

IN THE CASE OF: [REDACTED]

BOARD DATE: 16 November 2023

DOCKET NUMBER: AR20230003907

APPLICANT REQUESTS:

- upgrade of his under other than honorable conditions (UOTHC) discharge to an under honorable conditions (general) discharge
- to appear before the Board vial video/telephone

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Civilian Medical Records

FACTS:

1. The applicant did not file within the three-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 he served honorably and has not been in any trouble since his separation. He further notes that post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), and other mental health conditions are related to his request. He would have requested an upgrade sooner but was unaware of his ability to do so.
3. The applicant enlisted in the Regular Army on 2 April 2001 for a period of 4 years. Upon completion of initial entry training, he was assigned to a unit at Fort Hood, TX. He was advanced to the rank/grade of private/E-2 on 2 October 2001.
4. On 2 January 2002, the applicant was counseled for missing formation that morning. It was also noted this had happened several times prior and that he had performed corrective training as a result. He was advised that continued conduct of this nature could result in his involuntary separation from the service and the potential consequences of such a separation.

5. A memorandum, dated 15 January 2002, shows the applicant received a General Officer Memorandum of Reprimand (GOMOR) that was directed to be filed in his Official Military Personnel File (OMPF) and unit file. The GOMOR is not present in his OMPF.
6. On 1 April 2002, the applicant was counseled for missing recall formation and for his uniform not being up to standard. He was advised that he was being recommended for disciplinary action.
7. On 13 May 2002, the applicant accepted company grade nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice for, on or about 2 January 2002, without authority, failing to go at the time prescribed to his appointed place of duty. His punishment consisted of reduction to private/E-1; forfeiture of \$257.00, suspended to be automatically remitted if not vacated before 11 June 2002; extra duty for 14 days; and restriction for 14 days.
8. On 12 July 2002, the applicant was counseled for falling out of the physical training (PT) run. He was advised to work on his PT in his personal time so he could get up to standard.
9. On 13 August 2002, the applicant was counseled regarding being arrested on 12 August for driving under the influence (DUI) of alcohol off post. It was noted that this was not the first time this had happened, so it was obvious that he had no regard for safety of others or himself. This behavior was in direct violation of Army policy and punishable by civilian authorities. On 26 September 2002, the applicant received a GOMOR for this DUI incident.
10. On 12 October 2002, the applicant was arrested by military police for DUI on post.
11. On 29 October 2002, the applicant was ticketed by civil authorities for speeding. He was also arrested for an outstanding warrant.
12. On 16 November 2002, the applicant was arrested by military police for DUI on post.
13. The applicant's immediate commander notified the applicant on 21 February 2003 of his intent to initiate actions to separate him under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), paragraph 14-12, for pattern of misconduct. The specific reasons cited were the applicant's NJP, frequent arrests by both civilian and military authorities, failure to report to his appointed place of duty, and falling out of a PT run. He was advised that he was being recommended for a general discharge, but the final determination of his characterization of service would be made by the separation authority. The applicant acknowledged receipt of the proposed separation notification the same date.

14. On 16 April 2003, the applicant acknowledged that he was advised of the reasons for separation and of the rights available to him. He consulted with counsel and submitted a conditional election of rights wherein he elected:

- to waive consideration of his case by an administrative separation board (ASB) conditioned upon his receipt of a general discharge
- to waive personal appearance before an ASB conditioned upon his receipt of a general discharge
- not to submit statements in his own behalf.
- to request consulting counsel and representation by military counsel and/or civilian counsel at no expense to the Government

15. On 16 April 2003, the applicant's immediate commander formally recommended his separation prior to the expiration of his term of service under the provisions of Army Regulation 635-200, Chapter 14, by reason of a pattern of misconduct. He recommended the applicant receive a general discharge.

16. On 1 May 2003, the applicant acknowledged that he was advised of the reasons for separation and of the rights available to him. He consulted with counsel and submitted an unconditional election of rights wherein he elected:

- to waive consideration of his case by an ASB
- to waive personal appearance before an ASB
- not to submit statements in his own behalf
- to request consulting counsel and representation by military counsel

17. The applicant's interim commanders recommended approval of the separation action, and issuance of a discharge UOTHC. The Staff Judge Advocate concurred.

18. On 14 May 2003, the separation authority approved the applicant's unconditional waiver, approved the recommendation for separation, and directed the applicant be issued a discharge UOTHC.

19. Orders and the applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) show he was discharged on 30 May 2003, under the provisions of Army Regulation 635-200, paragraph 14-12c, by reason of misconduct, with separation code "JKQ" and reentry code "3." His service was characterized as UOTHC. He was credited with completion of 2 years, 1 month, and 29 days of net active service this period. He had no lost time.

20. The applicant provides documents showing he received medical treatment from [REDACTED] Health on 11 January 2023 following a seizure episode. These

documents show, in part, no mention of the catalyst for the applicant's medical conditions but that he reported his current problems and health issues as:

- Epilepsy post-traumatic
- Seizure
- TBI
- Anxiety
- Neck pain
- Lower back pain
- Sleep apnea
- Abdominal pain
- Vision problems
- Tinnitus
- Hearing loss
- Dizziness
- Skull fracture

21. By regulation, an applicant is not entitled to a hearing before the Board. Hearings may be authorized by a panel of the Board or by the Director of the ABCMR.

22. 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.

23. 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 (EMR) (AHLTA and/or MHS Genesis), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and 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 30 May 2003 discharge characterized as under other than honorable conditions. On his DD 149, he indicates that PTSD, TBI, and other mental health issues are related to his request. He states: "SM [service member] served honorably and hasn't gotten into any trouble since separation, TBI and PTSD present."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD 214 shows he entered the regular Army

on 2 April 2001 and was discharged under other than honorable conditions on 30 May 2003 under the separation authority provided by paragraph 14-12c of AR 635-200, Personnel Separations – Enlisted Personnel (1 November 2000): Commission of a serious offense. It does not list a period of service in a hazardous duty pay area.

d. On 21 February 2003, the applicant's company commander informed him of the initiation of separation action under be processed under paragraph 14-12b of AR 635 200:

c. "Under the provisions of AR 635-200, Chapter 14-12b, I am initiating action to separate you for A Pattern of Misconduct. The reasons for my proposed action are:

- You Failed to Report to your appointed place of duty on 2 January 2002, for which you received a Battery Grade Article 15, dated 13 May 2002.
- On 17 November 2002, you were arrested by the Military Police for Driving While Intoxicated and the alcohol content on your breath was 0.133.
- On 29 October 2002, you were arrested by the Killeen Police Department for an outstanding warrant for speeding.
- On 12 October 2002, you were arrested by the Military Police for Driving While Intoxicated and the alcohol content on your breath was 0.197.
- On 11 August 2002, you were arrested for Driving While Intoxicated and the alcohol content on your breath was 0.167.
- You were counseled for Failure to Report to your appointed place of duty on 1 April 2002 and for falling out of the PT run on 12 July 2002.

d. On 14 May 2003, the Commanding General of III Corps and Fort Hood approved the applicant's separation and directed he be separated with a characterization of Service of Under Other Than Honorable Conditions.

e. Discharge instructions dated 11 January 2023 show the applicant had been admitted for a seizure episode with a discharge diagnosis of posttraumatic epilepsy. His active problem list includes this condition as well as TBI, anxiety, dizziness, and skull fracture. There is no indication any of these issues occurred during or existed prior to his separation from the Army 20 years earlier.

f. No other medical documentation was submitted with the application and there are no clinical encounters in the EMR.

g. Review of his records in JLV shows he has is not registered with the Veterans Hospital Administration.

h. There is no evidence the applicant had a mental health or other medical condition during his service which would have then contributed to or would now mitigate his multiple UCMJ violations and thereby warrant consideration of an upgrade under liberal consideration guidelines.

Kurta Questions:

- (1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? NO
- (2) Did the condition exist or experience occur during military service? N/A
- (3) Does the condition or experience actually excuse or mitigate the discharge? N/A

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 Medical 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 a mental health condition. Based on a preponderance of the evidence, the Board determined the character of service the applicant received upon separation was 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 the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

2/16/2024

X [REDACTED]

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CHAIRPERSON  
[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, 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 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 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. 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.
4. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a provides that an honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

b. Paragraph 3-7b states 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.

c. Chapter 14 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions (a pattern of misconduct consisting solely of minor military disciplinary infractions), a pattern of misconduct (consisting of discreditable involvement with civil or military authorities or conduct prejudicial to good order and discipline). Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter; however, the separation authority may direct a general discharge if merited by the Soldier's overall record.

5. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Navy Records (BCM/NR) to carefully consider the revised post-traumatic stress disorder (PTSD) criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged under other than honorable conditions (UOTHC) and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

6. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD; traumatic brain injury; sexual assault; or sexual harassment. 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.

7. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and BCM/NRs regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-



martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, Boards shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

//NOTHING FOLLOWS//