

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 January 2024

DOCKET NUMBER: AR20230006707

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

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

- DD Form 149 (Application for Correction of Military Record)
- Legal brief on behalf of applicant
- Self-authored letter
- In-service records
- Character reference letter
- Various medical journal extracts

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 Docket Number AR20090005563 on 26 August 2009.

2. Counsel states, in pertinent part:

a. The applicant's discharge status is unjust because his capability to serve was seriously impacted by personal family issues that occurred. This personal trauma mitigates incidents of misconduct. His capability to serve was seriously impacted by the mental health symptoms he had at the time of his discharge from active duty, later diagnosed as major depressive disorder.

b. The applicant was involved in a domestic dispute while in service, and as a result received a special court-martial. His rank was reduced, and he was being supervised by Soldiers who were previously his subordinates. Because of his reduction of status, he started experiencing bullying and hazing by the other Soldiers. This wore on, and it was taking a major toll on him. Unfortunately, at the same time, the applicant's brother began experiencing very poor health. Emotions weighed on him heavily, so in tum he poured himself into is work. His ability to separate himself and only focus on work initially was successful. Eventually, it became too much for him to handle and the

updates he was receiving from home became more and more dire. Eventually, he was given emergency leave, so that he could visit his brother who was dying in the hospital.

c. The applicant had two positive urinalysis, one on December 27, 1984, and another on January 17, 1985. He admitted to being depressed, and was stressed with his brother's critical health condition. He admitted to smoking marijuana on leave. However, the time between tests was a mere 21 days. Tetrahydrocannabinol retains the highest concentration for the longest period of time in urine. Conducting two tests is not proper and should not be deemed as two positive urinalyses as the marijuana use during his leave would account for both positive results. After he was discharged, the applicant's mental health symptoms worsened. He fell deeper into a depression and had an extremely hard time transitioning to civilian life. He has experienced homelessness on and off since he was released from the Army.

d. The Board should weigh the applicant's in-service stressors as mitigating factors against the severity of the misconduct for which he was discharged. The evidence presented, including his statement and records, reflect that he was depressed and experiencing mental health symptoms that led to the misconduct for which he was discharged from the Army. Based on the above facts, the applicant respectfully requests that this Board consider the mental health issues and symptoms as mitigating factors and, in sound exercise of its just discretion, upgrade his discharge.

### 3. The applicant states:

a. He joined the Army so he could have a career, further his education and skills, and create a positive life for himself. When he was only 18 at the time and it seemed like the most reliable way to support himself. Boot camp was hard work, but it was worth it when he got through it. After boot camp, he was doing really well. He had high marks, and he was rising through the ranks. He was training other soldiers and teaching them the ropes.

b. He remembers feeling depressed when he was in the Army, that his family wasn't in the best of health, and he felt really far from them. He tried to avoid his depressive thoughts by focusing all his energy on work. He was doing great in his job, and was able to suppress any sadness or anger that he was feeling at first, but it was hard to keep doing it. He was slowly starting to unravel, but it wasn't showing outwardly until an altercation occurred. While living in Kansas, his girlfriend showed up on base unannounced. She was really angry when she found out he was dating other people. He was upset that she showed up uninvited to his base and was causing a scene. She started hitting him and he shoved her away and she fell. The military police came and took care of everything. He knew that his part in the altercation was wrong. From that time forward everything that was going on internally began to show outwardly. Despite that incident, the Army did not consider discharging him. He was given two months hard

labor and rank reduction to E-1. He was sent back to the same unit he had been moving up the ranks at and he found himself at the very bottom.

c. His personal life was causing him even more distress. He received news that one of his brothers was going to die. His brother asked if he could come see him because he didn't know how much time he had left. He was given leave to go visit his brother in the hospital. At that point, he couldn't see any positives in his life, everything around him seemed like a disaster and he wanted to escape. When he came back from leave, the Army did a random urinalysis and he tested positive for marijuana. He used marijuana because he was looking for an escape.

4. On his DD Form 149, the applicant notes other mental health issues are related to his request.

5. The applicant enlisted in the Regular Army on 1 September 1982, for 3 years. Upon completion of training, he was awarded military occupational specialty 94B (Food Service Specialist). The highest grade he attained was E-3.

6. Before a special court-martial on 18 April 1984, at Fort Riley, KS, the applicant was found guilty of one specification of unlawfully striking C\_T\_. The court sentenced him to confinement at hard labor for two months, forfeiture of \$200.00 pay per month for two months and reduction to E-1. The sentence was approved on 12 June 1984, and the record of trial was forwarded for appellate review.

7. On 22 January 1985 and 14 February 1985, the applicant tested positive for marijuana during a urinalysis test.

8. On 14 February 1985, the applicant accepted non-judicial punishment under Article 15 of the Uniform Code of Military Justice, for wrongfully using marijuana. His punishment included reduction in grade to E-1, forfeiture of \$144.00, and 14 days restriction and extra duty.

9. On 4 March 1985, the applicant underwent a mental status evaluation. He was psychiatrically cleared to participate in any administrative action deemed appropriate by the command.

10. The applicant's commander notified the applicant on 18 March 1985, that he was initiating actions to separate him under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), paragraph 14-12c, for commission of a serious offense.

11. The applicant consulted with legal counsel and acknowledged he had been advised of the basis for the contemplated separation action. Following his consultation, he

requested the right to personally appear before, and to have his case considered by a board of officers.

a. He declined to submit a statement in his own behalf. He requested representation by counsel.

b. He acknowledged he understood that as a result of issuance of a discharge UOTHC, he may be ineligible for many or all benefits as a veteran under Federal and State laws and that he could expect to encounter substantial prejudice in civilian life.

12. The applicant's commander formally recommended his separation under the provisions of Army Regulation 635-200, Chapter 14-12c. He noted the applicant's positive urinalysis during random urinalysis conducted on 27 December 1984 and 17 January 1985.

13. On 1 May 1985, a board of officers convened to determine if the applicant should be eliminated from the service. The Board determined that there had been a pattern of misconduct under the provisions of Army Regulation 635-200, Chapter 14, and recommended that he be discharged from the service. The Board further recommended issuance of an UOTHC Discharge Certificate.

14. Consistent with the board's findings and recommendation, the separation authority approved the recommended discharge on 20 May 1985. He directed the issuance of a UOTHC Discharge Certificate.

15. The applicant was discharged on 23 May 1985. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms he was discharged under the provisions of Army Regulation 635-200, paragraph 14-12c, for misconduct-commission of a serious offense. He was discharged in the lowest enlisted grade and his service was characterized as UOTHC. He was assigned Separation Code JKQ and Reentry Codes 3 and 3B. He completed 2 years, 8 months, and 23 days of net active service this period with 61 days of lost time.

16. The applicant petitioned the ABCMR requesting upgrade of his UOTHC discharge. On 26 August 2009, the Board voted to deny relief and determined that the overall merits of the case were insufficient as a basis for correction of his records.

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

a. Character reference letter that attests to his respect for the military, love for the Country, and volunteer work in his community and the Boys and Girls Club.

b. Medical journal extracts that highlight the recreational use of cannabis, and its association with depression and various mood disorders.

18. 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.

19. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under other than honorable conditions (UOTHC) discharge to under honorable conditions (general). The applicant asserted other mental health as a mitigating factor in 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:

- He enlisted in the Regular Army on 1 September 1982.
- Before a special court-martial on 18 April 1984, at Fort Riley, KS, the applicant was found guilty of one specification of unlawfully striking C\_T\_.
- On 22 January 1985 and 14 February 1985, the applicant tested positive for marijuana during a urinalysis test.
- On 14 February 1985, the applicant accepted non-judicial punishment under Article 15 of the Uniform Code of Military Justice, for wrongfully using marijuana.
- The applicant's commander notified the applicant on 18 March 1985, that he was initiating actions to separate him under AR 635-200, paragraph 14-12c, for commission of a serious offense.
- On 1 May 1985, a board of officers convened and determined that there had been a pattern of misconduct under the provisions of AR 635-200, Chapter 14, and recommended that he be discharged from the service. The Board further recommended issuance of an UOTHC Discharge Certificate.
- Per testimony during the board, it is evident that his initial UA (but not the second as it was taken too close/within 30 days of the first), his domestic dispute, and issues with being late to work were all taken into account.
- The applicant was discharged on 23 May 1985 and his service was characterized as UOTHC.
- ABCMR denied his request for relief on 26 August 2009.

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), his DD Form 214, his service and separation

records, as well as a self-authored statement, legal brief, character reference letter, various medical journal extracts and in-service records. 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 and his counsel contend that his capability to serve was seriously impacted by personal family issues that occurred, and that this “personal trauma” mitigates incidents of misconduct. Counsel stated that he was later diagnosed with major depressive disorder and that those symptoms mitigate any incidents of misconduct. In addition, it is asserted that under current policies it is doubtful he would have received the same discharge characterization. Contributing factors to his mental health concerns, and this assertion, is a domestic dispute which led to a court martial and him being treated poorly/differently (hazed, bullied) at work. In addition, a family member (his brother) fell ill (was reportedly going to die) and this caused stress on him and the family. This led to him using marijuana while he was on emergency leave visiting his brother. The applicant also asserted in his self-statement that a new company commander took over and took issue with him based on race. He believes this factored into his discharge as well. The applicant shared in his self-authored statement about the ongoing impact depression has on him, to include difficulty with relationships, thoughts of death and dealing with shame.

e. The applicant’s time in service predates use of electronic health records (EHR) by the Army, hence no EHRs are available for review. His service record and supporting documents did not contain his service treatment records (STR). Though, his supporting documents and service records contained relevant medical information. The applicant was seen for a mental status evaluation (MSE) on 4 March 1985. The applicant’s presentation and overall assessment was unremarkable. The applicant was found to have the mental capacity to understand and participate in the proceedings, was mentally responsible, met medical retention requirements per AR 40-501 chapter 3, and was psychiatrically cleared to participate in any administrative action deemed appropriate by the command. No other records were provided to substantiate his assertion of depression. There is no evidence of any mental health conditions nor concerns during his time in service.

f. Per the applicant’s VA EHR, he is not service connected. Given the characterization of his discharge, he would not typically be eligible for most VA benefits. However, he has had some limited and intermittent engagement in the VA starting in 2000 (again in 2001, 2004, 2008, 2018 and 2022), primarily working with homeless services (health care for homeless vets, grant & per diem, homeless outreach). His EHR indicates he’s been diagnosed with other mixed or unspecified drug abuse and lack of housing. Records reflect he no showed his initial mental health disorder

compensation and pension evaluation on 16 March 2022. Through review of JLV, this applicant did have "Community Health Summaries and Documents" available, though there was no record of a mental health diagnoses, nor mental health encounters. No other medical records were provided.

g. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence, outside of self-report, to support the applicant had any mental health conditions 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, applicant asserts other mental health (depression) is related to his request for upgrade.

(2) Did the condition exist or experience occur during military service? Yes. The applicant asserts other mental health was present during his time in service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant asserts he was experiencing depression secondary to the treatment he received after his initial misconduct (the domestic dispute) as well as in response to his brother falling ill. However, there is insufficient evidence, outside of self-report, to support the applicant had any mental health conditions during his time in service. The applicant did not provide any documentation to support that he has ever been diagnosed with depression, nor any other potentially mitigating conditions. In addition, even if depression was present during his time in service, it would only mitigate a portion of his misconduct. Of note, going AWOL is an avoidance behavior and using substances (marijuana) is avoidance and self-medicating behavior, both consistent with depression. However, intentionally striking his girlfriend in the face (and fracturing her nose) is not consistent with the natural history and sequelae of depression. In sum, there is insufficient evidence the applicant has ever been diagnosed with a mitigating mental health condition, however per Liberal Consideration guidance, his contention is sufficient to warrant the boards consideration.

#### 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 contentions, the military record, and regulatory guidance. The Board considered published DoD guidance for liberal consideration of discharge upgrade requests. The Board considered the frequency and nature of

misconduct, and the reason for separation. The Board noted that the applicant was afforded a mental status evaluation which showed his presentation and overall assessment were determined unremarkable. He was further found to have the mental capacity to understand and participate in the proceedings, was mentally responsible, met medical retention requirements in compliance with applicable regulatory guidance. Documentation shows he was psychiatrically cleared to participate in any administrative action deemed appropriate by the command. In the absence of new, relevant evidence or post-service achievements or letters of reference in support of a clemency determination, 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 Board determined 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 by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20090005563 on 26 August 2009.

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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, 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 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 15-185 (ABCMR) sets forth procedures for processing requests for the correction of military records. Paragraph 2-15a governs requests for reconsideration. This provision of the regulation allows an applicant to request reconsideration of an earlier decision of the ABCMR. The applicant must provide new relevant evidence or argument that was not considered at the time of the ABCMR's prior consideration.
4. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel.
  - 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 14 (Separation for Misconduct) established policy and prescribed procedures for separating members for misconduct. It states that action will be initiated

to separate a Soldier for misconduct when it was clearly established that rehabilitation was impracticable or unlikely to succeed. Paragraph 14-12c (Commission of a Serious Offense) applied to commission of a serious military or civil offense, if the specific circumstances of the offense warrant separation and a punitive discharge is, or would be, authorized for the same or a closely related offense. First time offenders below the grade of sergeant, and with less than 3 years of total military service, may be processed for separation as appropriate.

5. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR), on 3 September 2014, 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 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. 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.

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//