

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 29 September 2023

DOCKET NUMBER: AR20230003936

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions (UOTHC) characterization of service.

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

- DD Form 149 (Application for Correction of Military Record)
- Military Service Records (11 pages), dated 10 May 2002 to 3 December 2004
- DD Form 214 (Certificate of Release or Discharge from Active Duty), for the period ending 22 December 2004

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), Section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states, in effect, the events leading to his discharge took place shortly after he returned from Iraq. He was in an infantry unit which experienced multiple personnel combat losses. He recalls the members of his unit receiving psychological counseling to deal with combat related mental health issues, post-traumatic stress disorder (PTSD) being the most common. After returning home, he suffered from depression, anxiety, and bipolar disorder. He paid the price for his actions, carrying this blemish for 18 years. He was 21 years old and did not know any better. He would like to receive the Veterans Affairs (VA) services he has earned. He notes PTSD as a condition related to his request.
3. The applicant enlisted in the Regular Army on 27 September 2001 for a 4-year period. The highest rank he attained was sergeant/E-5.
4. The applicant served in Iraq in support of Operation Iraqi Freedom from 15 March 2003 through 29 January 2004.

5. The applicant's commander was notified on 17 August 2004 that a urine sample provided by the applicant tested positive for cocaine.

6. The applicant was formally counseled on 27 August 2004 for failing a urinalysis. He was notified of his requirement to attend the Army Substance Abuse Program (ASAP) and that he was being recommended for a summary court-martial.

7. The applicant was apprehended by Military Police on 10 September 2004, for pointing a handgun towards another Soldier's head and telling him to leave the area (the barracks). Military Police Report 04560-2004-MPC023, dated 11 September-2004, shows the applicant was charged with the following offenses:

- assault by pointing a gun (on post)
- communicating a threat (other than telephone)
- unlawful possession of a pistol/revolver (on post)
- conduct unbecoming a member of the military service – drunk and disorderly
- disobeying the lawful order of a commanding officer

8. A search of the applicant's room and privately owned vehicle did not result in locating the weapon. The Military Police were dispatched back to the barracks as a pistol, magazine, ammunition, and barrel brushes were later located on the backside of the barracks building. The items were retained as evidence.

9. A DD Form 458 (Charge Sheet) show court-martial charges were preferred against the applicant on 14 October 2004, for the following violations:

- violating a lawful general regulation, on or about 10 September 2004, by wrongfully displaying a pistol within the confines of Fort Bragg
- wrongfully using cocaine, between on or about 7 August and 10 August 2004
- committing assault, on or about 10 September 2004, by pointing a loaded firearm at another Soldier
- wrongfully disposing of a pistol and magazine with intent to prevent its seizure, between on or about 10 September and 11 September 2004

10. The applicant consulted with legal counsel on or about 4 November 2004.

a. He was advised of the basis for the contemplated trial by court-martial, the maximum permissible punishment authorized under the Uniform Code of Military Justice, the possible effects of a UOTHC discharge, and the procedures and rights that were available to him.

b. After receiving legal counsel, he voluntarily requested discharge, in lieu of trial by court-martial, under the provision of Army Regulation 635-200 (Active Duty Enlisted

Administrative Separations), Chapter 10. In his request for discharge, he acknowledged his understanding that by requesting discharge, he was admitting guilt to the charge against him, or of a lesser included offense that also authorized the imposition of a bad conduct or dishonorable discharge. He acknowledged making this request free of coercion. He further acknowledged understanding if his discharge request were approved, he could be deprived of many or all Army benefits, he could be ineligible for many or all benefits administered by the VA, and he could be deprived of his rights and benefits as a veteran under both Federal and State laws.

c. He was advised he could submit any statements he desired in his behalf. He did not provide a statement.

11. By memorandum, dated 4 November 2004, the applicant's Defense Counsel requested the chain of command consider that following the applicant's service in Iraq, he was diagnosed with PTSD which may help to explain his misconduct. He acted out in an intolerable manner that was unlike him. The victim of the crime immediately forgave him and had no bad feelings towards him. He understood the consequences of his actions. She further requested the applicant be discharged in lieu of court-martial.

12. The applicant's chain of command and the Staff Judge Advocate recommended approval of his request for discharge in lieu of trial by court-martial, with a service characterization of UOTHC.

13. The separation authority approved the applicant's request for discharge in lieu of trial by court-martial on 3 December 2004, and directed the issuance of an UOTHC characterization of service.

14. Accordingly, the applicant was discharged on 22 December 2004, under the provisions of Army Regulation 635-200, Chapter 10, in lieu of trial by court-martial. His DD Form 214 confirms his characterization of service was UOTHC. He was credited with 3 years, 2 months, and 26 days of net active service. He was awarded or authorized the following:

- Army Commendation Medal (2nd award)
- Global War on Terrorism Expeditionary Medal
- Global War on Terrorism Service Medal
- Army Service Ribbon
- Combat Infantryman Badge
- Parachutist Badge

15. Discharges under the provisions of Army Regulation 635-200, Chapter 10, are voluntary requests for discharge in lieu of trial by court-martial. A characterization of UOTHC is authorized and normally considered appropriate.

16. The Board should consider the applicant's argument and/or evidence in accordance with the published equity, injustice, or clemency determination guidance.

17. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under other than honorable conditions (UOTHC) characterization of service. The applicant asserts that PTSD mitigates his discharge.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Below is a summary of information pertinent to this advisory:

- Applicant enlisted into the Regular Army on 27 September 2001.
- The applicant served in Iraq in support of Operation Iraqi Freedom from 15 March 2003 through 29 January 2004. The applicant earned a Combat Infantry Badge as well as other medals and ribbons.
- The applicant was formally counseled on 27 August 2004 for failing a urinalysis (tested positive for cocaine). He was notified of his requirement to attend the Army Substance Abuse Program (ASAP) and that he was being recommended for a summary court-martial.
- The applicant was apprehended by Military Police on 10 September 2004, for pointing a handgun towards another Soldier's head and telling him to leave the area (the barracks).
- Court-martial charges were preferred against the applicant on 14 October 2004, for the following violations:
 - violating a lawful general regulation, on or about 10 September 2004, by wrongfully displaying a pistol within the confines of Fort Bragg
 - wrongfully using cocaine, between on or about 7 August and 10 August 2004
 - committing assault, on or about 10 September 2004, by pointing a loaded firearm at another Soldier
 - wrongfully disposing of a pistol and magazine with intent to prevent its seizure, between on or about 10 September and 11 September 2004
- On 4 November 2004 the applicant voluntarily requested to discharge under AR 635-200, Chapter 10 – in lieu of trial by court-martial. His request was approved.
- On 22 December 2004, the applicant was discharged with an UOTHC characterization of service.

c. Review of Available Records Including Medical:

The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 149, his ABCMR Record of Proceedings (ROP), DD Form 214, as well as documents from the

applicant's service record and separation. The VA electronic medical record and DoD health record were reviewed through Joint Longitudinal View (JLV). Lack of citation or discussion in this section should not be interpreted as lack of consideration.

d. The applicant asserts that PTSD mitigates his discharge. He expressed experiencing a lot in Iraq, and suffering from depression, anxiety and bipolar disorder when he returned home. During his separation, his defense counsel urged consideration, given his service in Iraq, and his PTSD diagnosis. Then, like now, it is asserted that his PTSD may help explain his misconduct. His behavior was described by his defense counsel as unlike him. It was also highlighted that the person who he pulled the gun on (the victim of this crime) had already forgiven the applicant for his actions, recognizing that this was completely out of character. The behaviors were strongly highlighted as one-time mistakes that his treating psychologist believed could be understood in the context of his PTSD.

e. The applicant's time in service predates consistent use of electronic health records (EHR) by the Army, hence no mental health EHRs are available for review. His service record and supporting documents did not contain his service treatment records (STR). Hence, his records are void of any mental health documentation from his time in service. However, the memorandum by the applicant's counsel from the time of separation references a specific provider [REDACTED] ongoing treatment, and a known diagnosis of PTSD.

f. Per the applicant's VA EHR, he is not service connected. He has not been engaged in any mental health care through the VA and he holds no mental health diagnoses with the VA. However, given the characterization of his discharge, he would not typically be eligible for most VA benefits. Through review of JLV, this applicant also did not have "Community Health Summaries and Documents" available for review. No other medical records were provided.

g. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that, per Liberal Consideration guidance, there is sufficient evidence to support that the applicant had a mitigating condition (PTSD) during his time in service.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes. The applicant asserts PTSD mitigates his discharge. It was also noted that other mental health conditions were present during his time in service (anxiety, depression, bipolar disorder).

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts that these potentially mitigating conditions were present during his time in service.

(3) Does the condition or experience actually excuse or mitigate the discharge?
Partial. The applicant asserts mitigation due to PTSD and other mental health. There is sufficient evidence from his time in service to support that the applicant had been diagnosed with PTSD after his return from Iraq, and at the time of misconduct (per a memo from defense counsel). In addition, the applicant self-reports experiencing anxiety, depression and bipolar disorder after his return from Iraq, though there is currently no available corroborating evidence of these diagnoses. The applicant's misconduct included behavior consistent with the natural history and sequelae of PTSD (self-medication and/or avoidance in use of cocaine and heightened hypervigilance and irritability as seen through aggressive actions not congruent with his typical behavior). There is a nexus between these behaviors and a portion of his misconduct that led to his discharge. However, there is typically no nexus between assault (though no physical harm was done), wrongfully displaying a pistol or wrongfully disposing of the pistol, and PTSD. If the applicant was actively psychotic, secondary to his trauma or asserted bipolar disorder, there is a case to be made for the applicant not being in touch with reality or knowing the difference between right and wrong, which would potentially mitigate all charges. However, there is insufficient evidence to support full mitigation at this time. Hence, this Agency Behavioral Health Advisor would recommend, at a minimum, partial mitigation.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that some relief was warranted. The Board carefully considered the applicant's statement, record of service, the frequency and nature of the misconduct, and published DoD guidance for consideration of discharge upgrade requests. The Board considered denying the request based on the severity of the misconduct. However, the Board agreed that it was more than likely that the applicant had a mitigating condition outside his span of control and determined the evidence presented sufficient to warrant a recommendation for partial relief.

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 determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending his DD214 for the period ending 22 December 2004 to show his character of service as under honorable conditions (general).

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I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, USC, Section 1552(b), provides that applications for correction of military records must be filed within 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. Section 1556 of Title 10, USC, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be

provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

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

a. Chapter 10 of that regulation provides, in pertinent part, that a member who has committed an offense or offenses for which the authorized punishment includes a punitive discharge may, submit a request for discharge for the good of the service in lieu of trial by court-martial. The request may be submitted at any time after charges have been preferred and must include the individual's admission of guilt. Although an honorable or general discharge is authorized, a discharge under other than honorable conditions is normally considered appropriate.

b. 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.

c. Paragraph 3-7b provides that 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.

4. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD; traumatic brain injury; sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences.

5. 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//