

IN THE CASE OF: ██████████

BOARD DATE: 24 April 2024

DOCKET NUMBER: AR20230010482

APPLICANT REQUESTS:

- reconsideration of his request for upgrade of his under other than honorable conditions (UOTHC) discharge
- change narrative reason for separation and separation code
- a favorable change of his reentry eligibility (RE) code

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

- DD Form 293 (Application for the Review of Discharge)
- Self-authored letter
- Character reference letters (3)
- Civilian employment survey
- Criminal background check
- Veterans Affairs (VA) decision letter
- In-service personnel records
- Certificate of graduation

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 AR20190009721 on 27 January 2020.

2. The applicant states:

a. He had the distinct pleasure of serving his country. He hopes for a discharge upgrade because he needs to provide a better life for his family. The mistakes he made in the military put an embarrassment on himself and a strain on his family. He wants his family to have the best things in life.

b. He was assisting a Soldier with fixing her personal family finances when she began flirting and showing him tattoos on her body that were in her phone. Subsequently, she accused him of sexual assault. He faced court-martial charges, his

attorney felt they could win the case; but the applicant would have to register as a sex offender, if they lost.

c. His discharge was unfair because the prosecution was based on the defendant instead of facts. He has learned from his mistakes; however, he feels he was mistreated by the Criminal Investigation Division. He would like for members of the Board to review his packet, and give him another opportunity. He needs a second chance.

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

4. On 24 June 2008, the applicant enlisted in the Regular Army for 5 years. Upon completion of training, he was awarded military occupational specialty 14T (Patriot Operator/Maintainer).

5. The applicant served in Kuwait from 15 March 2009 until 15 March 2010.

6. Court-martial charges were preferred against the applicant for violations of the Uniform Code of Military Justice (UCMJ); however, the relevant DD Form 458 (Charge Sheet) is not available for review.

7. The applicant's record is void of a separation packet containing the specific facts and circumstances surrounding his discharge processing.

8. The applicant was discharged on 17 December 2012, in the grade of E-1. He was credited with 4 years, 5 months, and 24 days of net active service this period. His DD Form 214 (Certificate of Release or Discharge from Active Duty) contains the following entries in:

- Item 24 (Character of Service) – UOTHC
- item 25 (Separation Authority) – AR [Army Regulation] 635-200 (Personnel Separations – Active Duty Enlisted Administrative Separations), Chapter 10
- item 26 (Separation Code) – KFS
- item 27 (Reentry Code) – RE-4
- item 28 (Narrative Reason for Separation) – in lieu of trial by court-martial

9. Additionally his DD Form 214 shows he was awarded or authorized the:

- Army Commendation Medal
- Army Achievement Medal
- Army Good Conduct Medal
- Global War on Terrorism Expeditionary Medal
- Global War on Terrorism Service Medal

- Noncommissioned Officer Professional Development Ribbon
- Army Service Ribbon
- Overseas Service Ribbon.

10. The applicant petitioned the ABCMR requesting upgrade of his UOTHC discharge. On 27 January 2020, the Board voted to deny relief and determined that the overall merits of this case are insufficient as a basis for correction of the records.

11. The applicant provides the following (provided in entirety for the Board):

- a. A self-authored letter that details the events that led to his separation, the investigation, and his personal life since leaving the service.
- b. Character reference letters (3) that collectively attest to the applicant's dedication, reliability, and work ethic.
- c. In-service personnel records that detail his professional accomplishments and noteworthy accolades.
- d. VA decision letter that shows he was granted service connection for PTSD (treatment purposes only).
- e. Graduation certificate from [REDACTED], that shows he successfully completed the Progression: Field Tech V - VI course.

12. 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.

13. 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.

14. MEDICAL REVIEW:

a. The applicant requests reconsideration of his previous request to upgrade his UOTHC discharge to honorable and a change in narrative reason for separation code. He contends his misconduct was related to PTSD.

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 24 June 2008 and served in Kuwait 15 March

2009 – 15 March 2010; 2) Court-martial charges were preferred against the applicant for violations of the Uniform Code of Military Justice (UCMJ); however, the relevant DD Form 458 (Charge Sheet) is not available for review; 3) The applicant's record is void of a separation packet containing the specific facts and circumstances surrounding his discharge processing; 4) The applicant was discharged on 17 December 2012, under provisions of AR 635-200 Chapter 10, in lieu of trial by court-martial.

c. The military electronic medical record (AHLTA), VA electronic medical record (JLV), ROP, and casefiles were reviewed. A review of AHLTA was void of any treatment history for the applicant. No hardcopy military BH-related records were provided for review. A review of JLV shows the applicant is 0 percent SC for PTSD. The associated Initial PTSD DBQ was not available for review, however, a VA Rating Decision Letter, dated 1 July 2022, confirms the 0 percent SC. JLV was void of any treatment history for the applicant. No civilian BH records were provided for review.

d. The applicant requests reconsideration of his previous request to upgrade his UOTHC discharge to honorable and a change in narrative reason for separation code. He contends his misconduct was related to PTSD. A review of the records was void of any treatment history for the applicant during service. Post-service records show the applicant is 0 percent SC for PTSD, however, JLV is void of any treatment history for the applicant. The applicant previous casefile (AR 20190009721) and current ROP suggest the applicant was administratively separated under provisions of Chapter 10 of AR 635 -200 for misconduct characterized by sexual assault. If the applicant, in fact, was separated secondary to misconduct characterized by sexual assault, the misconduct would not be mitigated by the disorder as the misconduct is not natural sequelae of PTSD. Additionally, there is no evidence in the records that the applicant had a condition, during service, that impacted his ability to differentiate between right and wrong and adhere to the right.

e. Based on the available information, it is the opinion of the Agency BH Advisor that there is sufficient evidence that the applicant had an experience or condition during his time in service, however, the condition did not mitigate his misconduct.

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 misconduct was related to PTSD.

(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 treatment history for the applicant during service. Post-service records show the applicant is 0 percent SC for PTSD, however, JLV is void of any treatment history for the applicant. The applicant previous casefile (AR 20190009721) and current ROP suggest the applicant was administratively separated under provisions of Chapter 10 of AR 635 -200 for misconduct characterized by sexual assault. If the applicant, in fact, was separated secondary to misconduct characterized by sexual assault, the misconduct would not be mitigated by the disorder as the misconduct is not natural sequelae of PTSD. Additionally, there is no evidence in the records that the applicant had a condition, during service, that impacted his ability to differentiate between right and wrong and adhere to the right.

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 medical review, the Board considered the advising official finding sufficient evidence that the applicant had an experience or condition during his time in service, however, the condition did not mitigate his misconduct. The Board noted the applicant's record is absent any evidence he was unable to distinguish between right and wrong.
2. The Board noted the applicant's post service achievements and character letters of support attesting to his honorable character, dedication to his community and family, reliability, and his unwavering work ethic. However, the Board determined there is insufficient evidence of in-service mitigating factors to overcome the misconduct. Evidence of record shows, at the time of separation, documentation supports the narrative reason for separation properly identified on the DD Form 214. As such, the Board determined under liberal consideration changes to the applicant's narrative reason are not warranted. The Board agreed there was insufficient evidence of an error which would warrant a change in the separation code. Furthermore, 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 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 AR20190009721 on 27 January 2020.

5/6/2024

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. 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 601-210 (Regular Army and Army Reserve Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment and processing into the Regular Army, U.S. Army Reserve, and Army National Guard. Table 3-6 provides a list of RE codes.

- RE code "1" applies to Soldiers completing an initial term of active service, who are considered qualified for enlistment if all other criteria are met
- RE code "2" is no longer in use but applied to Soldiers separated for the convenience of the government, when reenlistment is not contemplated, who are fully qualified for enlistment/reenlistment
- RE code "3" applies to Soldiers who are not considered fully qualified for reentry or continuous service at time of separation, whose disqualification is waivable – they are ineligible unless a waiver is granted
- RE code "4" applies to Soldiers separated from last period of service with a non-waivable disqualification

4. 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. Additionally, the SPD/RE Eligibility Code Cross Reference Table established RE code "4" as the proper reentry codes to assign to Soldiers separated under this authority and for this reason.

5. 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.

6. 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.

7. 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.

8. 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//