

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 July 2024

DOCKET NUMBER: AR20230013677

APPLICANT REQUESTS: his under other than honorable conditions (UOTHC) discharge be upgraded to under honorable conditions (general).

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 293 (Application for the Review of Discharge)

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 he served honorably and without any disciplinary actions, prior to someone taking advantage of him. He made a mistake by letting someone use his laptop. He has now suffered for 15 years due to that mistake. He needs medical care and counseling. It took years to realize he did not do anything wrong. He just tried to help a fellow Soldier. He lists posttraumatic stress disorder (PTSD) and other mental health as issues related to his request.
3. The applicant enlisted in the U.S. Army Reserve (USAR) on 26 June 1992. He entered active duty for training on 30 September 1992.
4. The applicant was released from initial active duty training (IADT) on 24 February 1993 and was transferred back to the USAR. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 4 months and 25 days of net active service. His service was uncharacterized [see Administrative Notes].
5. The applicant enlisted in the Regular Army on 4 February 2004 for a period of 3 years. His Military Occupational Specialty (MOS) was 19K (M1 Armor Crewman).
6. The applicant served in Iraq from 4 December 2005 through 4 December 2006.

7. The medical documents, dated 2005, show the applicant had extreme pain in his right heel, was referred, had surgery for plantar fasciitis (plantar fasciotomy) and was healing well and had a little problem with the medical occipital plantar fascia.

8. Court martial charges were preferred against the applicant on 14 March 2007, for violation of the Uniform Code of Military Justice (UCMJ). His DD Form 458 (Charge Sheet) shows he was charged with:

- violating a general order by wrongfully possessing sexually explicit digital photos and storing said digital photos on an Apple IPOD between on or about 15 January 2006 and on or about 29 June 2006
- violating a general order by wrongfully possessing sexually explicit digital photos and digital video and storing said digital photos and video on a Lacie external hard drive between on or about 15 January 2006 and on or about 29 June 2006
- violating a general order by wrongfully possessing sexually explicit digital photos and digital video and storing said digital photos and video on a Hewlett-Packard laptop between on or about 15 January 2006 and on or about 29 June 2006
- violating a lawful general order by wrongfully possessing sexually explicit digital photos and digital video, and storing said digital photos and video on a Sony gaming system, between on or about 15 January 2006 and on or about 29 June 2006
- wrongfully and knowingly possessing more than 600 images of child pornography on a Lacie external hard drive, which conduct was prejudicial to good order and discipline or likely to bring discredit upon the Armed Forces between on or about 15 January 2006 and on or about 29 June 2006
- wrongfully and knowingly possessing more than 400 images of child pornography on a Hewlett-Packard laptop, which conduct was prejudicial to good order and discipline or likely to bring discredit upon the Armed Forces between on or about 15 January 2006 and on or about 29 June 2006
- wrongfully and knowingly possessing more than 5 images of child pornography on an Apple IPOD, which conduct was prejudicial to good order and discipline or likely to bring discredit upon the Armed Forces between on or about 15 January 2006 and on or about 29 June 2006

9. The applicant consulted with legal counsel on 3 September 2007, and 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.

a. After consulting with legal counsel, he voluntarily requested discharge under the provision of Army Regulation (AR) 635-200 (Active-Duty Enlisted Administrative Separations), Chapter 10, in for the good of the service, lieu of trial by court-martial. He further acknowledged he understood that if his discharge request was 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 (VA), and he could be deprived of his rights and benefits as a veteran under both Federal and State laws and he may expect to encounter substantial prejudice in civilian life because of an UOTHC discharge.

b. He elected not to submit statements in his own behalf.

10. A memorandum from the applicant's defense counsel, dated 3 September 2007, states the applicant was pending court martial for his alleged possession of adult and child pornography. She requested the applicant's request for discharge be approved with his service characterized as under honorable conditions (general). The applicant had served honorably and if he received an UOTHC discharge he would not likely receive his VA medical benefits for his foot. Mr. EG__ who was a former Soldier deployed with the applicant, he used the applicant's computer during the first five months of the deployment because he did not have his own computer. The defense strongly believes the applicant is innocent of knowing possession of child pornography and that Mr. EG__ downloaded the child pornography onto the applicant's computer without his knowledge.

11. The applicant's commander recommended approval of his request for discharge in lieu of trial by court-martial. He further recommended a UOTHC discharge. The applicant's chain of command recommended approval with an UOTHC discharge.

12. The separation authority approved the applicant's request for discharge in lieu of trial by court-martial on 4 September 2007. He directed the applicant's reduction to the lowest enlisted grade with the issuance of a UOTHC discharge.

13. The applicant was discharged on 19 September 2007. His DD Form 214 shows he was discharged under the provisions of AR 635-200, Chapter 10, in lieu of trial by court-martial with Separation Code KFS and Reentry Code 4. His service was characterized as UOTHC. He completed 3 years, 7 months, and 16 days of net active service. He was awarded the: National Defense Service Medal (2nd Award), Global War on Terrorism Service Medal, Iraq Campaign Medal, Army Service Ribbon, and the Overseas Service Ribbon.

14. The applicant was charged due to the commission of an offense punishable under the UCMJ with a punitive discharge. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.

15. On 18 January 2024, an agency staff member, requested the applicant provide medical documents that support his mental health issue (PTSD). As of 1 March 2024, no response was provided.

16. In reaching its determination, the Board can consider the applicant's petition and service record in accordance with the published equity, injustice, or clemency determination guidance.

17. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his discharge under other than honorable conditions (UOTHC). He contends he experienced mental health conditions including PTSD 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) The applicant re-enlisted in the Regular Army on 4 February 2004 after serving in the U.S. Army Reserve (USAR); 2) The applicant served in Iraq from 4 December 2005-4 December 2006; 3) Court martial charges were preferred against the applicant on 14 March 2007, for violating general order by possessing sexually explicit images and for the possession child pornography; 4) The applicant was discharged on 19 September 2007, Chapter 10, in lieu of trial by court-martial with Separation Code KFS and Reentry Code 4. His service was characterized as UOTHC.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's available military service records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical records were provided.

c. The applicant asserts he experienced mental health conditions including PTSD, which mitigate his misconduct. There is insufficient evidence the applicant reported or was diagnosed with a mental health condition including PTSD while on active service.

d. A review of JLV provided insufficient evidence the applicant has been diagnosed with a mental health condition including PTSD by the VA. He has received assistance for homelessness.

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

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant asserts he experienced a mental health condition including PTSD while on active service that mitigates his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced mental health conditions including PTSD while on active service that mitigates his misconduct.

(3) Does the condition experience actually excuse or mitigate the misconduct? No, there is insufficient evidence beyond self-report the applicant experiencing a mental health condition including PTSD, while on active service. In addition, there is no nexus between his reported mental health conditions including PTSD and his misconduct of possession of child pornography: 1) this type of misconduct is not a part of the natural history or sequelae of reported mental health condition including PTSD; 2) His reported mental health conditions including PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing a mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

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 request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The evidence shows the e applicant was charged with commission of offenses (possession of adult and child pornography) punishable under the UCMJ with a punitive discharge. After being charged, he consulted with counsel and requested discharge under the provisions of AR 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial and carry an under other than honorable conditions discharge. The Board found no error or injustice in his separation processing. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the advising official. The Board concurred with the medical reviewer's finding insufficient evidence to support the applicant had a behavioral health condition during military service that mitigates his misconduct and discharge. Also, the applicant provided no evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination. Based on a preponderance of evidence, the Board determined that the character of service and reason for separation the applicant received upon separation were not in error or unjust.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

Except for the correction addressed in Administrative Note(s) below, 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.

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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.

ADMINISTRATIVE NOTE(S):

The applicant completed a period of IADT. He was awarded a MOS at the completion of training and was transferred back to the USAR. Army Regulation 635-200 provides that when a Reserve Component Soldier successfully completes IADT, the characterization of service is Honorable unless directed otherwise by the separation authority. Please reissue him a DD Form 214 for the period ending 24 February 1993 showing his character of service as Honorable.

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. Title 10, USC, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.
3. AR 635-200, Personnel Separations, in effect at the time, sets forth the basic authority for the separation of enlisted personnel.
 - a. An honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier'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. When a Soldier is discharged before ETS for a reason for which an honorable discharge is discretionary, the following considerations apply. Where there have been infractions of discipline, the extent thereof should be considered, as well as the seriousness of the offense(s).
 - 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 of that regulation provides that a Soldier who has committed an offense or offenses, the punishment for which 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 Soldier or where required, after referral, until final action by the court-martial convening authority.
4. 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 Service 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. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part to those conditions or experiences.

5. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and BCM/NRs on 25 July 2018, 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 court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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//