

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 June 2024

DOCKET NUMBER: AR20230013056

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions (UOTHC) character of service to honorable, and correction of his DD Form 214 (Certificate of Release or Discharge from Active Duty), to change his narrative reason for separation to "Secretarial Authority," with the appropriate corresponding changes to his separation program designator (SPD) code and reenlistment (RE) code.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214, for the period ending 8 October 1981
- Cover letter, New York Legal Assistance Group, dated 24 August 2023
- Legal Brief (10 Pages), undated
- Exhibit A, Self-authored statement, dated 21 August 2023
- Exhibit B
 - letter, National Personnel Records Center (NPRC), dated 10 May 2023
 - Official Military Personnel File (OMPF) excerpt (23 pages), dated 25 June 1980 to 8 October 1981
- Exhibit C, two medical statements, dated 28 August 2022 to 22 September 2022
- Exhibit D, two statements of support, dated 31 July 2023 to 3 August 2023
- Exhibit E, photograph, undated
- Exhibit F
 - Memorandum, Acting Under Secretary of Defense, Brad Carson, dated 24 February 2016
 - Memorandum, Secretary of Defense, Chuck Hagel, dated 3 September 2014
 - Memorandum, Acting Under Secretary of Defense for Personnel and Readiness, A.M. Kurta, dated 24 August 2017
 - U.S. Department of Veterans Affairs (VA) Author Manuscript, "Reckless Self-Destructive Behavior and PTSD in Veterans: The Mediating Role of New Adverse Events", Joanna D. Lusk, et al, dated 1 June 2018
 - VA Disability Benefits for Non-Combat PTSD Stressors, VA Disability Group PLLC

- Article, "Where is Marijuana Legal? A Guide to Marijuana Legalization", U.S. News, dated 31 May 2023
- "State Medial Cannabis Laws", National Conference of State Legislatures (NCSL), dated 22 June 2023
- Research Report, "An Empirical Assessment of the U.S. Army's Enlistment Waiver Policies", Rand Corporation, undated
- Article, "Smoked pot and want to enlist? Army issuing more waivers", LA Times, dated 2 December 2017

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, in effect:

a. He grew up in Queens, NY, surrounded by drugs and violent crime. He did his best to avoid trouble, signed up for sports, and enjoyed the camaraderie of being on a team. Following the paths of the positive role models in his life, he enlisted in the Army.

b. He enjoyed basic training, thrived physically and academically, and had a knack for weaponry. In advanced individual training (AIT), he started to see some of the negative elements he grew up around. It frustrated him to see servicemembers using drugs and not as fully committed to the Army values as he was. He tried to keep his head down, but this proved difficult because of his platoon sergeant (PSG).

c. Upon finding out he was from New York City, his PSG accused him of being a gang member and criminal. The PSG did not care about his outstanding performance in basic training or his efforts at AIT. He was tormented because of a perception, based upon where he was from. The PSG frequently threatened his physical safety and made it his mission to run him out of the Army. The constant abuse made him unsure of his position in the military. Being young and not knowing how to deal with the confusion, anxiety, and depression, he made the mistake of experimenting with marijuana.

d. He was given the opportunity for retraining and was hopeful that away from Fort Polk and his PSG, he could become the Soldier he wanted to be. Sadly, he never received the second chance he thought he would get. He worked hard to get back on track but failed an escape and evasion exercise and with that, he was discharged. He has had endless trouble since to include insomnia, flashbacks, nightmares, and anxiety.

e. He recently established care with a mental health provider, who has helped him understand post-traumatic stress disorder (PTSD) and begin moving past the abuse he suffered.

3. Counsel states, in effect:

a. The applicant was an excellent Soldier. As a result of his PSG's abuse, the applicant suffers from PTSD. His command did not provide him the treatment or support needed to address his behavioral health condition, which manifested itself as self-medication and anti-social behavior. This should be a mitigating factor when considering his misconduct and resulting discharge characterization.

b. The applicant regrets his mistakes and seeks forgiveness and understanding. He has since learned to cope in a constructive manner, found gainful employment, and has begun to move past the abuse he suffered.

4. The applicant enlisted in the Regular Army on 23 July 1980, for a 3-year period. Upon completion of initial entry training, he was awarded military occupational specialty 11B (Infantryman). The highest rank he attained was private/E-2.

5. 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 May 1981, for two specifications of willfully disobeying a lawful order from his superior noncommissioned officer (NCO) and for wrongfully using provoking words, on or about 16 April 1981. His punishment consisted of forfeiture of \$130.00 pay and confinement in the Correctional Custody Facility for seven days.

b. On 12 May 1981, for the wrongful possession of marijuana, on or about 23 April 1981. His punishment consisted of forfeiture of \$150.00 pay per month for two months, 30 days of extra duty, and 30 days of restriction.

6. Before a summary court-martial at Fort Polk, LA, on 9 July 1981, the applicant pled guilty to and was found guilty of two specifications of disobeying a lawful command from his superior commissioned officer, disobeying a lawful order from his superior NCO, wrongfully using provoking words and gestures, and communicating a threat to Private First Class J.L.J., on or about 10 June 1981. He was sentenced to reduction to E-1 and 30 days of confinement at hard labor. The sentence was approved and ordered executed on 9 July 1981.

7. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the UCMJ on 17 July 1981, for the wrongful possession of marijuana, on or about

10 July 1981. His punishment consisted of forfeiture of \$250.00 pay per month for two months.

8. The applicant was sent to Brigade for correctional training. In an interview conducted on 4 September 1981, the applicant stated he wanted a discharge and did not desire to be returned to duty.

9. A resume of conduct, attitude, performance, and discreditable acts, dated 14 September 1981, shows 33 instances of counseling, progress notes, and disciplinary actions conducted between 9 July and 14 September 1981.

10. On 14 September 1981, the applicant's immediate commander recommended the applicant be discharged from the Army under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), due to frequent acts of misconduct. The commander noted the applicant's repeated acts of misconduct and problems controlling his emotions and temper as reasons for the recommendation.

11. The applicant's intermediate commanders concurred with the recommendation and further recommended that the requirements for counseling and rehabilitation be waived.

12. On 16 September 1981, the applicant acknowledged receipt of the notification of discharge proceedings.

13. A statement of option, dated 21 September 1981, shows the applicant elected not to undergo a separation medical examination.

14. The applicant underwent a mental status evaluation on 22 September 1981. The examining provider determined he was mentally responsible and had the mental capacity to participate in administrative proceedings.

15. On that same date, the applicant consulted with legal counsel and was advised of the basis for the contemplated separation action, the type of discharge he could receive, and its effects, and of the procedures and rights available to him. He waived consideration of his case and a personal appearance before a board of officers. He further acknowledged understanding that he may expect to encounter substantial prejudice in civilian life as a result of the issuance of an under honorable conditions (general) discharge and that he may be ineligible for many or all benefits as a Veteran under both State and Federal laws as a result of the issuance of a UOTHC discharge. He elected not to submit a statement in his own behalf.

16. The separation authority approved the recommended separation action on 5 October 1981, waived the rehabilitative requirements, and directed the issuance of a UOTHC Discharge Certificate.

17. The applicant was discharged on 8 October 1981, under the provisions of AR 635-200, paragraph 14-33b (1), by reason of frequent involvement in incidents of a discreditable nature with civil or military authorities. His DD Form 214 confirms his service was characterized as UOTHC, with separation code JKA and reenlistment code RE-3B. He was credited with 1 year, 2 months, and 1 day of net active service, with lost time from 9 July 1981 to 30 July 1981.

18. The applicant provides:

a. A cover letter and legal brief from the New York Legal Assistance Group, dated 24 August 2023.

b. A letter from NPRC, dated 10 May 2023, and 23 pages of records from his OMPF, dated 25 June 1980 to 8 October 1981.

c. Two medical statements, dated 28 August 2022 and 22 September 2022, wherein the authors state, in effect, the applicant was diagnosed with PTSD related to interpersonal traumatic events with his PSG during his military service. He has received treatment for chemical dependence and co-occurring PTSD. He has shown personal and professional growth and assists other in their recovery journey. He shows commitment to long-term recovery and wellness but is still unable to maintain full-time work. The benefits resulting from a discharge upgrade would allow him to stay healthy and housed.

d. Two statements of support, dated 31 July 2023 and 3 August 2023, wherein two of the applicant's siblings state, in effect, the applicant's PSG hated him because the applicant was from New York and the PSG was from Alabama. He constantly berated the applicant and victimized him in a systematic way. He was repeatedly told his weapon was dirty, his uniform was unsatisfactory, he was constantly punished and confined to the barracks. The applicant lost hope and confidence in his future, began drinking, and had training flashbacks of live fire exercises. He developed PTSD and experienced years of depression and struggle. He is a wonderful kind, caring man, who was protective of his younger brother and supported his sister through the loss of her husband.

e. An undated photograph, presumably of the applicant, shows an individual in uniform.

f. The Hagel, Carson, and Kurta Memoranda provide clarifying guidance to Military Discharge Review Boards (DRB) 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, PTSD, and traumatic brain injury (TBI).

g. A VA Author Manuscript, entitled "Reckless Self-Destructive Behavior and PTSD in Veterans: The Mediating Role of New Adverse Events," Joanna D. Lusk, et al, dated 1 June 2018, outlines a study which shows a link between reckless self-destructive behavior and PTSD to include alcohol and drug abuse, driving while intoxicated, gambling, and aggression.

h. A VA Disability Benefits for Non-Combat PTSD Stressors, VA Disability Group PLLC, provides a definition of non-combat related PTSD and the steps required to submit a claim through the VA for non-combat PTSD.

i. An article from U.S. News, entitled "Where is Marijuana Legal? A Guide to Marijuana Legalization", dated 31 May 2023, shows that twenty-three states, along with Washington D.C. and Guam, have acted to legalize recreational marijuana.

j. A report from the NCSL, entitled "State Medical Cannabis Laws", dated 22 June 2023, shows that thirty-eight states, three territories, and the District of Columbia allow the medical use of cannabis products.

k. An undated research report by the Rand Corporation, entitled "An Empirical Assessment of the U.S. Army's Enlistment Waiver Policies", provides the result of a study which examines the Army enlistment standards, waiver policies for marijuana and behavioral health conditions, and the performance of recruits who receive waivers.

l. An article from the LA Times dated 2 December 2017, entitled "Smoked pot and want to enlist? Army issuing more waivers," asserts that as more states lessen or eliminate marijuana penalties, the Army is granting hundreds of waivers to enlist people who used marijuana in their youth.

19. Regulatory guidance provides:

a. When an individual is discharged under the provisions of AR 635-200, Chapter 14, the separation authority may direct a general discharge if such is merited by the Soldier's overall record. Characterization of service as honorable is not authorized unless the Soldier's record is otherwise so meritorious that any other characterization clearly would be inappropriate.

b. When an individual is discharged under the provisions of AR 635-200, paragraph 14-33b, the appropriate narrative reason for separation is "frequent involvement in incidents of a discreditable nature with civil or military authorities," with SPD "JKA."

20. The Board should consider the applicant's overall record in accordance with the published equity, injustice, or clemency determination guidance.

21. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade of his under other than honorable conditions character of service and a narrative reason change to Secretarial Authority. The applicant contends having PTSD, Depression, and Anxiety during military service that contributed to the misconduct that led to the separation.

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 16 July 1980.
- On 14 September 1981, the applicant's immediate commander recommended the applicant be discharged from the Army under the provisions of Army Regulation (AR) 635-200 due to frequent acts of misconduct.
- The applicant was discharged on 8 October 1981 and was credited with 1 year, 2 months, and 1 day 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 experiencing verbal abuse and physical threats by a platoon sergeant that led to the development of PTSD, which in turn contributed to the misconduct that led to his separation. The applicant also asserts experiencing Depression and Anxiety during military service. The applicant submitted two letters from post service BH providers dated 2022 that document that the applicant was diagnosed with PTSD related to his service in the military, specifically associated with interpersonal traumatic events by his platoon sergeant.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed. Due to the period of service, there were no active duty electronic medical records. VA medical records reveal that the applicant is not currently service connected, but has a pending claim for service connection. The applicant initiated contact with the VA in 2024 and in February 2024 was seen for a Compensation and Pension Exam that evaluated the applicant for service connection associated with PTSD. The exam diagnosed the applicant with Other Trauma- and Stressor- Related Disorder and determined that the condition was a direct result of the harassment by a platoon sergeant that occurred daily for about a year. It was documented that the applicant continues to remain extremely symptomatic and impaired as a result of the trauma experienced in the military. The VA medical record also reveals that the applicant was convicted of five total felonies post service with his longest incarceration being from 2010 to 2020 for felony robbery.

e. 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 BH condition or experience that partially mitigates the misconduct that led to the separation.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts PTSD, Depression, and Anxiety. The VA has diagnosed the applicant with Other Trauma- and Stressor- Related Disorder and post service civilian providers have diagnosed the applicant with PTSD.

(2) Did the condition exist or experience occur during military service? Yes. The applicant has a pending service connection by the VA for Other Trauma- and Stressor- Related Disorder which establishes that the condition existed during military service. Post service civilian providers have diagnosed the applicant with PTSD related to military service. The applicant also asserts Depression and Anxiety during military service.

(3) Does the condition or experience actually excuse or mitigate the discharge? Partial. Given the nexus between PTSD/Other Trauma- and Stressor- Related Disorder, self-medicating with substances, and difficulty with authority, possession of marijuana and disobeying lawful orders are mitigated. There is no natural sequela between PTSD/Other Trauma- and Stressor- Related Disorder and wrongfully using provoking words or gestures to a fellow soldier or wrongfully communicating a threat and there is no evidence to suggest that the applicant's PTSD/Other Trauma- and Stressor- Related contributed to this misconduct. Trauma conditions do not interfere with the ability to distinguish between right and wrong and act in accordance with the right. Finally, there is no medical evidence to support the applicant's asserted Depression or Anxiety existed during military service, but these conditions also do not have a nexus with wrongfully using provoking words or gestures to a fellow soldier or wrongfully communicating a threat. As such, this misconduct is not mitigated.

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 record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding sufficient evidence to partially support that the applicant had a BH condition or experience that partially mitigates the misconduct that led to the separation. The opine noted the nexus between PTSD/Other Trauma- and Stressor- Related Disorder, self-medicating with substances, and difficulty with authority, possession of marijuana and disobeying lawful orders are mitigated.

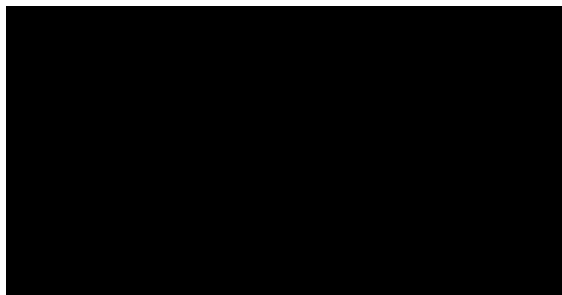
2. The Board noted the applicant’s character letters of support attesting to his character and integrity. The Board found the applicant accepted responsibility for his actions and was remorseful with his application, demonstrating he understands his actions were not that of all Soldiers. The Board agreed there is no natural sequela between PTSD/Other Trauma- and Stressor- Related Disorder and wrongfully using provoking words or gestures to a fellow soldier or wrongfully communicating a threat and there is no evidence to suggest that the applicant’s PTSD/Other Trauma- and Stressor- Related contributed to this misconduct. However, based on the advising official the Board determined an under honorable conditions (General) character of service is warranted, as he did not meet the standards of acceptable conduct and performance of duty for Army personnel making him suitable for an Honorable characterization. The Board agreed amending the applicant’s narrative reason to secretariat authority is warranted, but his RE-Code is appropriate. Therefore, the Board granted partial 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:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial 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 for the period ending 8 October 1981, showing his characterization of service as General Under Honorable Conditions and the narrative reason as secretarial authority, with a separation program designator (SPD) code of JFF.
2. The Board further determined 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 to amending the applicant's reenlistment (RE) code.



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 the 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 ABCMR applicants (and/or their counsel) prior to adjudication.

3. AR 601-210 (Active and Reserve Components Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment and processing into the Regular Army, U.S. Army Reserve, and Army National Guard. Table 3-1 provides a list of RE codes.

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

4. AR 635-5-1 (SPD) provides the specific authorities, reasons for separating Soldiers from active duty, and the SPD codes to be entered on the DD Form 214.

a. Separation code "JKA" is the appropriate code to assign to Soldiers involuntarily separated under the provisions of AR 635-200, paragraph 14-33b, by reason of frequent involvement in incidents of a discreditable nature with civil or military authorities.

b. Separation code "JFF" is the appropriate code to assign to Soldiers involuntarily discharged by reason of Secretarial Authority.

5. 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 14 established policy and prescribed procedures for separating members for misconduct. Specific categories included minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion,

or absences without leave. Action would be taken to separate a member for misconduct when it was clearly established that rehabilitation was impracticable or was unlikely to succeed. A discharge under other than honorable conditions (UOTHC) was normally considered appropriate. However, the separation authority could direct a general discharge if such was merited by the Soldier's overall record.

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.

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; TBI; 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.

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, 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//