

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 12 June 2024

DOCKET NUMBER: AR20230011745

APPLICANT REQUESTS: an upgrade of his characterization of service from under other than honorable conditions (UOTHC) to under honorable conditions (general), and a personal appearance before the Board.

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

- DD Form 149 (Application for Correction of Military Record), 28 August 2023
- self-authored statements
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 17 March 1988
- Medical Report, 19 August 2022
- Medical Summary, 23 June 2023

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, 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, in effect, he had two months left in the service, when he had fellatio with two other men, one of whom felt guilty and told the first sergeant. He was questioned by the first sergeant, captain, and his platoon sergeant about the incident. Next thing he remembers, he was being threatened by police detectives who gave him two options, the first one was to risk going to jail, and the second option was to "go home". He was 21 years old and afraid his family would find out the reason why he was discharged, and he was unaware he would receive a UOTHC discharge. He is seeking a discharge upgrade which would allow him to hold his head high.
3. The applicant notes on his DD Form 149, post-traumatic stress disorder (PTSD), other mental health, and sexual assault/harassment are related to his request.
4. The applicant enlisted in the Regular Army on 3 September 1985, for a 3-year period and subsequently extended on 11 December 1986 for one month. He was awarded the

military occupational specialty of 16S (Man-Portable Air Defense System (MANPADS) Crewmember) and the highest rank he attained was specialist four/E-4.

5. The applicant's official military personnel file is void of the facts and circumstances pertaining to his court-martial charges however a memorandum for record shows on 1 February 1988, the applicant's chain of command, to include the Staff Judge Advocate, recommended him for a bad conduct discharge by a special court martial.

6. The applicant consulted with legal counsel on 12 February 1988 and executed a written request for discharge for the good of the service under the provisions of Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10 (Discharge for the Good of the Service). He acknowledged his understanding of the following in his request:

a. He understood that he could request discharge for the good of the service because the charges preferred against him could result in the imposition of a punitive discharge.

b. Prior to completing this request, he was afforded the opportunity to consult with appointed counsel, who fully advised him of the basis for his contemplated trial by court-martial, the maximum punishment authorized under the Uniform Code of Military Justice (UCMJ), of the possible effects of an UOTHC character of service, and of the procedures and rights available to him.

c. He acknowledged that he was making this request of his own free will and had not been subjected to any coercion by any person. Although counsel furnished him legal advice, this decision was his own. Additionally, he elected not to submit a statement in his own behalf.

7. On 17 February 1988, the applicant's immediate commander recommended approval of the applicant's request for discharge under the provisions of AR 635-200, Chapter 10, and issuance of a UOTHC discharge.

8. On the same date, the applicant's intermediate commander recommended disapproval of the applicant's request for discharge under the provisions of AR 635-200, Chapter 10. Additionally, on 29 February 1988, the applicant's second intermediate commander recommended separation with issuance of an UOTHC discharge.

9. On 3 March 1988, the separation authority approved the applicant's request for discharge for the good of the service and further directed the applicant receive an UOTHC discharge, and he be reduced to the lowest enlisted grade of E-1.

10. The applicant's DD Form 214 shows he was discharged on 17 March 1988, under the provisions of AR 635-200, Chapter 10, for the good of the service-in lieu of court martial, in the grade of E-1. He received an UOTHC characterization of service, a separation code of KFS, and reenlistment code RE 3-3C. He was credited with 2 years, 6 months, and 15 days of net active service.

11. On 6 February 2024, in the processing of this case, the U.S. Army Criminal Investigation Division, searched their criminal file indexes, which revealed the applicant was charged with soliciting another to commit an offense (sodomy) and indecent assault between 1 May 1987 and 6 November 1987.

12. The applicant provides various medical documentation, addressing his treatment plan for his behavioral health issues showing classes to take, appointments to schedule, action to take for housing, connecting with the lesbian, gay, bisexual, transgender, queer, intersex, and asexual (LGBTQIA+) community to gain support, secure human immunodeficiency virus infection care. Additionally providing his medical summary showing diagnosis of medical issues to include but not limited to hyperlipidemia, chronic kidney pain, neuropathy, chronic pain syndrome, gastroesophageal reflux disease, seasonal allergies, bipolar affective disorder, anxiety disorder, PTSD, insomnia, vitamin D deficiency. Also showing medications prescribed, and a surgical information sheet.

13. Discharges under the provisions of AR 635-200, Chapter 10 are voluntary requests for discharge for the good of the service from the Soldier to avoid a trial by court-martial. An UOTHC character of service is normally considered proper.

14. In reaching its determination, the Board can consider the applicant's petition, service record, and statements in light of the published guidance on equity, injustice, or clemency.

15. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to his characterization of service from under other than honorable conditions (UOTHC) to under honorable conditions (general). He contends he experienced an undiagnosed mental health condition, military sexual trauma (MST), and 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 3 September 1985.
- The application was void of the facts and circumstances pertaining to his court-martial charges. It was noted that the applicant was recommended for a bad

conduct discharge by a special court martial, and he requested discharge for the good of the service. However, after consulting with counsel, the applicant requested discharge for the good of the service, and on 17 February 1988, the applicant's immediate commander recommended approval of the applicant's request for discharge under the provisions of AR 635-200, Chapter 10, and issuance of a UOTHC discharge.

- The applicant was discharged on 17 March 1988 and was credited with 2 years, 6 months, and 15 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 had a mental health condition, including PTSD, as well as an MST experience related to his misconduct resulting in discharge. He explains the event, engaging in fellatio with two other men, as the reason for discharge. The applicant implies this was consensual. The applicant provided mental health documentation dated 19 August 2022 showing diagnoses of bipolar disorder and PTSD with treatment goals that targeted improving psychosocial stressors, relationships, and management of his chronic health condition. It also indicated that the applicant is taking mood stabilizing medication, an antipsychotic, and medication for sleep and anxiety. A CID Report of Investigation provided a description of the events leading to the charge of indecent assault that the applicant committed against other soldiers. There was insufficient evidence that the applicant was diagnosed with PTSD or another psychiatric condition while on active service. There was also insufficient evidence that the applicant was a victim of sexual assault or harassment.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed no history of mental health related treatment or diagnoses.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support that the applicant had a mental health condition that mitigates his misconduct.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts he had an undiagnosed mental health condition, including PTSD, at the time of the misconduct. He provided mental health records from 2022 showing diagnoses of PTSD and bipolar disorder.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition, including PTSD, while on active service. There is evidence of an investigation related to sexual harassment/assault, but it appears that the applicant is the perpetrator of that experience.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is insufficient evidence that the applicant was experiencing a mental health condition while on active service. There is evidence that he was diagnosed with PTSD and bipolar disorder after discharge, but the onset of symptoms is unclear.

g. However, the applicant contends he was experiencing mental health condition as well as an MST that mitigated his misconduct, and per Liberal Consideration his assertion is sufficient for the board's consideration.

#### 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 her characterization of service. Upon review of the applicant's petition, available military record and medical review, the Board concurred with the advising official finding insufficient evidence to support that the applicant had a mental health condition that mitigates his misconduct. The opine found insufficient evidence that the applicant was experiencing a mental health condition while on active service.

2. The Board found insufficient evidence of in-service mitigating factors to overcome the misconduct. The applicant provided no post service achievements or character letters of support for the Board to weigh a clemency determination. Evidence shows the record is absent supporting documentation that the applicant was experiencing a mental health condition, including PTSD, while on active service. Furthermore, there is evidence of an investigation related to sexual harassment/assault, but it appears that the applicant is the perpetrator of that experience. The Board determined 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 to an honorable discharge. Therefore, the Board denied relief.

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

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 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 for correction of the records of the individual concerned.



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, 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, 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.

3. AR 15-185 (ABCMR), the regulation governing this Board, states applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

4. AR 635-200, in effect at the time, provided guidance for the administrative separation of enlisted personnel:

a. Chapter 10 of this regulation provided a member who has committed an offense or offenses, the punishment for which, under the UCMJ and the Manual for Courts-Martial, includes a bad conduct or dishonorable discharge, may submit a request for discharge for the good of the Service. The discharge request may be submitted after court-martial charges are preferred against the member, or, until final action on the case by the court-martial convening authority. A member who is under a suspended sentence of a punitive discharge may also submit a request for discharge for the good of the Service. An UOTHC discharge certificate normally is appropriate for a member who is discharged for the good of the Service. However, the separation authority may direct a general discharge certificate if such is merited by the member's overall record during the current enlistment.

b. An honorable discharge is a separation with honor. The issuance of an honorable discharge certificate is predicated upon proper military behavior and proficient performance of duty during the member's current enlistment or period of obligated service with due consideration for the member's age, length of service, grade, and general aptitude. Where a member has served faithfully and performed to the best of his ability, and there is no derogatory information in his military record, he should be furnished an honorable discharge certificate.

c. An under honorable conditions (general), discharge is a separation from the Army under honorable conditions. It is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

d. An UOTHC discharge is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct and the good of the service.

5. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder; traumatic brain injury; sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences.

6. 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//