

IN THE CASE OF: [REDACTED]

BOARD DATE: 15 August 2024

DOCKET NUMBER: AR20230015073

APPLICANT REQUESTS: upgrade of his under other than honorable conditions (UOTHC) discharge.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Character Letter

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 is a changed man.
3. The applicant provides a character letter, dated 19 September 2023, which states the applicant joined the Army to serve his country while having a mental illness. This should have been noticed while being put through the various routine pre-screening physical exams. The applicant receives limited treatment for his illness due to the cost of the out-of-pocket expense. He is a changed man who gives back to the community. Hopefully he will get a second chance to allow him to get his benefits.
4. The applicant enlisted in the Regular Army on 5 October 2000 for a period of three years. His military occupational specialty was 92Y (Unit Supply Specialist).
5. The applicant tested positive during a urinalysis on 9 July 2001, for tetrahydrocannabinol (THC), the active ingredient in marijuana.
6. He was counseled for the positive urinalysis test on 18 July 2001.

7. A DA Form 8003 (Alcohol and Drug Abuse Prevention and Control Program (ADAPCP)) Enrollment, dated 18 July 2001, shows the applicant was referred for THC, drug use. The commander's recommendation was that the applicant needs alcohol and/or drug education.

8. He again tested positive for THC on or about 13 August 2001.

9. The applicant accepted nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ) on 17 August 2001 for wrongful use of marijuana on or about 9 June 2001. His punishment consisted of reduction to private/E-1, extra duty, restriction, and forfeiture of \$243.00 (suspended).

10. The applicant was counseled for disenrollment from ADAPCP and possible separation from the Army on 28 August 2001.

11. A Criminal Investigative Division (CID) Report of Investigation, dated 6 September 2001 shows a positive urinalysis involving the applicant on 5 September 2001. The investigation established probable cause to believe the applicant committed the offense of wrongful use of marijuana when on 13 August 2001, he provided a urine sample which subsequently tested positive for THC, the active ingredient in marijuana.

12. The applicant tested positive for THC again on 24 September 2001.

13. The CID Report of Investigation, dated 19 October 2001, shows an investigation established probable cause to believe the applicant committed the offense of wrongful possession of marijuana. A health and welfare inspection was conducted on 19 October 2001, in the applicant's barracks room and resulted in the discovery of marijuana residue on a dresser. Further investigation established probable cause to believe the applicant committed the offense of wrongful use of marijuana when on 24 September 2001 he provided a urine sample which subsequently test positive for THC, the active ingredient in marijuana.

14. Court martial charges were preferred against the applicant on 14 December 2001, for violations of the UCMJ. His DD Form 458 (Charge Sheet) shows he was charged with:

- wrongful use of marijuana between on or about 13 July 2001 and on or about 13 August 2001
- wrongful use of marijuana between on or about 24 August 2001 and on or about 24 September 2001
- wrongful possession of some amount of marijuana on or about 19 October 2001

15. The applicant's immediate commander and chain of command recommended trial by special court martial.

16. The applicant consulted with legal counsel on 14 December 2001, 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, 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.

17. The applicant's immediate commander recommended approval of his request for discharge with a UOTHC discharge.

18. The applicant's chain of command recommended approval, with a UOTHC discharge.

19. The separation authority approved the applicant's request for discharge in lieu of trial by court-martial on 19 December 2001, with his service characterized as UOTHC. The applicant would not be transferred to the individual ready reserve (IRR).

20. The applicant was discharged on 8 January 2002. His DD Form 214 shows he was discharged under the provisions of AR 635-200, Chapter 10, in lieu of trial by court-martial. His service was characterized as UOTHC. He completed 1 year, 3 months, and 4 days of net active service.

21. 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.

22. The applicant provides a copy of his DD Form 214 and a character letter as discussed above.

23. 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.

24. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) discharge. He contends he experienced mental health conditions 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 enlisted in the Regular Army on 5 October 2000; 2) The applicant accepted nonjudicial on 17 August 2001 for wrongful use of marijuana on 9 June 2001; 3) Court martial charges were preferred against the applicant on 14 December 2001 for: A) wrongful use of marijuana on 13 July 2001 and 24 August 2001 and wrongful possession of marijuana on 19 October 2001; 4) The applicant was discharged on 8 January 2002, Chapter 10, in lieu of trial by court-martial. His service was characterized as UOTHC.

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

c. The applicant asserts he was experiencing mental health conditions while on active service, which mitigates his misconduct. There is insufficient evidence the applicant reported or was diagnosed with a mental health disorder while on active service. On 18 July 2001, the applicant was referred to the Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) for illegal drug use. The commander's recommendation was that the applicant needed alcohol and/or drug education. He was counseled for disenrollment from this program on 28 August 2001 and possible separation from the Army.

d. A review of JLV was void of any medical documentation, and the applicant does not receive any service-connected disability.

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 mental health conditions which mitigates his misconduct.

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

(3) Does the condition experience actually excuse or mitigate the misconduct? No, there is insufficient evidence beyond self-report the applicant was experiencing a mental health condition while he was on active service. The applicant did engage in substance abuse while on active service, which could be sequela to some mental health conditions. However, substance abuse is not sufficient evidence of the presence of a mental health condition. Yet, the applicant contends he was experiencing a mental health condition or an experience that mitigates his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined relief was/was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. One potential outcome discussed was to grant relief by upgrading to a general discharge based upon the misconduct leading to the applicant's separation. However, based upon the pattern of illegal drug use and the lack of mitigation found in the medical review, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant's characterization of service.

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.

2/5/2025

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 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. Army Regulation 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 10 provided that a member who had committed an offense or offenses, for which the authorized punishment included a punitive discharge, could submit a request for discharge for the good of the service in lieu of trial by court-martial. The request could be submitted at any time after charges had been preferred and must have included the individual's admission of guilt. Although an honorable or general discharge was authorized, a UOTHC discharge was normally considered appropriate.

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 (PTSD); 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.

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//