

IN THE CASE OF: ██████████

BOARD DATE: 3 April 2024

DOCKET NUMBER: AR20230003769

APPLICANT REQUESTS: Reconsideration of his previous request for upgrade of his under other than honorable conditions (UOTHC) discharge to under honorable conditions (general). Additionally, he requests a personal appearance before the Board.

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

- DD Form 149 (Application for Correction of Military Record) (online)
- Previous Application and documents
- Department of Veterans Affairs (DVA) Letters (two)
- Applicant Resume

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 Dockets Number:

- AR20080015625 on 23 December 2008
- AR20090003946 on 25 June 2009
- AR20120001434 on 12 July 2012
- AR20210008791 on 11 February 2022

2. The applicant states:

a. He had a 3-month affair with a married woman, at the time he never knew she was married, and her husband was deployed to Iraq. There were no other offences, and he resigned his commission in lieu of elimination, based on counsel. He was told the commanding general had recommended that he receive a general discharge. The Separation Program Designator (SPD) Code was to be JNC (unacceptable conduct) and not SPD code BFS (good of the service), since he had one misconduct in his military personnel record and other charges were brought up. The applicant's misconduct was willful, but not persistent after discovery. The characterization that a member receives will largely be based upon the reason for administrative discharge balanced against the quality of the member's service during that enlistment period. His

military records show enough reason why his discharge should be upgraded to under honorable conditions (general).

b. As new evidence the applicant states the most severe type of military administrative discharge is UOTHC. Examples of actions that could lead to an UOTHC discharge include security violations, use of violence, and conviction by a civilian court with a sentence including prison time, neither of those apply to him and his situation. He received nonjudicial punishment (NJP) which falls under Article 15 of the Uniform Code of Military Justice (UCMJ), it allows a commanding officer to determine a service member's innocence or guilt for a minor offense. A minor, isolated NJP should not affect a service member receiving an honorable discharge, as he only had one NJP in his service record.

c. The Evidence in this case supports a conclusion that his characterization of service was too harsh, and as a result it is inequitable. The Army Discharge Review Board (ADRB) analyst stated in case number AR20070007212, that after a careful review of all the available military records during the period of service under review, his characterization of service should be upgraded to under honorable conditions (general). This recommendation was made after full consideration of his faithful and honorable service, as well as his record of misconduct, which is only one NJP. While his misconduct is not condoned, the analyst also noted that the overall length and quality of his service, to include his combat service, mitigated the discrediting entry in his service record. Accordingly, the analyst recommended to the board that his characterization of service be upgraded to under honorable conditions (general). However, the reason for discharge remains both proper and equitable. The commanding general, Fort Riley, KS, that gave him the NJP also recommended he be separated with a under honorable conditions (general) discharge. General characterizations are typically appropriate if a member's service has been honest and faithful, but significant negative aspects of the member's conduct or performance outweigh positive aspects of his/her military record. UOTHC characterizations are deemed appropriate if based upon a pattern of behavior or acts that demonstrate a significant departure from the conduct expected of military members.

3. The applicant was appointed as a Reserve commissioned officer on 18 December 2000. His area of concentration was 35D (All Source Intelligence) previously 11A (Infantry).

4. The applicant served in Germany from 25 January 2002 to 30 November 2005 and in Kuwait and Iraq from 21 April 2003 to 20 July 2004. He was married with three dependents at the time.

5. In December 2006, pursuant to Army Regulation (AR) 15-6 (Procedures for Investigation Officers (IO) and Boards of Officers), an IO was appointed to investigate

the applicant's actions of alleged adultery with the wife of another Soldier who was deployed to Iraq. Based on interviews, statements, personal visits, emails, and other evidence, the IO stated he acquired sufficient evidence, supported with hotel receipts, travel itinerary, check stubs, and written/sworn statement that demonstrated:

- the applicant took part in an adulterous relationship with the other Soldier's wife as recently as 13 November 2006
- the applicant was involved in a second sexual relationship with another individual who was stationed with the applicant in Germany
- a great probability that the applicant had sexual intercourse with a junior noncommissioned officer, which should be further reviewed

6. A Legal Review, dated 22 January 2007, shows the applicant engaged in adulterous conduct and found it legally sufficient.

7. Although not filed in his records, the applicant's own testimony and the available evidence show that on 21 February 2007, NJP was imposed against the applicant by a general officer for misconduct in the form of conduct unbecoming an officer.

8. The Initiation of Elimination memorandum, dated 2 March 2007, Headquarters, 1st Infantry Division, Fort Riley, shows the Acting Commanding General (CG) notified the applicant that he was required to show cause for retention on active duty under the provisions of AR 600-8-24 (Officer Transfers and Discharges), paragraph 4-2b (8), for acts of personal misconduct and moral dereliction. He cited the following reasons as the basis for his notification to the applicant:

a. From August 2006 to November 2006, the applicant repeatedly engaged in an improper relationship with the spouse of a Soldier who was deployed to Iraq.

b. During the course of the Army Regulation 15-6 [investigation], the applicant violated clear and direct orders to have no contact with the individual in question, which he did in an attempt to improperly influence the investigation.

c. On 21 February 2007, the applicant was found guilty and received NJP as a result of General Officer proceedings under Article 15, of the UCMJ.

9. The previous case shows the Acting CG also advised the applicant that:

a. In conjunction with this action, a DA Form 268 (Suspension of Favorable Personnel Actions) had been initiated in accordance with AR 600-8-2 (Suspension of Favorable Personnel Actions (Flag)).

b. He may either have the assistance of an officer of the Judge Advocate General's

Corps appointed as counsel, or seek civilian counsel of his own selection (obtained by him at no expense to the Government), to prepare a written statement indicating any pertinent facts or any rebuttal bearing on the question of his elimination.

c. If he was eliminated for substandard performance of duty only, he would receive an honorable discharge. If he was eliminated for misconduct, moral or professional dereliction, the least favorable discharge he could receive was a UOTHC discharge. The final decision on the type of discharge would be determined by Headquarters, Department of the Army (HQDA).

d. Before taking action, he would consider all written comments or a rebuttal that the applicant could submit with his acknowledgement.

e. In accordance with (IAW) AR 600-8-24, paragraph 4-24, he could:

(1) Submit his resignation in lieu of elimination IAW AR 600-8-24, Chapter 4.

(2) Request discharge in lieu of elimination, IAW AR 600-8-24, Chapter 4.

(3) Apply for retirement in lieu of elimination if otherwise eligible, IAW AR 600-8-24, Chapters 4 and 6.

(4) In place of resignation, discharge, or retirement, submit a rebuttal or a declination statement and request appearance before a Board of Inquiry.

10. The applicant submitted his voluntary request for resignation in lieu of elimination on 13 March 2007.

a. He acknowledged that he had been advised prior to submitting his resignation that he could, at his option, consult with and be represented by legally qualified counsel who may be a member of the Judge Advocate General's Corp or civilian counsel retained by him. He had been fully advised and counseled in this matter by CPT [REDACTED], a member of the Judge Advocate General's Corps and the U.S. Army Trial Defense Service, on 13 March 2007 at Fort Riley, and fully understood the implications of this voluntary action.

b. He elected to waive any right he had either to appear before a board of officers with legally qualified counsel or to submit matters in explanation, rebuttal or defense concerning the allegation in his case.

c. If this resignation was accepted, he understood that he would be furnished an honorable, general or UOTHC discharge as determined by Headquarters Department of the Army (HQDA).

d. He further understood that if this resignation was accepted [and his discharge was determined by HQDA to be UOTHC, he would not be entitled to compensation for unused accrued leave and he could be barred from all rights, based on the period of service from which he would be separated under any laws administered by the VA, except War Risk, United States Government (Converted) National Service Life Insurance, and Service-Member's Group Life Insurance policies he may hold.

11. On 15 March 2007, the Headquarters, 1st Infantry Division, Fort Riley, CG forwarded his recommendation regarding the applicant's elimination to the U.S. Army Human Resources Command (HRC), Alexandria, Virginia, CG for consideration. The CG noted that as a nonprobationary officer, the applicant had the option of submitting a resignation in lieu of elimination or have his case heard before a show cause board. The applicant chose to submit a resignation in lieu of elimination proceedings with the understanding that he could receive a UOTHC discharge. After carefully considering all the evidence collected against the applicant, as well as the mitigating evidence provided, the CG opined that elimination was warranted and recommended the applicant receive a under honorable conditions (general) discharge.

12. On 4 April 2007, the Army Ad Hoc Review Board reviewed the applicant's voluntary resignation in lieu of elimination based on misconduct, moral or professional dereliction. Subsequently, the Acting Deputy Assistant Secretary of the Army (Review Boards) (DASA-RB) accepted the applicant's resignation in lieu of elimination based on misconduct and directed that he be discharged UOTHC.

13. The applicant's resignation was approved under the provisions of AR 600-8-24, Chapter 4, for misconduct - moral or professional dereliction with SPD code JNC.

14. The applicant was discharged on 16 May 2007. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of AR 600-8-24, paragraph 4-2b, due to unacceptable conduct with Separation Code JNC. His service was characterized as UOTHC. He completed 6 years, 4 months, and 29 days of net active service. He was awarded or authorized the Army Commendation Medal, Army Achievement Medal (second award), National Defense Service Medal, Global War on terrorism Service Medal, Iraq campaign Medal, Army service Ribbon, Overseas service ribbon, Combat Infantryman Badge, and Parachutist Badge.

15. The applicant provides:

a. A modified version of the petition rendered by his former counsel, in support of his previous request for reconsideration. However, he did not submit any of the supporting documentation cited in the petition. The entire modified petition is available in its entirety for the Board's consideration and a brief synopsis is available in the previous application Docket Number AR20210008791 on 11 February 2022.

b. A DVA letter, dated 23 April 2021, shows the character of discharge determination. The decision dated 21 November 2007 was not properly followed and warrants another review and decision. Upon review, the applicant's service discharge was not the result of for the good of the service; however, it was the result of unacceptable misconduct. To bar the applicant from DVA benefits was in error. The procedure to processing an administrative decision has changed overtime. The change of discharge was reviewed, and the decision was changed to the applicant's service from 18 December 2000 through 16 June 2007 as under honorable conditions (general) and is not a bar to DVA benefits and he is entitled to healthcare.

c. A DVA letter, dated 21 May 2021, shows the applicant's military service for the period of 18 December 2000 through 16 June 2007 is honorable for DVA purposes.

d. Applicant's resume shows his various certifications, experience, and education.

16. On 5 June 2008, the ADRB determined he was properly and equitably discharged and denied his request for a change in the character and/or reason of his discharge. (Case report is available for review).

17. On 23 December 2008, the ABCMR determined the evidence presented did not demonstrate the existence of a probable error or injustice. Therefore, the Board determined that the overall merits of the case were insufficient as a basis for correction of the applicant's records. (Docket is available for review).

18. On 29 June 2009, the ABCMR reconsidered the applicant's request for an upgrade of his discharge and determined the evidence did not demonstrate the existence of a probable error or injustice. Therefore, the Board determined that the overall merits of the case were insufficient as a basis to amend the decision of the ABCMR set forth in Docket Number AR20080015625 on 23 December 2008. (Docket is available for review).

19. On 12 July 2012, the ABCMR reconsidered his request for an upgrade of his discharge, and again denied his request for relief.

20. On 11 February 2022, the ABCMR determined the evidence presented did not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case were insufficient as a basis to amend the decision of the ABCMR set forth in Dockets Number AR20080015625, AR20090003946, and AR20120001434, on 23 December 2008, 25 June 2009, and 12 July 2012, respectively. A Medical Review was completed in conjunction with this consideration. It shows that a review of Joint Legacy Viewer indicates the applicant has received medical care in the DVA since July 2021. He has a service-connected disability rating of 80% with 30% for post-traumatic stress disorder (PTSD) effective

6 April 2021. In accordance with the 3 September 2014, Secretary of Defense Liberal Guidance Memorandum and the 25 Aug 2017, Clarifying Guidance there is documentation to support a behavioral health diagnosis at the time of his discharge. He met retention standards at the time of his discharge. Under liberal guidance, PTSD is not considered a mitigating factor for the misconduct that led to his discharge.

21. In reaching its determination, the Board can consider the applicant's petition and service record in accordance with the published equity, injustice, or clemency determination guidance.

#### 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, the Board determined there is insufficient evidence of in-service mitigating factors to overcome the misconduct as a commissioned officer of having an adulterous relationship with another Soldier's wife, witness tampering and violation of direct orders from his leadership for the Board to weigh a clemency determination.

2. The Board determined because the applicant was a commissioned officer at the time, he had adequate training and experience necessary to avoid conducting himself in that manner and understanding right from wrong regarding his misconduct. The applicant was entrusted to set the example for subordinate Soldiers to emulate as a leader and therefore, the discharge characterization was proper and fitting for the misconduct. Furthermore, the Board agreed the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief, specifically an upgrade of the under other than honorable conditions (UOTHC) discharge to a general under honorable conditions discharge. 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:

<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 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 AR20080015625 on 23 December 2008, AR20090003946 on 25 June 2009, AR20120001434 on 12 July 2012 and AR20210008791 on 11 February 2022.

5/14/2024

X [Redacted Signature]

CHAIRPERSON

[Redacted Title]

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. AR 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. AR 600-8-24 prescribes the officer transfers from active duty to the Reserve component and discharge functions for all officers on active duty for 30 days or more.

a. Paragraph 1-22 of Army Regulation 600-8-24 provides, in pertinent part, that an officer will normally receive an honorable characterization of service when the quality of the officer's service has met the standards of acceptable conduct and performance of duty, or the final revocation of a security clearly for reasons that do not involve acts of misconduct.

b. Paragraph 1-22 of Army Regulation 600-8-24 also provides, in pertinent part, that an officer will normally receive a general discharge when the officer's military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Additionally, paragraph 1-22 of Army Regulation 600-8-24 provides, in pertinent part, that a discharge under other than honorable conditions is an administrative separation from the service under conditions other than honorable. An officer will normally receive a discharge under other than honorable conditions when they resign for the good of the service, are dropped from the rolls of the Army, or are involuntarily separated due to misconduct, moral or professional dereliction, or for the final revocation of a security clearance as a result of an act or acts of misconduct, including misconduct for which punishment was imposed.

3. AR 600-8-24, Chapter 4 (Eliminations), states an officer is permitted to serve in the Army because of the special trust and confidence the President and the nation have placed in the officer's patriotism, valor, fidelity, and competence. An officer is expected to display responsibility commensurate to this special trust and confidence and to act with the highest integrity at all times. However, an officer who will not or cannot maintain those standards will be separated.

a. Paragraph 4-2b (Reason for Elimination) states while not all inclusive, when one of the several listed or similar conditions exist, elimination action may be or will be initiated for misconduct, moral or professional dereliction, or in the interests of national security; acts of personal misconduct, conduct unbecoming an officer, or conduct or actions that result in the loss of a professional status.

b. Paragraph 4-5 (Separation date) states an officer approved for involuntary separation by the Secretary of the Army or his designee, or whose request for resignation or discharge in lieu of elimination is approved for misconduct, moral, or professional dereliction, or in the interest of national security will be separated accordingly.

c. Paragraph 4-6 (Board of Inquiry) states the Board of Inquiry's purpose is to give the officer a fair and impartial hearing to determine if the officer will be retained in the Army. Through a formal administrative investigation conducted under Army Regulation 15-6 and this regulation, the Board of Inquiry establishes and records the facts of the respondent's alleged misconduct, substandard performance of duty, or conduct incompatible with military service. Based upon the findings of fact established by its investigation and recorded in its report, the board then makes a recommendation for the officer's disposition, consistent with this regulation.

d. Paragraph 4-11 (Respondent) states in accordance with paragraph 4-24, respondents may at any time prior to final action in their case apply for voluntary retirement, if eligible; tender resignation; or request discharge.

e. Paragraph 4-17 (Board of Review) states an officer recommended for elimination by a Board of Inquiry will have their case referred to a Board of Review. The Board of Review is appointed by the Secretary of the Army or his designee and has the same board composition as the Board of Inquiry. The Board of Review, after thorough review of the records of the case, will make recommendations to the Secretary of the Army or his designee as to whether the officer should be retained in the Army. Appearance by the respondent (or counsel) is not authorized.

f. Paragraph 4-18 (Rules for processing an elimination of a non-probationary officer (more than 5 years of active duty)), unless precluded by another paragraph, states elimination action will be initiated against an officer who is identified by one or more of the reasons outlined in paragraph 4-2. On receipt of elimination action, the CG, U.S. Army Human Resources Command (HRC), will close the case or forward it to the Board of Review.

g. Paragraph 4-24 (Rules for processing an option that an officer elects while elimination action is pending) states an officer identified for elimination may, at any time during or prior to the final action in the elimination case, elect one of the following options (as appropriate): (1) Submit a resignation in lieu of elimination; (2) Request discharge in lieu of elimination; or (3) Apply for retirement in lieu of elimination if otherwise eligible. When an officer submits a resignation in lieu of elimination or a request for discharge in lieu of elimination, the officer waives the right to a hearing before a Board of Inquiry, and the case will be processed without convening a Board of

Inquiry. An officer may wish to waive the right to a Board of Inquiry contingent upon receiving a characterization of service more favorable than the least favorable characterization authorized for the reason for elimination set forth in the notice of elimination. Officers wishing to submit a conditional waiver will submit a completed Resignation in Lieu of Elimination or a Request for Discharge in Lieu of Elimination. Commanders will ensure that an officer has had an opportunity to consult with counsel before waiving the right to a hearing before a Board of Inquiry. The appropriate separation authority may approve or disapprove the conditional waiver. If the conditional waiver is disapproved, the case will be referred to a Board of Inquiry unless there is a subsequent resignation in lieu of elimination or request for discharge in lieu of elimination, where the officer unconditionally waives the right to a hearing before a Board of Inquiry.

4. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service Discharge Review Boards and Service Boards for Correction of Military/Naval Records (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//