

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 3 September 2024

DOCKET NUMBER: AR20240001348

APPLICANT REQUESTS:

- upgrade of his under other than honorable conditions (UOTHC) characterization of service
- restoration of rank based on disability

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 293 (Application for the Review of Discharge)
- DD Form 149 (Application for Correction of Military Record)
- Self-authored statement
- Character reference letters (4)
- Department of Veterans Affairs (VA) Rating Decision

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 in the characterization of his service because he was the victim of an injustice. He was experiencing mental health issues and was denied the ability to seek treatment by his squad leader for no reason. He was recently granted service-connected disability compensation for unspecified depressive disorder based on his experiences in the military that eventually led to the behavior for which he was discharged.

a. He had no intention to enlist in the Army. He was a high school dropout living with his grandmother and making a little money working off the books. His situation changed when his girlfriend became pregnant, and he knew growing up in the inner city of Philadelphia, PA, was not something he wanted his children to do. He decided to join the Army as a way to support his family. Basic Combat Training (BCT) and Advanced Individual Training (AIT) were not easy for him, but he knew he had a wife and child

who depended upon him. He graduated AIT at the top of his class and was assigned to Fort Stewart, GA for his first duty station. That is where his problems began.

b. He kept the bills paid at his grandmother's house after her death. His cousin was supposed to live in the house and maintain the bills, but that did not happen. While on leave between BCT and AIT, he kicked his cousin out of the house. While at AIT, he retained a lawyer so he could become executor of his grandmother's estate.

c. Shortly after arriving at Fort Stewart, GA, he needed to return to Philadelphia to finalize estate planning buy selling his grandmother's house. He completed a leave request form and gave it to his squad leader, Sergeant (SGT) C\_\_\_\_, for processing. As the beginning date of his leave approached, he asked SGT C about the status of his request and SGT C told him the first sergeant (1SG) had denied his request. The applicant had his lawyer contact the 1SG to let him know the urgency of his request and was informed that SGT C never submitted the request. He was granted leave, but SGT C had it in for him after that.

d. When his actual squad leader, SGT B\_\_\_\_ returned from deployment, the applicant believes SGT C turned him against the applicant. SGT B, SGT C, and other noncommissioned officers (NCOs) would regularly give him a hard time. In addition to his problems with the NCOs, the applicant was constantly arguing with his wife because they were young, it was their first time being away from home, they were new parents, and it was too much for them to handle. One argument turned physical, and the applicant was arrested. His unit had an upcoming field training exercise, and they decided it would be best for his wife and child to travel back home so she would have some help with caring for the child. They also figured it would be good for each of them to get individual counseling before she returned and then attend couples counseling together when she returned, but she never returned. She conspired with her parents to leave and take their son away from him since he was in the military and could not go chasing after them.

e. His wife leaving with his child was more than he could handle. His family was worried because he became withdrawn, could not eat, began drinking, and fell into a deep depression. When he told SGTB what he was dealing with, SGT B dismissed his concerns and decided he did not need any help. Had SGT B allowed him to seek counsel, maybe he would not have started drinking, withdrew from his family and friends, fallen into deep depression, or felt helpless and hopeless. Maybe he could have had a 20-year career and save his family. With help from his current wife, he has overcome some obstacles, but still has depression-related issues.

f. The applicant indicates on his DD Form 293 that post-traumatic stress disorder (PTSD) and other mental health issues are related to his request.

3. On 22 March 2000, the applicant enlisted in the Regular Army for a period of 3 years. Upon completion of BCT and AIT, he was assigned to a unit at Fort Stewart, GA. He was advanced to the rank/grade of private first class (PFC)/E-3 on 1 February 2001, the highest rank he held.

4. A DD Form 458 (Charge Sheet) shows on 8 January 2002, court-martial charges were preferred against the applicant for the following violations of the Uniform Code of Military Justice (UCMJ):

- 22 specifications of failure to go at the time prescribed to his appointed place of duty (Domestic Violence Treatment Program, Work Call, Physical Training)
- 3 specifications of willfully disobeying a lawful order from a superior NCO
- being disrespectful in language toward a superior NCO
- 2 specifications of being derelict in the performance of his duties

5. On 23 January 2002, 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. He elected to submit the following statement in his own behalf.

"I am 22 years old. My wife, T\_\_\_\_, is 19 years old and we have been married for 2 years. We have one son, Q, who is 19 months old. In June 2001, my wife left me and took our son with her. My wife missed her family, and we were having financial difficulties. When she left and took our son, I was devastated and became very depressed. I stopped eating. I isolated myself from my friends. I rarely went out or talked on the phone. I began to drink alcohol to avoid the feelings I was having. At one point, I even had thoughts of suicide. This depression continues to this day. This state of mind is what led to the offenses in my case. I accept responsibility for my actions. I make this statement not as an excuse, but only to explain the circumstances in which I found myself. I apologize for my misconduct. Since I have been in the Army, I have only received nonjudicial punishment (company level) one time. If I could, I would seek help for my depression, try to reunite with my family, accept nonjudicial punishment for these offenses, and soldier through this difficult time. However, if that is not possible, I understand. I do not want my son to see his father with a federal conviction or a jail sentence. If this request is accepted, I ask that you consider these circumstances and my continuing desire to provide for my wife and son in deciding what characterization of service is appropriate. Thank you for taking the time to consider this statement."

6. The applicant's chain of command recommended approval of his request for discharge with his service characterized as UOTHC.
7. On 24 January 2002, 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.
8. Orders and the applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) show he was discharged on 4 February 2002, in the rank/grade of Private/E-1, under the provisions of Army Regulation 635-200, Chapter 10, by reason of "In Lieu of Trial By Court-Martial" with Separation code "KFS" and Reentry code "4." He was credited with completing 1 year, 10 months, and 13 days of net active service this period. He did not complete his first full term of service.
9. On 11 August 2009, the applicant petitioned the Army Discharge Review Board (ADRB) for an upgrade of his character of service. On 3 October 2011, the applicant was informed that after careful review of his application, military records, and all other available evidence, the ADRB determined he was properly and equitably discharged and denied his request.
10. The applicant provides the following documents which are available in their entirety for the Board's consideration:
  - four letters wherein the authors rendered favorable remarks about the applicant's character, work ethic, and contributions to his workplace and community
  - VA Rating Decision, dated 4 March 2024, which shows, in part, he was granted service-connection for treatment purposes only for:
    - Unspecified depressive disorder
    - Tinnitus (claimed as ringing in ears)
    - Lumbosacral strain
    - Flat foot (pes planus), right
    - Flat foot (pes planus), left
11. Army Regulation 635-200 states a Chapter 10 is 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.
12. 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.

### 13. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to his characterization of service from under other than honorable conditions (UOTHC) to honorable. 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 22 March 2000.
- The applicant had court-martial charges preferred against him on 8 January 2002 for the following: 22 specifications of failure to go at the time prescribed to his appointed place of duty; 3 specifications of willfully disobeying a lawful order from a superior NCO; being disrespectful in language toward a superior NCO; and 2 specifications of being derelict in the performance of duties. He voluntarily requested discharge in lieu of trial by court-martial, and this was approved.
- The applicant was discharged on 4 February 2002 and was credited with completing 1 year, 10 months, and 13 days of net active service.

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 he requested to be afforded mental health treatment while in service, and his request was refused by his sergeant. He stated he is service connected by the VA for this same condition and his condition led to his misconduct. The application included a Rating Decision letter from the VA dated 4 March 2024, which showed the applicant is service connected for treatment purposes only for Unspecified Depressive Disorder as well as physical health conditions. A charge sheet dated 8 January 2002 showed the applicant failed to show up for a Domestic Violence Treatment program on three separate dates in July 2001, and the other incidents of failing to show up were PT or work related in August, September, November and December 2001. The specifications of disobeying a lawful order and being disrespectful in language occurred on the same date, 8 November 2001. In his request for discharge dated 23 January 2002, the applicant discussed his family difficulties and subsequent depression, which he attributed as the cause for his offenses. He stated, "If I could, I would seek help for my depression, try to reunite with my family, accept NJP for these offenses, and soldier through this difficult time." There was insufficient evidence that the applicant was diagnosed with PTSD or another psychiatric condition while on active service.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed that the applicant engaged with mental health treatment through the VA on 12 August 2024, and he reported symptoms of depression and anxiety, which has been on-going since 2001 or 2002. He discussed anger issues, marital problems associated with his infidelity, and

excessive alcohol use, and he was diagnosed with Recurrent Depressive Disorder. He was referred to specialty mental health care and to a couples' relationship enhancement class, but he declined this when contacted for scheduling. Non-VA medical documentation showed that he had a history of diagnoses of Anxiety and Alcohol Dependence, and he has a prescription history for an anxiolytic in 2021, 2022, and 2024.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support that the applicant had a condition or experience that fully mitigates his misconduct. The applicant's assertion that he was experiencing a mental health condition is substantiated by his statement included in his request for discharge, but there is no medical or mental health documentation during his time in service supporting his assertion.

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 an undiagnosed mental health condition, including PTSD, at the time of the misconduct. There is documentation that he discussed mental health symptoms when he requested discharge in lieu of court-martial, but there are no records showing he was diagnosed with a mental health condition while on active service. VA records show he was diagnosed with a Recurrent Depressive Disorder, and there is some evidence of treatment for anxiety in his non-VA medical history.

(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.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of military medical and mental health records revealed no documentation of any mental health condition(s) while on active service. There is evidence that the applicant reported mental health symptoms at the time of his discharge, and these symptoms are associated with a diagnosis of Depressive Disorder. Low frustration tolerance, absenteeism from work, and difficulty with attention to detail or lack of focus can all be natural sequela to mental health conditions such as Depression, but the presence of misconduct is not sufficient evidence of a mental health condition. However, the applicant contends he was experiencing a 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.

a. Discharge Upgrade: Deny. The applicant was charged with commission of an offense (22 counts of failure to go at the time prescribed to his appointed place of duty (Domestic Violence Treatment Program, Work Call, Physical Training); 3 counts of willfully disobeying a lawful order from a superior NCO; being disrespectful in language toward a superior NCO; and 2 counts of being derelict in the performance of his duties) 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.

(1) 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 determination finding insufficient evidence to support that the applicant had a condition or experience that fully mitigates his misconduct. Although he asserts that he was experiencing a mental health condition there is no medical or mental health documentation during his time in service supporting his assertion.

(2) The applicant provides four letters in support of a clemency determination. The authors rendered favorable remarks about the applicant's character, work ethic, and contributions to his workplace and community.

b. Grade: Deny. The Board noted that the applicant was ordered discharged with an under other than honorable conditions character of service. When a Soldier was to be discharged under other than honorable conditions, the separation authority would direct an immediate reduction to the lowest enlisted grade.

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.

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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. 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 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//