

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 January 2024

DOCKET NUMBER: AR20230007192

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

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- Department of Veterans Affairs (VA) Form 21-4138 (Statement in Support of Claim)
- Letter from a VA Regional Office
- VA Medical Record Summary

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, that following his deployment to Haiti, he was "placed out on medical" for his knees. He was in and out of medical care. He indicated on his application that post-traumatic stress disorder (PTSD) and other mental health conditions are related to his request.
3. On 31 August 1993, the applicant enlisted in the Regular Army for a period of 3 years. Upon completion of initial entry training, he was assigned to a unit at Fort Drum, NY. He was advanced to specialist/E-4 on 1 November 1994.
4. He served in Haiti from 21 September 1994 to 17 November 1994.
5. A DD Form 458 (Charge Sheet) shows on 8 September 1995, court-martial charges were preferred against the applicant for the following offenses in violation of the Uniform Code of Military Justice (UCMJ):

- on or about 1 September 1995, without authority, absenting himself from his unit and remaining so absent until on or about 8 September 1995
- on or about 31 August 1995 and on or about 1 September 1995, failing to obey a lawful order issued by a superior commissioned officer
- on or about 31 August 1995, unlawfully striking his wife around the face and body with his hand
- on or about 31 August 1995, wrongfully communicating to a superior noncommissioned officer a threat to murder his wife and anybody who got in his way

6. On 21 September 1995, the applicant's trial defense counsel rendered a memorandum to the court-martial convening authority asking that he approve the applicant's request for discharge in lieu of court-martial and issue him a general discharge. He noted that on 31 August 1995, the applicant allegedly struck his wife at their apartment during a domestic dispute. Reacting to stress, he then left the area, going to his mother's house in North Carolina. Once his company commander contacted him, the applicant returned voluntarily several days later. He stated that within a day of the applicant's return from absence without leave, he was hospitalized for a week in the psychiatric ward of a local civilian hospital at the request of military medical authorities. The applicant had not been able to handle the stress resulting from the rapid pace of his unit's deployments and training. During his 4-month marriage, the applicant had been separated from his wife; and to top it off, they just learned they were expecting a child. The applicant's wife did not want to see him face court-martial and indicated she wants to help him through his problems and raise a family.

7. On 25 September 1995, the applicant voluntarily requested discharge under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10, in lieu of trial by court-martial.

a. He consulted with legal counsel and was advised of the basis for the trial by court-martial; the maximum permissible punishment authorized under the UCMJ; the possible effects of a UOTHC discharge; and the procedures and rights that were available to him.

b. He submitted a statement to the court-martial convening authority wherein he provided a history of his time in the Army and how he had developed a sense of pride while serving in Haiti and seeing how everyone operated as a team. He acknowledged what he did was wrong but attributed it to stress and depression that were exacerbated by him not being able to go on vacation to spend time with his family. He felt he had failed himself, his unit, and the Army. Once discharged, he planned to go to school part-time, earn a degree in Criminal Justice, and get a job in a state correctional facility. He also committed to attending marriage counseling with his wife so they could strengthen their marriage.

8. The applicant's company, battalion, and brigade-level commanders all recommended approval of his request. The separation authority's decision document and discharge orders are not present in the applicant's available record.

9. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged on 16 October 1995, in the rank/grade of private/E-1, under the provisions of Army Regulation 635-200, Chapter 10, by reason of "In Lieu of Trial by Court-Martial" with separation code "KFS" and reentry code "3." He was credited with completing 2 years, 1 month, and 16 days of net active service this period. He did not complete his first full term of service.

10. Army Regulation 635-200 states a Chapter 10 is a voluntary discharge request in-lieu of trial by court-martial. In doing so, he would have waived his opportunity to appear before a court-martial and risk a felony conviction. A characterization of UOTHC is authorized and normally considered appropriate.

11. The applicant provides the following documents in support of his petition which are all available in their entirety for the Board's consideration.

a. A statement in support of his claim for VA benefits so he can receive treatment for his knees. He stated he was not in the correct mindset after returning from his deployment and contends PTSD and other mental factors were not considered when making judgement on the characterization of his discharge.

b. A letter from a VA Regional Office shows the applicant was informed that the characterization of his discharge bars him from VA benefit payments and from any other noncontractual VA benefits.

c. VA medical record summaries, which show in part, that he underwent a psychiatric evaluation that revealed he suffered from psychosis due to cocaine use. He also self-reported that he suffers from PTSD related to a house fire that killed his twin brother when he was 9 years old.

12. 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.

13. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under other than honorable conditions (UOTHC) discharge to an honorable discharge. The applicant asserts that PTSD and other mental health are 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 31 August 1993.
- He served in Haiti from 21 September 1994 to 17 November 1994.
- A DD Form 458 (Charge Sheet) shows on 8 September 1995, court-martial charges were preferred against the applicant for the following offenses:
- on or about 1 September 1995, without authority, absenting himself from his unit and remaining so absent until on or about 8 September 1995
- on or about 31 August 1995 and on or about 1 September 1995, failing to obey a lawful order issued by a superior commissioned officer
- on or about 31 August 1995, unlawfully striking his wife around the face and body with his hand
- on or about 31 August 1995, wrongfully communicating to a superior noncommissioned officer a threat to murder his wife and anybody who got in his way
- On 25 September 1995, the applicant voluntarily requested discharge under AR 635-200, Chapter 10, in lieu of trial by court-martial. His request was approved.
- The applicant was discharged on 16 October 1995, under AR 635-200, Chapter 10, by reason of " In Lieu of Trial by Court-Martial," with an UOTHC discharge.

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 293, his ABCMR Record of Proceedings (ROP), his DD Form 214, his service and separation records, as well as Department of Veterans Affairs (VA) Statement in Support of Claim, letter from a VA Regional Office, and VA Medical Record Summary. 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 identified PTSD and other mental health on his application as related to his request for upgrade but gave no further details about his mental health on the application. He did report that after his deployment to Haiti, he was placed "out on medical" for his knees. The applicant included his VA Statement in Support of Claim in his supporting documents. In this self-authored claim, he reported he was not in "the correct mindset at the time after my deployment. PTSD and other mental factors were not considered when making judgement on the character of my discharge."

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). The applicant included a statement as part of his separation process. He reported that he had been experiencing depression and stress due to not getting to go on vacation with his family and asserted that "this illness became a problem because I haven't been on a vacation since basic training." No records were provided to substantiate his claim of experiencing mental health concerns and/or PTSD during his time in service. There is no evidence of any mental health conditions being diagnosed nor treated while he was in the Army.

f. Per the applicant's VA EHR, he has been engaged with care through the VA since 2012, with some limited mental health engagement. He is 0% service connected for medical conditions, though there is no indication of service connection for treatment purposes only, for any mental health concerns. The applicant was seen for a psychiatric appointment 3 January 2018, as well as a mental health consult on 11 February 2022, with these encounters providing relevant medical history. Per these encounters, the applicant has a reported history of one psychiatric hospitalization in 2017, which the applicant noted was when his behavioral health history began (no prior treatment). From his non-VA hospitalization, it was reported that he experienced delusional thinking, paranoid behavior, and diagnoses of psychotic disorder, paranoid delusion, cocaine abuse, THC abuse, and PTSD by history (the applicant asserted trauma secondary to the death of his twin brother in a house fire when he was 9 years old). By the VA he has been diagnosed with unspecified psychosis, insomnia and was given a rule out of PTSD. Through review of JLV, this applicant did have "Community Health Summaries and Documents" available. His summary indicated that he's been diagnosed with psychosis and cocaine use (both noted in 2017). 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 a mitigating mental health condition during his time in service. Regardless, due to the severity and nature of several of his charges, a majority of his misconduct would not be mitigated.

#### 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 and PTSD as related to his request for upgrade.

(2) Did the condition exist or experience occur during military service? Yes. His application does not specify, however in a statement made during his separation

proceedings, the applicant asserted experiencing stress and depression due to not getting to take vacation with his family.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. 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 PTSD, though PTSD has been listed as a rule out diagnosis in 2022 (approximately 27 years after discharge). In addition, even if depression or PTSD were present during his time in service, it would only mitigate a portion of his misconduct. Of note, going AWOL is an avoidance behavior consistent with depression and PTSD. However, assaulting his wife and communicating a threat to murder his wife is not consistent with the natural history and sequelae of depression or PTSD. These asserted conditions do not affect one's ability to distinguish right from wrong and act in accordance with the right. In sum, there is insufficient evidence the applicant was diagnosed with a mitigating mental health condition during his time in service, and he is not service connected for any mental health conditions now. However, per Liberal Consideration guidance, his contention is sufficient to warrant the boards consideration.

BOARD DISCUSSION:

After reviewing the application and all supporting documents and the evidence found within the military record, the Board found relief was not warranted. The Board carefully considered applicant's contentions, military record and regulatory guidance. The Board considered supporting documents, evidence in the records and published DoD guidance for consideration of discharge upgrade requests. The Board noted the applicant's length and nature of the misconduct and the reason for separation. After due consideration of the case, given the severity of the misconduct and, in the absence of mitigating circumstances, post-service achievements or letters of reference to weigh in support of a clemency determination, 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 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 discharge under other than honorable conditions to an honorable discharge 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 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 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.
4. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.
  - a. Chapter 10 stated a member who committed an offense or offenses for which the authorized punishment included a punitive discharge could, at any time after the charges have been preferred, submit a request for discharge for the good of the service in lieu of trial by court-martial. Although an honorable or general discharge was authorized, a discharge under other than honorable conditions was normally considered appropriate. At the time of the applicant's separation the regulation provided for the issuance of an UOTHC discharge.
  - b. 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. 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.

d. When a Soldier was to be discharged UOTHC, the separation authority would direct an immediate reduction to the lowest enlisted grade.

5. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) to carefully consider the revised PTSD criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged 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, BCM/NRs 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//