

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 March 2024

DOCKET NUMBER: AR20230003452

APPLICANT REQUESTS:

- Reconsideration of his prior denial of an upgrade of his under other than honorable conditions (UOTHC) discharge
- Voiding of his UOTHC discharge and showing he was separated due to length of service or medical disability
- He be granted constructive service credit for the period 10 December 1991 to 7 December 2022
- Restoration of his rank and grade to sergeant first class(E-7)
- Retroactive promotion to E-8 and E-9
- Restoration of all pay and allowances forfeited

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

DD Form 149 (Application for Correction of Military Record) (2 copies)

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 AR20080000657 on 20 March 2008.

2. The applicant states:

a. His UOTHC from 30 years ago should be voided due to the fact that there was no guilty plea; the general court-martial authority approved his discharge without a guilty plea and directed his demotion.

b. Because of this, his discharge should be considered involuntary and constitutes a continuation for constructive service. He believes he should be shown to have been separated after 2019, but within 3 years of new liberal policies, with an upgrade to an honorable characterization of service, his rank of SFC must be restored and he be granted promotions to E-8 and E-9, because he was never "FLAGGED."

c. He requests all pay and allowances from 10 December 1991 to the date the board received his claim, as he should be shown to have been on active duty until properly discharged.

d. He states after a mere 45 days into basic training, he was hearing voices and attacked a fellow Soldier with a lamp due to the on-set of his bipolar disorder. He received nonjudicial punishment for disorderly conduct, but should have been referred to a medical evaluation board (MEB) and honorably discharged.

e. An upgrade to honorable is appropriate, because his defense counsel did not have him plead guilty but abandoned him to be railroaded out. He maintains his innocence to the present, and only apologizes to the noncommissioned officer corps, his friends, family, and children for the pain and suffering caused by not fighting back.

f. He believes because the charge sheet reflected a black male at the top right hand corner, it indicates racial prejudice that ultimately made his decision to request a Chapter 10. There is no discretion to not reissue a DD Form 215 and release him from a stigmatizing discharge and reimburse him for his loss of pay.

3. On the applicant's DD Form 149, he indicates other mental health issues as contributing and mitigating factors in the circumstances that resulted in his separation. However, the applicant has not provided any new official documentation to support the diagnoses.

4. The applicant enlisted in the Regular Army for 4 years 13 April 1977. He had immediate reenlistments on 16 January 1980, 25 October 1985, and 30 May 1991. The highest grade he held was E-7. He served overseas in Greece, Germany, and Korea (two tours).

5. The applicant accepted nonjudicial punishment (NJP), under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ), on the following dates for the indicated offenses:

- 21 May 1977, for disorderly conduct
- 18 April 1978, between 31 December 1977 and 13 March 1978 defrauding the government by through false pretenses placing long distance telephone calls
- 2 August 1978, for disobeying a lawful order

6. On 12 August 1991, the applicant underwent a physical examination and was found qualified for retention with a physical profile of 111121.

7. On 14 August 1991, the applicant was relieved for cause pending a formal investigation of charges of sexual harassment and a formal Article 32 investigation was initiated.

8. A DA Form 3822-R (Report of Mental Status Evaluation), dated 20 September 1991, shows he was found to be mentally responsible, able to distinguish right from wrong and to adhere to the right, and had the mental capacity to understand and participate in board proceedings. There were no disqualifying mental defects sufficient to warrant disposition through medical channels.

9. In October 1991, an Article 32 investigation was completed. The investigation report contains sworn statements from a number of individuals of the applicant's conduct. The formal recommendation is not of record; however, it is noted that the charges and recommendations were forwarded for consideration of a trial by a general court-martial.

10. Court-martial charges were preferred against the applicant on 8 October 1991 for violations of the Uniform Code of Military Justice (UCMJ). The relevant DD Form 458 (Charge Sheet) shows he was charged with:

- 8 specifications of violations of Article 93 and 14 specifications of violations of Article 134 including:
  - Maltreatment of female Soldiers (8 Counts)
  - indecent assault (3 counts)
  - communicating a threat (2 counts)
  - communicating offensive comments of a sexual nature (9 counts)
  - wrongful solicitation of a female Soldier to commit adultery
  - conduct prejudicial to good order and discipline
  - use of racial slurs toward a Soldier under his command

11. The applicant consulted with legal counsel on 12 November 1991 and was advised of the basis for the contemplated trial by court-martial; the maximum permissible punishment authorized under the UCMJ; the possible effects of an under other than honorable conditions discharge; and the procedures and rights that were available to him.

a. Subsequent to receiving legal counsel, the applicant voluntarily requested discharge under the provision of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10, for the good of the service in lieu of trial by court-martial. In his request for discharge, he acknowledged his understanding that by requesting the discharge, he was admitting guilt to the charges against him, or of lesser included offenses, that authorized the imposition of a bad conduct or dishonorable discharge. He further acknowledged he understood that if his discharge request was

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 Affairs (VA), and he could be deprived of his rights and benefits as a Veteran under both Federal and State laws.

b. The applicant provided a statement requesting he receive a general discharge because he was a single parent with two children. He was apologetic for disappointing the Noncommissioned Officers that supported him but most of all, he was remorseful for all the pain and mental anguish he had caused everyone.

12. The applicant's chain of command recommended he be discharged UOTHC and the staff Judge Advocate General found the discharge processing correct and also recommended discharge.

13. The general court-martial convening authority approved the applicant's request for discharge on 18 November 1991, under the provisions of Army Regulation 635-200, Chapter 10, in lieu of trial by court-martial. He directed that the applicant be reduced to the lowest enlisted grade in accordance with Army Regulation 600-200, paragraph 6-11 (as then in effect), he receive a UOTHC, be barred for Fort Ord, and that his military clothing issue be disposed of in accordance with regulations.

14. The applicant was discharged on 10 December 1991 in the grade of E-1. His DD Form 214 shows he was discharged under the provisions of Army Regulation 635-200, Chapter 10, for the good of the service – in lieu of court martial and his service was characterized as UOTHC. He was credited with 14 years, 7 months, and 28 days of net active. He had continuous honorable active service from "800116 UNTIL 910530." His awards are listed as the:

- Army Commendation Medal (3rd award)
- Army Good Conduct Medal (3rd Award)
- Army Service Ribbon
- Overseas Service Ribbon (3)
- Noncommissioned Officer Professional Development Ribbon (3)

15. The applicant was charged due to the commission of offenses punishable under the UCMJ with a punitive discharge. Subsequent to being charged, he consulted with counsel and requested discharge under the provisions of Army Regulation 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.

16. The applicant's service medical records do not contain a diagnosis of a bipolar disorder or any other mental health issues.

17. The ABCMR denied the applicant's prior request for an upgrade on 20 March 2008. In that review the applicant's evaluation reports were reviewed and indicated he had been considered an extremely competent NCO technically and tactically proficient that he was an intelligent Soldier who always sought self-improvement and that he consistently accomplished the mission to the fullest capacity. In his supporting documents the applicant provided a copy of [REDACTED] Mental Health Centers Treatment Plan, dated 1 November 2003 that afforded the applicant a diagnosis of bipolar affective disorder depressed severe specified as with psychotic behavior and with a start date of 20 October 2006.

18. The applicant has not provided any supporting documentation that his diagnosis of a bipolar disorder manifested itself at the time he received his first NJP or at any time in the 12 years following his third NJP and the date he was discharged.

19. In determining whether to grant relief the Boards for Correction of Military/Navy Records (BCM/NR) 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 applicant is applying to the ABCMR requesting reconsideration of his request to upgrade of his under other than honorable conditions (UOTHC) discharge. Also, he is requesting his discharge show he was separated due to length of service or medical disability. He contends he experienced mental health conditions 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: 1) The applicant enlisted into the Regular Army on 13 April 1977; 2) Court-martial charges were preferred against the applicant on 8 October 1991 for 8 specifications of violations of Article 93 and 14 specifications of violations of Article 134; 3) On 10 December 1991, the applicant was discharged, Chapter 10, for the good of the service – in lieu of court-martial. His service was characterized as UOTHC.

c. The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed the supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical documentation was provided for review.

d. The applicant asserts he was experiencing mental health conditions, which mitigates his misconduct. There was insufficient evidence the applicant reported or was diagnosed with a mental health condition while on active service. A review of JLV provided insufficient evidence the applicant has been diagnosed with and or treated for

any service-connected mental health condition by the VA. He also does not receive any service-connected disability.

e. 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 mitigates his misconduct. In addition, there is insufficient evidence the applicant warrants a referral to DES from a behavioral health perspective, at this time.

**Kurta Questions:**

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant asserts he experienced a mental health condition that mitigates his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced a mental health condition while on active service that mitigates his misconduct.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is insufficient evidence beyond self-report the applicant was experiencing a mental health condition while on active service. Also, there is no nexus between his reported mental health condition and the applicant's misconduct: 1) these types of misconduct are not a part of the natural history or sequelae of the applicant's reported mental health condition; 2) the applicant's mental health condition does not affect one's ability to distinguish right from wrong and act in accordance with the right. In addition, there is insufficient evidence the applicant warrants a referral to DES from a behavioral health perspective at this time. 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:**

The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, the frequency and nature of his misconduct and the reason for his separation. The Board considered the applicant's mental health claim and the review and conclusions of the ARBA BH Advisor. The applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding his misconduct not being mitigated by mental health condition or that

he had any conditions that warranted his referral to the Disability Evaluation System. Based on a preponderance of the evidence, the Board determined the reason for the applicant's discharge, his character of service, and the related reduction in grade were not in error or unjust.

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 that the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Number AR20080000657 on 20 March 2008.

7/23/2024

X

CHAIRPERSON

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 1556 provides the Secretary of the Army shall ensure that an applicant seeking corrective action by the Army Review Boards Agency (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.

2. Army Regulation 15-185 (ABCMR) sets forth procedures for processing requests for the correction of military records. Paragraph 2-15a governs requests for reconsideration. This provision of the regulation allows an applicant to request reconsideration of an earlier decision of the ABCMR if the decision has not previously been reconsidered. The applicant must provide new evidence or argument that was not considered at the time of the ABCMR's prior consideration.

3. Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation) governs the evaluation of physical fitness of Soldiers who may be unfit to perform their military duties because of physical disability. The unfitness is of such a degree that a Soldier is unable to perform the duties of his office grade rank or rating in such a way as to reasonably fulfill the purposes of his employment on active duty.

4. Army Regulation 635-40 also states that an enlisted member may not be referred for physical disability processing when action has been started that may result in his separation with a discharge under other than honorable conditions unless the General Court-Martial Authority finds that the disability is the cause or substantial contributing cause of the misconduct that might result in a discharge under other than honorable conditions.

5. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at that time provided that:

a. 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. 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. A characterization of under honorable conditions may be issued only when the reason for the Soldier's separation specifically allows such characterization.

c. Chapter 10 of that regulation provided, in pertinent part, that a member who had committed an offense or offenses for which the authorized punishment included a punitive discharge, could submit a request for discharge for the good of the service in lieu of trial by court-martial. The request could be submitted at any time after charges had been preferred and must have included the individual's admission of guilt. Although



an honorable or general discharge was authorized, an under other than honorable conditions discharge was normally considered appropriate.

d. Chapter 12 sets the policies and procedures for voluntary retirement of Soldiers because of length of service. In pertinent part it states that a Soldier who has completed 20 years active federal service and who has completed all required service obligations is eligible to retire,

6. Army Regulation 600–8-2 (Suspension of Favorable Personnel Actions (Flag)) prescribes Army policy for the suspension of favorable personnel actions (Flag) function of the military personnel system. It is linked to AR 600 – 8 and provides principles of support, standards of service, and policies regarding the initiation, transfer, removal, and management of Flag. The suspension of favorable actions on a Soldier is mandatory when military or civilian authorities initiate any investigation or inquiry that may potentially result in disciplinary or adverse administrative action. Commanders, general officer staff heads, and heads of HQDA staff agencies (to include the DA Suitability Evaluation Board) must ensure that favorable personnel actions are suspended in accordance with the criteria contained in this regulation.

7. Army Regulation 600-200, Paragraph 6-11, as then in effect, states that Soldiers who were being separated under the provisions of Army Regulation 635-200, Chapter 10, would be reduced to the lowest enlisted grade.

8. The Under Secretary of Defense for Personnel and Readiness issued guidance to DRBs and BCM/NR on 25 July 2018, 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 court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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//