

IN THE CASE OF: [REDACTED]

BOARD DATE: 13 June 2024

DOCKET NUMBER: AR20230009493

APPLICANT REQUESTS: an upgrade of his characterization of service from under other than honorable conditions (UOTHC) to honorable and an appearance before the Board via video/telephone.

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

- DD Form 149 (Application for Correction of Military Record), 16 June 2023
- Congressional correspondence, 31 July 2023

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, 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 that at the time of his discharge, he was told it would be changed to honorable after 10 years, but this was not the case. He was on leave at the time and had no knowledge about the incident. His discharge has caused him to suffer from depression because he was planning on making the Army his career.
3. The applicant notes on his DD Form 149 that post-traumatic stress disorder (PTSD) is related to his request.
4. The applicant enlisted in the Regular Army on 21 June 1996 for a period of 3 years in the rank/pay grade of private first class/E-3, and that was the highest rank he attained. He was awarded the military occupational specialty of 92Y (Unit Supply Specialist).
5. On 21 November 1998, the applicant accepted nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for wrongfully using marijuana between on or about 20 September 1998 and 20 October 1998. His

punishment imposed was reduction to private/E-1, 45 days extra duty, and 30 days restriction.

6. On 13 January 1999, he accepted NJP under the provisions of Article 15, UCMJ, for violating a lawful general regulation between on or about 18 July 1998 and 10 August 1998 by consuming alcoholic beverages while under the legal drinking age of 21 years; for violating a lawful general regulation between on or about 18 July 1998 and 10 August 1998 by permitting and giving alcoholic beverages to two females who were under the age of 21 years; and violating a lawful order between on or about 18 July 1998 and 10 August 1998 by allowing a female under the age of 18 years to stay overnight in his assigned room. His punishment imposed was forfeiture of \$150.00 and 45 days of extra duty.

7. On 25 January 1999, the applicant's immediate commander notified the applicant of the intent to recommend him for separation under the provisions of Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel), Chapter 14-12c (Commission of a Serious Offense). The commander recommended the applicant receive a discharge UOTHC and noted the specific reasons for the proposed separation were the applicant's:

- receipt of Field Grade Article 15 for one violation of the UCMJ for wrongful use of marijuana
- investigation by the Criminal Investigation Division for violations of the UCMJ to include carnal knowledge, wrongful distribution, possession and use of marijuana, sodomy, and failure to obey a general regulation
- receipt of Field Grade Article 15 for three violations of the UCMJ for failure to obey lawful orders and/or regulations

8. The applicant consulted with counsel on 26 January 1999, and was advised of the basis for the contemplated action to separate him and of the rights available to him. He voluntarily waived consideration of his case by an administrative separation board contingent upon him receiving a characterization of service or description of separation no less favorable than a general, under honorable conditions discharge. He also elected to not submit a statement in his own behalf. He acknowledged he was making the request of his own free will and understood if his request for a conditional waiver was refused his case would be referred to an administrative separation board, where he elected to receive consulting counsel and representation by military counsel or civilian counsel at no expense to the government. He further acknowledged he may encounter substantial prejudice in his civilian life if a general, under honorable conditions discharge was issued to him.

9. On 27 January 1999, the applicant's immediate commander formally recommended the applicant be separated under AR 635-200, paragraph 14-12c (commission of a

serious offense) and recommended disapproval of the conditional waiver submitted by the applicant.

10. On 2 February 1999, the applicant's intermediate commanders recommended disapproval of the applicant's conditional waiver and that his case be sent before an administrative separation board.

11. The separation authority disapproved the applicant's request for a conditional waiver on 1 March 1999 and directed his case be heard before an administrative separation board.

12. The applicant's case was brought before an administrative separation board. The board of officers found the applicant did commit serious misconduct under the provisions of AR 635-200, Chapter 14-12c and recommended he be discharged with a discharge UOTHC. On 28 April 1999, the findings and recommendations were found to be legally sufficient and in compliance with applicable regulations.

13. On 30 April 1999, the separation authority approved the administrative separation board findings and directed the applicant be separated under the provisions of AR 635-200, Chapter 14-12c and discharged with the issuance of an Other Than Honorable Discharge Certificate.

14. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged on 14 May 1999 under the provisions of AR 635-200, paragraph 14-12c, by reason of misconduct, in the grade of E-1. His characterization of service was UOTHC. He completed 2 years, 10 months, and 14 days of net active service and his awards included the Army Achievement Medal, Army Service Ribbon, Overseas Service Bar, and Marksman Marksmanship Qualification Badge with Rifle Bar.

15. Regulatory guidance states when an individual is discharged under the provisions of AR 635-200, Chapter 14, for misconduct, an under other than honorable conditions characterization of service is normally appropriate. However, the separation authority may direct a general discharge if such is merited by the Soldier's overall record.

16. In reaching its determination, the Board can consider the applicant's petition, service record, and statements in light of the published guidance on equity, injustice, or clemency. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

## 17. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) characterization of service to honorable. He contends he was informed his discharge would be upgraded to honorable 10 years post-discharge but this has not happened. On his DD Form 149 the applicant indicated that Posttraumatic Stress Disorder (PTSD) is related to his request. 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 21 June 1996, 2) the applicant asserts he was on leave at the time of the incident and had no knowledge of it, 3) the applicant accepted nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for using marijuana between 20 September 1998 and 20 October 1998, 4) on 13 January 1999 he received an Article 15 for violating a lawful general regulation between 18 July 1998 and 10 August 1998 for underage drinking, and giving alcohol to two women under the age of 21 years and allowing a female under the age of 18 years old stay overnight in his assigned room, 5) the applicant was recommended for separation under the provisions of Army Regulation (AR) 635-200, Chapter 14-12c with the specific reasons for the proposed separation as receipt of a Field Grade Article 15 for wrongful use of marijuana, investigation by the Criminal Investigation Division for violations of the UCMJ to include carnal knowledge, wrongful distribution, possession and use of marijuana, sodomy, and failure to obey a general regulation, and receipt of Field Grade Article 15 for three violations of the UCMJ for failure to obey lawful orders and/or regulations, 6) the applicant was discharged on 14 May 1999 under the provisions of AR 635-200, paragraph 14-12c by reason of misconduct, 7) he received several awards while in service to include an Army Achievement Medal.

b. The Army Review Boards Agency (ARBA) Behavioral Health Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. The electronic military medical record (AHLTA) was not reviewed as it was not in use during the applicant's time in service. No military or civilian behavioral health (BH) records were provided for review. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. Based on a review of the Separation Board Proceedings, the applicant's Commander testified that he was command directed to ADAPC following the CID report after a random company urinalysis. The applicant made a statement during the board that he completed ADAPC and attended Alcoholics Anonymous. There is no military service treatment record (STR) available regarding the applicant's completion of ADAPC.

d. A review of JLV was void of medical information. The applicant is not service-connected through the VA for any BH conditions. No military or civilian behavioral health (BH) records were provided for review.

e. The applicant requests an upgrade of his UOTHC discharge to honorable. He contends he was informed his discharge would be upgraded 10 years post-discharge but that has not occurred. On his DD Form 149 he also indicated PTSD was related to his request. A review of records was void of any BH diagnosis or treatment history for the applicant during or after service and he provided no medical documentation supporting his assertion of PTSD. In absence of documentation supporting his assertion, there is insufficient evidence to establish his misconduct was related to or mitigated by PTSD and insufficient evidence to support an upgrade based on BH medical mitigation.

f. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence that the applicant had a condition or experience during his time in service that mitigated his misconduct. However, he contends his misconduct was related to PTSD, and, per liberal guidance, his assertion is sufficient to warrant the Board's consideration.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends his misconduct was related to PTSD.

(2) Did the condition exist or experience occur during military service? Yes, per the applicant's assertion.

(3) Does the condition experience actually excuse or mitigate the discharge? No. The applicant asserts mitigation due to PTSD. Per liberal consideration guidelines, his assertion alone is worthy of consideration by the Board. A review of records was void of any BH diagnosis or treatment history for the applicant during or after service and he provided no medical documentation supporting his assertion of PTSD. In absence of documentation supporting his assertion there is insufficient evidence to establish his misconduct was related to or mitigated by PTSD and insufficient evidence to support an upgrade based on BH medical mitigation.

#### BOARD DISCUSSION:

1. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.

2. The Board carefully considered the applicant's request, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the applicant's PTSD claim and the review and conclusions of the ARBA Behavioral Health Advisor. The applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding his misconduct not being mitigated by PTSD. Based on a preponderance of the evidence, 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 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.

12/9/2024

X

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. 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 the Army Review Boards Agency (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 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 has occurred by a preponderance of the evidence. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.
4. 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.

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 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//