

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 8 November 2024

DOCKET NUMBER: AR20240006936

APPLICANT REQUESTS: reconsideration of his previous request for upgrade of his under honorable conditions (General) discharge.

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

- DD Form 149 (Application for Correction of Military Record)
- Support letter, Major J.E.H., 12 March 1998
- DD Form 2329 (Record of Trial by Summary Court-Martial), 23 March 1998
- Letter by Command Sergeant Major A.M., 19 May 1998
- illegible DD Form 214 (Certificate of Release or Discharge from Active Duty)

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20220001289 on 15 August 2022.
2. The applicant states he was being treated unfairly, because others did not agree with his court-martial acquittal. He has always felt this way just never decided to move forward. His significant other pushed him to relive these moments and fight for his upgrade.
3. The applicant enlisted in the Regular Army on 26 January 1994.
4. On 16 December 1997, the applicant received non-judicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for being absent without leave (AWOL) from on or about 20 November to 24 November 1997. His punishment consisted of reduction to private first class (PFC)/E-3.
5. His record shows he was counseled on:
  - 31 December 1997, for not being at his appointed place of duty at the appointed time; the applicant was told to be at the motor pool for weapons draw and a company road march

- 10 February 1998, for missing movement to the National Training Center on 11 January 1998, and disobeying orders, since his arrival in the platoon he had missed several formations and a road march
6. On 3 March 1998, the applicant underwent a mental status evaluation for chapter 14 (misconduct). He was psychiatrically cleared for any administrative action deemed appropriate by his chain of command.
7. On 4 March 1998, summary court-martial charges were preferred against the applicant for:
- missing movement on 11 January 1998
  - being AWOL from on or about 9 January to 10 January 1998
  - being AWOL from on or about 13 January to 11 February 1998
8. He was again counseled on 6 March 1998 for failing to follow instructions. The applicant failed a Class A uniform inspection. He concurred with the counseling.
9. The applicant provided a support letter on 12 March 1998 from Major J.E.H. stating:
- a. Ms. S.C. was admitted to Labor and Delivery at WINN Army Community Hospital on 8 January 1998, for premature rupture of membranes and preterm labor. Ms. C. was 26 weeks pregnant at the time and her baby was at risk for severe morbidity and mortality. She was transferred to the Medical College of Georgia at 1705. The accepting physician was Dr. M\_\_z. A.M. (child) was born on 16 January 1998, at the Medical College of Georgia and is still currently in the Neonatal Intensive Care Unit. He is still having trouble tolerating food and is still very sick. A.M. is still only weighing about two pounds.
  - b. The applicant is the baby's father and appears to have acted appropriately as a concerned father. It is a difficult task to ask a parent to leave a child that may be dying. Please take this into consideration when evaluating his situation.
10. The applicant provides DD Form 2329, which shows on 13 March 1998, a summary court-martial found the applicant not guilty of one specification of missing movement and two specifications being AWOL.
11. On 16 March 1998, he underwent a separation physical. He was qualified for separation.
12. He was again counseled on 20 March 1998 for failing to follow a lawful order and not being at his appointed place of duty. He non-concurred and wrote a rebuttal on the counseling form.

13. On 27 March 1998, the applicant's commander notified him that he was initiating action to separate him under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), chapter 14, paragraph 14-12b, for patterns of misconduct. The reasons for the proposed action were based on the applicant's numerous failures to be at his appointed places of duty and disobeying lawful orders. The commander recommended the applicant receive a general discharge and advised him of his rights. The applicant acknowledged receipt on the same day.

14. On 27 March 1998, Senior Defense Counsel, Trial Defense Service, provided a memorandum in which he wrote, in pertinent part, the counseling statement should not be in the discharge packet and the alleged misconduct cannot be grounds for separation. Putting in the counseling statement violates the regulation; including it without the acquittal report is misleading and unfair. The court-martial did not include charges based upon any prior misconduct, nor was there any decision to initiate separation proceedings based upon the record of counseling prior to the court-martial. Under the provisions of AR 635-200, the subject matter of the applicant's acquittal may not be considered for separation, and the rehabilitation options should be seriously considered after a Soldier is acquitted of criminal charges so that he can have the opportunity at a fresh start.

15. The 2d Brigade Legal Advisor/Trial Counsel provided a memorandum in response to the Senior Defense Counsel's memorandum and stated, in pertinent part:

a. The applicant "has been recommended for separation, because of a pattern of not showing up to his appointed place of duty and because of his failure to follow instructions, not because of any retaliatory efforts on the part of the chain of command. The separation packet that includes a counseling statement which refers to misconduct for which private first class (PFC) M [the applicant] had been acquitted at summary court martial is legally sufficient. Furthermore, if separation had been based purely on this misconduct, the action would still be legally sufficient."

b. The applicant "is being separated, because he has a negative effect on discipline, but this negative effect is created from PFC M's failure to be at appointed place of duty and failure to follow instructions. The command had decided to initiate separation prior to the summary court-martial, contrary to defense counsel's assertion. Given the Soldier's performance and the commander's assessment of the Soldier's potential, separation is warranted without further rehabilitative requirements."

c. "Separation based purely upon [the applicant] PFC M's missing movement to NTC would have been legally sufficient, because a summary court-martial should not be considered a "judicial proceeding" within the meaning of AR 635-200, which states: "No Soldier will be considered for administrative separation because of conduct that...has

been the subject of judicial proceedings resulting in an acquittal or action having the effect thereof.”

d. In contrast to General Court-Martial and Special Court-Martial, a Summary Court-Martial should not be considered a “judicial proceeding”. Whereas General and Special Court-Martials are full-blown trials which entitle the accused to all Due Process protections, a Summary Court Martial is a less formal procedure, closer to nonjudicial punishment under Article 15. Therefore, since a Summary Court-Martial is not a “judicial proceeding,” the applicant’s missing movement to NTC could have been used as the sole basis for separation, had the command decided to do so. However, the applicant was recommended for separation, because of his pattern of failing to be at an appointed place of duty and failing to follow instructions, and the impact his actions had on his unit. Separation was warranted under the provisions of AR 635-200, paragraph 14-12(b) and “the separation packet is legally sufficient.”

16. His chain of command recommended approval of the separation action and to waive further rehabilitative requirements.

17. On 7 April 1998, the separation authority approved the discharge under the provisions of AR 635-200, chapter 14, paragraph 14-12c (commission of a serious offense); and directed his service be characterized as general under honorable conditions.

18. On 10 April 1998, having been advised by his consulting counsel of the basis for the contemplated action to separate him for numerous failure(s) to report and disobeying lawful orders under AR 635-200, chapter 14, paragraph 14-12b, and its effects; of the rights available to him; and the effect of any action taken by him in waiving his rights. He understood he may expect to encounter substantial prejudice in civilian life if a general discharge under honorable conditions is issued to him.

19. On 23 April 1998, he was discharged under honorable conditions under the provisions of AR 635-200, paragraph 14-12c. His DD Form 214 shows he completed 4 years, 2 months, and 28 days active service. It also shows:

- Item 26 (Separation Code): JKQ
- Item 27 (Reentry Code): 3
- Item 28 (Narrative Reason for Separation): Misconduct
- Item 29 (Dates of Time Lost During this Period): None

20. There is no evidence the applicant applied to the Army Discharge Review Board within the Board’s 15-year statute of limitations.

21. On 15 August 2022, the ABCMR considered his case and determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to upgrading the characterization of his discharge.

22. 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.

23. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to his characterization of service from under honorable conditions (general) to honorable. He contends he experienced an undiagnosed mental health condition, including PTSD, that mitigates his misconduct.

b. 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:

- The applicant enlisted into the Regular Army on 26 January 1994.
- The applicant received NJP for being absent without leave (AWOL) from on or about 20 November to 24 November 1997. He was counseled on 31 December 1997 for not being at his appointed place of duty and again on 10 February 1998 for disobeying orders related to missing formation and a road march.
- Summary court-martial charges were preferred against him for missing movement and two incidents of being AWOL in January and February 1998. On 13 March 1998, a summary court-martial found the applicant not guilty of one specification of missing movement and two specifications being AWOL.
- He was counseled for failing to follow a lawful order and not being at his appointed place of duty on 20 March 1998.
- On 27 March 1998, the applicant's commander notified him that he was initiating action to separate him under the provisions of Army Regulation (AR) 635-200, chapter 14, paragraph 14-12b, for patterns of misconduct. The reasons for the proposed action were based on the applicant's numerous failures to be at his appointed places of duty and disobeying lawful orders.
- The applicant was discharged on 23 April 1998 and completed 4 years, 2 months, and 28 days net active service.

c. Review of Available Records: The Army Review Board Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts he was treated unfairly because others did not agree with his court-martial acquittal. He did not indicate any mental health related issues as part of his application. The application included a Report of Mental Status Evaluation dated 3

March 1998, which showed that the applicant met retention standards and had the mental capacity to understand the proceedings. He was psychiatrically cleared for administrative action deemed appropriate by command. A Report of Medical History and a Report of Medical Examination dated 16 March 1998 showed that the applicant did not endorse any psychiatric symptoms. There was insufficient evidence that the applicant was diagnosed with any psychiatric condition while on active service.

d. The Joint Legacy Viewer (JLV), which includes medical and mental health records from DoD and VA, was also reviewed and showed that the applicant is 30% service connected through the VA for PTSD. An Initial PTSD Disability Benefits Questionnaire dated 11 July 2023 showed that the applicant endorsed the requisite number of symptoms to warrant a diagnosis of PTSD, and he reported he was exposed to death during his deployment to Bosnia and Kosovo. He discussed a particular incident where his convoy came across a deceased child in the road, and he was not able to do anything to help. He reported excessive alcohol use after leaving the military but stopped drinking heavily after a DUI in 2017. He expressed feelings of guilt and shame about the trauma exposure, sleep difficulty and nightmares, and emotional numbing. He discussed some relationship impairment due to his anger and irritability, but he denied occupational impairment. The applicant initiated mental health treatment on 14 June 2024 after having a panic attack at work. He reported sleep problems, symptoms of depression, and anxiety, and he screened positive for PTSD. He was diagnosed with Depression and Anxiety and started on a medication, and he was referred for psychotherapy. His most recent visit was on 1 November 2024 where he completed an intake for psychotherapy and focused on his mood dysregulation, suicidal thoughts, and trauma history.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support that the applicant had a mental health condition while on active service. There is evidence of a history of PTSD diagnosis and treatment through the VA, but the number of years between his misconduct and his initial treatment makes it difficult to fully support a nexus. It is this Advisor's opinion that the reported trauma exposure while on active duty partially mitigates his misconduct of being AWOL, missing movement, and disobeying a lawful order.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts significant stressors surrounding his misconduct while on active service. A Report of Mental Status Evaluation from March 1998 showed no indication of any mental health symptoms while in service, but the applicant is 30% service connected for PTSD by the VA and has been diagnosed with Depression and Anxiety.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition while on active service. He reported a deployment history to Bosnia and Kosovo where he encountered trauma exposure.

(3) Does the condition or experience actually excuse or mitigate the discharge? Partial. A review of military medical and mental health records revealed no documentation of any mental health condition(s) while on active service. However, there is sufficient evidence that the applicant was diagnosed with PTSD due to a service-connected traumatic event. The applicant's report of alcohol abuse following discharge is a common self-medicating strategy for avoiding uncomfortable emotions and memories related to trauma exposure. Additionally, avoidant behavior, such as going AWOL and missing movement, can be a natural sequela to mental health conditions associated with exposure to traumatic and stressful events. Yet, the presence of misconduct alone is not sufficient evidence of a fully mitigating mental health condition during active service. However, the applicant contends he was experiencing a mental health condition that mitigates his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

#### BOARD DISCUSSION:

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 request, supporting documents, evidence in the records, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The Board found no error or injustice in the separation proceedings and designated characterization of service assigned during separation. The Board noted the applicant provided no new documentation to support his request. The Board reviewed and concurred with the medical advisor's review finding insufficient evidence to support the applicant had a mental health condition on active duty that would have mitigated his misconduct. Based on a preponderance of the evidence, the Board concluded that the characterization of service the applicant received upon separation was appropriate.

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 amendment of the ABCMR decision rendered in Docket Number AR20220001289 on 15 August 2022.

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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. Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel. Chapter 14 (Separation for Misconduct) deals with separation for various types of misconduct, which includes drug abuse, and states that individuals identified as drug abusers may be separated prior to their normal expiration of term of service. The regulation in effect at the time stated individuals in pay grades E-5 and above could be processed for separation upon discovery of a drug offense. Those in pay grades below E-5 could also be processed after a first drug offense and must have been processed for separation after a second offense. The issuance of a discharge under other than honorable conditions was normally considered appropriate.

a. Paragraph 3-7a (1) 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. Only the honorable characterization may be awarded a member upon completion of his or her period of enlistment or period for which called or ordered to active duty or active duty for training, or where required under specific reasons for separation, unless an entry level status separation (uncharacterized) is warranted.

b. Paragraph 3-7b (1) 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. Paragraph 3-7b (2) states a characterization of under honorable conditions may be issued only when the reason for the member's separation specifically allows such characterization. It will not be issued to members upon separation at expiration of their period of enlistment, military service obligation, or period for which called or ordered to active duty.

2. 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.

3. 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//