

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 October 2024

DOCKET NUMBER: AR20240002281

APPLICANT REQUESTS:

- an upgrade of his under other than honorable conditions discharge
- restoration of his rank
- a video/telephonic appearance before the Board

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Behavioral Health Clinic 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 his discharge should be upgraded, and his rank/grade should be restored due to the fact that he was suffering from post-traumatic stress disorder (PTSD), depression, and anxiety disorder at the time of the misconduct that led to his discharge. He is requesting these corrections so he can become eligible for treatment for his medical conditions.
3. On 4 February 1999, the applicant enlisted in the Regular Army.
4. The applicant's duty status was changed as follows:
 - from Present for Duty (PDY) to Absent Without Leave (AWOL) effective 13 March 2000
 - from AWOL to PDY effective 14 April 2000
 - from PDY to AWOL to Dropped from Rolls (DFR) and reported as a deserter effective 10 May 2000

5. A DD Form 458 (Charge Sheet) shows on 16 May 2000, court-martial charges were preferred against the applicant for violation of the Uniform Code of Military Justice (UCMJ) by:

- being AWOL from on or about 13 March 2000 to on or about 14 April 2000
- unlawfully grabbing his spouse (another Soldier) and pushing her into a wall, banging her head
- unlawfully choking his spouse by placing his arm and then his hands around her neck
- assaulting his spouse by pointing a knife at her stomach with a dangerous weapon, to wit: a 10-inch long kitchen knife
- wrongfully threatening to stab and kill his spouse
- wrongfully using marijuana between on or about 17 March 2000 and on or about 17 April 2000

6. The applicant's duty status was changed from DFR to PDY/Returned to Military Control effective 21 August 2000 when he surrendered to military authorities

7. A DD Form 458 shows on 25 August 2000, court-martial charges were preferred against the applicant for violation of the UCMJ by being AWOL from on or about 14 March 2000 to on or about 13 April 2000 and from on or about 10 May 2000 to on or about 21 August 2000.

8. On 25 August 2000, 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 an under other than honorable conditions discharge; and the procedures and rights that were available to him. The applicant elected not to submit any statements in his own behalf.

10. On 18 January 2002, the applicant's immediate commander recommended approval of his request for discharge with his service characterized as under other than honorable conditions.

11. On 25 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 UOTHHC, and further directed that the applicant be reduced to the lowest enlisted grade prior to execution of the discharge.

12. He was discharged on 4 February 2002, 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." His service was characterized as under other than honorable conditions. He completed 2 years, 7 months, and 16 days of active service.

13. The applicant petitioned the Army Discharge Review Board (ADRB) for relief. On 12 April 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.

14. 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 under other than honorable conditions is authorized and normally considered appropriate.

15. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition. By regulation, an applicant is not entitled to a hearing before the Board.

16. 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 including PTSD 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 4 February 1999; 2) Court-martial charges were preferred against the applicant on 16 May 2000 for: A) being AWOL from 13 March-14 April 2000; B) various types of assault on his spouse including threatening to kill her; and C) wrongfully using marijuana; 3) The applicant was found to be AWOL again from 10 May-21 August 2000; 4) The applicant was discharged on 4 February 2002, Chapter 10, by reason of "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 records. The VA's Joint Legacy Viewer (JLV) and hardcopy civilian medical documentation provided by the applicant were also examined.

c. The applicant asserts he was experiencing mental health conditions including PTSD while on active service, which mitigates his misconduct. There is insufficient evidence the applicant reported or was diagnosed with a mental health disorder including PTSD, 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. The applicant provided civilian medical documentation, dated 30 November 2023, from TidalHealth Behavioral Health Clinic in Salisbury, MD. The behavioral health provider stated the applicant has been in care with her since 22 September 2023. She reported his current diagnoses are PTSD, current severe episode of Major Depressive Disorder, and Generalized Anxiety Disorder. There was insufficient evidence provided on the history of the applicant's current mental health conditions or if they were related to his military experience.

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 including PTSD, which mitigates his misconduct. The applicant was diagnosed with PTSD, Major Depressive Disorder, and Generalized Anxiety Disorder by a civilian provider in 2023.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced mental health conditions including PTSD 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 mental health conditions including PTSD, while he was on active service. The applicant did go AWOL and used marijuana, which could be avoidant behavior and a natural sequelae to some mental health conditions including PTSD. However, the presence of misconduct is not sufficient evidence of the presence of a mental health condition. In addition, there is no nexus between the applicant's report of experiencing mental health conditions including PTSD and the assault and threat to kill his spouse. 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. 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 Department of Defense guidance for liberal consideration of

discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was charged with being absent without leave from 13 March 2000 to 14 April 2000, grabbing another Soldier and pushing her into a wall banging her head, choking the Soldier by placing his arm and then hands around her neck, assaulting the Soldier by pointing at her stomach with a dangerous weapon, to wit: a 10-inch long kitchen knife, communicating a threat to the Soldier by threatening to stab and kill her, and wrongfully using marijuana, punishable under the Uniform Code of Military Justice with a punitive discharge. After being charged, he consulted with counsel and voluntarily requested discharge in lieu of trial by court-martial. The Board found no error or injustice in the separation proceedings and designated characterization of service. The Board noted the applicant's contention of post-traumatic stress disorder; however, reviewed and concurred with the medical advisor's review finding insufficient evidence to support a condition or experience existed that would mitigate his misconduct. Based on a preponderance of the evidence, the Board concluded that the characterization of service the applicant received upon separation was not in error or unjust.

2. Based on the foregoing, the Board concluded restoration of his rank was unwarranted. The applicant was charged under the Uniform Code of Military Justice as a private first class (PFC)/E-3 and upon approval of his voluntary separation, reduced to private (PVT)/E-1 in accordance with regulatory guidance prior to the execution of the discharge. The Board determined no relief was warranted.

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, 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.

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. 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.
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//