

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 29 September 2023

DOCKET NUMBER: AR20230002715

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions (UOTHC) characterization of service to honorable, and an appearance before the Board via video or telephone.

APPLICANT'S SUPPORTING DOCUMENT(S) 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, in effect, his discharge was inequitable due to post-traumatic stress disorder (PTSD), changes in policy (Hagel memo, 2014), and a lack of proper access to healthcare and mental health services.
3. The applicant enlisted in the Regular Army on 26 January 2001 for a 4-year period. He was awarded military occupational specialty (MOS) 19D (Cavalry Scout). The highest rank he attained was private first class/E-3.
4. The applicant accepted non-judicial punishment under the provisions of Article 15, of the Uniform Code of Military Justice on 30 July 2002, for wrongfully using marijuana, between on or about 10 June 2002 and 9 July 2002. His punishment consisted of reduction to private/E-1, forfeiture of \$552.00 pay per month for two months, 45 days of extra duty, and 14 days of restriction.
5. The applicant was deployed to Kuwait/Iraq from 10 September 2002 to 10 August 2003.
6. He accepted non-judicial punishment under the provisions of Article 15, of the Uniform Code of Military Justice on two additional occasions:

a. On 9 October 2002, for failure to go at the time prescribed to his appointed place of duty, on or about 31 August 2002.

b. On 17 December 2003, for wrongfully using marijuana, between on or about 22 September 2002 and 21 October 2003. His punishment consisted of reduction to private/E-1, forfeiture of \$575.00 pay for one month, 45 days of extra duty, and 45 days of restriction.

7. Four DA Forms 4187 (Personnel Action) show the following changes in his duty status:

- Present for Duty (PDY) to absent without leave (AWOL) on 18 March 2004
- AWOL to Dropped from Rolls (DFR) on 28 April 2004
- AWOL to Desertion on 28 April 2004
- AWOL to PDY on 14 June 2004

8. The applicant's commander was notified by the Army Substance Abuse Program (ASAP) that the applicant provided a urine specimen on 15 June 2004 that tested positive for tetrahydrocannabinol (THC).

9. An additional memorandum from ASAP notified the commander that the applicant had four positive urinalysis reports between 9 July 2002 and 15 June 2004.

10. The applicant was formally counseled on 31 August 2004 and 20 October 2004. Areas of emphasis covered in the counseling include, but are not limited to:

- recommendation for special court-martial by reason of desertion, missing movement, and illegal use of marijuana
- being drunk on duty

11. A DD Form 458 (Charge Sheet) shows court-martial charges were preferred against the applicant on 1 December 2004, for being AWOL from on or about 18 March 2004 until on or about 14 June 2004, the wrongful use of marijuana, between on or about 15 May 2004 and on or about 15 June 2004, and incapacitation in the performance of his duties due to the overindulgence of alcohol, on or about 20 October 2004. His chain of command recommended trial by a special court-martial.

12. The applicant consulted with legal counsel on or about 10 December 2004.

a. He was advised of the basis for the contemplated trial by court-martial, the maximum permissible punishment authorized under the Uniform Code of Military Justice, the possible effects of a UOTHC discharge, and the procedures and rights that were available to him.

b. After receiving legal counsel, he voluntarily requested discharge, in lieu of trial by court-martial, under the provision of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 10. In his request for discharge, he acknowledged his understanding that by requesting discharge, he was admitting guilt to the charge against him, or of a lesser included offense that also authorized the imposition of a bad conduct or dishonorable discharge. He acknowledged making this request free of coercion. He further acknowledged understanding if his discharge request were approved, he could be deprived of many or all Army benefits, he could be ineligible for many or all benefits administered by the Department of Veterans Administration, and he could be deprived of his rights and benefits as a veteran under both Federal and State laws.

c. He was advised he could submit any statements he desired in his behalf. He did not provide a statement.

13. The applicant's chain of command recommended disapproval of the request. The Staff Judge Advocate recommended approval of the discharge with the issuance of a UOTHC discharge.

14. On 7 January 2005, the separation authority approved the applicant's request for discharge in lieu of court-martial and directed a UOTHC characterization of service.

15. The applicant was discharged on 28 January 2005, under the provisions of Army Regulation 635-200, Chapter 10, in lieu of trial by court-martial, with an UOTHC characterization of service. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was credited with 3 years, 9 months, and 28 days of net active service. He had lost time from 18 March 2004 to 13 June 2004. His awards include:

- Presidential Unit Citation
- National Defense Service Medal
- Global War on Terrorism Expeditionary Medal
- Global War on Terrorism Service Medal
- Army Service Ribbon

16. The Army Discharge Review Board reviewed the applicant's request for an upgrade of his characterization of service on 20 August 2021. After careful review, the Board determined the applicant was properly and equitably discharge and denied his request.

17. On 3 April 2023, the Army Review Boards Agency (ARBA), Case Management Division, sent the applicant a request for medical documents that supported his contention of PTSD. To date, no additional documentation has been received.

18. Discharges under the provisions of Army Regulation 635-200, Chapter 10, are voluntary requests for discharge for the good of the service - in lieu of a trial by court-martial. An UOTHC character of service is normally considered appropriate.

19. The Board should consider the applicant's argument and/or evidence in accordance with the published equity, injustice, or clemency determination guidance.

20. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) discharge. He contends he had PTSD and anxiety that mitigated 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: 1) The applicant enlisted in the Regular Army on 26 January 2001; 2) The applicant accepted non-judicial punishment (NJP) on 30 July 2002 for wrongfully using marijuana; 3) The applicant was deployed to Kuwait/Iraq from 10 September 2002-10 August 2003; 4) The applicant accepted NJP on 09 October 2002 for failure to be on time and on 17 December 2003 for wrongly using marijuana on two occasions; 5) The applicant was found AWOL on 18 March 2004-14 June 2004; 6) Court-martial charges were preferred against the applicant on 1 December 2004, for being AWOL, the wrongful use of marijuana on two occasions, and incapacitation in the performance of his duties due to the overindulgence of alcohol; 7) The applicant was discharged on 28 January 2005, Chapter 10, in lieu of trial by court-martial. His character of service was UOTHC; 7) The Army Discharge Review Board reviewed and denied the applicant's request for an upgrade of his characterization of service on 20 August 2021.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional hardcopy medical documentation was provided.

d. On his application, the applicant noted PTSD and anxiety were related to his request, as contributing and mitigating factors in the circumstances that resulted in his separation. There is sufficient evidence the applicant deployed to a combat environment. There was evidence the applicant was enrolled in the Army Substance Abuse Program while on active service. However, there was insufficient evidence the applicant reported or was diagnosed with a mental health condition, including PTSD while on active service.

e. A review of JLV provided evidence the applicant has sought out behavioral health services for reported symptoms of depression, anxiety, and alcohol abuse from the VA. However, the applicant has not been diagnosed with a mental health condition by the VA and receives no service-connected disability. The applicant did not provide any

civilian medical documentation indicating he has been diagnosed with any mental health condition including PTSD.

f. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence to support the applicant had condition or experience that mitigated his misconduct.

#### Kurta Questions

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends he was experiencing PTSD and anxiety that contributed to his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant reports experiencing a PTSD and anxiety while on active service.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is insufficient evidence beyond self-report the applicant was experiencing PTSD and anxiety while on active service. The applicant did go AWOL and abuse alcohol and illegal drugs, which is avoidant behavior that can be a sequela to some mental health conditions. However, the presence of misconduct is not sufficient to establish a history of a mental health condition including PTSD during active service. However, the applicant contends he was experiencing PTSD and anxiety that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

#### BOARD DISCUSSION:

1. The applicant's request for a personal appearance 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 before the Board is not necessary to serve the interest of equity and justice in this case.


2. After reviewing the application and all supporting documents, the Board found that relief was not warranted. The Board carefully considered the applicant's request, supporting documents available for review and evidence in the records. The Board considered the frequency and nature of the misconduct, the reason for separation and whether to apply clemency. Based on the lack of documentation showing in-service mitigating factors to overcome the misconduct or evidence of post-service achievements or letters of reference to weigh in support of a clemency determination, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
█	█	█	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined 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 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, USC, 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.

3. Army Regulation 15-185 (ABCMR), paragraph 2-11 states applicants do not have the right to a hearing before the ABCMR. The Director of the ABCMR may grant a formal hearing whenever justice requires.

4. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Chapter 10 of that regulation provides, in pertinent part, that a member who has committed an offense or offenses for which the authorized punishment includes a punitive discharge may, submit a request for discharge for the good of the service in lieu of trial by court-martial. The request may be submitted at any time after charges have been preferred and must include the individual's admission of guilt. Although an honorable or general discharge is authorized, a discharge under other than honorable conditions is normally considered appropriate.

b. 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.

c. Paragraph 3-7b provides that 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.

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 PTSD criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged UOTHC 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 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 PTSD; 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.

7. 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//