

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 September 2024

DOCKET NUMBER: AR20230014440

APPLICANT REQUESTS: Upgrade of his under other than honorable conditions (UOTHC) discharge to an honorable discharge.

APPLICANT'S SUPPORTING DOCUMENT CONSIDERED BY THE BOARD:

DD Form 149 (Application for Correction of Military Record)

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, he desires his discharge to be upgraded to honorable in order to right the wrongs that he endured and so he can heal and move forward with life. He wants to be a voice for those who have been mocked, hurt, and discouraged. He wants to take back the power. He was housed with a predator, but no one listened, and he had to take matters into his own hands by breaking his roommate's arm. Now, he must tell his story. The applicant indicates on his application that mental health and sexual assault/harassment issues are related to his request.
3. The applicant enlisted in the Regular Army on 1 September 1999 for a period of 3 years. Upon completion of initial entry training, he was assigned to a unit at Fort Drum, NY. He was advanced to private (PV2)/E-2 on 1 March 2000.
4. The applicant was counseled on 25 March 2000 for failing to obey a direct order from a noncommissioned officer (NCO). He was advised that further misconduct could result in corrective training, punishment under the provisions of the Uniform Code of Military Justice (UCMJ), and/or initiation of action to separated him from the Army and the potential consequences of such a separation.

5. The applicant was counseled on 28 April 2000 regarding his failure to pass the Army Physical Fitness Test. He was also reminded of the potential consequences for failing to meet Army standards.

6. The applicant accepted summarized company grade nonjudicial punishment (NJP) under the provisions of Article 15, of the UCMJ on 28 June 2000 for being disrespectful toward an NCO.

7. The applicant was counseled on twelve occasions between 9 August 2000 and 7 November 2000 for the following reasons:

- failure to show proof of paying the fine for a speeding ticket
- failure to be at his appointed place of duty on two occasions
- destruction of government property on two occasions
- failure to shine his boots in accordance with Army standards
- why he was not being recommended for promotion
- failure to follow a directive from an NCO on three occasions
- being disrespectful to an NCO
- failure to meet Army height and weight standards
- failure to meet Army physical fitness standards
- poor performance and appearance

8. On 29 November 2000, the applicant accepted company grade NJP under the provisions of Article 15, of the UCMJ for willfully disobeying a lawful order from an NCO on two occasions; and being disrespectful in language toward an NCO. His punishment consisted of reduction to E-1, forfeiture of \$234.00, extra duty for 14 days, and restriction for 14 days.

9. On 5 December 2000, the applicant was counseled for failing to report for morning accountability formation and being found in his room where he had overslept.

10. On 11 December 2000, the applicant accepted company grade NJP under the provisions of Article 15, of the UCMJ for on or about 6 November 2000, without authority, absenting himself from his unit and remaining so absent until on or about 19 November 2000. His punishment consisted of reduction to PV1/E-1, forfeiture of \$263.00, extra duty for 14 days, and restriction for 14 days. The applicant appealed the punishment but did not submit additional matters in his own behalf. The appeal was denied on 15 December 2000.

11. The applicant was counseled on 12 December for failing to be at his appointed place of duty.

12. On 17 January 2001, the applicant underwent a pre-separation medical examination and was found to be qualified for separation.

13. On 25 January 2001, the applicant underwent a mental status evaluation and was determined to have the mental capacity to understand and participate in the proceedings. He was mentally responsible and met regulatory retention requirements. It was determined there was no mental disease or defect which warranted disposition through medical channels. He was psychiatrically cleared for any administrative or judicial actions deemed appropriate by the command.

14. On 14 March 2001, the applicant's immediate commander notified the applicant of his intent to initiate actions to separate him under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 14, paragraph 14-12b, for a pattern of misconduct. The specific reasons for this action were the applicant's aforementioned misconduct, his failure to respond to numerous rehabilitation attempts, and his display of a severe lack of discipline and responsibility. He was advised that he was being recommended for a discharge UOTHC, but the final determination of his characterization of service would be made by the separation authority. The applicant acknowledged receipt of the proposed separation notification on the same day.

15. On 15 March 2001, the applicant acknowledged that he was advised of the reasons for separation and of the rights available to him. He requested his right to consult with counsel. He waived his right to appear before an administrative separation board. He elected to submit a statement in his own behalf, wherein he took full responsibility for the actions leading to his separation. He realized the Army is not for everyone, and he is one of those people. He asked the separation authority to consider separating him with a General discharge so he could avoid the stigma of a discharge UOTHC. A discharge UOTHC would have an adverse impact on his job opportunities and his ability to support his family.

16. The applicant's immediate commander formally recommended his separation prior to the expiration of his term of service under the provisions of Army Regulation 635-200, Chapter 14, by reason of a pattern of misconduct with a discharge UOTHC. The applicant's battalion and brigade commanders concurred with the recommendation.

17. On 21 May 2001, the separation authority approved the recommended separation and directed the applicant to be discharged UOTHC in the lowest enlisted grade.

18. Orders and the applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) show he was discharged in the rank/grade of PV1/E-1 on 30 May 2001, under the provisions of Army Regulation 635-200, paragraph 14-12b, by reason of misconduct. His service was characterized as UOTHC. He was credited with completion

of 1 year, 8 months, and 16 days of net active service this period. He had lost time from 6 November 2000 to 19 November 2000.

19. The applicant petitioned the Army Discharge Review Board (ADRB) for relief. On 17 June 2009, the applicant was informed that after careful consideration of his military records and all other available evidence, the ADRB determined that he was properly and equitably discharged and denied his petition.

20. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition.

21. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other honorable (UOTH) discharge to an honorable discharge. He contends he experienced military sexual trauma (MST) and mental health conditions that mitigate 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 enlisted in the Regular Army on 1 September 1999; 2) There is evidence the applicant was formally counseled fifteen times starting on 25 March 2000-December 2000 for various types misconduct; 3) The applicant accepted nonjudicial punishment on three occasions between June- December 2000 for being disrespectful towards an NCO, not following an order, and going AWOL; 4) The applicant was discharged on 30 May 2001, Chapter 14-12b, by reason of Misconduct. His service was characterized as UOTH.

b. The Army Review Boards Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents and the applicant's available military records and medical records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical information was provided for review.

c. The applicant asserts he experienced MST and mental health conditions while on active service, which mitigates his misconduct. He stated that he was exposed to a "predator," which resulted in him breaking his roommate's arm. There is insufficient evidence the applicant was disciplined for breaking a Soldier's arm. There is insufficient evidence the applicant reported MST or any resultant mental health condition, while on active service. On 25 January 2001, the applicant underwent a mental status evaluation. He was not diagnosed with a mental health condition, and he was cleared from a psychiatric perspective for any action deemed appropriate by Command.

d. A review of JLV provided evidence the applicant began engaging with the VA for medical care starting in 2017 for physical concerns. There is insufficient evidence the applicant has been diagnosed with a service-connected mental health condition, and there was insufficient evidence the applicant reported experiencing MST to the VA.

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 repeated pattern of misconduct which led to his discharge. However, the applicant reported on his application that he did experience sexual assault/harassment at some point during his active service which resulted in him assaulting another Soldier. Therefore, per Liberal Consideration, his contention alone is sufficient for the board's consideration.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant noted on his application that he experienced MST and mental health conditions at some point during his active service.

(2) Did the condition exist or experience occur during military service? Yes, the applicant noted on his application that he experienced MST and mental health conditions at some point during his active service.

(3) Does the condition experience actually excuse or mitigate the discharge? No, the applicant noted on his application that he experienced MST and mental health conditions at some point during his active service. However, there is insufficient evidence he reported experiencing MST or reported any resultant mental health symptoms while on active service. In addition, he has not been diagnosed with a mental health condition by the VA, and there is insufficient evidence he reported experiencing MST to the VA. Lastly, the applicant stated he assaulted another Soldier as a result of being exposed to MST, but there is insufficient evidence the applicant was discharged for this action. However, per Liberal Consideration, his contention of MST and experiencing mental health conditions on his application alone is sufficient for the board's consideration.

BOARD DISCUSSION:

The Board carefully considered the applicant's request, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the applicant's mental health and MST claim and the review and conclusions of the ARBA Behavioral Health Advisor. The applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding his

misconduct not being mitigated by a mental health condition or MST. Based on a preponderance of the evidence, the Board determined the character of service the applicant received upon separation was 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:

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.

3/4/2025

X

CHAIRPERSON

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 three 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 three-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 the Army Review Boards Agency (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. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation provides that the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing. 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. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a provides that an honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

b. Paragraph 3-7b states 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 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions (a pattern of misconduct consisting solely of minor military disciplinary infractions), a pattern of misconduct (consisting of discreditable involvement with civil or military authorities or conduct prejudicial to good order and discipline). Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter; however, the separation authority may direct a general discharge if merited by the Soldier's overall record.

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. 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. 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.

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//