

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 3 September 2024

DOCKET NUMBER: AR20230014638

APPLICANT REQUESTS:

- reconsideration of his previous request for upgrade of his characterization of service from under other than honorable conditions (UOTHC)
- a personal appearance before the Board via video/telephone.

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

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States), 13 November 2023
- self-authored statement, 16 November 2023
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 19 October 2000
- Department of Veterans Affairs (VA) decision documents, 18 May 2023, 28 August 2023, and 2 November 2023

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Dockets Number:

- AR20070015339 on 6 March 2008
- AR20210005766 on 12 October 2021

2. The applicant states, he was released from active duty earlier than expected, as he wanted to retire from the Army. He spent five months and four days in Kuwait while being exposed to a lot of chemicals. He now has service-connected disabilities under the Pact Act and is requesting an upgrade of his UOTHC discharge to help him receive compensation for his disabilities.

3. On his DD Form 293, he indicates post-traumatic stress disorder (PTSD) and other mental health are related to his request.

4. The applicant enlisted in the Regular Army on 10 September 1989, for a period of 3 years. He was awarded the military occupational specialty of 19K (M1 Armor Crewman), the highest rank he attained was private first class/E-3.

5. His DA Form 2-1 (Personnel Qualification Record) shows he served in Kuwait from 15 December 1999 to 19 April 2000.

6. Two DA Forms 4187 (Personnel Action) show the applicant's duty status changed from present for duty to absent without leave (AWOL) on or about 30 July 1999 and changed from AWOL to present for duty on or about 25 August 1999.

7. Court-martial charges were preferred against the applicant for violations of the Uniform Code of Military Justice (UCMJ). The relevant DD Form 458 (Charge Sheet) is void in his official military personnel file. However, he was charged with:

- wrongful distribution of a controlled substance
- absenting himself from his appointed place of duty.

8. On 10 October 2000, the applicant consulted with legal counsel and executed a written request for discharge in lieu of trial by court-martial under the provisions of Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10 (Discharge in Lieu of Trial by Court-Martial). 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, of wrongful distribution of a controlled substance and absenting himself from his appointed place of duty, 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 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 to not submit a statement in his own behalf and understood he may encounter substantial prejudice in civilian life.

9. On 10 October 2000, the applicant's immediate and intermediate commander's recommended approval of his request for discharge under the provisions of AR 635-200, Chapter 10, and issuance of a UOTHC discharge.

10. The separation authority approved the applicant's request for discharge in lieu of trial by court-martial on 11 October 2000, and further directed the applicant receive an UOTHC discharge.

11. The applicant's DD Form 214 shows he was discharged on 19 October 2000, under the provisions of AR 635-200, Chapter 10, in lieu of trial by court-martial, in the grade of E-1. He received an UOTHC characterization of service, a separation code of KFS, and reentry code 3. He was credited with 2 years and 14 days of net active service, with lost time from 30 July 2000 to 24 August 2000. His awards include the Armed Forces Expeditionary Medal and the Army Service Ribbon.

12. The applicant provides three VA decision documents showing on 18 May 2023 he was found to have a service-connected disability for shortness of breath; on 28 August 2023 he was found to have a service-connected disability for tinnitus; and on 2 November 2023 he was found to have a service-connected disability of PTSD.

13. On 23 September 2005, the Army Discharge Review Board carefully reviewed the applicant's request, military records, and all other available evidence, and determined he was properly and equitably discharged. The Board denied his request for a change in his character and/or reason of discharge.

14. On 6 March 2008, the ABCMR denied the applicant's request for discharge upgrade, stating the evidence presented did not demonstrate the existence of a probable error or injustice and the Board determined that the overall merits of his case were insufficient as a basis for correction of his records.

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

16. 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.

17. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting a reconsideration an upgrade of his under other than honorable conditions (UOTHC) characterization of service. The applicant's previous cases are summarized in Docket Number Docket Number AR20070015339 on 6 March 2008 and AR20210005766. The applicant indicated that Posttraumatic Stress Disorder (PTSD) and Other Mental Health Issues are related to his request. Additionally, the applicant asserts that he was exposed to chemicals while in Kuwait and now has service-connected disabilities for treatment purposes only as a

result of his service. 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) he enlisted in the Regular Army (RA) on 10 September 1989 as a 19K (M1 Armor Crewman), 2) he served in Kuwait from 15 December 1999 to 19 April 2000, 3) the applicant was absent without leave (AWOL) from on or about 30 July 1999 to 25 August 1999, 4) court-martial charges were preferred against the applicant though the DD Form 458 was void in the applicant's personnel file. The charge sheet shows he was charged with wrongful distribution of a controlled substance and absenting himself from his appointed place of duty, 5) the applicant was discharged on 19 October 2000 under the provisions of AR 635-200, Chapter 10, in lieu of trial by court martial, 6) the ARDB denied the applicant's request for relief on 23 September 2005. The ABCMR denied the applicant's request for discharge upgrade on 06 March 2008.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. The electronic military medical record (AHLTA) was not reviewed as it was not in use during the applicant's time in service. There were no in-service military treatment records available for review. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. The applicant provided a Department of Veterans Affairs decision letter dated 02 November 2023 documenting that he was granted service-connection for treatment purposes only for PTSD (this was not reflected in JLV), Tinnitus, and shortness of breath due to undiagnosed illness. VA records available in JLV are limited to two Compensation and Pension (C&P) examinations, one pertaining to BH. The applicant completed a BH C&P examination on 08 June 2023 and was diagnosed with PTSD. The identified stressor associated with his diagnosis was documented as witnessing one Soldier kill another in Kuwait (a friend).

d. The applicant previously petitioned the ABCMR in 2021. The Medical Advisor opined that there was insufficient evidence that he had a condition nor any evidence of psychological symptoms during his time in service. As such, an upgrade was not recommended.

e. The applicant is applying to the ABCMR requesting a reconsideration an upgrade of his UOTHC characterization of service. The applicant indicated that PTSD and Other Mental Health Issues are related to his request. There were no in-service medical records available for review. Post-discharge, the applicant has been diagnosed and service-connected through the VA with PTSD for treatment purposes only secondary to an event he witnessed while deployed to Kuwait.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant has been diagnosed and service-connected through the VA with PTSD for treatment purposes only.

(2) Did the condition exist or experience occur during military service? Yes, the applicant has been diagnosed and service-connected through the VA with PTSD for treatment purposes only.

(3) Does the condition or experience actually excuse or mitigate the discharge? Partially. The applicant's application was void of any in-service medical records. Post-discharge, the applicant has been diagnosed and service-connected with PTSD for treatment purposes only. As there is an association between avoidance behaviors and AWOL, there is a nexus between the applicant's diagnosis of PTSD and some of the misconduct that led to his discharge. However, there is no association between the sale of a controlled substance and PTSD as PTSD does not interfere with the ability to distinguish between right and wrong and adhere to the right. As such BH mitigation is partially supported. Regarding applicant's assertion of Other Mental Health Issues, while there is no evidence to support this diagnosis, applicant's self-assertion of Other Mental Health Issues alone merits consideration by the board.

#### BOARD DISCUSSION:

1. The Board determined 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.

2. 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.

a. The applicant was charged with commission of an offense (wrongful distribution of a controlled substance and absenting himself from his appointed place of duty) 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.

b. The Board also considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewing official. The

Board concurred with the medical official's finding insufficient evidence to support that the applicant had an in service condition or experience that mitigates his misconduct. The applicant was diagnosed with PTSD and awarded service-connection for treatment purposes only, post discharge. As there is an association between avoidance behaviors and AWOL, there is a nexus between his diagnosis of PTSD and some of the misconduct that led to his discharge. However, there is no association between the sale of a controlled substance and PTSD as PTSD does not interfere with the ability to distinguish between right and wrong and adhere to the right. As such behavioral health mitigation is partially supported. 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 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 to amend the decision of the ABCMR set forth in Dockets Number: AR20070015339 on 6 March 2008 and AR20210005766 on 12 October 2021

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. 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.

2. 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 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.

3. Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), in effect at the time, provided guidance for the administrative separation of enlisted personnel:

a. Chapter 10 of that regulation 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.

b. 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.

c. 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.

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 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 PTSD; 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.

5. 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, BCM/NRs 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//