

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 2 February 2024

DOCKET NUMBER: AR20230008236

APPLICANT REQUESTS:

- an upgrade of his discharge under other than honorable conditions (UOTHC) to an honorable discharge
- to appear at his own expense before the Board

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Self-authored declaration
- DA Form 638 (Recommendation for Award)
- Character Reference letters (3)
- Department of Veterans Affairs (VA) claim for benefits
- Letter to a Judge

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:

a. He suffered from post-traumatic stress disorder (PTSD) after serving two tours in Kuwait during Operation Enduring Freedom (OEF). During the past 19 years, he was unaware of what he was suffering from and at time had dire consequences due to not being diagnosed with PTSD after returning from the war. He served for 3 years and received many accolades and awards. He finds it beyond insulting that his entire 3 years of service were negated by his mistakes made in the end due to his undiagnosed PTSD.

b. PTSD and addiction are considered mental disorders under the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition. The Army would not give someone

suffering from cancer a dishonorable discharge. Therefore, it should not disregard someone's time in service and negate the fact that PTSD and addiction are also illnesses. They may be different as one is in the mind and the other resides in the body, but they are both an awful situation that someone has to deal with and fight to live. In his declaration, the applicant contends the Army made a mistake by not properly diagnosing and treating his condition when they noticed a change in his behavior and then made an error of fact by not taking it into consideration when determining the nature of his discharge.

c. His less than honorable discharge has affected his entire life since he returned from war. The Kurta memorandum was not released until 2016 and he is confident that if it was released earlier, he would have been properly diagnosed, treated, and not succumbed to the Army's error of fact. As described in the Kurta memorandum, he should have been provided special consideration since he clearly exhibited signs of PTSD. He did not have a chance to be diagnosed and collect a documented history of mental health problems or symptoms because he was not debriefed after his two tours and then was given only 10 days to leave the service. As a result, he received an inequitable and unjust discharge.

3. On 1 February 2001, the applicant enlisted in the Regular Army for a period of 4 years in the rank/pay grade of private (PV1)/E-1. Upon completion of initial entry training, he was assigned to a unit at Fort Hood, TX.

4. The applicant's Enlisted Record Brief shows:

- he was advanced to the rank/grade of private (PV2)/E-2 on 1 August 2001
- no indication that he served an overseas deployment
- no awards or decorations typically associated with an overseas deployment

5. A DD Form 458 (Charge Sheet) shows on 3 December 2003, court-martial charges were preferred against the applicant for one specification of violation of Article 112a of the Uniform Code of Military Justice (UCMJ) by wrongfully using marijuana and one specification of violating Article 134 by wrongfully taking the mail of another Soldier with intent to pry.

6. The applicant's company, battalion, and brigade commanders recommended that he be tried by a Special Court-Martial empowered to adjudge a Bad Conduct Discharge.

7. On 19 December 2003, 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. 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. He elected not to submit statements in his own behalf.

8. On 14 January 2004, the separation authority approved the applicant's request for discharge in lieu of trial by court-martial, with his service characterized as UOTHC. He further directed the applicant be reduced to the lowest enlisted grade.

9. Orders and the applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) show he was discharged on 23 January 2004, in the rank of PV1, 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, 11 months, and 23 days of net active service this period. He did not complete his first full term of service.

a. Block 13 (Decorations, Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized) shows he was awarded or authorized the National Defense Service Medal and Army Service Medal.

b. Block 18 (Remarks) does not indicate any overseas deployments.

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 document in support of his petition which are all available in their entirety for the Board's consideration:

a. A partially distorted DA Form 638 that shows Permanent Orders awarded him the Army Achievement Medal for meritorious achievement in support of OEF in Kuwait from 16 November 2001 to 4 April 2002.

b. Three character reference letters:

(1) An unsigned and undated letter rendered by a Soldier whom the applicant states died since rendering the letter, shows the author met the applicant in September 2001 and served with him in support of OEF. Although he was not the applicant's direct supervisor, he worked closely with him for over 3 years and was able to observe his work ethic, professionalism, and ability to lead. The applicant displayed an unmatched work ethic, and his drive and motivation played a key role in the accomplishment of the unit's mission. Being a leader is where he shined the most. His impression of the applicant's tactical and technical knowledge was that of a senior noncommissioned officer. He owned his platoon, took responsibility for their mistakes, never made

excuses for his shortcomings, and always gave the trainees credit for their successes. As the war continued, he could notice the struggle the applicant was having with night terrors and a difference in his ability to mask the incredibly devastating situations he witnessed. He was surprised to learn of the applicant's discharge UOTHC. He is fully aware of the applicant's actions and understands that he must be held accountable. However, he believes that PTSD cannot be ignored, and his condition has not been treated due to not receiving Veteran benefits.

(2) The applicant's wife met him in an Alcoholics Anonymous/Narcotics Anonymous program 5 years ago. He has always been an upstanding citizen, reliable friend to many, and a person on whom others can depend. This past year his world suddenly changed when his girlfriend of many years was tragically killed in a motorcycle accident. He began to withdraw from everyone and did not seem to cope with the loss. He ended up renting a room in her house, they became close, recently married, and are currently in the process of obtaining a VA loan to refinance their home. His discharge status is detrimental to his new family and an opportunity for a new beginning. He is a man who has suffered problems with addiction that stemmed from using substances to mask the trauma he suffered in the Iraq war, and most recently with the loss of his girlfriend. He is a substantial citizen who selflessly put his country before himself and served two overseas tours. Now it is time for the country to take care of those who suffered mental damages from being immersed in war and have to function despite not being given the necessary treatment.

(3) A friend of the applicant attests that he is a hardworking man with whom he has been a business associate at various times. He is a defender of the underdog, reliable, and supportive of people who have experienced loss. He personally witnessed the applicant, dead asleep, yelling out emotionally about things that sounded like combat experiences of war and death. He hopes the applicant can receive the treatment he needs to deal with the trauma of his combat experience and not be incarcerated for the help that he has not received.

c. A VA claim for benefits due to a diagnosis of PTSD.

d. A letter addressed to a Judge at a Community Collaborative Court (CCC) that was rendered by a VA social worker on the applicant's behalf, dated 29 March 2023. The letter was provided to advise the court of the applicant's Veteran status and to request that the court consider allowing him the opportunity to take advantage of the Military Misdemeanor Diversion Statute 1001.80 or Military Felony Statute 1170.9. The author mentions the applicant deployed twice, both times in support of OEF/Operation Iraqi Freedom. His first deployment took place between November 2001 and April 2002 in Kuwait. His second deployment to Kuwait was between January 2003 and July 2003. The applicant also deployed to Iraq for a month in March 2003. The applicant stated that during both deployments he encountered local militia groups and he constantly

worried about being attacked. He also reported having nightmares and night terrors about his deployments. He began using alcohol and marijuana to help him sleep. He was later discharged from the Army for his use of marijuana and reported abusing alcohol for 13 years before beginning to use methamphetamines to help with his night terrors. He has never received treatment for polysubstance use or PTSD associated with his military service. Upon acceptance at the CCC, the applicant will receive the care that he needs.

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. The applicant is applying to the ABCMR requesting an upgrade of his discharge under other than honorable conditions (UOTHC) to an honorable discharge. He contends he experienced PTSD that mitigates 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 enlisted in the Regular Army on 1 February 2001; 2) On 3 December 2003, court-martial charges were preferred against the applicant for wrongfully using marijuana and wrongfully taking the mail of another Soldier; 3) The applicant was discharged on 23 January 2004, Chapter 10, by reason of " In Lieu of Trial by Court-Martial." His service was characterized as UOTHC.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's available military service records. The VA's Joint Legacy Viewer (JLV) and supportive VA documentation were also examined.

d. The applicant asserts he was experiencing PTSD as a result of being deployed to Kuwait twice. There is inconclusive evidence the applicant was deployed to an active combat environment twice. However, there is sufficient evidence the applicant was deployed to Kuwait from 16 November 2001-04 April 2002 as a heavy machine operator. There is insufficient evidence the applicant ever reported or was diagnosed with PTSD or another mental health condition while on active service.

e. A review of JLV provided evidence the applicant has been assisted with homelessness by the VA since 06 April 2023. Due to his description of being deployed and current report of symptomatology, the applicant had been recommended for behavioral health programming available for homeless veterans, who do not qualify for regular services. The applicant has not attended the prescribed programming due to incarceration. There is insufficient evidence the applicant has ever been diagnosed with

a service-connected mental health condition including PTSD. The applicant receives no service-connected disability.

f. 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.

#### 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 PTSD as a result of his deployments to Kuwait which mitigate his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he was experiencing PTSD while on active service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No, there is insufficient evidence beyond self-report that the applicant was experiencing of symptoms of PTSD while on active service. The applicant had one incident substance use during his military service after returning from his deployment to Kuwait. PTSD can be associated with avoidant behavior. The applicant's substance use could be an attempt to self-medicate or to avoid his negative emotional state. However, the presence of substance use misconduct is not sufficient to establish a history of PTSD during active service. Also, there is no nexus between the applicant's reported PTSD and wrongfully taking the mail of another Soldier: 1) this type of misconduct is not part of the natural history or sequelae of PTSD; 2) PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing PTSD that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

#### BOARD DISCUSSION:

1. The Board considered the applicant's claim that he suffered from a condition or an experience, such as, PTSD during his military service; the Board considered the applicant's statements and all the supporting statements he provided; the Board considered his record of service to include deployments, the frequency and nature of his misconduct, the reason for his separation, the ARBA Medical Advisory opinion, and whether to apply clemency and liberal consideration.

2. The Boards determined, based on a preponderance of the evidence, the character of service the applicant received upon separation was not in error or unjust.

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

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.

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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 post-traumatic stress disorder (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. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

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//