

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 June 2024

DOCKET NUMBER: AR20230011541

APPLICANT REQUESTS:

- an upgrade of his under other than honorable conditions (UOTHC) discharge to honorable
- correction of his DD Form 214 (Certificate of Release or Discharge from Active Duty) by:
  - removing all references of misconduct
  - amending narrative reason for separation and corresponding separation program designator (SPD) code to "Secretarial Authority"

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

- DD Form 149 (Application for Correction of Military Record)
- Cover letter, Covington & Burlington LLP, dated 17 August 2023
- Legal Brief (29 Pages), dated 17 August 2023
- List of Exhibits, undated
- Exhibit A, Statutes, Regulations, and Department of Defense Instruction (DoDI)
  - excerpt, Title 10, U.S. Code (USC), Armed Forces
  - excerpt, Code of Federal Regulation (CFR), Title 32, Chapter V (Department of the Army)
  - DoDI 1332.28, Discharge Review Board (DRB) Procedures and Standards, dated 4 April 2004
  - excerpt, Army Regulation (AR) 40-501 (Standards of Medical Fitness), effective 14 June 1989
  - excerpt, AR 635-40 (Physical Evaluation for Retention, Retirement, or Separation), effective 15 September 1990
  - DoD Directive 1332-14, Enlisted Administrative Separations, dated 21-December 1993
- Exhibit B, Memorandum, Under Secretary of Defense, Robert L. Wilkie, dated 25 July 2018

- Exhibit C, Memorandum, Acting Under Secretary of Defense for Personnel and Readiness, A.M. Kurta, dated 24 August 2017
- Exhibit D, Memorandum, Acting Under Secretary of Defense, Brad Carson, dated 24 February 2016
- Exhibit E, excerpt, Official Military Personnel File (OMPF), (24 pages)
- Exhibit F, Self-authored statement, dated 28 February 2023
- Exhibit G, Statement of Support, dated 27 June 2022
- Exhibit H, Resume, dated January 2000 to present
- Exhibit I, Transcript, Mount Hood Community College, dated 7 June 2022
- Exhibit J, Student Transaction Summary Report, University of Portland, dated 24 May 2022
- Exhibit K, Bachelor of Science, University of Portland, dated 7 August 2009
- Exhibit L, Transcript, University of Portland, dated 7 June 2022
- Exhibit M, Statement of Support, dated 26 May 2022
- Exhibit N, Army Board for Correction of Military Records (ABCMR), Docket Number AR20180001101, Record of Proceedings (ROP), dated 17 May 2019
- Exhibit O, ABCMR Docket Number AR20190002194, ROP, dated 9 May 2019
- Exhibit P, ABCMR Docket Number AR20170001210, ROP, dated 27 January 2020

#### 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 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:

a. His experience in the U.S. Army was mostly positive. He held significant responsibility, made friends, and organized community events. However, he became depressed and had trouble sleeping. It became difficult for him to perform his duties, and he was sometimes late for morning formation.

b. On one occasion, he missed formation and was told the military police were looking for him. He became stressed and anxious, had a breakdown, and left. He was not thinking clearly. It was a terrible decision which he has come to regret. He was homeless, had anxiety attacks and thoughts of suicide, and was using drugs. After waking up in the hospital following a drug overdose, he turned himself in to shore patrol. He was returned to Fort Sill and was discharged.

c. For the first few years following his discharge, he continued to struggle with behavioral health issues, homelessness, and drug use. In 2001, he started to build a better life and enrolled in an iron workers apprenticeship program. In 2003, he learned he was going to be a father. He started college and worked tirelessly to earn a degree. He could barely afford tuition and slept in his car. The president of the university found out about his situation and granted him an emergency scholarship, for which he is still grateful. He started seeing a therapist and volunteered at a homeless shelter.

d. He graduated with a Bachelor of Science in Civil Engineering and finished a master's program for engineering technology management. He currently works exclusively on federal government projects for the U.S. Navy and Marines. His role in construction management has created a lot of pride, but he feels an even greater pride in being a father. He helped raise a wonderful child who is flourishing and furthering her education at the Oregon Institute of Technology.

e. He still struggles with mental health issues. He is seeking an upgrade because he works around a lot of Veterans and a UOTHC discharge could hurt his future as a construction manager. A discharge upgrade would help him seek affordable mental health care, allow him to continue on his professional path, and provide the best opportunities he can to his child. He has learned a lot about resilience and overcoming adversity. He will not squander another opportunity.

3. The applicant, through counsel, states:

a. The actions leading to the applicant's discharge were the result of mental health issues the Army diagnosed but did not treat. He suffered from severe depression and insomnia, which interfered with his ability to perform his duties. He was referred for a psychiatric evaluation and was diagnosed with "adjustment disorder with depressed mood" and "personality disorder." He was recommended for weekly follow-up treatment which he never received. His condition declined until he suffered a mental breakdown and left his unit, which led to his administrative separation.

b. The applicant put forth tremendous effort in turning his life around. He is a successful engineer and a loving, dedicated father. He made a terrible mistake in abandoning his unit and regrets his actions. He lives in fear that his discharge status will cause the loss of his job. It also prevents him from obtaining affordable mental healthcare.

c. He is requesting relief under the revised guidance issued by the Department of Defense, based upon his mental health condition. He credits the Army for instilling in him the discipline and skills that have led to his career success. However, his discharge characterization continues to hold him back.

4. After a brief period of enlisted service in the California Army National Guard, the applicant obtained a conditional release and enlisted in the Regular Army on 29 December 1994.

5. Three DA Forms 4187 (Personnel Action) show the following changes in his duty status:

- Present for Duty (PDY) to Absent Without Leave (AWOL) on 13 March 1996
- AWOL to Dropped from Rolls (DFR) on 13 April 1996
- DFR to Attached, surrendered to military authorities, on 21 April 1996

6. Court-martial charges were preferred against the applicant on 23 April 1996 for violation of the Uniform Code of Military Justice. The relevant DD Form 458 (Charge Sheet) shows he was charged with being AWOL from on or about 13 March 1996 until on or about 21 April 1996.

7. The applicant consulted with legal counsel on 25 April 1996.

a. He was advised of the basis for the contemplated trial by court-martial, the maximum permissible punishment authorized under the Uniform Code of Military Justice, 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 a discharge in lieu of trial by courts-martial, under the provision of 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 that 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 Veterans Administration, 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. He elected not to submit a statement.

8. The applicant's immediate commander recommend approval of the request and the issuance of a UOTHC discharge, further stating the applicant was disillusioned with the military and retention was not in the best interest of the Army.

9. On 10 June 1996, the separation authority approved the applicant's requested discharge, in lieu of trial by courts-martial, and further directed the applicant be reduced to the lowest enlisted grade and the issuance of an UOTHC discharge.

10. The applicant was discharged on 3 July 1996 under the provisions of AR 635-200, Chapter 10, in lieu of trial by court-martial. His DD Form 214 shows his characterization of service was UOTHC, with separation code KFS and reenlistment code RE-3. He was credited with 1 year, 4 months, and 26 days of active service, with lost time from 13 March 1996 to 20 April 1996.

11. The applicant provides the following:

a. A cover letter and 29-page legal brief, dated 17 August 2023, and an undated list of exhibits from Covington & Burlington LLP.

b. Excerpts from the following Statutes, Regulations, and Department of Defense Instruction (DoDI) that counsel deems applicable to the applicant's request:

- Title 10, USC, Armed Forces
- CFR, Title 32, Chapter V (Department of the Army)
- DoDI 1332.28, DRB Procedures and Standards, dated 4 April 2004
- AR 40-501, effective 14 June 1989
- AR 635-40, effective 15 September 1990
- DoD Directive 1332-14, Enlisted Administrative Separations, dated 21 December 1993

c. The Wilkie, Kurta, and Carson Memorandas provide clarifying guidance to Military Discharge Review Boards (DRBs) and Boards for the Correction of Military/Naval Records (BCM/NR) on liberal consideration, statute of limitations, and requests by Veterans for modification of their discharge due to mental health conditions, sexual assault/harassment, post-traumatic stress disorder, and traumatic brain injury.

d. 24 pages extracted from the applicant's OMPF, are summarized, in pertinent part, in the ROP above, to include eight pages of service treatment records which will be summarized in the medical review section of the ROP below.

e. Two statements of support, dated 26 May 2022 and 27 June 2022, wherein the authors state, in effect, the applicant is an honorable man who has worked to better himself and overcome the mistakes he made in his youth. He succeeded in academics despite the enormous struggle of being homeless at the time. He has a stable career as a civil engineer and is a positive role model for his child. He has always shared the financial and emotional responsibilities of raising his child and ensured his child had opportunities that were not available to him.

f. A resume, college transcripts, and diploma, show his post service accomplishments in academics, the award of his bachelor's and master's degrees, and his subsequent employment as a project manager and site superintendent.

g. Three ABCMR Records of Proceedings, dated 9 May 2019 to 27 January 2020, which do not directly pertain to the applicant, show previous ABCMR decisions in which the Board granted consideration of evidence and a discharge upgrade under similar circumstances as the applicant.

12. Regulatory guidance provides when an individual is discharged under the provisions of AR 635-200, Chapter 10, in lieu of trial by court-martial, "KFS" is the appropriate separation code.

13. The DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of release from active duty, retirement, or discharge. The information entered thereon reflects the conditions as they existed at the time of separation.

14. In reaching its determination, the Board can consider the applicants petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

15. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) characterization of service and change his narrative reason for separation. He contends he experienced mental health conditions that mitigates his misconduct. 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) After a brief period of enlisted service in the California Army National Guard, the applicant obtained a conditional release and enlisted in the Regular Army on 29 December 1994; 2) Court-martial charges were preferred against the applicant on 23 April 1996 being AWOL from 13 March-21 April 1996; 3) The applicant was discharged on 3 July 1996, Chapter 10, in lieu of trial by court-martial. His character of service was UOTHC. He was credited with 1 year, 4 months, and 26 days of net active service, with lost time from 13 March 1996 to 20 April 1996

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's available military service and medical records. The VA's Joint Legacy Viewer (JLV) and military medical documentation provided by the applicant were also examined.

c. The applicant asserts he was experiencing mental health conditions while on active service, which mitigates his misconduct. The applicant provided a consultation sheet from military Physician Assistant dated 08 November 1995. The applicant was being seen for Chapter physical, but the nature of the Chapter was not discussed. The applicant was reported to be depressed and experiencing sleep problems. He also endorsed suicidal thoughts for the last six months. He was sent Community Mental Health for an evaluation. There is evidence the applicant was evaluated by a military psychologist on 12 November 1995. He was again reported to be experiencing depressed mood, and he was diagnosed with an Adjustment Disorder with Depressed Mood Secondary to a Non-specified Personality Disorder. He was recommended for weekly follow-up therapy at Community Mental Health treatment.

d. A review of JLV provided insufficient evidence the applicant has been diagnosed with a mental health condition, and he does not receive any service-connected disability.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to support the applicant had a condition or experience that partially mitigates his misconduct which led to his discharge.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant asserts he experienced a mental health condition that mitigates his misconduct. There is evidence the applicant had been diagnosed with an Adjustment Disorder secondary to a Personality Disorder, while in the process of an earlier Chapter physical. He was recommended and referred to behavioral health treatment five months prior to his misconduct, which resulted in his discharge.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced a mental health condition that mitigates his misconduct. There is evidence the applicant had been diagnosed with an Adjustment Disorder secondary to a Personality Disorder, while in the process of an earlier Chapter physical. He was recommended and referred to behavioral health treatment five months prior to his misconduct, which resulted in his discharge.

(3) Does the condition experience actually excuse or mitigate the discharge? Partially, there is sufficient evidence beyond self-report the applicant was experiencing depressed mood, insomnia, and suicidal ideation while on active service. This was identified five months prior to the applicant going AWOL during an earlier Chapter physical. He was diagnosed with an Adjustment Disorder secondary to a Personality Disorder, and he was referred to behavioral health treatment while on active service. Despite being referred to weekly behavioral health treatment, the applicant did engage in misconduct, which could be identified as avoidant behavior and a natural sequelae to depressed mood. However, he was identified and offered therapy to assist him with his

low mood, insomnia, and occupational problems. Therefore, per Liberal Consideration, the applicant's misconduct, which led to his discharge is only partially mitigable.

BOARD DISCUSSION:

1. 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 Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was charged with being absent without leave from 13 March 1996 to 21 April 1996. After being charged, he consulted with counsel and voluntarily requested discharge in lieu of trial by court-martial. The Board noted the applicant's contention that his absence was the result of untreated mental health issues. The Board concurred with the medical advisor's review that there was sufficient evidence to support a condition or experience existed that partially mitigated his misconduct. In view of the foregoing, the Board concluded his characterization of service should be upgraded from other than honorable conditions to under honorable conditions (General) and the corresponding blocks amended to reflect Secretarial Authority.

the applicant's contention of being wrongfully accused of rape and adultery and determined his statement and the evidence of record was sufficient to warrant a change to the applicant's authority for separation, narrative reason for separation, and re-entry code.

2. The Board found no error or injustice in the designated characterization of service assigned by his commander during separation. The Board noted the applicant's post-service achievements; however, determined they were not enough to grant relief to the characterization of service based on clemency. Based on a preponderance of the evidence, the Board concluded that the characterization of service the applicant received upon separation was appropriate.



BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:            :            :            GRANT FULL RELIEF

■           ■           ■           GRANT PARTIAL RELIEF

:            :            :            GRANT FORMAL HEARING

:            :            :            DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant partial 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 14 July 1996, to show:

- item 24 (Character of Service) under honorable conditions (General)
- item 25 (Separation Authority): Army Regulation 635-200
- item 26 (Separation Code): JFF
- item 27 (Reentry Code): 1
- item 28 (Narrative Reason for Separation): Secretarial Authority

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 upgrading his characterization of service to honorable.



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 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, 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.
3. AR 40-501 governs medical fitness standards for enlistment, induction, appointment (including officer procurement programs), retention, and separation (including retirement).
4. AR 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 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.

d. Chapter 15 (Secretarial Plenary Authority) states Secretarial plenary separation authority is exercised sparingly and used when no other provision of this regulation applies. Separation under this chapter is limited to cases where the early separation of a Soldier is clearly in the best interest of the Army. Separations under this chapter are effective only if approved in writing by the Secretary of the Army or the Secretary's approved designee as announced in updated memoranda. Separation under this chapter may be voluntary or involuntary. Separations under this authority will be characterized as honorable or (general) under honorable conditions.

5. AR 635-40 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, 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.

6. AR 635-5 (Separation Documents), in effect at the time, prescribed the separation documents that must be prepared for Soldiers at the time of retirement, discharge, or release from active duty service or control of the Active Army. It established standardized policy for preparing and distributing the DD Form 214. The DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of release from active duty, retirement, or discharge. The information entered thereon reflects the conditions as they existed at the time of separation.

7. AR 635-5-1 (SPD) 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. It states that the separation code "KFS" is the appropriate code to assign to Soldiers separated under the provisions of AR 635-200, Chapter 10, for the good of the service – in lieu of court-martial.

8. 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 (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) 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.

9. 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//