

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 November 2024

DOCKET NUMBER: AR20240004419

APPLICANT REQUESTS:

- an upgrade of his Under Other Than Honorable Conditions (UOTHC) characterization of service
- to appear before the Board via video/telephone

APPLICANT'S SUPPORTING DOCUMENT 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 (USC), 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 desires an upgraded characterization of service for the purpose of obtaining Veterans benefits. He had no incidents of misconduct prior to catching his wife cheating on him and beating the guy with whom she was cheating. Although the incident took place off post, it resulted in him being discharged UOTHC. The applicant indicates on his DD Form 149 that mental health issues/conditions are related to his request.
3. The applicant enlisted in the Regular Army on 25 February 1987 in the rank/pay grade of private (PV1)/E-1 for a period of 3 years. Upon completion of initial entry training, he was assigned to a unit at Fort Wainwright, Alaska.
4. On 26 August 1987, the applicant extended his enlistment for a period of 18 months in order to fulfill the service remaining requirement for an overseas tour in Alaska.
5. He was advanced to specialist (SPC)/E-4 on 1 May 1988, the highest rank he held.

6. The applicant was assigned to a unit at Fort Lewis, Washington on 29 September 1989.

7. The applicant's duty status was changed from Present for Duty (PDY) to Confined by Civil Authorities (CCA) on 24 October 1990 when he was apprehended by King County Police for charges of first degree assault.

8. A King County Police incident report shows on 24 October 1990, the applicant found a letter from his wife, A.J., which detailed an extramarital relationship between her and J.B.. The applicant drove to the residence of J.B. and B.P., knocked on the door, was welcomed in, then picked up a baseball bat and severely beat J.B.. J.B. suffered numerous lacerations to the head and face. Several bones were also broken. When A.J. and B.P. tried to go to J.B.'s defense, A.J. was struck by the bat on her right arm as it was being swung. B.P. was struck on the back of her head in a similar manner. The applicant then departed the scene. Fort Lewis military police detained the applicant at their office. He was advised of his rights, which he acknowledged. He was interviewed by the police and confessed to hitting J.B. with a bat that he obtained from J.B.'s residence. He was booked for assault and confined by civil authorities. The case was closed on 26 October 1990.

9. The applicant's duty status was changed from CCA to PDY on 3 November 1991 upon his release from King County Jail.

10. A Fort Lewis District, 6th Region, U.S. Army Criminal Investigation Command (CID), Fort Lewis, WA memorandum, Subject: CID Report of Investigation - Collateral [case number], dated 21 December 1990, recounts the information in the King County Police incident report. It also shows the applicant was awaiting prosecution by the King County Prosecutor's Office.

11. A Superior Court of Washington for King County court document shows a sentencing hearing of the applicant's case occurred on 22 February 1991. He was found guilty of Assault in the Second Degree and sentenced to 15 months confinement.

12. The applicant underwent a mental status evaluation on 12 March 1991. It was determined that he had the mental capacity to understand and participate in the proceedings and was mentally responsible. There was no evidence of any psychiatric condition which would warrant disposition through medical channels. He was psychiatrically cleared for any administrative action deemed appropriate by command.

13. On 13 March 1991, the applicant was counseled regarding his unsatisfactory performance and misconduct. He was advised that he may be processed for administrative separation and the potential ramifications of such a separation. He acknowledged his understanding on the same day.

14. On 18 March 1991, the applicant's immediate commander notified the applicant of his intent to initiate action to separate him under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 14, paragraph 14-5a for his arrest and conviction by a civil court for the charge of assault in the second degree and subsequent sentencing to confinement for a period of 15 months. He was advised that he was being recommended for a General under honorable conditions discharge. He was advised intermediate commanders could recommend a different characterization of service and the separation authority could approve whatever characterization of service deemed appropriate. The applicant acknowledged receipt of the notification the same day.

15. On 18 March 1991, the applicant's immediate commander formally recommended his separation prior to the expiration of his term of service, under the provisions of Army Regulation 635-200, paragraph 14-5a, by reason of conviction by civil court. He recommended the applicant be given a General under honorable conditions discharge. He also stated the applicant had waived the right to appear before a board of officers convened to determine whether he should be separated, and if separated, to determine the characterization of his service.

16. On 19 March 1991, the applicant acknowledged that he was advised of the reasons for separation and of the rights available to him. He declined the opportunity for consideration of his case by an administrative separation board and elected not to submit statements in his own behalf.

17. The applicant's battalion and brigade commanders recommended that he be separated UOTHC, and the Division Staff Judge Advocate concurred with the recommendations.

18. On 14 April 1991, the separation authority approved the recommendation. He directed the applicant's service be characterized as UOTHC. He further directed the applicant be reduced to PV1/E-1.

17. Orders as amended, and the applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) show he was discharged in the rank/pay grade of PV1/E-1 on 9 May 1991, under the provisions of Army Regulation 635-200, paragraph 14-5, by reason of civilian conviction with separation code "JKB" and reentry code "3." His service was characterized as UOTHC. He was credited with completion of 4 years and 16 days of net active service this period. He had time lost from 24 October to 2 November 1990 and from 22 March to 9 May 1991. He did complete his first full term of service, as he was extended on active duty at the request and for the convenience of the government.

18. In reaching its determination, the Board can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance. By regulation, an applicant is not entitled to a hearing before the Board.

19. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an of upgrade of his under other than honorable conditions (UOTHC) characterization of service. He contends mental health conditions are related to his request. 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 25 February 1987; 2) On 22 February 1991, applicant was found guilty of assault in the second degree and sentenced to 15 months confinement; 3) The applicant was discharged on 9 May 1991, Chapter 14-5, by reason of civilian conviction. His service was characterized as UOTHC.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the 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 experienced mental health conditions, which mitigates his misconduct. There is insufficient evidence the applicant reported or was diagnosed with a mental health condition while on active service. The applicant underwent a mental status evaluation on 12 March 1991 as part of his separation proceedings. The applicant was not diagnosed with a mental health condition, and he was determined capable and able to participate in the proceedings.

d. A review of JLV provided insufficient evidence the applicant has been diagnosed with a service-connected mental health condition. In addition, he 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 mental health conditions.

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

(3) Does the condition experience actually excuse or mitigate the misconduct? No, there is insufficient evidence beyond self-report the applicant was experiencing mental health conditions, while on active service. In addition, there is no nexus between the applicant's reported mental health conditions and his misconduct of assault in that: 1) this type of misconduct is not a part of the natural history or sequelae of the applicant's reported mental health conditions; 2) the applicant's reported mental health conditions do not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing 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:

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 misconduct against another and the lack of mitigation found by the medical advisor for the misconduct, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant's characterization of service.

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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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, USC, Section 1552(b), provides that applications for correction of military records must be filed within three 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 three-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Title 10, USC, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

3. 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 regulation provides that the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing. 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.

4. Army Regulation 635-200 (Personnel Separations - Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel.

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. Paragraph 3-7b states 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 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions (a pattern of misconduct consisting solely of minor military disciplinary infractions), a pattern of misconduct (consisting of discreditable involvement with civil or military authorities or conduct prejudicial to good order and discipline). Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter; however, the separation authority may direct a general discharge if merited by the Soldier's overall record.

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 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. 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.

6. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and 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 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//