

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 January 2024

DOCKET NUMBER: AR20230005809

APPLICANT REQUESTS: Upgrade of his under other than honorable conditions (UOTHC) discharge to honorable.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 293 (Application for the Review of Discharge)
- Self-authored Letter
- Character Reference Letter (2)
- Digital image of a torso
- Digital image of social media page
- Digital image of son's Army enlistment proclamation
- In-service personnel and medical documents
- Social Security Administration (SSA) work history report
- Veterans Affairs (VA) correspondence and medical notes
- Form 1095-B (Health Coverage)

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 his discharge was inequitable. It was based off one incident; he loved being a Soldier in the Army. He was progressing and planning to reenlist. He was stabbed in his stomach by a Soldier in his unit and held down by four other Soldiers. His life changed. If he had known of the resources available to him at the time he went absent without leave (AWOL), he would have made better decisions. He felt his life was in danger. He could not sleep because he was paranoid and stressed. He has not been able to be social and he feels depressed from this personal assault.

3. On his DD Form 149, the applicant notes post-traumatic stress disorder (PTSD), other mental health, and reprisal/whistleblower as issues related to his request.

4. On 5 November 1979, the applicant enlisted in the Regular Army for 3 years. Upon completion of training, he was awarded military occupational specialty 11B (Infantryman).

5. On 14 November 1980, the applicant accepted non-judicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ) for failing to go at the time prescribed to his appointed place of duty on or about 4 November 1980. His punishment included reduction to the grade of E-1, forfeiture of \$115.00, and seven days of confinement.

6. On 27 September 1981 the applicant was reported as AWOL and remained absent until he was apprehended by civil authorities on 24 December 1981.

7. Court-martial charges were preferred against the applicant for violations of the UCMJ; however, the relevant DD Form 458 (Charge Sheet) is not available for review.

8. On 8 January 1982, the applicant consulted with legal counsel 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 a bad conduct discharge; and the procedures and rights that were available to him.

a. Subsequent to receiving legal counsel, the applicant voluntarily requested discharge under the provisions 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 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 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 Veterans Administration, and he could be deprived of his rights and benefits as a Veteran under both Federal and State laws.

b. He did not elect to submit a statement in his own behalf.

9. The applicant's commander recommended approval of the applicant's request for discharge, and further recommended the issuance of an UOTHC discharge.

10. The applicant's record is void of the separation authority's approval memorandum. However, his request for discharge in lieu of trial by court-martial was recommended for approval with issuance of an UOTHC discharge certificate.

11. The applicant was discharged on 28 January 1982. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms he was discharged under the

provisions of Army Regulation 635-200, Chapter 10, by reason of administrative discharge conduct triable by court-martial. He was discharged in the lowest enlisted grade and his service was characterized as UOTHC. He completed 1 year, 11 months, and 27 days of net active service this period with 88 days of lost time.

12. The applicant provides the following (provided in entirety for the Board):

- a. Two character reference letters that collectively attest to his dedication to family, his good nature, work ethic, trustworthiness, and honesty.
- b. A digital image of a torso with a scar.
- c. Numerous documents from his official military personnel file.
- d. Multiple pages of SSA forms and correspondence in support of his disability application.
- e. Multiple pages of VA progress notes that show he received treatment for various medical issues including depression and PTSD.

13. The applicant was charged due to the commission of an offense 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.

14. 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.

15. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) characterization of service. He contends he had mental health conditions, including PTSD and experienced reprisal/whistleblower issues that mitigated 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 was enlisted in the Regular Army on 5 November 1979; 2) On 27 September 1981, the applicant was reported as AWOL and remained absent until he was apprehended by civil authorities on 24 December 1981; 3) Court-martial charges were preferred against the applicant. However, the relevant DD Form 458 (Charge Sheet) is not available for review; 4) The applicant was discharged on 28 January 1982, Chapter

10, by reason of administrative discharge conduct triable by court-martial. He was discharged in the lowest enlisted grade and his service was characterized as UOTHC.

c. The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed the supporting documents and available military service records. The VA's Joint Legacy Viewer (JLV) was also examined. Additional VA medical documentation and applications for disability were also provided for review.

d. The applicant noted mental health conditions including PTSD and the experience of reprisal/whistleblower were contributing and mitigating factors in the circumstances that resulted in his separation. There was no indication the applicant reported mental health symptoms while on active service, and there is no evidence the applicant reported any reprisal or negative experiences related to whistleblowing. A review of JLV provided evidence the applicant engaged in behavioral health at the VA starting in August 2022. He reported history of being diagnosed with Attention Deficit Disorder (ADD), depression, PTSD, and alcohol abuse. Due to his report of being assaulted while on active service, he was offered group therapy for PTSD, and he was provided psychiatric medication. He attended a few group sessions before discontinuing behavioral health treatment. During his appointments at the VA in December 2023, he was no longer reporting symptoms of depression, anxiety, or PTSD. The applicant has not been diagnosed with a service-connected mental health condition by the VA.

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 mitigated his misconduct. In addition, there is insufficient information concerning the specific events surrounding the applicant's discharge to provide an opinion on possible mitigation as the result of a mental health condition or experience.

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 and also experienced reprisal/whistleblowing while on active service, which contributed to his misconduct. The applicant has never been diagnosed with a service-connected mental health condition, but he was treated for PTSD for a short time in 2022-2023.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he was experiencing mental health conditions including PTSD and also experienced reprisal/whistleblowing while on active service, which contributed to his misconduct. The applicant has never been diagnosed with a service-connected mental health condition, but he was treated for PTSD for a short time in 2022-2023.

(3) Does the condition or experience actually excuse or mitigate the discharge? No, there is evidence the applicant was diagnosed and treated for PTSD in 2022-2023 due to his report of events which occurred during his active service and a recent increase in his symptoms. However, he was never diagnosed with a service-connected mental health condition including PTSD. There was insufficient evidence the applicant was experiencing a mental health condition including PTSD while on active service. In addition, there was insufficient evidence the applicant experienced the negative effects of reprisal/whistleblower while on active service. The applicant did go AWOL, which can be a sequela to some mental health conditions including PTSD, but this is not sufficient to establish a history of a condition or experience during active service. Lastly, there is insufficient information concerning the specific events surrounding the applicant's discharge to provide an opinion on possible mitigation as the result of a mental health condition or experience. However, the applicant contends he was experiencing a mental health condition and 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 Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding there being insufficient information available to support a conclusion that his misconduct was 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:

<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.

4/15/2024

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, 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. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the 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 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 a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 10 provided 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, a UOTHC discharge was normally considered appropriate.

4. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Navy Records (BCM/NR), on 3 September 2014, to carefully consider the revised PTSD criteria, detailed medical considerations, and mitigating factors when taking action on applications from former service members administratively discharged under other than honorable conditions 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.

5. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating 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 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.

6. 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//