

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 March 2024

DOCKET NUMBER: AR20230008956

APPLICANT REQUESTS: Reconsideration of his request for upgrade of his under other than honorable conditions (UOTHC) discharge. Additionally, a different narrative reason for separation and a favorable change of his separation code.

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

- DD Form 293 (Application for the Review of Discharge)
- Self-authored statement
- Veterans Affairs (VA) Form 21-4138 (Statement in Support of Claim)
- Medical notes

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 AR20040010086 on 30 August 2005.

2. In a new argument, the applicant strongly feels that his UOTHC discharge was unjustly awarded. A year prior to his discharge, he believes extenuating circumstances may have played a role.

a. He recalls an incident when he was awakened in his barracks room by yelling from a noncommissioned officer (NCO). Not being fully conscience, the situation escalated into a physical altercation. He was court-martialed and given the maximum punishment, despite presenting a good case for his defense. He believes this incident led to his chain of command viewing him in a negative way.

b. He details his time in Iraq, and the friction he had with the lead NCO. She constantly criticized him for not reading the Bible the way she did. She constantly berated him because of his rank. She would not go to mission briefings to get critical details. He felt that her incompetence put his life and his friends' lives in jeopardy. All these factors attributed to his loss of professionalism, which resulted in his discharge.

c. He doesn't believe his previous court-martial was fair and nobody would listen to him about his NCO in Iraq. He lost faith in the chain of command and the system entirely. These are true and honest facts. He asks the Board to make this wrong, right.

3. On his DD Form 293, the applicant notes post-traumatic stress disorder (PTSD), and reprisal/whistleblower issues are related to his request.

4. On 19 March 2000, the applicant enlisted in the Regular Army, for 6 years. Upon completion of training, he was awarded military occupational specialty 88M (Motor Transport Operator).

5. The applicant's record is void of a separation packet containing the specific facts and circumstances surrounding his discharge processing. However, the previous ABCMR record of proceedings indicates:

a. In December 2002, a summary court-martial found the applicant guilty of disrespect towards an NCO and assault upon an NCO. This incident occurred when the applicant was awakened by an NCO he did not recognize and ordered to assume a watch that the applicant alleges he had no knowledge of. The applicant stated that he struck the NCO, as he was coming out of a deep sleep, it was an instinctive reaction to the NCO's verbal assault not a deliberate act.

b. On 28 February 2003, the applicant reported for service in Iraq.

c. Between 6 July 2003 and 23 July 2003, the applicant received formal counseling on three occasions for insubordinate conduct toward an NCO and provoking speech or gestures.

d. On 14 August 2003, the applicant was charged with disobeying a lawful order from an NCO and disrespect in deportment toward an NCO.

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

f. On 15 August 2003, after consulting with counsel and being advised of his rights and options, the applicant submitted a formal request for discharge for the good of the service in lieu of trial by court-martial, under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10, in lieu of trial by court-martial. He acknowledged he had been advised of and understood his rights under the Uniform Code of Military Justice (UCMJ), that he could receive an UOTHC discharge which would deprive him of many or all of his benefits as a veteran, that he could expect to experience substantial prejudice in civilian life if he received an UOTHC discharge, and that there is no automatic upgrading or review of a less than honorable discharge.

g. On 28 August 2003, the separation authority approved the applicant's request and directed he be reduced to the lowest enlisted grade and be discharged with an UOTHC characterization of service.

6. The applicant departed Iraq, on 10 September 2003.

7. The applicant was discharged on 26 September 2003. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms he was discharged under the provisions of Army Regulation 635-200, Chapter 10, in lieu of trial by court-martial. He was discharged in the lowest enlisted grade and his service was characterized as UOTHC. He was assigned Separation Code KFS and Reentry Code 4. He completed 3 years, 6 months, and 8 days of net active service this period.

8. Additionally, his DD Form 214 shows he was awarded or authorized the National Defense Service Medal, Army Service Ribbon, Aircraft Crewman Badge, and the Air Assault Badge.

9. The applicant petitioned the Army Discharge Review Board requesting upgrade of his UOTHC discharge. On 17 November 2004, the Board voted to deny relief and determined his discharge was both proper and equitable.

10. The applicant petitioned the ABCMR requesting upgrade of his UOTHC discharge. On 30 August 2005, the Board voted to deny relief and determined that the overall merits of this case were insufficient as a basis for correction of the records.

11. In the processing of this case, a search of the Army Inspector General (IG) database was requested for a copy of all IG records pertaining to the applicant. The search revealed no records pertaining to the applicant.

12. The applicant provides medical documents from Positive Pathways Behavioral Health, that show he has been diagnosed and receives treatment for PTSD, major depressive disorder, and an unspecified bipolar disorder. These documents are provided in their entirety for the Board's review within the supporting documents.

13. The applicant was charged due to the commission of an offense punishable under the UCMJ with a punitive discharge. Subsequent to being charged, he consulted with counsel and requested discharge under the provisions of Army Regulation 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.

14. In reaching its determination, the Board can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance.

15. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting reconsideration of his request for an upgrade of his under other than honorable conditions (UOTHC) discharge. Additionally, he is requesting a different narrative reason for separation and a favorable change of his separation code. He contends he experienced PTSD and reprisal/whistleblowing issues 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 into the Regular Army on 19 March 2000; 2) In December 2002, a summary court-martial found the applicant guilty of disrespect towards a NCO and assault upon an NCO; 3) The applicant deployed to Iraq from 28 February 2003-10 September 2003; 4) The applicant was counseled three times for insubordinate conduct towards an NCO and provoking speech or gesture in July 2003; 4) On 14 August 2003, the applicant was charged with disobeying a lawful order from an NCO and disrespect in deportment toward an NCO; 5) Court-martial charges were preferred against the applicant. However, the relevant Charge Sheet is not available for review; 6) The applicant was discharged on 26 September 2003, Chapter 10, in lieu of trial by court-martial. He was discharged in the lowest enlisted grade and his service was characterized as UOTHC. He was assigned Separation Code KFS and Reentry Code 4; 7) The ADRB, on 17 November 2004, reviewed and denied the applicant's request for an upgrade. The ABCMR reviewed and denied the applicant's request for an upgrade on 20 August 2005.

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 hardcopy civilian medical documents provided by the applicant were also examined.

d. The applicant asserts he was experiencing PTSD and reprisal/whistleblowing issues while on active service, which mitigates his misconduct. There is insufficient evidence the applicant reported mental health symptoms or reprisal/whistleblowing while on active service. A review of JLV was void of medical documentation, and the applicant does not receive any service-connected disability. The applicant provided civilian medical documentation, dated 25 October 2023, from Positive Pathways Behavioral Health located in Vicksburg, MS. The applicant was diagnosed with PTSD as a result of his reported traumatic experiences in Iraq. He also reported a history of behavioral health problems, which started during his teenage years.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had condition or experience that mitigates his known misconduct. In addition, there is insufficient evidence surrounding the events which resulted in the applicant's discharge to provide an appropriate opinion on possible mitigation as the result of mental health condition or experience.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant asserts he was experiencing PTSD and whistleblowing/reprisal issues. The applicant did provide civilian documentation that he has been diagnosed with PTSD related to his reported experiencing in Iraq.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing PTSD and whistleblowing/reprisal issues. The applicant did provide civilian documentation that he has been diagnosed with PTSD related to his reported experiencing in Iraq.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is sufficient evidence the applicant has been diagnosed with PTSD related to his reported experiencing in Iraq after his discharge. There is, however, no nexus between PTSD and the applicant's misconduct of disrespect, failure to follow orders, assault and threatening NCOs. The applicant had a pattern of this behavior prior to his deployment and during his deployment. In particular, the violent and threatening behavior are not a part of the natural history or sequelae of PTSD. Also, PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right. The applicant reported reprisal/whistleblowing issues on active service, but there is insufficient evidence beyond self-report. Again, this does not mitigate his violent and threatening behavior as there is no nexus between this experience and that behavior. Lastly, there is insufficient evidence surrounding the specific events which resulted in the applicant's discharge to provide an appropriate opinion on possible mitigation as the result of mental health condition or experience. However, the applicant contends he was experiencing a mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's 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 record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy

and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant’s petition, available military records and the medical review, the Board concurred with the advising official finding insufficient evidence to support the applicant had condition or experience that mitigates his known misconduct. Additionally, the opine noted there is insufficient evidence surrounding the events which resulted in the applicant’s discharge to provide an appropriate opine on possible mitigation as the result of mental health condition or experience.

2. The applicant provided no post service achievements or character letters of support attesting to his honorable conduct for the Board to weigh a clemency determination. The Board determined beyond the applicant’s self-report there is insufficient evidence of in-service mitigating factors to overcome the misconduct of disrespect, failure to follow orders, assault and threatening NCOs. Evidence of record shows, at the time of separation, documentation supports the narrative reason for separation properly identified on the applicant’s DD Form 214. As such, the Board determined under liberal consideration changes to the applicant’s narrative reason are not warranted. Furthermore, the Board determined there was insufficient evidence of an error or injustice which would warrant a change in the separation code. The Board found the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief, specifically an upgrade of the under other than honorable conditions (UOTHC) discharge. Therefore, the Board determined reversal of the previous Board decision is without merit and denied relief.

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 found 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 of the ABCMR set forth in Docket Number AR20040010086 on 30 August 2005.

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CHAIRPERSON

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. 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.
2. 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.
3. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the separation codes to be entered on the DD Form 214. At the time, this regulation prescribed the separation code "KFS" as the appropriate code to assign

to Soldiers separated under the provisions of Army Regulation 635-200, in lieu of trial by court-martial.

4. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

a. An honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

b. A general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 10 provided that a member who had committed an offense or offenses, for which the authorized punishment included a punitive discharge, could submit a request for discharge for the good of the service in lieu of trial by court-martial. The request could be submitted at any time after charges had been preferred and must have included the individual's admission of guilt. Although an honorable or general discharge was authorized, a UOTHC discharge was normally considered appropriate.

5. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Navy Records (BCM/NR), on 3 September 2014, to carefully consider the revised PTSD criteria, detailed medical considerations, and mitigating factors when taking action on applications from former service members administratively discharged under other than honorable conditions and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

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//