

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 13 February 2024

DOCKET NUMBER: AR20230003613

APPLICANT REQUESTS: His under other than honorable conditions (UOTHC) be upgraded to an honorable discharge.

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

- DD Form 293 (Application for the Review of Discharge) in lieu of DD Form 149
- Personal statement
- DD Form 214 (Members Copy)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, 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:

a. He was in the process of receiving an under honorable conditions (general because of anxiety and depression and was not able to perform his Military Police duties, because of the depression and medication prescribed. During the transition phase, he was charged with two counts under the Uniform Code of Military Justice (UCMJ), Article 92 for disobeying the orders of his commanding officer, because he was involved with a group of individuals that were found to be a part of a militia while being active duty military. He was not trying to join such militia but was closely involved with members and did not view the group as a militia, but as a group of military friends that enjoyed shooting weapons and camping.

b. Once he was aware that this group was illegal, under the UCMJ, he disassociated himself with them; however, the Criminal Investigative Division (CID) had already begun the investigation and had found his association. The military lawyer he was assigned advised him to take a plea bargain instead of going to a full court-martial, receiving a summary grade court martial for involvement in the group. His punishment was 30 days confinement to barracks for and loss of one pay grade from E-4 to E-3.

Although his court-martial did not include discharge; however, his commander saw it fit to discharge him. He was not discharged through the medical, but as a result of the court-martial.

3. On the applicant's DD Form 293, he indicates post-traumatic stress disorder (PTSD) and other mental health conditions as contributing and mitigating factors in the circumstances that resulted in his separation. However, the applicant has not provided any evidence to support these contentions.

4. A review of the applicant's service record shows he enlisted in the Regular Army on 1 September 2009 for 6 years. He completed training with award of the military occupational specialty 31B (Military Police). The highest grade he held was E-4.

5. The Federal Bureau of Investigation (FBI) initiated an investigation in July 2012 of Soldiers being involved with a local militia, who intended to kill individuals crossing the U.S. border. The CID was notified at that time.

6. A U.S. Army Criminal Investigation Division (CID) report shows that:

a. The CID initiated its investigation based upon a referral from the FBI that the applicant and seven other Soldiers had come under investigation by the FBI for being involved with a local militia whose intent was to kill individuals crossing the U.S. border.

b. The CID investigation established probable cause to show that the eight Soldiers committed the offenses of conspiracy to commit murder, solicitation to commit murder, failure to obey order or regulation, and communicating a threat (offences under Article 81 (Conspiracy), Article 82 (Solicitation), Article 92 (Failure to Obey Order or Regulation), and Article 134 (Communicating a Threat))

c. The individuals were reported as conspiring to commit the offenses of conspiracy to commit murder, failure to obey order or regulation, when they conspired to murder individuals they believed to be drug cartel members crossing the U.S./Mexico border illegally; when they conspired to murder unknown individuals they believed to be drug cartel members at a local hotel; and when they knowingly joined an extremist organization while serving on active duty.

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

a. Between on or about 1 April 2011 and on or about 22 October 2012, at or near Fort Bliss, TX, under Article 81, UCMJ, to conspire, with five other Soldiers, to fail to obey a lawful general regulation (Army Regulation (AR) 600-20 (Army Command Policy))

paragraph 4-12), by wrongfully participating in an extremist organization by attending meetings and training events; and

b. Between on or about 1 April 2011 and on or about 22 October 2012, at or near Fort Bliss, TX, under Article 92, UCMJ, failure to obey a lawful general regulation (AR 600-200, paragraph 4-12) by wrongfully participating in extremist orgs by attending meetings and training events.

8. The applicant entered in pre-trial agreements to waive some administrative rights and to offer to plead guilty to two charges before a summary court-martial.

9. A Record of Trial by Summary Court-Martial, dated 6 February 2013, shows the applicant did not object to trial by summary court-martial and was not represented by counsel. The charges were:

a. Between on or about 1 April 2011 and on or about 22 October 2012, at or near Fort Bliss, TX, under Article 81, UCMJ, to conspire, with five other Soldiers, to fail to obey a lawful general regulation (AR 600-20, paragraph 4-12), by wrongfully participating in an extremist organization by attending meetings and training events; and

b. Between on or about 1 April 2011 and on or about 22 October 2012, at or near Fort Bliss, TX, under Article 92, UCMJ, failure to obey a lawful general regulation (AR 600-200, paragraph 4-12) by wrongfully participating in extremist orgs by attending meetings and training events.

c. The applicant plead guilty and was found guilty of both offenses. The court sentenced him to restriction for 30 days and reduction to E-3.

10. The applicant's immediate commander notified the applicant, on 8 March 2013, of his intent to initiate actions to separate him under AR 635-200 (Active Duty Enlisted Administrative Separations), Chapter 14, paragraph 14- 12c for misconduct – commission of a serious offence. His commander noted the specific reasons as for his wrongful participation in extremist organizations between on or about 01 April 2011 and on or about 14 October 2012.

11. The applicant consulted with legal counsel on 11 March 2013. He was advised of the basis for the contemplated discharge, the possible effects of an under honorable conditions discharge, and the procedures and rights that were available to him. He elected not to submit a statement in his own behalf.

12. The applicant's immediate commander formally recommended his separation from service under the provisions of Army Regulation 635-200, Chapter 14, paragraph 14-12c, recommending he receive a UOTHC.

13. The appropriate authority approved the discharge recommendation on 21 March 2013 and directed the applicant be issued a UOTHC Discharge Certificate, under Army Regulation 635-200, para 14-12c.

14. The applicant was discharged on 8 April 2013 in the pay grade of E-1. His DD Form 214 shows he was discharged under the provisions of Army Regulation 635-200, Chapter 14, for misconduct with UOTHC character of service, a Separation Code JKQ, and a Reentry Code of 3. He was credited with 3 years, 7 months, and 8 days of net active service with no lost time. His awards are shown as the:

- Army Achievement Medal
- Army Good Conduct Medal
- Global War On Terrorism Service Medal
- Korean Defense Service Medal
- Army Service Ribbon
- Overseas Service Ribbon/

15. A review of the records at the Department of the Army Criminal Investigation, Division Crime Records Center reveal the report referenced above. Copies of the reports were forwarded to the applicant in accordance with regulations for his review and option to rebut or make an additional comment.

16. The applicant responded on 1 July 2023 stating after reviewing the documents from his Court-Martial, he had found an inconsistency in his records and the records sent him. In the documents provided it has the charge of "conspiracy to commit murder." The documents he has and the charge sheet from his court day don't have this charge. He was never tried for the charge of "conspiracy to commit murder." As for the charge of "joining an extremist organization", he was charged with this. At the time he didn't understand that the people he was hanging out with were a part of an "extremist organization" and that going to the range and other "events" were against UCMJ. He understands that is not an excuse for his actions. He took a "summary court martial" in an effort to avoid a dishonorable discharge. He in no way would or will ever disobey his oath of enlistment, and that was never his intentions when he was serving in the Army.

17. While the documentation of record shows the charge of conspiracy to commit murder is reference in the development of the case against he was never formally charged or adjudged on this potential charge. The charges for which he plead guilty were for participating in an extremist organization.

18. In determining whether to grant relief the Boards for Correction of Military/Naval 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.

18. 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 experienced mental health conditions including PTSD that mitigated his misconduct. 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 1 September 2009; 2) Court-martial charges were preferred against the applicant for conspiring to and participating in an extremist organization by attending meetings and training events. The applicant plead guilty on 22 October 2012; 3) The applicant was discharged on 8 April 2013, Chapter 14, paragraph 14-12c. He received an UOTHC characterization of service.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service and medical records. The Armed Forces Health Longitudinal Technology Application (AHLTA) and the VA's Joint Legacy Viewer (JLV) were also examined. No additional medical documentation was provided.

c. On his application, the applicant contends mental health conditions including PTSD were contributing and mitigating factors in the circumstances that resulted in his separation. There is evidence the applicant was engaged in behavioral health treatment while he was stationed in South Korea. He was brought in by his unit on 19 October 2010 after he verbalized homicidal ideations. The applicant was placed on safety precautions, and he was diagnosed with an occupational problem and an Adjustment Disorder with disturbance of emotion and conduct. He was seen again on 25 October 2010 and reported difficulty adjusting to the military, irritability, and depressive symptoms. He continued in individual therapy while stationed in South Korea and was also prescribed anti-depressant medication. His diagnosis was changed to Major Depression Recurrent in November 2010, and he reported and demonstrated an improvement with his symptoms on this treatment protocol. He was found to be in remission prior to his move from South Korea.

d. After being stationed at Fort Bliss, the applicant did not reengage in behavioral health treatment till 28 November 2011, when he reported to behavioral health as a walk-in. He was describing an increase in worrying and depression. He requested to be placed back on psychiatric medication and was again diagnosed with Adjustment Disorder with disturbance of emotion and conduct. He was again prescribed psychiatric medication and recommended to attend group and individual therapy. The applicant was later diagnosed with Major Depression. On 02 August 2012, the applicant was evaluated at his Commander's request to assess his appropriateness for a Chapter 5-17 administrative separation for his mental health condition. The results of the evaluation were provided to his Command, but they were not available in the electronic medical record. However, he was diagnosed with Major Depression and Adjustment

Disorder with disturbance of emotion and conduct. In later behavioral health encounters, it was noted the applicant was facing a 5-17 administrative separation for an Adjustment Disorder. The applicant continued in behavioral health treatment for depression and stress till his discharge. There was insufficient evidence he was ever diagnosed with PTSD.

e. A review of JLV was void of mental health documentation, and the applicant receives no service-connected disability. The applicant did not provide any additional medical documentation from a licensed behavioral health provider. 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 mental health conditions including PTSD that contributed to his misconduct. He was diagnosed with an Adjustment Disorder and Major Depression while on active service.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he was experiencing mental health conditions including PTSD that contributed to his misconduct. He was diagnosed with an Adjustment Disorder and Major Depression while on active service.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is sufficient evidence beyond self-report the applicant was experiencing a mental health condition while on active service. However, there is no nexus between the applicant's diagnosed mental health conditions and his misconduct of conspiring to participate and participating in an extremist organization: 1) these types of misconduct are not part of the natural history or sequelae of his diagnosed mental health conditions; 2) His diagnosed mental health conditions do not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing 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:

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 DoD 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 applicant was discharged from active duty due to misconduct – commission of a serious offense (wrongful participation in extremist organizations). All requirements of law and regulation were met, and the rights of the applicant were fully protected throughout the separation process. The Board found no error or injustice in his separation processing. The Board also considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewer. The Board concurred with the medical reviewer's finding insufficient evidence of in-service mitigating factors to overcome the misconduct. The applicant provided no evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination. Based on a preponderance of evidence, 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 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.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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, U.S. Code, 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. 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.

3. Army Regulation 635-200, Chapter 4 (Military Discipline and Conduct) provides:

Paragraph 4-12 (Extremist organizations and activities) that participation in extremist organizations and activities by Army personnel is inconsistent with the responsibilities of military Service. It is the policy of the United States Army to provide EO and treatment for all Soldiers without regard to race, color, religion, gender, or national origin. Enforcement of this policy is a responsibility of command, is vitally important to unit cohesion and morale, and is essential to the Army's ability to accomplish its mission. It is the commander's responsibility to maintain good order and discipline in the unit. Every commander has the inherent authority to take appropriate actions to accomplish this goal. This paragraph identifies prohibited actions by Soldiers involving extremist organizations, discusses the authority of the commander to establish other prohibitions, and establishes that violations of prohibitions contained in this paragraph or those established by a commander may result in prosecution under various provisions of the UCMJ. This paragraph must be used in conjunction with DODI 1325.06.

4. DA Pamphlet 600-15 provides further guidance in implementing Army policy on extremist activities and organizations stating.

a. Military personnel must reject participation in extremist organizations and activities. Extremist organizations and activities are ones that advocate:

(1) Racial, gender, or ethnic hatred or intolerance.

(2) Creating or engaging in illegal discrimination based on race, color, gender, religion, or national origin.

(3) The use of force or violence or unlawful means to deprive individuals of their rights under the United States Constitution or the laws of the United States, or any State.

(4) Support for terrorist organizations or objectives.

(5) The use of unlawful violence or force to achieve goals that are political, religious, or ideological in nature.

(6) Expressing a duty to engage in violence against DOD or the United States in support of a terrorist or extremist cause.

(7) Support for persons or organizations that promote or threaten the unlawful use of force or violence.

(8) Encouraging military or civilian personnel to violate laws or disobey lawful orders or regulations for the purpose of disrupting military activities (subversion).

(9) Participating in activities advocating or teaching the overthrow of the U.S. Government by force or violence, or seeking to alter the form of government by unconstitutional means (sedition).

b. Soldiers are prohibited from the following actions in support of extremist organizations or activities. Penalties for violations of these prohibitions include the full range of statutory and regulatory sanctions, both criminal (UCMJ), and administrative.

(1) Participating in public demonstrations or rallies.

(2) Attending a meeting or activity with the knowledge that the meeting or activity involves an extremist cause when on duty, when in uniform, when in a foreign country (whether on or off duty or in or out of uniform), when it constitutes a breach of law and order, or when it is likely to result in violence or when in violation of off limits sanctions or commander's order.

(3) Fund raising activities.

(4) Recruiting or training members (including encouraging other Soldiers to join).

(5) Creating, organizing, or taking a visible leadership role in such an organization or activity.

(6) Distributing literature on or off a military installation, the primary purpose and content of which concerns advocacy or support of extremist causes, organizations, or activities; and it appears that the literature presents a clear danger to the loyalty, discipline, or morale of military personnel, or the distribution would materially interfere with the accomplishment of a military mission.

5. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the 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 Soldiers whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 14 (Separation for Misconduct) establishes policy and prescribes procedures for separating personnel for misconduct because of minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, and absence without leave.

d. Paragraph 14-12c (Commission of a Serious Offense) applied to Soldiers who committed a serious military or civilian offense, when required by the specific circumstances warrant separation and a punitive discharge was, or could be authorized for that same or relatively similar offense under the UCMJ.

6. The Manual for Court-Martials states:

a. A summary court-martial is designed to dispose of minor offenses. Only enlisted Soldiers may be tried by summary court-martial. A single officer presides over the hearing. The accused has no right to counsel but may hire an attorney to represent him.

b. A maximum punishment a summary court-martial may sentence a Soldier to is confinement for up to 1 month, hard labor without confinement for up to 45 days, restriction to specified limits for up to 2 months, and forfeiture of up to two-thirds of 1 month's pay.

c. A summary court-martial conviction may form the basis for a future administrative separation and/or bar to reenlistment.

7. 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//