

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 22 May 2024

DOCKET NUMBER: AR20230010625

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

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

- DD Form 149 (Application for Correction of Military Record), with self-authored statement, dated 5 July 2023
- DD Form 149, with self-authored statement, dated 22 August 2023
- Army Service Records (17 pages), dated 28 July 1977 to 4 September 1979
- DD Form 214 (Report of Separation from Active Duty), for the period ending 4 September 1979
- Service Treatment Records (33 pages), dated 25 December 1977 to 27 June 1979
- Department of Veterans Affairs (VA) Medical Records (94 pages), printed 12 August 2022
- Civilian Medical Records, MetroHealth System (12 pages), dated 21 July 2020 to 15 March 2023

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous considerations of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Numbers AR201000012103 on 31 November 2010 and AR20110013901 on 18 January 2012.

2. As a new argument, the applicant states, in effect, he suffered from behavioral health issues and had problems adjusting to military life. His depressive episodes and suicidal intentions led to misconduct for which he received disciplinary action. He is under medical care now for major depression and suicidal ideation. The applicant notes disability, post-traumatic stress disorder (PTSD), and other mental health as conditions related to his request.

3. The applicant enlisted in the Regular Army on 10 February 1977, for a 3-year period. Upon completion of initial entry training, he was awarded military occupational specialty 94B (Food Service Specialist). The highest rank he attained was private first class/E-3.
4. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) on two occasions:
  - a. On 1 August 1977, for willfully disobeying a lawful order from his superior noncommissioned officer, on or about 17 July 1977. His punishment consisted of forfeiture of \$97.00 pay (suspended 90 days) and seven days of extra duty. On 19 September 1977, the punishment of forfeiture of \$97.00 pay was remitted to the forfeiture of \$87.00 pay (suspended for 90 days). On 20 September 1977, the suspension of \$87.00 pay was vacated, and the unexecuted portion of the punishment was ordered duly executed.
  - b. On 28 November 1977, for failure to go at the time prescribed to his appointed place of duty, on or about 25 October 1977. His punishment consisted of forfeiture of \$92.00 pay (suspended for 90 days), seven days of extra duty, and seven days of restriction. On 9 December 1977, the suspension of \$92.00 pay was vacated, and the unexecuted portion of the punishment was ordered duly executed.
5. A DA Form 2173 (Statement of Medical Examination and Duty Status), dated 5 January 1978, shows the applicant was admitted to the hospital on 25 December 1977, following a drug overdose. He ingested an unknown number of Tylenol and called an ambulance, resulting in his unauthorized absence for a shift in the mess hall. A formal line of duty (LOD) investigation was initiated.
6. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the UCMJ on 12 January 1978, for four instances of failure to go at the time prescribed to his appointed place of duty, on or about 9 December, 16 December, 22 December, and 24 December 1977, and for willfully disobeying a lawful command from his superior commissioned officer, on or about 16 December 1977. His punishment consisted of forfeiture of \$92.00 pay, seven days of extra duty, and seven days of restriction.
7. A DD Form 261 (Report of Investigation - LOD and Misconduct Status), dated 3 February 1978, shows the investigation into the applicant's self-inflicted drug overdose (Tylenol and Bleach) on 25 December 1977, resulted in a finding of "not in the line of duty – due to own misconduct."
8. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the UCMJ on two additional occasions:

a. On 29 November 1978, for wrongfully having in his possession a meal card that did not belong to him, on or about 7 October 1978, and for willfully disobeying a lawful order from his superior commissioned officer, on or about 30 October 1978. His punishment consisted of ten days of extra duty and forfeiture of \$113.00 pay.

b. On 14 January 1979, for willfully disobeying a lawful order from his superior commissioned officer, on or about 7 May 1979. His punishment consisted of forfeiture of \$109.00 pay, seven days confinement at the Correctional Custody Facility, and reduction to private/E-2.

9. A Military Police Report, dated 26 June 1979, shows the applicant was pulled over for failing to stop at a red light on 30 May 1979. After approaching the vehicle, the military police officer detected the odor of marijuana. A search of [the applicant] revealed a .25 caliber pistol in his coat pocket which he stated belonged to a friend. No marijuana was found. [The applicant] was advised of his rights, which he waived, and he was apprehended for carrying a concealed weapon and possession of a stolen weapon. He was later released to his unit.

10. The applicant underwent a mental status evaluation on 27 June 1979. The examining provider noted the applicant's behavior was passive and his mood depressed; however, there was no impression of mental illness. The applicant was cleared for any action deemed appropriate by his command.

11. Court-martial charges were preferred against the applicant on 19 July 1979, for violations of the UCMJ. The relevant DD Form 458 (Charge Sheet) shows he was charged with two specifications of failure to go at the time prescribed to his appointed place of duty, on or about 16 June and 9 July 1979, and for unlawfully carrying a concealed weapon, on or about 30 May 1979.

12. He consulted with legal counsel on 13 August 1979.

a. He was advised of the basis for the contemplated 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.

b. After receiving legal counsel, he voluntarily requested discharge for the good of the service, under the provision of Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10. In his request for discharge, he acknowledged his understanding that by requesting a discharge, he was admitting guilt to the charge against him, or of a lesser included offense that also authorized the imposition of a bad conduct or dishonorable discharge. He acknowledged making this request free of coercion. He further acknowledged understanding if his discharge request were approved, he could be deprived of many or all Army benefits, he could be

ineligible for many or all benefits administered by the VA, and he could be deprived of his rights and benefits as a Veteran under both Federal and State laws.

c. He was advised he could submit any statements he desired in his behalf. In an attached statement, the applicant noted, a discharge would be a benefit to both the Army and himself. He was holding the "concealed weapon" for a friend who was in trouble. He was not aware that holding it for a short period of time would ruin his military career. By law he was wrong, but he had no knowledge of what the offense would bring. He wanted a good record. He had a son to look after.

13. On 23 August 1979, the separation authority approved the applicant's request for discharge for the good of the service, directed the applicant be reduced to the lowest enlisted grade, and the issuance of a DD Form 794A (UOTHC Discharge Certificate).

14. The applicant was discharged on 4 September 1979, under the provisions of AR 635-200, Chapter 10, by reason of administrative discharge - conduct triable by court-martial. His DD Form 214 confirms his character of service was UOTHC, with separation code JFS and reenlistment code RE-3. He was credited with 2 years, 6 months, and 25 days of net active service.

15. The Army Discharge Review Board (ADRB) reviewed the applicant's discharge on or about 23 June 1982 and determined he was properly and equitably discharged. His request for a change in his characterization of service was denied.

16. The ABCMR reviewed the applicant's petition for a discharge upgrade on 31 November 2010. After careful consideration, the Board determined the applicant did not provide evidence showing he was any less mature than other Soldiers. Nor did he provide evidence showing the discharge he was issued was inequitable or unjust. His request for relief was denied. The applicant's request was reconsidered on 18 January 2012. After further consideration, the Board determined the applicant's discharge accurately reflected his overall record of service. The evidence presented did not demonstrate a probable error or injustice. The Board denied his request for relief.

17. Discharges under the provisions of AR 635-200, Chapter 10 are voluntary requests for discharge for the good of the service, in lieu of a trial by court-martial. A UOTHC characterization of service is normally considered appropriate.

18. As new evidence, the applicant provides:

a. 17 pages of Army Service Records, dated 28 July 1977 to 4 September 1979, which are detailed in the "Facts" section of this Record of Proceedings (ROP) above.

b. 33 pages of Service Treatment Records, dated 25 December 1977 to 27 June 1979, which will be summarized, in pertinent part, in the "Medical Review" section of this ROP below.

c. 94 pages of VA medical records, printed 12 August 2022, and 12 pages of civilian medical records from MetroHealth System, dated 21 July 2020 to 15 March 2023, which show the applicant has been diagnosed with and treated for major depressive disorder, suicidal ideation, and PTSD, will be further summarized, in pertinent part, in the "Medical Review" section of this ROP below.

19. The Board should consider the applicant's argument and/or evidence in accordance with the published equity, injustice, or clemency determination guidance.

20. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting reconsideration of his previous request for an upgrade of his under other than honorable conditions (UOTHC) character of service. He contends he experienced an undiagnosed mental health condition, including PTSD, 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:

- The applicant enlisted into the Regular Army on 10 February 1977.
- The applicant accepted NJP for willfully disobeying an order; failure to be at his appointed place of duty; four instances of failure to be at appointed place of duty; another instance of willfully disobeying an order; wrongfully possessing a meal card that did not belong to him; and another instance of willfully disobeying an order. On 19 July 1979 court-martial charges were preferred against him for two specifications of failure to be at his appointed place of duty and for unlawfully carrying a concealed weapon. He voluntarily requested discharge for the good of the service, which was approved on 23 August 1979.
- The applicant was discharged on 4 September 1979 with an UTOHC, and he was credited with 2 years, 6 months, and 25 days of net active service.

c. Review of Available Records: The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts he was experiencing depression and anxiety, including suicidal intentions, which led to his misconduct. Medical records from the applicant's time in active service showed diagnoses of Mild Depression and Attempted Drug Overdose. A Statement of Medical Examination and Duty Status dated 5 January 1978 indicated that the applicant "was not mentally sound" on 25 December 1977 when he took "an unknown number of Tylenol and then called an ambulance." This event was referenced as a suicide attempt (consumption of bleach and Tylenol), and depression was noted on

a document dated 27 June 1979, which was signed by a physician. A clinical record note dated 26 December 1977 quoted the applicant as stating that he was depressed “being alone on Christmas” and the problems he was having with his unit “got to be too much.” Documentation from his inpatient stay also indicates he was “found by friends with an empty bottle of bleach and a partially empty bottle of Tylenol.” A Report of Investigation (Line of Duty) determined the applicant had a self-inflicted overdose on drugs, which concluded the event was not in the line of duty and due to his own misconduct. A Report of Mental Status Evaluation dated 27 June 1979 indicated the applicant did not have a significant mental illness; had the mental capacity to understand and participate in board proceedings; and met retention standards. He was cleared for any action deemed appropriate by command.

d. Documentation provided by the applicant from the VA showed a discharge summary dated 29 June 2020 with a diagnosis of Major Depressive Disorder, and the documentation indicated he presented to the ER with suicidal ideation in conjunction with several chronic physical health problems. He was started on a psychiatric medication to improve mood and was referred for follow up with mental health. Documentation dated 21 July 2020 from the MetroHealth System was also provided and showed a diagnosis of Major Depression and passive thoughts of death with a “history of adverse experiences in the military.” There were also four psychotherapy notes with the same diagnosis as well as a letter dated 15 March 2023 stating that the applicant receives psychological treatment every two weeks for Major Depression and PTSD. There was sufficient evidence that the applicant was diagnosed with a mental health disorder while on active service.

e. The VA’s Joint Legacy Viewer (JLV) was also reviewed and showed that the applicant initiated mental health treatment through the VA by contacting the Veterans Crisis Line in June 2020. All documentation in JLV has already been summarized above with the applicant’s provided documentation.

f. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to support that the applicant had a mental health condition, Major Depressive Disorder, while on active service. There is insufficient evidence to support that he had PTSD during active service, and the documentation of the PTSD diagnosis does not sufficiently demonstrate the necessary symptom criteria to warrant such a diagnosis.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts he had a diagnosed mental health condition at the time of the misconduct, and there is documentation to support this assertion.

(2) Did the condition exist or experience occur during military service? Yes, there is documentation of a diagnosis of Depression with a suicide attempt while the applicant was on active service.

(3) Does the condition or experience actually excuse or mitigate the discharge? Partial. The applicant has a documented history of a mental health condition, depression of severity such that he engaged in suicidal behavior, while on active service. The applicant's innocuous behaviors associated with difficulty maintaining military standards, showing up for duty, and possession of a meal card that did not belong to him could be indicative of impaired judgment or lethargy that is consistent with a depressive episode. It is not uncommon for individuals who are depressed to have difficulty engaging in normal activities of daily living. However, there is no real nexus between depression and the misconduct of unlawfully carrying a concealed weapon. Per Liberal Consideration, the totality of the events leading to the applicant's discharge are worthy of the board's consideration of mitigation.

#### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was 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. One potential outcome was to deny relief finding no real nexus between depression and the applicant's misconduct of unlawfully carrying a concealed weapon. However, upon further review of the applicant's petition, available military records and the medical review, the Board concurred with the advising official finding sufficient evidence to partially support that the applicant had a mental health condition, Major Depressive Disorder, while on active service. Although, there is insufficient evidence to support that he had PTSD during active service, and the documentation of the PTSD diagnosis does not sufficiently demonstrate the necessary symptom criteria to warrant such a diagnosis.

2. The Board determined there is sufficient evidence of in-service mitigating factors to overcome the misconduct. The Board noted the applicant's documented history of a mental health condition, depression of severity such that the applicant engaged in suicidal behavior while on active duty. The Board found under liberal consideration the applicant's case warrants clemency with an upgrade of his discharge to under honorable (general) conditions. Therefore, the Board granted 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 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 reissuing the applicant a DD Form 214 showing his characterization of service as Under Honorable (General) Conditions.

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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, U.S. Code (USC), Section 1203 provides for the physical disability separation of a member who has less than 20 years of service and a disability rating at less than 30 percent (%).
2. Title 38, USC, Sections 1110 and 1131, permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.



a. The Army rates only conditions determined to be physically unfitting at the time of discharge which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career.

b. The VA does not have authority or responsibility for determining physical fitness for military service. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge, to compensate the individual for loss of civilian employability. As a result, the VA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform his duties. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

3. Section 1556 of Title 10, USC, 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.

4. AR 40-501 (Standards of Medical Fitness) governs medical fitness standards for enlistment, induction, appointment (including officer procurement programs), retention, and separation (including retirement). Once a determination of physical unfitness is made, the physical evaluation board (PEB) rates all disabilities using the Veterans Affairs Schedule for Rating Disabilities (VASRD).

a. Chapter 2, provides physical standards for enlistment, appointment, and induction with the purpose to ensure members medically qualified are medically capable of completing required to training, adapt to a military environment without geographical limitations, perform duties without aggravation of existing physical defects or medical conditions.

b. The standards in Chapter 2 are applicable to individuals who enlist in the Regular Army - for medical conditions or physical defects pre-dating original enlistment, standards are applicable for enlistee's first 6 months of active duty. It states that enlisted Soldiers identified within the first 6 months of active duty with a condition that existed prior to service that does not meet the physical standards may be separated following an evaluation by an Entrance Physical Standards Board, under the provisions of AR 635-200, Chapter 5.

5. AR 635-40 (Physical Evaluation for Retention, Retirement, or Separation) establishes the Army Disability Evaluation System (DES) and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. It states, in part:

a. Only the unfitting conditions or defects and those that contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability. The mere presence of impairment does not, in and of itself, justify a finding of unfitness because of physical disability.

b. The PEB-appointed counsel advises the Soldier of the Informal PEB (IPEB) findings and recommendations and ensures the Soldier knows and understands his or her rights. The Soldier records his or her election to the PEB on the DA Form 199 and has 10 calendar days from the date of receiving the PEB determination to make the election, submit a rebuttal, or request an extension.

6. AR 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Chapter 10 of that regulation provides, in pertinent part, that a member who has committed an offense or offenses for which the authorized punishment includes a punitive discharge may, submit a request for discharge for the good of the service in lieu of trial by court-martial. The request may be submitted at any time after charges have been preferred and must include the individual's admission of guilt. Although an honorable or general discharge is authorized, a discharge under other than honorable conditions is normally considered appropriate.

b. 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.

c. Paragraph 3-7b provides that 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.

7. 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 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 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.

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//