

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 17 September 2024

DOCKET NUMBER: AR20240000487

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

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

- DD Form 293 (Application for the Review of Discharge)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)

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 his discharge was inequitable due to him experiencing significant personal health issues that affected his ability to finish serving his term. The applicant indicates post-traumatic stress disorder (PTSD) as related to his request.
3. The applicant enlisted in the Regular Army on 28 September 2004, for 4 years. His military occupational specialty was 92M (Mortuary Affairs Specialist).
4. Before a general court martial on 27 March 2007, at Fort Lee, VA, the applicant was found guilty of wrongful appropriation of money to purchase goods for personal use, of an aggregate value of about \$9,410.46, the property of Bank of America on diverse occasions between on or about 5 August 2005 and on or about 27 February 2006. The court sentenced the applicant to be reduced to private/E-1 and to be confined for three months. The sentence was approved on 7 December 2007.
5. The applicant's sworn statement, dated 13 August 2007 shows the applicant was in another Soldier's room and his sister and her friends were in his room, and he was not there. His sister needed money. The applicant borrowed some money from another friend to give to her. His sister and friends were in the parking lot drinking and the military police showed up and one of the Soldier's was being intolerable and he and two

others were taken to the military police station. (Full sworn statement available for review).

6. The applicant was counseled on numerous occasions between 13 August 2007 and 7 March 2008 for:

- failure to report (8)
- noncommissioned officer (NCO), failure to follow order or regulation (4)
- not appropriate uniform and recommendation for the Army Substance Abuse Program (2)
- violation of group barrack's policy (3)
- failure to report to accountability formation
- failure to obey order or regulation (5)
- failure to go to his appointed place of duty at the time prescribed (2)
- failing to follow a pre-established plan of action
- insubordinate conduct toward warrant, NCO, or petty officer

7. A Report of Medical History shows in Item 29 (Explanation of "Yes" Answers) the applicant was depressed about his life, worried about his family and future; received counseling at Community Mental Health (CMH) in February 2006 to October 2006 (witnessed friend getting shot). Item 30 (Examiner's Summary) shows: hypertension, low back pain, sleep apnea and depression for 2 years seen by Community Mental Health, ok now.

8. A Report of Behavioral Health Evaluation, dated 13 February 2008 shows the applicant had the mental capacity to understand and participate in the proceedings, was mentally responsible and met retention requirements. The diagnosis was deferred. The applicant was psychiatrically cleared for any administrative action deemed appropriate by command.

9. On 27 March 2008, the applicant's immediate commander notified the applicant of his intent to initiate action to separate him from the Army under the provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), Chapter 14-12b, for pattern of misconduct. The applicant was found asleep while on duty numerous times between 26 October 2007 and 6 March 2008; failing to report to his appointed place of duty at the prescribed time and had an unauthorized visitor in his barracks room on 4 December 2007. His commander recommended he receive a UOTHC discharge. The applicant acknowledged receipt.

10. The applicant consulted with legal counsel on the same date and was advised of the basis for his separation and the procedures and rights that were available to him. He waived consideration of his case and personal appearance before a board of officers. He understood he was not entitled to have his case heard by an administrative

separation board. He understood that he may expect to encounter substantial prejudice in civilian life if an UOTHC discharge was issued to him. He elected to submit statements in his own behalf however, the statement is not available for review.

11. The applicant's immediate commander formally recommended the applicant be separated from the Army prior to his expiration term of service, and receive a UOTHC discharge. His chain of command recommended approval.

12. The separation authority approved the recommended discharge action on 22 April 2008 and directed that the applicant receive a UOTHC discharge.

13. The applicant was discharged on 20 May 2008, in the rank/grade of private/E-1. His DD Form 214 shows he was discharged under the provisions of AR 635-200, Paragraph 14-12b, for a pattern of misconduct, with Separation Code JKA and Reentry Code 3. His service was characterized as UOTHC. He completed 3 years, 7 months, and 23 days of net active service this period. He was awarded or authorized the: National Defense Service Medal, Global War on Terrorism Service Medal, and the Army Service Ribbon.

14. Soldiers are subject to separation under the provisions AR 635-200, Chapter 14, for misconduct. A discharge UOTHC is normally appropriate for a Soldier discharged under this chapter. However, the separation authority may direct a general discharge if such is merited by the overall record.

15. 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.

16. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to under other than honorable conditions (UOTHC) characterization of service. He contends he experienced an undiagnosed mental health condition, including PTSD, that mitigates his misconduct.

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 28 September 2004.
- The applicant was found guilty by a general court martial on 27 March 2007 for wrongful appropriation of money to purchase goods for personal use with a value of \$9,410.46. He was sentenced to confinement for three months. Then he received counseling (i.e. failure to report; violation of policy; failure to obey order or regulation; insubordinate conduct) on numerous occasions between August

2007 and March 2008. On 27 March 2008 he was notified of intent to initiate action to separate him from the Army under the provisions of Army Regulation (AR) 635-200, Chapter 14-12b, for pattern of misconduct.

- The applicant was discharged on 20 May 2008 and completed 3 years, 7 months, and 23 days of net active service this period.

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 significant personal health issues and PTSD as mitigating factors in his discharge. A Report of Medical History dated 19 December 2007 and authored by the applicant showed he endorsed sleep difficulty, depression or excessive worry, and having received counseling. He stated, "received counseling at CMH in Feb 06- Oct 06 (witness to friend getting shot)" and "depressed about my life. Worried about my family and my future." The examiner noted "ok now" in regard to the applicant's indication of depression history. A Report of Behavioral Health Evaluation dated 13 February 2008 indicated the applicant met retention standards and had capacity to understand and participate in the proceedings. Diagnosis was deferred. There was insufficient evidence that the applicant was diagnosed with PTSD or another psychiatric condition while on active service.

d. The Joint Legacy Viewer (JLV), which includes medical and mental health records from DoD and VA, was also reviewed and showed the applicant initiated mental health treatment on 30 May 2006 and reported insomnia and anxiety. He reported recent stressor of witnessing a friend get shot in an attempted carjacking, and at follow up he elaborated on family concerns, difficulty with his chain of command, and excessive alcohol use (currently in ASAP). His diagnosis was Adjustment Disorder with disturbance of emotions and conduct, Sleep Disorder, and Nicotine Dependence. A Chapter 14 evaluation dated 13 February 2008 showed that the applicant reported having received mental health treatment through a community provider, but it had been discontinued because the provider was no longer accepting Tricare. The applicant related having difficulty in being on time to formations and that he was diagnosed with sleep apnea and irregular sleep patterns. A review of medication history showed a prescription for an antidepressant on 23 August 2006 and a sleep medication on 26 June 2006.

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 mental health condition while on active service, but the condition does not mitigate his misconduct.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts he had a mental health condition, including PTSD, at the time of the misconduct. DoD documentation showed the applicant reported symptoms of insomnia and anxiety and was diagnosed with an Adjustment Disorder.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition while on active service. The applicant reported to medical personnel that he witnessed a traumatic event, a friend being shot, and he engaged in mental health treatment while on active service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. DoD mental health documentation showed the applicant had involvement in ASAP and was diagnosed with an Adjustment Disorder. He appears to have received mental health treatment through a community provider, but those records are not available for review.

g. While the applicant reported a traumatic experience, the shooting of a friend, and trauma exposure can result in certain mental health conditions, such as PTSD, there is insufficient evidence to support that the applicant was experiencing PTSD at the time of his misconduct. Additionally, his pattern of behaviors does not present a clear nexus to his documented mental health condition. However, the applicant contends he was experiencing 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 applicant exhibited a pattern of misconduct. After his conviction by a general court-martial, the applicant continued to exhibit misconduct consisting of multiple negative counseling for various infractions, being found asleep while on duty numerous times, failing to report to his appointed place of duty, and having unauthorized visitor in his barracks. As a result, his chain of command initiated separation action against him for misconduct and he received an under other than honorable conditions discharge. The Board found no error or injustice in his separation processing. 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 agreed with the medical reviewers' finding that although there is sufficient evidence to support that the applicant had a mental health condition while on active service; however, the condition does not mitigate his misconduct. Also, the

applicant provided insufficient evidence of post-service achievements or letters of reference in support of a clemency determination. Therefore, based on a preponderance of available 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 for correction of the records of the individual concerned.

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, U.S. Code (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 (AR) 635-200 (Active Duty Enlisted Administrative Separations), 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 was normally considered appropriate. However, the separation authority could direct a general discharge if merited by the Soldier's overall record.

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 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//