

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 September 2024

DOCKET NUMBER: AR20240002436

APPLICANT REQUESTS: an upgrade of his characterization of service.

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

DD Form 149 (Application for Correction of Military Record), 30 November 2023

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, 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 realized after his separation the mistakes he made, and he does not think he should be punished for the rest of his life for them. He has two sons and worked hard to raise them. Times are difficult and he could use the help from benefits to help his son with college and his everyday life.
3. On his DD Form 149, he annotates post-traumatic stress disorder (PTSD) and other mental health are related to his request.
4. The applicant enlisted in the Regular Army on 28 February 2002 for a period of 3 years. He was awarded military occupational specialty 77F (Petroleum Supply Specialist) and the highest rank he attained was private/E-2.
5. On 3 February 2003, the applicant was reprimanded for driving while intoxicated on 25 January 2003. The Commanding General stated the applicant's decision to drive after he had been drinking demonstrated a lack of maturity and judgment, he risked his life and the lives of other travelers, and his misconduct casted doubt on his ability to perform his duties or be placed in any position of responsibility. The applicant acknowledged the letter of reprimand, and it was permanently filed in his official military personnel file.

6. The applicant accepted nonjudicial punishment (NJP), under the provisions of Article 15, of the Uniform Code of Military Justice (UCMJ), on 12 February 2003, for violating a lawful general order by consuming alcohol under the age of 21 and physically controlling a vehicle while the alcohol concentration in his blood was 0.10 grams of alcohol per 100 millimeters of blood or greater, on or about 25 January 2003. His punishment imposed was reduction to E-1, forfeiture of \$500.00 pay per month for two months, and 45 days of extra duty and restriction.

7. A DD Form 2624 (Specimen Custody Document – Drug Testing) confirmed on 11 March 2003 the applicant received a positive urinalysis, showing he tested positive for the use of Tetrahydrocannabinol (THC).

8. On 12 March 2003, he accepted NJP, under the provisions of Article 15, of the UCMJ, for wrongfully using marijuana on or between 31 December 2002 and 21 January 2003. His punishment imposed was forfeiture of \$575.00 per month for two months and 45 days of extra duty.

9. Court-martial charges were preferred against the applicant on 12 May 2003, for violations of the UCMJ. The relevant DD Form 458 (Charge Sheet) shows he was charged with:

- discharging a semiautomatic weapon on or about 16 March 2003, in order to prevent the apprehension of another Soldier, while the other Soldier was fleeing the scene of the crime
- failed to go to his appointed place of duty on or about 16 March 2003
- making an official statement with the intent to deceive a Special Agent, saying he was not aware of anyone handling or firing a weapon illegally
- wrongfully using marijuana between on or about 11 February 2003 and 4 March 2003

10. The applicant consulted with legal counsel on 14 July 2003, and executed a written request for discharge in lieu of trial by court martial under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Active Duty Enlisted Administrative Separations), Chapter 10 (Discharge in Lieu of Trial by Court-Martial). He acknowledged his understanding of the following in his request:

a. He understood that he could request discharge in lieu of trial by court martial because the charges preferred against him could result in the imposition of a punitive discharge.

b. Prior to completing this request, he was afforded the opportunity to consult with appointed counsel, who fully advised him of the basis for his contemplated trial by court-martial, the maximum punishment authorized under the UCMJ, of the possible effects of

an under other than honorable conditions (UOTHC) character of service, and of the procedures and rights available to him.

c. He acknowledged that he was making this request of his own free will and had not been subjected to any coercion by any person. Although counsel furnished him legal advice, this decision was his own. Additionally, he elected not to submit a statement in his behalf and understood he may encounter substantial prejudice in civilian life.

11. The applicant's immediate and intermediate commander's recommended approval of his request for separation under the provisions of AR 635-200, Chapter 10. Additionally recommending he be issued an UOTHC discharge certificate.

12. The separation authority approved the applicant's request for separation in lieu of court-martial and directed issuance of an UOTHC characterization of service.

13. The applicant was discharged on 13 August 2003, under the provisions of AR 635-200, Chapter 10, in lieu of trial by court-martial, in the grade of E-1. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms his character of service was UOTHC. He was credited with 1 year, 5 months, and 16 days of net active service.

14. Discharges under the provisions of AR 635-200, Chapter 10, are voluntary requests for discharge in lieu of a trial by court-martial. An UOTHC character of service is normally considered appropriate.

15. In reaching its determination, the Board can consider the applicant's petition, service record, and statements in light of the published guidance on equity, injustice, or clemency.

16. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his characterization of service. On his DD Form 149, the applicant indicated that Posttraumatic Stress Disorder (PTSD) and Other Mental Health Issues are related to his request. 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 (RA) on 28 February 2002 as a 77F (Petroleum Supply Specialist), 2) on 03 February 2003 he was reprimanded for driving while intoxicated on 25 January 2003, 3) the applicant received an Article 15 on 12 February 2003 for consuming alcohol under the age of 21 and controlling a vehicle while the alcohol concentration in his blood was 0.10 grams of alcohol per 100 millimeters of blood or greater on or about 25 January 2003, 4) on 11 March 2003 the applicant received a positive urinalysis showing he tested positive for the use of Tetrahydrocannabinol (THC), 5) on 12 March 2003 the applicant received an Article 15

for wrongfully using marijuana on or between 31 December 2002 and 21 January 2003, 6) court-martial charges were preferred against the applicant on 12 May 2003 and the charge sheet shows he was charged with the following: discharging a semiautomatic weapon on or about 16 March 2003 in order to prevent the apprehension of another Soldier while the other Soldier was fleeing the scene of the crime, failing to go to his appointed place of duty on or about 16 March 2003, making an official statement with the intent to deceive a Special Agent, saying he was not aware of anyone handling or firing a weapon illegally, and wrongfully using marijuana between on or about 11 February 2003 and 04 March 2003, 7) the applicant was discharged on 13 August 2003 under the provisions of Army Regulation (AR) 635-200, Chapter 10, in lieu of trial by trial by court-martial. His character of service was under other than honorable conditions (UOTHC) with a separation code of KFS and re-entry code of '4.'

b. The Army Review Boards Agency (ARBA) Behavioral Health Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. There were only two in-service medical records available for review in JLV, neither of which were BH-related. There were no VA records available for review. It is of note that the applicant is not eligible for VA services due to his characterization of service.

d. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence that the applicant had a condition or experience during his time in service that mitigated his misconduct. However, he contends his misconduct was related to PTSD and Other Mental Health Issues, and, per liberal guidance, his assertion is sufficient to warrant the Board's consideration.

e. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends his misconduct was related to PTSD and Other Mental Health Issues.

(2) Did the condition exist or experience occur during military service? Yes, per the applicant's assertion.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of records was void of any BH diagnosis or treatment history for the applicant during or after service and he provided no medical documentation supporting his assertion of PTSD or Other Mental Health Issues. However, the applicant contends he experienced PTSD and Other Mental Health Issues, and, per liberal guidance, his

assertion alone is worthy of the Board’s consideration. In absence of documentation supporting his assertion there is insufficient evidence to establish his misconduct was related to or mitigated by PTSD or Other Mental Health Issues and insufficient evidence to support an upgrade based on BH medical mitigation. Perhaps more importantly, some of the applicant’s misconduct (i.e., discharging a semiautomatic weapon) outweighs the relief offered by liberal guidance, and as such, even if there were evidence of a potentially mitigating condition, BH mitigation would not be supported for this offense due to the seriousness of the misconduct.

BOARD DISCUSSION:

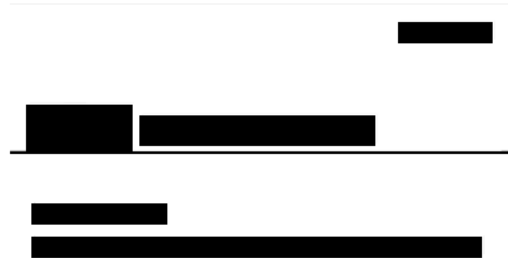
The Board carefully considered the applicant's request, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, the frequency and nature of his 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. The applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. The 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. Based on a preponderance of the evidence, the Board determined the character of service the applicant received upon separation was not in error or unjust.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	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. Section 1556 of Title 10, USC, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.
  
3. Army Regulation 635-200 (Personnel Separations – Active Duty Enlisted Administrative Separations), in effect at the time, provided guidance for the administrative separation of enlisted personnel:
  - a. Chapter 10 of that regulation provides, in pertinent part, that a member who has committed an offense or offenses for which the authorized punishment includes a punitive discharge may, submit a request for discharge in lieu of trial by court-martial.

The request may be submitted at any time after charges have been preferred and must include the individual's admission of guilt. Although an honorable or general discharge is authorized, a discharge under other than honorable conditions is normally considered appropriate.

b. Paragraph 3-7a provides that 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. Paragraph 3-7b provides that 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.

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 PTSD; Traumatic Brain Injury; sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences.

5. 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, 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//