

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 November 2024

DOCKET NUMBER: AR20240004396

APPLICANT REQUESTS:

- an upgrade of his under other than honorable conditions discharge to honorable.
- a in person appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- Department of Veterans Affairs Mental Health Center Service (VAMHCS), Psychological Assessment

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 feels he should have been upgraded to honorable discharge after being disrespected by his noncommissioned officer when he was in Germany. He states he was previously upgraded to other than honorable discharge.
3. The applicant provides VAMHCS - Psychological Assessment from Dr. L.D.S., Clinical Psychologist dated 31 October 2013 shows: Military history: He received an other-than-honorable discharge from the Army 1986 that was recently upgraded. He is unsure of why he was given an other than honorable discharge. He achieved the rank of E3. He was not exposed to any MST. He did not receive any substance abuse treatment or psychiatric treatment while in the military. He is not service connected, and he did not serve in a war zone.
4. A review of the applicant's service record shows:

a. He enlisted in the Regular Army on 25 October 1984

b. On 20 February 1986, he accepted nonjudicial punishment for one specification disrespect language toward noncommissioned officer, between on or about 19 February 1986. One specification wrongfully communicating to sergeant (SGT) D.S. a threat to injure, by busting his head and by busting his face. His punishment included reduction to private second class (PV2)/E-2 and forfeiture of half months pay for two months.

c. On 14 March 1986, he accepted nonjudicial punishment for on or about 28 February 1986 the applicant went absent without leave (AWOL) until on or about 6 March 1986. One specification disrespect language toward specialist 4 (SP4) K.M.M., between on or about 8 March 1986. One specification wrongfully communicates to SP4 K.M.M. a threat to injure, by whipping him. His punishment included reduction to private.

d. 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 28 April 1986
- SF 93 (Report of Medical History) dated 28 April 1986
- DA Form 3822-R (Report of Mental Status Evaluation)

e. On 25 May 1986, the applicant's immediate commander notified the applicant of his intent to separate him under the provisions of Army Regulation (AR) 635-200 (Personnel Separation – Enlisted Personnel), Chapter 14-12c, for commission of a serious offense. The applicant acknowledged receipt on the same day.

f. On 29 May 1986, after requesting consultation with legal counsel, he acknowledged:

- the rights available to him and the effect of request said rights
- he requests personal appearance before an administrative separation board
- he requests consulting counsel and representation by counsel for representation or military counsel and civilian counsel at no expense to the government
- he may encounter substantial prejudice in civilian life if a character of service that is less than honorable was issued to him
- he be ineligible for many or all benefits as a Veteran under Federal and State laws.
- he may apply to the Army Discharge Review Board or the ABCMR for upgrading

- he will be ineligible to apply for enlistment for a period of 2 years after discharge

g. On 30 May 1986, 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.

h. On 3 June 1986, the intermediate commanders recommended approval.

i. On 23 June 1986, the General Court-Martial Convening Authority (GCMCA) directed the applicant be referred to a board of officers to determine whether he should be separated for misconduct.

j. On 16 July 1986, after waiving consultation with legal counsel, he acknowledged:

- the rights available to him and the effect of waiving said rights
- he may encounter substantial prejudice in civilian life if a character of service that is less than honorable was issued to him
- he will be ineligible for many or all benefits as a Veteran under Federal and State laws.
- he may apply to the Army Discharge Review Board or the ABCMR for upgrading
- he will be ineligible to apply for enlistment for a period of 2 years after discharge

k. On 5 August 1986, the GCMCA directed discharge of the applicant under the provisions of AR 635-200, paragraph 14-12c. The applicant will be issued an Under Other Than Honorable Discharge Certificate.

l. Orders 123-4, dated 8 August 1986, discharged the applicant from active duty with an effective date of 14 August 1986.

m. On 8 August 1986, he was discharged from active duty with an under other than honorable conditions characterization of service. His DD Form 214 shows he completed 1 year, 9 months, and 8 days of active service with 7 days of lost time. He was assigned separation code JKQ and the narrative reason for separation listed as "Misconduct – Commission of a Serious Offense" with reentry code 3, 3B. It also shows he was awarded or authorized:

- Army Service Ribbon
- Sharpshooter Marksmanship Qualification Badge with Rifle Bar (M-16)
- Sharpshooter Marksmanship Qualification Badge with Hand Grenade

5. 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.

6. By regulation (AR 635-5), the DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of release from active duty, retirement, or discharge. The information entered thereon reflects the conditions as they existed at the time of separation.

7. By regulation (AR 635-200), action will be taken to separate a Soldier for misconduct, such as commission of a serious offense, 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 applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) characterization of service to honorable. On his application(s), the applicant indicated Posttraumatic Stress Disorder (PTSD) and Other Mental Health Issues are related to his request. More specifically, he noted that he feels his discharge should be upgraded because he felt disrespected by a Sergeant when stationed in Germany. 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 (RA) on 25 October 1984, 2) he accepted nonjudicial punishment on 20 February 1986 for disrespect in language toward a noncommissioned officer (NCO) and wrongfully communicating a threat to injure, 3) on 14 March 1986, he accepted nonjudicial punishment for being absent without leave (AWOL), disrespectful language towards a specialist, and wrongfully communicating a threat to injure, 4) on 25 May 1986, the applicant's commander notified him of his intent to separate him under the provisions of Army Regulation (AR) 635-200, Chapter 14-12c, for commission of a serious offense, 5) the applicant was discharged on 08 August 1986 under other than honorable conditions with a separation code of JKQ and the narrative reason for separation listed as Misconduct-Commission of a Serious Offense, with a reentry code of 3, 3B.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. The electronic military medical record (AHLTA) was not reviewed as it was not in use during the applicant's time in service. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. An in-service Report of Medical Examination dated 28 April 1986 for the purposes of Chapter 14 separation documented psychiatric as 'normal' on clinical evaluation and he was cleared for separation. The associated Report of Medical History shows his statement of health as, 'excellent, I smoke 10 cigarettes a day. No medicine.' On the form, he endorsed frequent or severe headache, dizziness or fainting spells, and a history of sleepwalking. In the remarks section, it was noted that his headaches and dizzy spells were due to a viral syndrome and sleepwalking was a childhood condition. A report of mental status evaluation (MSE) (undated) documented all domains of his MSE as normal. It was documented that he had the mental capacity to understand and participate in proceedings and met retention standards in accordance with (IAW) AR 40-501. There were no other in-service medical records available for review.

d. A review of JLV shows the applicant is not service-connected through the VA for any conditions; however, it is of note that due to the applicant's UOTHC discharge he is ineligible for VA services. A review of VA records shows the applicant presented to the VA on 31 January 2013 with the chief complaint noted as impoverishment. The provider documented he was not exposed to Military Sexual Trauma (MST), did not receive any behavioral health or substance use treatment in the military, and that he did not serve in a war zone. It was also noted that he had a 30-year history of alcohol and cocaine abuse. His diagnoses were noted as Housing/Economic Circumstances, Alcohol Dependence, and Legal Problems/Circumstances. He continued to follow-up through the VA for services related to homelessness and group therapy/psychoeducation through 08 July 2013. He had a brief encounter with social work on 10 May 2017 and two additional visits related to homelessness in 2021.

e. Based on the available information, it is the opinion of the Agency Medical Advisor that there is insufficient evidence that the applicant had a condition or experience in-service that mitigated his misconduct. Review of the available in-service medical records were absent of any BH diagnosis or treatment history. Moreover, an in-service DA 3822 indicated he met retention standards and shows he was not diagnosed with a psychiatric condition at the time of the evaluation. Since being discharged from the military, he has not been service-connected through the VA for any conditions though it is of note that his UOTHC discharge renders him ineligible for clinical services. It was documented that he was diagnosed with Housing/Economic Circumstances, Alcohol Dependence, and Legal Problems/Circumstances through the VA; however, psychosocial problems and alcohol use disorders do not constitute mitigating conditions

nor were these conditions associated with his military service. However, he contends his misconduct was related to PTSD and Other Mental Health Issues, and, per liberal guidance, his assertion is sufficient to warrant the Board's consideration.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends his misconduct was related to PTSD and Other Mental Health Issues.

(2) Did the condition exist or experience occur during military service? Yes, per the applicant's assertion.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of the records was void of any BH diagnosis or treatment history in-service. Military medical records show the applicant was psychiatrically cleared to participate in administrative proceedings, was not diagnosed with a BH condition, and met retention standards. Post-discharge, the applicant has been diagnosed with several conditions through the VA, Housing/Economic Circumstances, Alcohol Dependence, and Legal Problems/Circumstances; however, psychosocial circumstances and alcohol use disorders do not constitute mitigating conditions nor were these conditions associated with his military service. In the absence of documentation supporting his assertion there is insufficient evidence to establish his misconduct was related to or mitigated by PTSD or Other Mental Health Issues and insufficient evidence to support an upgrade based on BH medical mitigation.

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 official finding insufficient evidence that the applicant had a condition or experience in-service that mitigated his misconduct. The opine noted, the applicant's available in-service medical records were absent of any BH diagnosis or treatment history.

2. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the misconduct of wrongfully communicating a threat to a noncommissioned

officer to injure, by busting his head and by busting his face. The Board noted, the applicant provided no post service achievement or character letters of support for the Board to weigh a clemency determination. The Board found the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief, specifically an upgrade of the under other than honorable conditions (UOTHC) discharge to honorable. Therefore, the Board denied relief.

3.. 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 (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. 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.
3. Army Regulation 635-8 (Separation Processing and Documents), in effect at the time, states the DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of release from active duty, retirement, or discharge. The information entered thereon reflects the conditions as they existed at the time of separation.
4. Army Regulation 635-200 (Personnel Separation – 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.

5. 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.

6. 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.

7. 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.

8. 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//