

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 March 2025

DOCKET NUMBER: AR20240008897

APPLICANT AND COUNSEL REQUESTS:

- reconsideration of his prior request for an upgrade of his other than under honorable conditions discharge to honorable
- a personal appearance before the Board
- corrections to his DD Form 214, including an upgrade to Honorable or General Under Honorable Conditions, revisions to the separation authority and code to "Secretarial Authority,"
- block 29 (Dates of Time Lost During this Period) remove dates 810206 - 810217

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel Letter (The complete one-page letter is available for review by the Board in supporting documents)
- Letter of Support from US House Member Foxx (The complete one-page letter is available for review by the Board in supporting documents)
- Petition (The complete three-pages petition is available for review by the Board in supporting documents)
- Counsel Brief (The complete 38-pages brief is available for review by the Board in supporting documents)
- Exhibit 1 – Affidavit (The complete four-page affidavit is available for review by the Board in supporting documents)
- Exhibit 2 – Official Military Personnel File (OMPF) (310 pages)
- Exhibit 3 – Selected Veterans Benefits Management System Records (42 pages)
- Exhibit 4 – Kurta Memo
- Exhibit 5 – Wilkie Memo
- Exhibit 6 – DOD - Task Force on the Administration of Military Justice in the Armed Forces - Investigation about racism and discrimination within the Armed Forces (77 pages)
- Exhibit 7 – NIH report on - Traumatic Brain Injury (TBI) – outlines TBI (8 pages)
- Exhibit 8 – Report of JAG of the Army (9 pages)
- Exhibit 9 – Report to Congress (19 pages)

- Exhibit 10 – Army Board of Correction of Military Records Record of Proceedings, AR20210015407 (March 1, 2022) (9 pages)
- Exhibit 11 – Character Letter M.D.
- Exhibit 12 – Character Letter C.S.F.
- Exhibit 13 – Letter of Representation from Congresswomen V.F.

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 AR20210015407 on 1 March 2022 and AR20140001007 on 28 August 2014.

2. The applicant states in his affidavit that he regrets his mistakes in the Army, attributing his struggles to lasting effects from an attack in Germany, which left him with head injuries and ongoing health issues. He found it difficult to meet military expectations, faced racism, and experienced unfair demotions at Fort Stewart. After leaving the Army, he worked in car sales for 26 years and now receives Social Security due to his traumatic brain injury. "Complete affidavit is available in supporting documents pages 38 - 41."

3. Counsel requests on behalf of the applicant that the Army Board for Correction of Military Records (ABCMR) upgrade his under other than honorable (UOTH) discharge, citing service-connected Traumatic Brain Injury (TBI), procedural injustice, and racial disparities in military justice. The applicant seeks corrections to his DD Form 214, including an upgrade to honorable or general under honorable conditions), revisions to the separation authority and code to "Secretarial Authority," and removal of incorrectly recorded AWOL dates.

a. Under the Kurta Memo, the Board must consider mental health conditions when reviewing discharges. The applicant suffered a TBI from an assault while stationed in Germany, later diagnosed by the VA as service connected. His 1981 service treatment records (STRs) confirm a concussion, and his misconduct—tardiness, insubordination, and brief AWOLs—occurred only after the injury. TBI can impair judgment and behavior, making his UOTH discharge unjust under these guidelines.

b. The Wilkie Memo supports relief when discharge-related misconduct is nonviolent and does not constitute a crime in civilian courts. The applicant has since maintained steady employment and strong family relationships, demonstrating rehabilitation.

c. The Department of Defense recognized systemic racial disparities in military justice as early as 1972. The applicant's Non-Judicial Punishments (NJP) and UOTH discharge align with documented racial disparities in disciplinary actions at the time.

d. New evidence of VA service connection for TBI was not available during the 2022 ABCMR decision, warranting reconsideration. Given the direct impact of TBI on his performance, post-service rehabilitation, historical racial bias in military discipline, and new medical evidence, counsel respectfully requests that the ABCMR correct the record and upgrade the applicant's discharge. (Counsel's full brief is available for review by the Board on pages 9 - 36.)

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

a. He enlisted in the Regular Army on 6 July 1978.

b. He had foreign service in Germany from 15 October 1978 – 1 August 1980.

c. A Special Court-Martial convened on 7 December 1979, and found the applicant guilty of assault on a superior noncommissioned officer.

- His sentence included forfeiture of \$150.00 per month for two months, extra duty 30 days, and restriction for 30 days
- On 28 January 1980, the convening authority approved the sentence and ordered it duly executed

d. The applicant accepted multiple nonjudicial punishments:

- on 21 October 1980, disrespect to a superior officer; he appealed his punishment on 23 October 1980; his appeal was disapproved on 24 October 1980
- on 9 January 1981, absent without leave (AWOL) from on or about 22 December 1980 until on or about 24 December 1980
- on 23 January 1981, failure to report
- on 23 February 1981, AWOL from on or about 6 February 1981 until on or about 18 February 1981
- on 9 March 1981, failure to report; he appealed his punishment on 23 March 1981; his appeal was disapproved on 30 March 1981

e. On 5 March 1981, his commander notified him of intent to separate him under the provisions (UP) of Chapter 14, Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), for patterns of misconduct and frequent incidents of discreditable nature with civil or military authorities; he acknowledged on 5 March 1981.

f. On 5 March 1981, a Commander's Report, states the commander recommended discharge of the applicant because he was regularly late for formation, AWOL, has no respect for authority, and attempts at rehabilitation had no effect. The applicant made no attempt to improve his performance.

g. On 9 March 1981, he was advised by counsel of the basis for the contemplated action to separate him for patterns of misconduct UP of Chapter 14, AR 635-200, and its effects; of the rights available to him; and the effects of any action by him waiving his rights. He requested personal appearance before an administrative discharge board.

- The applicant did not submit a statement in his own behalf. On 6 May 1981, the applicant consulted with counsel an additional time and waived consideration of his case by an administrative discharge board

h. His chain of command recommended approval for discharge under provisions of Chapter 14-33b AR 635-200.

i. On 20 May 1981, the separation authority approved separation under the provisions of AR 635-200, chapter 14-33b. He was reduced to the lowest enlisted grade and furnished an Under Honorable Conditions Discharge Certificate.

j. Accordingly, he was discharged under other than honorable conditions on 29 May 1981, he completed 2 years, 10 months, and 6 days net active service this period.

- Period of lost time - from 22 December 1980 to 23 December 1980, 6 February 1981 to 17 February 1981, and 16 April 1981 to 19 April 1981

5. On 28 August 2014, the ABCMR rendered a decision in Docket Number AR20120019501. The Board found 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.

6. On 1 March 2022, the ABCMR rendered a decision in Docket Number AR20120019501. The Board found 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.

7. 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.

8. 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 and to update the separation authority on his DD Form 214 to "Secretarial Authority." The applicant's request to remove dates of lost time from his DD Form 214 is outside of the scope of this Advisory and will not be addressed. On his DD Form 149, the applicant indicated Traumatic Brain Injury (TBI) is 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 (RA) on 06 July 1978, 2) a Special Court-Martial convened on 07 December 1979 found the applicant guilty of assault on a superior noncommissioned officer (NCO). His sentence included forfeiture of \$150.00 per month for two months, extra duty 30 days, and restriction for 30 days, 4) the applicant received nonjudicial punishment on numerous occasions: on 21 October 1980 for disrespect to a superior officer; on 9 January 1981 for being absent without leave (AWOL) from on or about 22 December 1980 until on or about 24 December 1980; on 23 January 1981 for failure to report; on 23 February 1981 for being AWOL from on or about 6 February 1981 unit on or about 18 February 1981; and on 9 March 1981 for failure to report, 5) On 5 March 1981, a Commander's Report shows the commander recommended discharge of the applicant because he was regularly late for formation, AWOL, had no respect for authority, and attempts at rehabilitation had no effect. The applicant made no attempt to improve his performance, 6) the applicant was discharged on 29 May 1981 under the provisions of AR 635-200, 14-33b, with the narrative reason for separation as Misconduct-frequent incidents of a discreditable nature with military authorities, a separation code of JKA, and reentry code of RE-3, 3B, 7) the applicant's previous petitions to the ABCMR, summarized in Docket Numbers AR20120019501 dated 28 August 2014 and AR20120019501 dated 01 March 2022, were denied as it was determined that the Board found no evidence of probable error or injustice.

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. In-service medical records included as part of the applicant's application were reviewed. The applicant's Report of Medical Examination dated 15 October 1977 shows psychiatric as 'normal' on clinical evaluation. The Report of Medical History dated 15 October 1977 shows he marked 'no' to head injury and all BH-related items. A medical note dated 23 October 1978 shows his PULHES as 111111, indicating he was not on a profile for any reason at that time. A Unit Commanders Report for Psychiatric

Examination dated 15 November 1979 for the purposes of pre-trial report shows the applicant was referred for an evaluation, in effect, due to a report of misconduct that occurred on 15 October 1979. The command documented that the applicant got along well with peers but not superiors; however, the results of the evaluation were not available for review. A medical note dated 01 January 1979 shows the applicant reported he was struck in the head with a handgun which resulted in two small lacerations. An Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) client intake and follow-up record dated 19 July 1979 shows the applicant was diagnosed with improper use of amphetamines, improper use of cocaine, and improper use of tranquilizers. A subsequent ADAPCP progress report (undated) shows the applicant was enrolled in the program from 02 July 1979 through 02 September 1979. He was seen for two counseling sessions, was deemed an ADAPCP success, and was placed in a follow-up status; however, it was documented that the evaluating provider recommended an additional 30 days of "intensified counseling." The applicant presented to the ER on 05 January 1980 due to having been "pistol whipped" on New Years Eve and the radiology report indicated no significant abnormalities were noted. An SF 600 shows the applicant presented on [illegible date] January 1980 due to a head injury reporting headaches and blurry vision, noting he said he had been "knocked semi-conscious." The provider documented the injury occurred on New Years Eve, that he was three days post trauma and diagnosed him with post-concussion headache.

The applicant underwent a Mental Status Evaluation (MSE) for an unspecified purpose on 16 March 1981. All domains of the MSE were within normal limits (WNL). The evaluating provider indicated that the applicant did not have significant mental illness, was mentally responsible, was able to distinguish right from wrong and adhere to the right and had the mental capacity to understand and participate in board proceedings. The provider also noted that the applicant met retention standards in accordance with Chapter 3, AR 40-501. A Report of Medical Examination dated 21 May 1981 for the purposes of Chapter 14 separation shows item number 42, psychiatric, as 'normal' on clinical evaluation. The associated Report of Medical History dated 21 May 1981 shows the applicant stated he was in "good health", and he denied experiencing any BH-related symptoms. He marked 'yes' to head injury and in the remarks section it shows "concussion 01 January 1980." A medical note dated 08 April 1981 shows the applicant presented to the Emergency Room (ER) due to hitting his head on the hatch of a vehicle, to which a radiology report indicated there were "no significant abnormalities." The medical note documented he denied experiencing a loss of consciousness that there was no evidence of significant head trauma.

d. Through counsel, the applicant asserts that he was the victim of an assault and suffered a TBI while stationed in Germany. It was further indicated that his TBI has impacted his ability to function and still affects his quality of life.

e. A VA Rating Decision Letter dated 01 February 2023 shows the applicant was granted service connection for treatment purposes only for Traumatic Brain Injury, Post Traumatic Headaches (residual of TBI), Tinnitus (residual of TBI), and for temporomandibular disorder status post jaw fracture. He completed a VA Compensation and Pension (C&P) examination for Initial Evaluation of Residuals of Traumatic Brain Injury on 02 December 2022 showing that the applicant was determined to have a TBI and that it was 'at least as likely as not that the veteran suffered a mild traumatic brain injury while on active duty.' The evaluating provider determined that there was evidence of mild functional impairment.

f. The Medical Advisory as part of the applicant's previous petition to the ABCMR summarized in Docket Number AR20210015407 dated 01 March 2022 was reviewed. The evaluating provider documented that there was no documentation that supported a behavioral health diagnosis at the time of discharge and that there was no diagnosis to consider with respect to mitigation of a pattern of misconduct. The Advisor further opined that a mild TBI would not be considered a mitigating factor for the misconduct that resulted in discharge.

g. Based on the available information, it is the opinion of the Agency Medical Advisor that there is sufficient evidence that the applicant was diagnosed with a potentially mitigating condition. This Advisor would contend that the applicant's misconduct that led to his discharge is mitigated by his in-service diagnosis of concussion (later diagnosed and service-connected for treatment purposes only through the VA as TBI).

h. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant was diagnosed with concussion in-service. Since being discharged from the military, he has been service-connected for treatment purposes only through the VA for TBI.

(2) Did the condition exist or experience occur during military service? Yes, the applicant was diagnosed with concussion in-service. Since being discharged from the military, he has been service-connected for treatment purposes only through the VA for TBI.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. The applicant has one condition, TBI, which mitigates his misconduct. As there is an association between problems with poor decision-making, motivation, oppositionality, and head injury, there is a nexus between the applicant's misconduct of disrespect to a superior officer, AWOL, failure to report and his diagnosis of TBI. As such, BH mitigation is supported.

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 considered the advising official finding sufficient evidence that the applicant was diagnosed with a potentially mitigating condition. The opine noted the applicant's misconduct that led to his discharge is mitigated by his in-service diagnosis of concussion (later diagnosed and service-connected for treatment purposes only through the VA as TBI).
2. The Board notwithstanding the medical opine, found there is insufficient evidence of in-service mitigating factors for the misconduct or that would warrant a change to the applicant's separation authority or separation code. The applicant's record is absent sufficient evidence to support block 29 (Dates of Time Lost During this Period) remove dates 810206 – 810217 from his DD form 214. The burden of proof rest with the applicant and his counsel to support his contentions that he was hospitalized and not AWOL. Additionally, evidence in the record shows the applicant did not have significant mental illness, was mentally responsible, was able to distinguish right from wrong and adhere to the right and had the mental capacity to understand and participate in board proceedings. The Board recognized the VA Compensation and Pension (C&P) examination for Initial Evaluation of Residuals of Traumatic Brain Injury dated 02 December 2022 showing that the applicant was determined to have a TBI and that it was 'at least as likely as not that the veteran suffered a mild traumatic brain injury while on active duty. However, the Board determined the applicant, and his counsel have not demonstrated an error or injustice. 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 Board found 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 to amend the decision of the ABCMR set forth in Docket Number AR20210015407 on 1 March 2022 and AR20140001007 on 28 August 2014.

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 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.

2. Army Regulation 601-210 (Regular Army and Army Reserve Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment and processing into the RA and the United States Army Reserve. Table 3-1 included a list of the RA RE codes. RE codes are numbered 1, 3, and 4.

- RE-1 applies to Soldiers completing their term of active service who are considered qualified to reenter the U.S. Army; they are qualified for enlistment if all other criteria are met
- RE-3 applies to Soldiers who are not considered fully qualified for reentry or continuous service at the time of separation, but the disqualification is waivable; those individuals are ineligible unless a waiver is granted
- RE-4 applies to Soldiers ineligible for reentry

3. Army Regulation 635-5 (Separation 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 635-5-1 (Separation Program Designator (SPD) Codes) states SPD codes are three-character alphabetic combinations which identify reasons for and types of separation from active service. The SPD code of "JKA" was the correct code for Soldiers separating under chapter 14-33b for Pattern of Misconduct.

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

a. 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. 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, such as a pattern of 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.

6. 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.

7. 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.

8. 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.

9. 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//