

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 January 2024

DOCKET NUMBER: AR20230007025

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions (UOTHC) characterization of service. Additionally, he requests that erroneous disciplinary records be deleted from his military records.

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

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States) with self-authored statement, dated 10 March 2023
- DD Form 149 (Application for Correction of Military Record), dated 12 March 2023
- letter, Department of Veterans Affairs (VA), Rating Decision, dated 6 February 2023
- VA Form 20-0996 (Decision Review Request: Higher-Level Review), dated 9 March 2023

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, he has suffered for over 30 years with misdiagnosed conditions resulting from the traumatic events which occurred during his time in service. His discharge was upgraded to honorable by the VA for benefit purposes. His military records need to align with his VA documentation so he can access necessary treatment and therapy. Additionally, he found inaccurate disciplinary records in his file. He never drove with a suspended license. Nor was he charged with disrespecting an officer. The applicant notes post-traumatic stress disorder (PTSD), other mental health, and sexual assault/harassment as conditions related to his claim.
3. The applicant enlisted in the Regular Army on 1 March 1989 for a 4-year period. The highest rank he attained was specialist/E-4.

4. The applicant accepted non-judicial punishment, under the provisions of Article 15 of the Uniform Code of Military Justice, on two occasions:

a. On 21 May 1990, for being disrespectful in language toward a warrant officer who was in the execution of his office, on or about 15 May 1990. His punishment consisted of reduction to private/E-2, forfeiture of \$187.00 pay, 14 days of extra duty, and 14 days of restriction.

b. On 7 June 1991, for failing to go at the time prescribed to his appointed place of duty, on or about 10 May 1991. His punishment consisted of extra duty for 14 days and 14 days of restriction.

5. Two DA Forms 4187 show the following changes in the applicant's duty status:

- Present for duty (PDY) to absent without leave (AWOL) – 9 July 1991
- AWOL to PDY – 12 July 1991

6. The applicant accepted non-judicial punishment, under the provisions of Article 15 of the Uniform Code of Military Justice, on 18 July 1991, for being AWOL on or about 9 July 1991 until on or about 12 July 1991. His punishment consisted of reduction to private first class/E-3 and 14 days of extra duty. The applicant appealed the punishment. The appeal was denied.

7. He was formally counseled on five occasions between 14 September 1991 and 22 November 1991. Areas of emphasis covered in the counseling include, but are not limited to:

- violating a lawful order by departing his place of duty in a privately owned vehicle during duty hours
- driving with a suspended license
- failure to report on three occasions

8. The applicant accepted non-judicial punishment, under the provisions of Article 15 of the Uniform Code of Military Justice, on 25 November 1991, for two occasions of failure to go at the time prescribed to his appointed place of duty, on or about 12 November 1991 and on or about 15 November 1991. His punishment consisted of reduction to private/E-2, forfeiture of \$197.00 pay, and seven days of extra duty.

9. The applicant's immediate commander notified the applicant on 10 December 1991 of his intent to initiate separation actions against him under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 14, for patterns of misconduct. His commander noted the applicant's four instances of nonjudicial punishment within one and one half years, as well as numerous counseling

statements for not being at his appointed place of duty as reasons for the proposed separation action. The applicant acknowledged receipt on 12 December 1991.

10. 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. He declined to submit a statement in his own behalf. He requested representation by counsel. He acknowledged he understood that he may be ineligible for many or all benefits as a Veteran under Federal and State laws, and he could expect to encounter substantial prejudice in civilian life as a result of the issuance of an UOTHC discharge.

11. On 15 December 1991, the applicant's immediate commander formally recommended his separation from service under the provisions of Army Regulation 635-200, paragraph 14-12b, by reason of patterns of misconduct, with the issuance of an UOTHC characterization of service. Additionally, the commander requested waiver of the requirement for rehabilitative transfer. Both intermediate commanders concurred with the recommendation.

12. The applicant was formally counseled on 14 February 1992 for not being at his prescribed place of duty on 7 February 1992.

13. The request for waiver of rehabilitative transfer was approved on 14 February 1992.

14. The applicant accepted non-judicial punishment, under the provisions of Article 15 of the Uniform Code of Military Justice, on 6 March 1992, for failure to go at the time prescribed to his appointed place of duty, on or about 7 February 1992 and for willfully disobeying a lawful order from a noncommissioned officer, on or about 14 February 1992. His punishment consisted of reduction to private/E-1 and 14 days of extra duty. The applicant appealed the punishment. The appeal was denied.

15. On 27 March 1992, a board of officers held a hearing to determine if the applicant should be eliminated from service. The board recommended a waiver of the rehabilitative transfer requirements, and that he be discharged under the provisions of Army Regulation 635-200, Chapter 14, paragraph 14-12b with the issuance of a DD Form 794A (UOTHC Discharge Certificate).

16. Consistent with the board's findings and recommendations, the separation authority approved the recommended discharge on 24 April 1992, with a service characterization of UOTHC.

17. The applicant underwent a mental status examination on 5 May 1992. The examining provider determined he was mentally responsible and psychiatrically cleared for any administrative actions deemed appropriate by the command.

18. The applicant was discharged on 15 May 1992, under the provisions of Army Regulation 635-200, paragraph 14-12b, by reason of misconduct – pattern of misconduct. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms his character of service was UOTHC, with separation code JKM and reentry code RE-3. He was credited with 3 years, 2 months, and 12 days of net active service. He was awarded or authorized the following:

- Army Service Ribbon
- Mechanics Badge
- National Defense Service Medal
- Marksman Marksmanship Qualification Badge with Rifle Bar (M-16)
- Expert Marksmanship Qualification Badge with Grenade Bar

19. The Army Discharge Review Board (ADRB) reviewed his request for a discharge upgrade on 6 October 1994. After careful consideration, the Board determined his discharge was proper and equitable. The Board denied his request for relief.

20. On 17 August 2023, in the processing of this case the U.S. Army Criminal Investigation Division, requested Police Reports pertaining to the applicant from the U.S. Army Criminal Investigation Division (CID). Two Military Police Reports (MPR) indicate:

a. MPR 00912-1990-MPC222-6900D-5Q5, dated 24 September 1990, shows the applicant was apprehended for speeding on radar and driving while his license was suspended or revoked on 13 July 1990. He appeared in U.S. Magistrate Court on 6 September 1990. He was found guilty of speeding on radar. The charge of driving while his license was suspended or revoked was dismissed due to an error with the Department of Motor Vehicles recordkeeping system.

b. MPR 01168-1991-MPC222-6952X-5Q5, dated 30 August 1992, shows the applicant was charged with traffic accident/no injuries, driving while his license was suspended, and following too close on 5 November 1991. He appeared in U.S. Magistrate Court on 27 January 1992. He was found not guilty of following too close. The charge of driving while his license was suspended was dismissed by the Judge.

21. The applicant provides the following:

a. A rating decision from the VA, dated 6 February 2023, shows the applicant's service connected compensation amount from the VA.

b. VA Form 20-0996, dated 9 March 2023, shows the applicant requested a rating decision review from the VA to add service connected disability for tinnitus and retroactive pay dating back to 1992.

22. Regulatory guidance provides when an individual is discharged under the provisions of Army Regulation 635-200, Chapter 14, by reason of misconduct, an UOTHC characterization of service is normally appropriate.

23. The Board should consider the applicant's overall record in accordance with the published equity, injustice, or clemency determination guidance.

24. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under other than honorable conditions (UOTHC) characterization of service. The applicant selected PTSD, other mental health, and harassment on his application as related to his request.

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 in the Regular Army on 1 March 1989.
- The applicant accepted non-judicial punishment, under the provisions of Article 15 of the Uniform Code of Military Justice, on:
  - 21 May 1990, for being disrespectful in language toward a warrant officer who was in the execution of his office, on or about 15 May 1990.
  - 7 June 1991, for failing to go at the time prescribed to his appointed place of duty, on or about 10 May 1991.
  - 18 July 1991, for being AWOL on or about 9 July 1991 until on or about 12 July 1991.
  - 25 November 1991, for two occasions of failure to go at the time prescribed to his appointed place of duty, on or about 12 November 1991 and on or about 15 November 1991.
  - 6 March 1992, for failure to go at the time prescribed to his appointed place of duty, on or about 7 February 1992 and for willfully disobeying a lawful order from a noncommissioned officer, on or about 14 February 1992.
- He was formally counseled on five occasions between 14 September 1991 and 22 November 1991. Areas of emphasis covered in the counseling include, but are not limited to:
  - violating a lawful order by departing his place of duty in a privately owned vehicle during duty hours
  - driving with a suspended license
  - failure to report on three occasions

- Applicant's immediate commander notified the applicant on 10 December 1991 of his intent to initiate separation actions against him under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 14, for patterns of misconduct. His commander noted the applicant's four instances of nonjudicial punishment within one and one half years, as well as numerous counseling statements for not being at his appointed place of duty as reasons for the proposed separation action. The applicant acknowledged receipt on 12 December 1991.
- On 27 March 1992, a board of officers held a hearing to determine if the applicant should be eliminated from service. The board recommended a waiver of the rehabilitative transfer requirements, and that he be discharged under the provisions of Army Regulation 635-200, Chapter 14, paragraph 14-12b with the issuance of a DD Form 794A (UOTHC Discharge Certificate).
- Applicant was discharged on 15 May 1992, under the provisions of Army Regulation 635-200, paragraph 14-12b, by reason of misconduct – pattern of misconduct. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms his character of service was UOTHC, with separation code JKM and reentry code RE-3.

c. The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 293, DD Form 149, VA rating decision letter dated 6 February 2023, VA Form 20-0996 (Decision Review Request: Higher-Level Review) dated 9 March 2023, his ABCMR Record of Proceedings (ROP), and documents from his service record and separation packet. 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 states he has suffered for over 30 years with misdiagnosed conditions resulting from the traumatic events which occurred during his time in service. His discharge was upgraded to honorable by the VA for benefit purposes. His military records need to align with his VA documentation so he can access necessary treatment and therapy. Additionally, he found inaccurate disciplinary records in his file. He never drove with a suspended license. Nor was he charged with disrespecting an officer.

e. Due to the period of service, no active-duty electronic medical records were available for review. The applicant underwent a Mental Status Examination on 5 May 1992. The examining provider determined he was mentally responsible and psychiatrically cleared for any administrative actions deemed appropriate by the command.

f. No VA electronic medical records were available for review and Joint Longitudinal View (JLV) does not indicate the applicant is service connected. However, the applicant submitted a VA decision letter dated 6 February 2023 indicating his combined rating is

30 percent or more disabling. The letter does not indicate the reason for his service connection. However, the evidence in support of the decision indicates a hearing transcript was received on 20 October 2022 and there is no indication of any behavioral health documentation submitted as evidence. Overall, no medical documentation of any behavioral health condition/diagnosis was evidenced in the record and the applicant did not submit any documentation indicating a behavioral health condition or diagnosis.

g. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a behavioral health condition/diagnosis that mitigates his misconduct. However, per Liberal Consideration the applicant's assertion of PTSD, other mental health, and harassment warrants consideration by the board.

#### 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 a mitigating condition.

(2) Did the condition exist or experience occur during military service? Yes. The applicant selected PTSD, other mental health, and harassment on his application.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is insufficient evidence of a mitigating BH condition while in military service. There is no evidence of an in-service BH diagnoses, and there is no medical documentation indicating the VA has service-connected the applicant for any BH condition. And while the applicant self-asserted PTSD, other mental health, and harassment, the applicant did not submit any medical documentation substantiating his claim.

**BOARD DISCUSSION:**

After reviewing the application and all supporting documents, the Board found relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records and published DoD guidance for consideration of discharge upgrade requests. The Board noted the nature and frequency of the misconduct and reason for separation. The Board agreed that the applicant was afforded consultation with legal counsel and properly advised of the basis for the contemplated separation action and potential outcomes. The Board considered his reference to having misdiagnosed conditions due to traumatic events occurred during his time in service. Available documentation does not reveal a behavioral health condition or diagnosis that could be considered mitigating toward the misconduct and none was provided for consideration by the Board. After due consideration of the applicant's request, and in the absence of evidence contesting to post-service achievements or letters of reference to weigh in support of a clemency determination, the Board found 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 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 for correction of the records of the individual concerned and an upgrade of his under other than honorable conditions characterization of service is not warranted.

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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 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) 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. The ABCMR is not an investigative body and decides cases based on the evidence presented in the military records provided and the independent evidence submitted with the application.

4. Army Regulation 340-21 (The Army Privacy Program) paragraph 2-10 (Amendment of Records) states individuals may request the amendment of their records, in writing, when such records are believed to be inaccurate as a matter of fact rather than judgement, irrelevant, untimely, or incomplete. Consideration of a request for amendment would be appropriate if it can be shown that circumstances leading up to the event recorded on the document were challenged through administrative procedures and found to be inaccurately described.

5. 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.

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 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 post-traumatic stress disorder; 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.

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//