

IN THE CASE OF: [REDACTED]

BOARD DATE: 5 September 2024

DOCKET NUMBER: AR20240001226

APPLICANT REQUESTS: Upgrade of his under other than honorable conditions (UOTHC) characterization of service.

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- 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 he is requesting a change of discharge because while in service he was a good Soldier. He never got into trouble, and never received nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ). His ex-wife was bipolar and schizophrenic and tried to commit suicide multiple times with their newborn child in the house. He left to try to save his son and himself from harm. The applicant indicates on his DD Form 293 that mental health issues and intimate partner violence/domestic violence are related to his request.
3. On 30 December 1998, the applicant enlisted in the Regular Army for a period of 3 years in the rank/grade of private/E-2. Upon completion of training, he was assigned to a unit at Fort Lewis, WA. His DA Form 2-1 (Personnel Qualification Record Part II) shows he was advance to the rank/grade of specialist (SPC)/E-4 on 1 November 2000.
4. The applicant's duty status was changed as follows:
  - from Present for Duty (PDY) to Absent Without Leave (AWOL) effective 29 November 2000

- from AWOL to Dropped from Rolls (DFR) effective 29 December 2000
- from DFR to PDY/Returned to Military Control effective 12 January 2001

5. A DD Form 458 (Charge Sheet) shows on 8 January 2002, court-martial charges were preferred against the applicant for violation of the UCMJ for being AWOL on or about 29 November 2000 and remaining so absent until on or about 12 January 2001.

6. On 19 January 2001, the applicant voluntarily requested discharge under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10, in lieu of trial by court-martial. He consulted with legal counsel and was advised of the basis for the 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. Only the first page of his request is available in his Army Military Human Resource Record so, it is unknown whether he elected to submit any statements in his own behalf.

7. On 19 October 2001, the applicant's immediate commander recommended approval of his request for discharge with his service characterized as UOTHC.

8. On 31 October 2001, the separation authority approved the applicant's request for discharge in lieu of trial by court-martial. He directed his service be characterized as UOTHC, and further directed that the applicant be reduced to the lowest enlisted grade.

9. Orders and the applicant's DD Form 214 show he was discharged on 19 November 2001, in the grade of E-1, under the provisions of Army Regulation 635-200, Chapter 10, by reason of "In Lieu of Trial By Court-Martial." His service was characterized as UOTHC. He was credited with completing 2 years, 9 months, and 6 days of net active service this period. He had time lost due to AWOL from 29 November 2000 to 11 January 2001. He did not complete his first full term of service.

10. Army Regulation 635-200, chapter 10, provides for a voluntary discharge request in-lieu of trial by court-martial. In doing so, he would have waived his opportunity to appear before a court-martial and risk a felony conviction. A characterization of UOTHC is authorized and normally considered appropriate.

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

#### 12. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) characterization of service. He contends he

experienced mental health conditions and intimate partner violence/domestic violence 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 30 December 1998; 2) On 8 January 2002, court-martial charges were preferred against the applicant for being AWOL from 29 November 2000-12 January 2001; 3) The applicant was discharged on 19 November 2001, Chapter 10, by reason of "In Lieu of Trial By Court-Martial." His service was characterized as UOTHC.

b. The Army Review Boards Agency (ARBA) Behavioral Health Advisor reviewed the available 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 for review.

c. The applicant asserts he was experiencing mental health conditions and intimate partner violence/domestic violence while on active service, which mitigates his misconduct. There is insufficient evidence the applicant reported or was diagnosed with a mental health disorder or intimate partner violence/domestic violence while on active service.

d. A review of JLV provided insufficient evidence the applicant has ever been diagnosed with a mental health condition, and he 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 and intimate partner violence/domestic violence which mitigates his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced mental health conditions and intimate partner violence/domestic violence that mitigates his misconduct while on active service. \

(3) Does the condition or 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 go AWOL, which could be avoidant behavior and a natural sequelae to a mental health condition. The applicant did report being concerned his son was at risk of harm due to his ex-

wife's reported mental health condition, which would also potentially result in the applicant going AWOL. However, there is insufficient evidence beyond self-report the applicant was experiencing this stressor. The presence of misconduct is not sufficient evidence of the presence of a mental health condition or experience. Yet, the applicant contends he was experiencing a mental health condition or an experience that mitigates his misconduct, and per Liberal Consideration his contention alone is sufficient for the board's consideration.

#### BOARD DISCUSSION:

1. 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 claim and the review and conclusions of the ARBA Behavioral Health Advisor.
2. A majority of the Board found the applicant's statement regarding the circumstances leading to his unauthorized absence to be credible and, in light of the non-violent nature of his misconduct, found the character of service he received to be too harsh. Based on a preponderance of the evidence, a majority of the Board determined the applicant's character of service should be changed to under honorable conditions (general).
3. The member in the minority 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. The member in the minority noted the applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. Based on a preponderance of the evidence, the member in the minority 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 Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by reissuing his DD Form 214 to show his character of service as under honorable conditions (general).

2/26/2025

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 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.

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. Chapter 10 stated a member who committed an offense or offenses for which the authorized punishment included a punitive discharge could, at any time after the charges have been preferred, submit a request for discharge for the good of the service in lieu of trial by court-martial. Although an honorable or general discharge was authorized, a discharge under other than honorable conditions was normally considered appropriate. At the time of the applicant's separation the regulation provided for the issuance of an UOTHC discharge.

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.

d. When a Soldier was to be discharged UOTHC, the separation authority would direct an immediate reduction to the lowest enlisted grade.

5. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) to carefully consider the revised Post-Traumatic Stress Disorder (PTSD) criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged UOTHC and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

6. 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 DRBs

and BCM/NRs 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. 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.

7. 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//