

IN THE CASE OF: ██████████

BOARD DATE: 18 April 2024

DOCKET NUMBER: AR20230009825

APPLICANT REQUESTS: reconsideration of his previous request for an upgrade of his under other than honorable conditions (UOTHC) characterization of service to honorable.

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

- DD Form 149 (Application for Correction of Military Record), with self-authored statement
- eight statements of support, dated 6 June 2023 to 15 June 2023

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 AR20150005149 on 8 December 2015.

2. The applicant states he was a very immature 17 year-old when he joined the Army. He takes full responsibility for his actions. He is not the same person he was 40 years ago. He is active in his community as a Recovery Engagement Specialist at Healing Transitions of Wake County, NC. He serves those in drug and alcohol recovery and helps them through the same adversity he experienced. His sole purpose is to be a better person. The applicant notes "other behavioral health" as a condition related to his request.

3. The applicant enlisted in the Regular Army on 19 June 1979. Upon the completion of initial entry training, he was awarded military occupational specialty 12B (Combat Engineer). The highest rank he attained was private/E-2.

4. The applicant was counseled on seven occasions between 22 July 1980 and 21 October 1981. Areas of emphasis covered in the counseling include:

- missing formation on four occasions
- not being at proper place of duty
- unauthorized use of a sick call slip

- absent from place of duty on two occasions
- failure to follow orders
- performance and misconduct

5. The applicant accepted nonjudicial punishment, under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ), on 3 August 1981, for two occasions of failure to go at the time prescribed to his appointed place of duty on or about 18 July 1981 and on or about 21 July 1981. His punishment consisted of forfeiture of \$130.00 pay, 14 days of extra duty, and 14 days of restriction.

6. On 21 October 1981, the applicant received two Letters of Reprimand (LOR) from his immediate commander, for committing carnal knowledge, on or about 6 June 1981, and for willfully damaging government property, on or about 12 July 1981. The commander further informed the applicant he was forwarding both letters through the Commander, 39th Engineer Battalion, with recommendations that the LORs be placed in his official military personnel file. The applicant acknowledged reading and understanding the LORs and elected not to submit statements in his own behalf.

7. The applicant underwent a pre-separation medical examination on 23 October 1981. A Standard Form (SF) 93 (Report of Medical History) and the corresponding SF 88 (Report of Medical Examination) shows the applicant reported being in good health, and he was deemed physically qualified for separation.

8. The applicant accepted nonjudicial punishment, under the provisions of Article 15 of the UCMJ, on 27 October 1981, for the wrongful possession of marijuana, on or about 12 July 1981, and for stealing a pair of sunglasses from the Post Exchange, on or about 21 July 1981. His punishment consisted of forfeiture of \$100.00 pay and correctional custody for 21 days.

9. The applicant underwent a mental status evaluation on 27 October 1981. The examining provider determined the applicant was mentally responsible and had the mental capacity to understand and participate in administrative proceedings.

10. The applicant's immediate commander notified the applicant on 8 December 1981 of his intent to initiate separation action against the applicant under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 14, paragraph 14-33b (1), other acts or patterns of misconduct. As reasons for the proposed action, the commander noted the applicant's nonjudicial punishment, LORs, and multiple episodes of counseling. He further stated, after being given numerous chances, the applicant failed to show any improvement in his substandard behavior. The applicant acknowledged receipt of the proposed separation action.

11. The applicant accepted nonjudicial punishment, under the provisions of Article 15 of the UCMJ, on 16 December 1981, for willfully disobeying a lawful order from his superior noncommissioned officer, on or about 11 November 1981, and failure to go at the time prescribed to his appointed place of duty, on or about 26 November 1981. His punishment consisted of reduction to private/E-1 and forfeiture of \$50.00 pay.

12. On 17 December 1981, the applicant consulted with legal counsel and acknowledged he had been advised of the basis for the contemplated separation action, its effects, the rights available to him, and the effect of waiving his rights. He requested to have his case considered before a board of officers, representation by counsel, and a personal appearance before the board. He acknowledged understanding 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. He elected not to submit a statement in his own behalf.

13. On that same date, the applicant's immediate commander recommended his separation from service under the provisions of AR 635-200, Chapter 14, by reason of misconduct. The commander further noted the applicant was a rehabilitative transfer from another company. The battalion commander concurred with the recommendation and further noted counseling and rehabilitation requirements had been met.

14. A board of officers was appointed to determine whether or not the applicant should be discharged for misconduct, prior to the expiration of his term of service. The board convened at Fort Devens, MA, on 9 March 1982. The board determined the applicant was guilty of frequent incidents of a discreditable nature with military authorities, attempts to rehabilitate him were made without success, and further rehabilitative efforts would be counterproductive. The board recommended the applicant be separated from service due to misconduct with a UOTHC discharge.

15. The applicant's chain of command initiated nonjudicial punishment against the applicant, under the provisions of Article 15 of the UCMJ, on 12 March 1982, for failure to go at the time prescribed to his appointed place of duty and willfully disobeying a lawful order from his superior noncommissioned officer, on or about 16 February 1982. The applicant appealed the punishment, consisting of forfeiture of \$125.00 pay and 14 days of extra duty and restriction. On 2 April 1982, the punishment was set aside, and all rights, privileges, and property affected were restored.

16. The separation authority reviewed the board's findings and recommendations, approved the recommended discharge, and directed the issuance of a DD Form 794A (UOTHC Discharge Certificate).

17. The applicant was discharged on 20 May 1982, under the provisions of AR 635-200, Chapter 14, by reason of misconduct-frequent incidents of a discreditable nature

with civil or military authorities. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms his service was characterized as UOTHC, with separation code JKA and reenlistment code RE-3. He was credited with 2 years, 11 months, and 2 days of net active service.

18. The ABCMR reviewed the applicant's request for an upgrade of his characterization of service on 8 December 2015. After careful consideration, the Board determined the reason for discharge and the type of discharge directed were appropriate considering all the facts of the case. The Board denied his request.

19. As new evidence, the applicant provides eight statements of support, dated 6 June to 15 June 2023, wherein the authors attest to the applicant's strong character and integrity. He is a respected co-worker and employee, who dedicates his time to supporting individuals in recovery from drug and alcohol addiction. He is dependable, courteous, and respectful. He is a positive role model, with a genuine commitment to his community.

20. On 6 November 2023, the Army Review Boards Agency (ARBA) sent a letter to the applicant, requesting documentation to support his contention of "other mental health" issues. To date, no additional documentation has been received.

21. Regulatory guidance provides when an individual is discharged under the provisions of AR 635-200, Chapter 14, the separation authority may direct a general discharge if such is merited by the Soldier's overall record. An honorable characterization of service is not authorized unless the Soldier's record is otherwise so meritorious that any other characterization clearly would be inappropriate.

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

23. MEDICAL REVIEW:

a. The applicant requests reconsideration of his previous request to upgrade his UOTHC discharge characterization to Honorable. He notes Other Mental Health Issues are related to his request.

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 19 June 1979; 2) As outlined in the ROP the applicant received 7 negative counseling statements for various infractions between 22 July 1980 and 21 October 1981; 3) The applicant accepted NJP under provisions of Article 15 of the UCMJ on 3 August 1981 for failure to report, on 27 October 1981 for wrongful possession of Marijuana and stealing sunglasses, on 16 December 1981 for

disobeying a lawful order and failure to report, and on 12 March 1982 for failure to report and disobeying a lawful order; 4) A Board of Officers convened on 9 March 1982 and determined the applicant was guilty of frequent incidents of discreditable nature with military authorities, that rehabilitative efforts were unsuccessful, and that the applicant should be separated with an UOTHC discharge due to misconduct; 5) The separation authority reviewed the board's findings and recommendations, approved the recommended discharge, and directed the issuance of a DD Form 794A (UOTHC Discharge Certificate). The applicant was discharged on 20 May 1982, under the provisions of AR 635-200, Chapter 14, by reason of misconduct-frequent incidents of a discreditable nature with civil or military authorities.

c. The VA electronic medical record (JLV), ROP, and casefiles were reviewed. The electronic military medical record (AHLTA) was not reviewed as it was not in use during the applicant's time in service. Included in the applicant's casefile is a Reported of Medical Examination dated 23 October 1981 that shows the applicant was deemed medically qualified for administrative separation. Also included was a Report of Mental Status Evaluation, dated 27 October 1981, that shows the provider determined the applicant was mentally responsible for his behavior and had the mental capacity to understand and participate in administrative proceeding. No other military BH-related records were provided for review.

d. A review of JLV shows the applicant does not have a SC disability but does have a treatment history of MDD, recurrent. Records show the applicant was diagnosed with MDD recurrent on 8 November 2018 and engaged, routinely, in outpatient individual and group BH therapies through December 2021 with fair results. Records show the applicant reported depression onset occurred in 2013 after the loss of his brother to an automobile accident and his mother death 4 days later, secondary to old age. He also noted his declining health, to include being diagnosed with Type 2 Diabetes Mellitus and chronic hip pain, as contributing factors of his depression. A review of the records appears void of an association with the applicant MDD diagnosis and military service.

e. The applicant requests reconsideration of his previous request to upgrade his UOTHC discharge characterization to Honorable. He notes Other Mental Health Issues are related to his request. A review of the records was void of any BH diagnosis or treatment history for the applicant during service. Post service records show the applicant is diagnosed by the VA with MDD recurrent, but the applicant does not have a SC diagnosis. Records suggest the applicant's MDD onset occurred in 2013 secondary to the loss of his brother and mother within a 4-day period. His mood is also further impacted by declining medical conditions, to include Diabetes Mellitus and chronic hip pain. As the applicant's MDD diagnosis is not SC and there is no evidence in the record to support he met criteria for a BH diagnosis during service, there is insufficient evidence to establish that his misconduct was related to or mitigated by Other Mental Health Issues.

f. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence that the applicant had an experience or condition during his time in service that mitigated his misconduct. However, he contends his request for upgrade is related to Other Mental Health Issues, and per liberal guidance his assertion is sufficient to warrant the Board's consideration.

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 contends his request is related to Other Mental Health Issues.

(2) Did the condition exist or experience occur during military service? Yes.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of the records was void of any BH diagnosis or treatment history for the applicant during service. Post service records show the applicant is diagnosed by the VA with MDD recurrent, but the applicant does not have a SC diagnosis. Records suggest the applicant's MDD onset occurred in 2013 secondary to the loss of his brother and mother within a 4-day period. His mood is also further impacted by declining medical conditions, to include Diabetes Mellitus and chronic hip pain. As the applicant's MDD diagnosis is not SC and there is no evidence in the record to support he met criteria for a BH diagnosis during service, there is insufficient evidence to establish that his misconduct was related to or mitigated by Other Mental Health Issues.

BOARD DISCUSSION:

1. The Board carefully considered the applicant's request, supporting documents, 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 mental health claim and the review and conclusions of the ARBA Behavioral Health Advisor.

2. The Board concurred with the conclusion of the ARBA Behavioral Health Advisor that the evidence does not indicate the applicant had any mental health diagnoses during his period of service that would have mitigated his misconduct. However, a majority of the Board did find the statements of support the applicant provided are a basis for clemency in this case. Based on a preponderance of the evidence, a majority

of Board determined applicant's character of service should be changed to under honorable conditions (general).

3. The member in the minority found the statements of support provided by the applicant insufficient to support clemency in light of the applicant's repeated incidents of misconduct. The member in the minority determined the character of service the applicant received upon separation was not in error or unjust.

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:

11. The Board determined the evidence presented is sufficient to warrant partial amendment of the decision of the ABCMR set forth in Docket Number AR20150005149 on 8 December 2015. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by reissuing his DD Form 214 to show his character of service as under honorable conditions (general).

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to upgrading the character of service to fully honorable.

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CHAIRPERSON

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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. 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. AR 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.

3. 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. 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.

4. 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//