. Excerpts from a 2 May 1984 narrative summary:

“PRESENT HISTORY: E2 [Applicant] was admitted to the hospital on 24 April 1984 with a chief complaint of pain in the back and inability to move his lower extremities. He states that he and five or six other fallow soldiers were horsing around near the barracks when he and a fellow soldier climbed onto the roof of the barracks, and he jumped into a nearby tree. In attempting to descend the tree, he caught hold of a branch that fractured and he fell to the ground. He fell from approximately from 15 or 20 feet in the air and landed on his buttock. He was picked up by the hospital ambulance and brought to the Emergency Room of Irwin Community Hospital shortly after his fall.”

HOSPITAL COURSE: The patient was admitted to Irwin Army Community Hospital and shortly after admission, a CT scan was obtained of the spine fracture in question. The CT scan demonstrated significant posterior displacement of the body of L1 with marked narrowing of the neural canal and impingement on the nerve roots at the level of L1.

The patient was kept on an NPO (nothing to eat or drink) status and placed in the Intensive Care Unit for monitoring. He was treated on a Stryker frame ... He was placed on IV steroid treatment and his sensory level appeared to improve somewhat ... He did not demonstrate any change in his motor function however ...

He was transferred to the Intensive Care Unit following his surgery ... On 30 April 1984 he was taken to the cast room and a mold for a body jacket was made. He was continued on physical therapy and occupational therapy rehab programs to maximize his present function.

CURRENT STATUS: Current status of SPC [Applicant] is that he maintains a T12 level of spinal injury. He does not demonstrate any motor function of his hips, knees, ankles, or feet in either lower extremity; he does, however, have sensation into the dermatome areas of L3. A body jacket is being constructed for him while he will be able to utilize it in order to sit in a wheelchair so increasing his activity level.

At this time, it is expected that Specialist [REDACTED] will not gain significant function of his legs to allow him to walk. In all likelihood, he will be wheelchair bound for the remainder of his life.

FINAL DIAGNOSIS:

Burst fracture of L1 closed, with neurological deficit below T12.

RECOMMENDATIONS: It is the recommendation of this Medical Board that this member is unfit for retention on Active Duty according to AR 40-501, Chapter 3-28o. He is unavailable for worldwide deployment. His case is referred to a PEB for final disposition. It is recommended that he be expeditiously transferred to a VA Rehab Center to maximize his rehabilitation.”

h. A line of duty investigation into his injuries determined on 10 May 1984 they were “Not in Line of Duty – Due to Own Misconduct.” The investigation itself was not available for review.

i. On 10 May 1984, his company commander notified the applicant of his commendation he be separated under provisions in paragraph 7-17b(2) of AR 635-200. On 29 May 1984, the Commanding General of the 1st Infantry Division (Mechanized) and Fort Riley directed he be so separated with a general discharge.

j. No additional medical documentation was submitted with the application and his service predates the EMR.

k. The first entry in JLV, dated 13 April 2011, shows he is incarcerated at the Oakdale Prison in Iowa. Forty-six of the forty-eight encounters in JLV are related to his incarceration with the final encounter dated 18 December 2023 showing he expects to be released in 2025 and was inquiring about his VA eligibility. The only item listed on his medial problem list is “imprisonment and other incarceration.”

l. Given the several issues listed below, the ARBA medical advisor in unable to make a recommendation on this case.

1. While the applicant’s narrative summary forecast a dire outcome for his ability to regain function of his lower extremities, the record is silent following his discharge and to his final functional status.
2. While the Line of Duty Investigation should have been a formal investigation, it is unclear if it was and if this would have changed the outcome. Appendix A of AR 600-33, Line of Duty Investigations (15 July 1980) lists principles governing line of duty investigations and misconduct determinations in the Army in the form of rules. Several rules were possibly applicable here:

Rule 1. Injury or disease proximately caused by the intentional misconduct or willful negligence is not in line of duty. It is due to misconduct. This is a general rule and must be considered in every case in which misconduct or willful negligence appears to be involved.

Rule 9. Injury because of erratic or reckless conduct, or other deliberate conduct without regard for personal safety or the safety of others, is not in the line of duty. It is due to misconduct. This rule has its chief application in the operation of a vehicle, but may be applied with any deliberate conduct which risks the safety of self or others. "Thrill" or "dare-devil" type activities also are examples in which this rule may be applied.

Rule 12. The line of duty and misconduct status of a member injured or incurring disease while taking part in outside activities, such as business ventures, hobbies, contests, professional or amateur athletic activities, is determinable as any other case under the applicable rules and facts presented in the case. To determine whether an injury is due to willful negligence, the nature of the outside activity should be considered with the training and experience of the member.

m. Rule two states in part "Simple negligence is not misconduct." In addition, it is not known whether an injury or disease incurred during a fraudulent enlistment is or is not an In Line of Duty medical condition.

3. Throughout the years, AR 635-200 has consistently stated that Soldiers being processed for misconduct are eligible for the medical evaluation portion of Disability Evaluation System processing but that referral of their case to the physical evaluation board requires the approval of the Soldier's General Court Martial Convening Authority. Several versions of this regulation from the 1980's were reviewed. All state this basic concept, and paragraph 1-35b of AR 635-200 (30 January 1987) also addressed fraudulent entry:

When the examining medical officer decides that a soldier being considered for separation for misconduct (chap -14) or fraudulent entry (chap 7, sec V) does not meet the retention medical standards, he or she will refer the soldier to a medical board ... The medical treatment facility commander will furnish a copy of the approved board proceedings to the commander exercising general court-martial jurisdiction over the soldier concerned. A copy will also be furnished to the unit commander. The commander exercising general court-martial jurisdiction will direct the soldier to be processed through disability channels per AR 635-40 when it is determined that:

(1) The disability is the cause or substantial contributing cause of the misconduct.

(2) Circumstances warrant disability processing instead of administrative processing.

n. This concept is carried over into AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (25 February 1975). Paragraph 1-2c states:

“A member who is charged with an offense for which he could be dismissed or given a punitive discharge may not be referred for disability processing. However, if the officer exercising appropriate court-martial jurisdiction dismisses the charge or refers it for trial to a court-martial which cannot adjudge such a sentence, the case may be referred for disability processing.”

o. Paragraph 1-2e provides similar guidance:

“No enlisted member may be referred for physical disability processing when action has been or will be taken to separate him for unfitness under chapter 13 or misconduct under chapter 14, AR 635-200, except when the officer exercising general court-martial jurisdiction determines that the disability was the cause or substantial contributing cause of the misconduct, or that circumstances warrant physical disability processing in lieu of administrative processing.”

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 records and the medical review, the Board concurred with the advising opinion finding the lack of clarity surrounding the formal line of duty investigation, the absence of post-discharge medical documentation, and the regulatory barriers to disability processing in cases involving misconduct and fraudulent entry, the opine found insufficient evidence to support a medical retirement or disability separation. As such, an upgrade of the applicant's discharge from under honorable (general) conditions to honorable is without merit.

2. The Board noted, the applicant enlisted in the Regular Army on 2 November 1983 and served for a brief period of 8 months and 16 days. His discharge under Army Regulation 635-200, paragraph 7-17b, was the result of fraudulent enlistment,

specifically the willful concealment of a civilian conviction for second-degree burglary, which included multiple offenses and a five-year probation sentence. Evidence in the records shows the applicant sustained a serious spinal injury during service, the line of duty investigation determined the injury was not incurred in the line of duty but was the result of his own misconduct. The Board acknowledges the medical hardship and subsequent hospitalization; however, this does not mitigate the severity of the fraudulent entry nor justify an upgrade. The applicant was afforded due process, including legal counsel and the opportunity to respond to separation proceedings.

3. Furthermore, the Board agreed the applicant's concealment directly violated enlistment standards and undermined the integrity of the accession process. Based on the preponderance of evidence the Board found the applicant's discharge was appropriately characterized based on the nature of his misconduct and in accordance with regulatory guidance and does not meet the standards of exemplary conduct required for an Honorable discharge. Therefore, the request for upgrade is denied.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>
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:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
XXX	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.

X //SIGNED//

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. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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.
3. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel) sets policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons.

a. Paragraph 3-7a provides that 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 7 established policy and prescribed procedures for separating enlisted members for minority, erroneous enlistment, reenlistment or extension of enlistment, defective enlistment agreement, or fraudulent entry. Paragraph 7-17 provided that fraudulent entry is the procurement of an enlistment, re-enlistment, or period of service through any deliberate material misrepresentation, omission, or concealment of information which, if known and considered by the Army at the time of enlistment or re-enlistment, might have resulted in rejection. This includes all disqualifying information requiring a waiver. Upon determination that a fraudulent entry existed, the discharge authority would direct discharge and direct issuance of an honorable or general discharge certificate.

c. Paragraph 7-17 provides that fraudulent entry is the procurement of an enlistment, reenlistment, or period of active service through any deliberate material misrepresentation, omission, or concealment of information which, if known and considered by the Army at the time of enlistment or reenlistment, might have resulted in rejection. This includes all disqualifying information requiring a waiver. When separation of a Soldier in an entry level status is warranted by the provisions of this chapter; his or her service will be described as uncharacterized.

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 Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder; 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 sexual assault or sexual harassment was unreported, or 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.

5. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and BCM/NRs, on 25 July 2018, 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. 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//