

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 8 December 2023

DOCKET NUMBER: AR20230003258

APPLICANT REQUESTS: upgrade of his under other than honorable conditions (UOTHC) discharge, and correction of his records to show he:

- enlisted in 2001
- was honorably discharged and reenlisted in 2004
- was honorably discharged and reenlisted in 2006
- reenlisted in 2009

APPLICANT'S SUPPORTING DOCUMENT CONSIDERED BY THE BOARD:

DD Form 149 (Application for Correction of Military Records)

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, that at the time of his misconduct he was suffering from post-traumatic stress disorder (PTSD), family issues, financial hardship, homelessness, and had a mental breakdown. When he returned from a deployment, he was reassigned to a non-deployable unit where he was supervised by a contractor and did not know how to handle the transition, which made his conditions worse. He was also diagnosed with diabetes at his last duty station. He was advised by legal that the best thing for him to do was to sign and agree to the reduction in rank and discharge and then apply for an upgrade. His records are incorrect because he enlisted in 2001, reenlisted in 2004, was honorably discharged and reenlisted in 2006, was honorably discharged and reenlisted in 2009 while on Stop Loss on deployment. He currently suffers from PTSD, diabetes, congestive heart failure, and high blood pressure, but has been unable to receive medical service from the Department of Veterans Affairs due to the nature of his discharge.

3. The applicant's Army Military Human Resource Record is void of any documentation of his service in the U.S. Navy (USN). However, his Enlisted Record Brief (ERB) and DD Form 214 (Certificate of Release or Discharge from Active Duty) show:

- his Date Initially Entered Military Service was 23 August 2001
- his Basic Active Service Date and Pay Entry Base Date was 1 October 2001
- he was awarded or authorized the USN "E" Ribbon, USN Good Conduct Medal, and the USN Sea Service Deployment Ribbon

4. The applicant's ERB shows he enlisted in the Regular Army in the rank/grade of private/E-2 on 23 August 2005. He was advanced to private first class/E-3 on 16 April 2004.

5. On 11 May 2007, the applicant reenlisted in the Regular Army for a period of 2 years in the rank/grade of specialist/E-4. He was promoted to sergeant/E-5 on 1 September 2007.

6. He served in Afghanistan from 23 June 2008 to 28 June 2009. On 23 April 2009, he reenlisted in the Regular Army for a period of 6 years.

7. On 8 February 2011, the applicant accepted company grade nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for five specifications of failing to go at the time prescribed to his appointed place of duty; one specification of willfully disobeying lawful orders from a superior noncommissioned officer (NCO); and one specification of, with intent to deceive, making a false statement to a superior NCO. His punishment consisted of forfeiture of \$653.00 pay, suspended, to be automatically remitted if not vacated before 7 August 2011; extra duty for 14 days, suspended, to be automatically remitted if not vacated before 7 August 2011; and an oral reprimand.

8. On 3 May 2011, the suspended punishments were vacated based on the applicant's failure to go at the time prescribed to his appointed place of duty on or about 4 April 2011.

9. Changes in the applicant's duty status were reported as follows:

- from Present for Duty (PDY) to Absent Without Leave (AWOL) on 26 May 2011
- from AWOL to PDY on 1 June 2011

10. On 8 February 2011, the applicant accepted field grade NJP under the provisions of Article 15, of the UCMJ for 17 specifications of failing to go at the time prescribed to his appointed place of duty; one specification of being AWOL from his unit from on or about 26 May 2011 until on or about 1 June 2011; one specification of willfully disobeying a

lawful command from a superior commissioned officer; two specifications of being derelict in the performance of his duties; two specifications of, with intent to deceive, making a false statement to a superior commissioned officer and two NCOs; and one specification of willfully and unlawfully altering a public record. His punishment consisted of reduction to specialist/E-4; forfeiture of \$600.00 pay per month for 2 months, suspended, to be automatically remitted if not vacated before 23 January 2012; and extra duty for 30 days, suspended, to be automatically remitted if not vacated before 23 January 2012.

11. On 17 August 2011, the suspended punishments were vacated based on the applicant's failure to go at the time prescribed to his appointed place of duty on or about 8 August 2011.

12. Changes in the applicant's duty status were reported as follows on the dates shown:

- from PDY to AWOL on 17 August 2011
- from AWOL to Dropped from Rolls (DFR) on 17 September 2011
- from DFR to PDY on 7 December 2011 following his apprehension on 6 December 2011

13. A DD Form 458 (Charge Sheet) shows on 8 December 2011, court-martial charges were preferred against the applicant for violation of:

- Article 86, of the UCMJ on or about 17 August 2011, without authority, absenting himself from his organization and remaining so absent until he was apprehended on or about 6 December 2011
- Article 92, of the UCMJ at divers locations, between on or about 6 July 2011 and 4 August 2011, violating a lawful general regulation by using his government travel charge card for expenses unrelated to official travel in the amount of \$5,206.68.

14. On 12 December 2011, the applicant voluntarily requested discharge under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10, in lieu of trial by court-martial. He consulted with legal counsel and was advised of the basis for the trial by court-martial; the maximum permissible punishment authorized under the UCMJ; the possible effects of a UOTHC discharge; and the procedures and rights that were available to him. He elected not to submit a statement in his own behalf.

15. The applicant's chain of command recommended approval of his request with a discharge UOTHC.

16. On 13 December 2011, the separation authority approved the applicant's request for discharge in lieu of trial by court-martial, with his service characterized as UOTHC. He further directed the applicant be reduced to the lowest enlisted grade.

17. Orders and the applicant's DD Form 214 show he was discharged on 14 December 2011, in the grade of E-1, under the provisions of Army Regulation 635-200, Chapter 10, by reason of "In Lieu of Trial by Court-Martial" with Separation Code "KFS" and Reenlistment Code "4." He was credited with completing 5 years, 11 months, and 26 days of net active service this period.

18. Army Regulation 635-200 states a Chapter 10 is a voluntary discharge request in lieu of trial by court-martial. In doing so, he would have waived his opportunity to appear before a court-martial and risk a felony conviction. A characterization of UOTHC is authorized and normally considered appropriate.

19. 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.

20. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting an upgrade of his 14 December 2011 discharge characterized as under other than honorable conditions. He states:

"I was suffering from PTSD, family issues, financial hardship, I was homeless, and had a mental breakdown. I came from a deployment and was assigned to non-deployable unit with contractor did not know how to handle the transition which made my conditions worse. I also was diagnosed with diabetes at the time of my last duty station.

I am sufferings from PTSD, Diabetes, congestive heart failure, high blood pressure. I served my country well however due to my military mental and physical health and family issues and financial issues caused a break down it the

time to my last duty station by legal I was told the best thing to do was to sign and agree to the reduction and rank and discharge and apply for an upgrade it took so long due my transition and lack of VA support to reach this point.”

c. The Record of Proceedings details the applicant’s military service and the circumstances of the case. His DD 214 for the period of service under consideration shows he entered the Regular Army on 23 August 2005 and was discharged under other than honorable conditions on 14 December 2011 under the separation authority provided chapter 10 of AR 635-200, Active Duty Enlisted Administrative Separations (17 December 2009): Discharge in Lieu of Trial by Court-Martial. It shows Service in Afghanistan from 23 June 2008 thru 28 June 2009 with the awarding of a Combat Action Badge.

d. The applicant received an Article 15 on 8 February 2011 for five specifications or failure to repair, one specification of failure to obey a lawful order of an NCO, and one specification of making a false official statement.

e. The applicant was pending a Chapter 14 (Misconduct) discharge in June 2011. His 15 June 2011 pre-separation mental status evaluation [MSE] revealed he likely had PTSD but the examination was not congruent with the applicant’s presentation:

“SM [Service Member] is endorsing an unusually high number of items on the PCL-M [PTSD Checklist – Military], an instrument that allows soldiers to self-report symptoms of PTSD. SM appeared somewhat calm and was respectful during this MSE. The level of symptomatology reported by SM is inconsistent with this presentation. This is not to negate the presence of his symptoms but raises concerns as to whether SM may be overreporting such symptoms.

PCL-M = 83

f. The applicant received a second Article 15 on 13 July 2011 for 18 specifications of failure to repair, one specification of failure to obey the lawful order of a commissioned officer, two specifications of failure to obey an order or regulation, two specifications of making false official statements, and one specification under article 134 of the UCMJ:

“In that you, did, at or near Fort Sam Houston, Texas, on or about 7 March 2011, willfully and unlawfully alter a public record, to wit: Revocation of Custody, Juvenile Court, Parish of Jefferson, State of Louisiana court document dated 1 March 2011. This is in violation of Article 134, UCMJ.”

g. In July 2011, a request for a medical evaluation board was submitted. A 13 July 2011 behavioral health encounter shows the applicant was improving with treatment and had recently been diagnosed with type I diabetes mellitus:

“SM has managed to control his anger by dismissing himself from a possible confrontational situation, coming to the Warrior Clinic or calling this provider. He appears to be putting into practice some of the actions we discussed for dealing with his command. SM has met with PCM [primary care manager] and confirmed that he has Type I diabetes and is considered 'out of control'. He was started on oral medications but will require insulin to manage his diabetes. He will also require education on how to manage his diabetes.”

h. A mid-July behavioral health encounter states the applicant had been informed by his unit physician assistant that he was not qualified for an MEB. It is assumed this was due to his pending Chapter 14 discharge.

i. Paragraph 4-3a and 4-3b of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (8 February 2006) state:

“Except as provided below, an enlisted Soldier may not be referred for, or continue, physical disability processing when action has been started under any regulatory provision which authorizes a characterization of service of under other than honorable conditions.

If the case comes within the limitations above, the commander exercising general court-martial jurisdiction over the Soldier may abate the administrative separation. This authority may not be delegated. A copy of the decision, signed by the general court-martial convening authority (GCMCA), must be forwarded with the disability case file to the PEB. A case file may be referred in this way if the GCMCA finds the following:

(1) The disability is the cause, or a substantial contributing cause, of the misconduct that might result in a discharge under other than honorable conditions.

(2) Other circumstances warrant disability processing instead of alternate administrative separation.”

j. A 6 December 2011 Charge Sheet (DA 458) shows the applicant was charged with absence without leave from 17 August 2011 thru 6 December 2011 and “using his government travel charge card for expenses unrelated to official travel in the amount of \$5,206.68.”

k. On 12 December 2011, the applicant voluntarily requested discharge in lieu of trial by court-martial under AR 635-200, Chapter 10. He delinked to submit a written statement on his behalf and to receive a pre-separation health examination.

l. On 13 December 2011, the Commanding General of The United States Army North (Fifth Army) and Fort Sam Houston approved the applicant’s request and directed

he be discharged with an under other than honorable conditions characterization of service and be administratively reduced to private (E01).

m. Review of his records in JLV shows he had been awarded 70% for VA service-connected PTSD.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? YES: PTSD

(2) Did the condition exist or experience occur during military service? YES

(3) Does the condition or experience actually excuse or mitigate the discharge? Partially: As PTSD is associated with avoidant behaviors and resistance to authority, it mitigates his numerous failures to repair and period of AWOL as well as his failure to obey lawful orders. However, the condition does not interfere with one's inability to differentiate right from wrong and adhere to the right and so therefore cannot mitigate his multiple false official statements, misuse of his government issued credit card, or his violation of article 134 of the UCMJ.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records and published DoD guidance for liberal consideration and clemency in determining discharge upgrade requests. The Board considered the misconduct and whether there was sufficient evidence of mitigating circumstances to weigh in favor of clemency determination. The Board agreed that although the applicant had a condition diagnosed during his period of service, it was not a mitigating factor toward his misconduct. After due consideration of the applicant's request, the Board determined the evidence presented does not meet the burden of proof in determining the existence of an error or injustice and a recommendation for relief is not warranted.

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.

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

a. Chapter 10 stated a member who committed an offense or offenses for which the authorized punishment included a punitive discharge could, at any time after the charges have been preferred, submit a request for discharge for the good of the service in lieu of trial by court-martial. Although an honorable or general discharge was authorized, a discharge under other than honorable conditions was normally considered appropriate. At the time of the applicant's separation the regulation provided for the issuance of an UOTHC discharge.

b. 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. 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.

d. When a Soldier was to be discharged UOTHC, the separation authority would direct an immediate reduction to the lowest enlisted grade.

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.

//NOTHING FOLLOWS//