

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 April 2024

DOCKET NUMBER: AR20230010578

APPLICANT REQUESTS: an upgrade of his discharge under other than honorable conditions (UOTHC).

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) Form 21-4138 (Statement in Support of Claim)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)

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 there were extenuating circumstances that were not taken into consideration at the time of his discharge. He was harassed and threatened due to his ethnicity and or nationality. He went to his first line leaders for help and that only made things worse. He was embarrassed in front of his Basic Combat Training (BCT) formation. He was disrespected as an individual and a human being. It was humiliating and degrading. He was unfairly judged and never afforded the opportunity to show his worth and value.

a. His VA Form 21-4138 states from day one of BCT he was the victim of snide remarks and inappropriate jokes. He was called a "sand nigger," "camel jockey," "Saddam Hussein," and "towel head," just to name a few. On one occasion, he woke up to three fellow trainees standing over him while he slept. One held him down by his neck and shoulders and one had his feet. They threatened him and expressed a discontent with his existence. They indicated the next time this happened, they would do something to hurt him. His fellow trainees would constantly run into him making no attempt to avoid him. He was also pushed from behind. During a range fire training event, a fellow trainee indirectly pointed his weapon at him and made a comment about

"sneaking a live round from the range for insurance purposes." He stated it was insurance since they would be defending the United States from his "cousins and uncles."

b. He honestly believes it started out just as jokes. However, as it continued it became more aggressive and threatening. They became meaner. He finally ran because he was afraid for his health and welfare and safety. His attempt to resolve or quell the behavior through his leadership only made things worse. The applicant indicates on his DD Form 149 that post-traumatic stress disorder (PTSD) is related to his request.

3. On 31 January 2005, the applicant enlisted in the Regular Army for a period of 3 years and 19 weeks in the rank/grade of private (PV1)/E-1. He was assigned to a unit at Fort Benning, GA for completion of BCT.

4. The applicant's unit changed his duty status from:

- Present for Duty (PDY) to Absent Without Leave (AWOL) on 8 March 2005
- AWOL to Dropped from Rolls (DFR) on 8 April 2005
- DFR to Attached/PDY on 28 November 2005 when he was apprehended by civil authorities and returned to military control

5. Orders show he was assigned to Special Processing Company, U.S. Army Personnel Control Facility, U.S. Army Armor Center, Fort Knox, KY, effective 28 November 2005.

6. A DD Form 458 (Charge Sheet) shows on 8 December 2005, court-martial charges were preferred against the applicant for violation of Article 86 of the Uniform Code of Military Justice (UCMJ) for absenting himself from his organization and remaining so absent on or about 8 March 2005 until on or about 28 November 2005.

7. On 8 December 2005, the applicant voluntarily requested discharge under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10, for the good of the service 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 did not elect to provide a statement in his own behalf.

8. On 13 December 2005, the applicant's immediate commander recommended approval of his request with a discharge UOTHC.

9. On 16 December 2005, the separation authority approved the applicant's request for discharge in lieu of trial by court-martial, with his service characterized as UOTHC.

10. Orders and the applicant's DD Form 214 show he was discharged on 21 December 2005, 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 Eligibility Code "4." He was credited with completing 2 months and 8 days of net active service this period. He had lost time due to AWOL from 8 March 2005 to 27 November 2005. He did not complete his first full term of service.

11. 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.

12. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition.

13. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under other than honorable conditions (UOTHC) characterization of service.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Below is a summary of information pertinent to this advisory:

- Applicant enlisted in the RA on 31 January 2005.
- DD Form 458 (Charge Sheet) shows on 8 December 2005, court-martial charges were preferred against the applicant for violation of Article 86 of the Uniform Code of Military Justice (UCMJ) for absenting himself from his organization and remaining so absent on or about 8 March 2005 until on or about 28 November 2005.
- Orders and the applicant's DD Form 214 show he was discharged on 21 December 2005, 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 Eligibility Code "4."

c. Review of Available Records Including Medical:

The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 149, DD Form 214, ABCMR Record of Proceedings (ROP), and documents from his service record and separation. The VA electronic medical record and DoD health record were

reviewed through Joint Longitudinal View (JLV). Lack of citation or discussion in this section should not be interpreted as lack of consideration.

The applicant states there were extenuating circumstances that were not taken into consideration at the time of his discharge. He was harassed and threatened due to his ethnicity and or nationality. He went to his first line leaders for help and that only made things worse. He was embarrassed in front of his Basic Combat Training (BCT) formation. He was disrespected as an individual and a human being. It was humiliating and degrading. He was unfairly judged and never afforded the opportunity to show his worth and value. His VA Form 21-4138 states from day one of BCT he was the victim of snide remarks and inappropriate jokes. He was called a "sand nigger," "camel jockey," "Saddam Hussein," and "towel head," just to name a few. On one occasion, he woke up to three fellow trainees standing over him while he slept. One held him down by his neck and shoulders and one had his feet. They threatened him and expressed a discontent with his existence. They indicated the next time this happened, they would do something to hurt him. His fellow trainees would constantly run into him making no attempt to avoid him. He was also pushed from behind. During a range fire training event, a fellow trainee indirectly pointed his weapon at him and made a comment about "sneaking a live round from the range for insurance purposes." He stated it was insurance since they would be defending the United States from his "cousins and uncles." He honestly believes it started out just as jokes. However, as it continued it became more aggressive and threatening. They became meaner. He finally ran because he was afraid for his health and welfare and safety. His attempt to resolve or quell the behavior through his leadership only made things worse. The applicant indicates on his DD Form 149 that post-traumatic stress disorder (PTSD) is related to his request.

d. Due to the period of service, no active-duty electronic medical records were available for review and the applicant did not submit hardcopy medical documentation from his time in service. No VA electronic medical records were available for review and the applicant is not service connected. In addition, the applicant did not submit any medical documentation post-military service substantiating his assertion of PTSD.

e. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a behavioral health condition that mitigates 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 self-asserts a mitigating condition.

(2) Did the condition exist or experience occur during military service? No. The applicant asserts PTSD, however, he provides no medical documentation.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant provides no medical documentation substantiating any BH diagnosis. There is no evidence of any in-service BH diagnoses, and the VA has not service-connected the applicant for any BH condition. And while the applicant self-asserts PTSD, he did not provide any medical documentation substantiating any diagnoses. However, per Liberal Consideration guidelines, the applicant's self-assertion of PTSD merits consideration by the Board.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The applicant served on active duty from 31 January 2005 to 28 December 2005 and did not complete his full term of service. The applicant was charged with being absent without leave from 8 March 2005 to 27 November 2005, punishable under the Uniform Code of Military Justice with a punitive discharge. Subsequently, he voluntarily, through counsel, submitted a request for discharge in lieu of trial by court-martial. The Board found no error or injustice in the separation proceedings; however, the Board majority determined the applicant was in an entry-level status and therefore, his service characterization should be uncharacterized. The Board minority noted regulatory guidance that would allow for the separation with an under other than honorable conditions being warranted due to the circumstances of the case.

The Board majority determined that in view of the entry-level status, an uncharacterized characterization of service is appropriate under published DoD guidance for liberal consideration of discharge upgrade requests. The Board determined that the underlying reason for separation did not change and thus the narrative reason for separation and corresponding codes should not change.

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:

1. In addition to the corrections annotated in Administrative Notes below, the Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant's DD Form 214, for the period ending 21 February 1972, to show in:

- item 24 (Character of Service): Uncharacterized
- item 25 (Separation Authority): No Change
- item 26 (Separation Code): No Change
- item 27 (Reentry Code): No Change
- item 28 (Narrative Reason for Separation): No Change

2. The Board further determined that 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 an upgrade of his discharge.

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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.
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//