

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 November 2024

DOCKET NUMBER: AR20240003553

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions (UOTHC) discharge.

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) Form 21-526EZ (Notice to Veteran/Service Member of Evidence Necessary to Substantiate a Claim for Veterans Disability Compensation and Related Compensation Benefits) pages 11-14

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 served his country in its time of need. He fought bravely and never deserted his post when on duty. He needed help with his health problems and had a lot going on in his life when he returned to Fort Hood, TX. His wife left him so, he was alone and depressed. He had thoughts of suicide and suffered from post-traumatic stress disorder (PTSD).
3. On 17 October 1989, the applicant enlisted in the Regular Army in the rank/grade of private (PV1)/E-1 for a period of 3 years. He was assigned to a unit at Fort Hood, TX.
4. On 17 April 1990, he was advanced to private/E-2. He was advanced to private first class (PFC)/E-3 on 17 October 1990, the highest grade he held while serving.
5. He served in the Imminent Danger Pay area of Southwest Asia from 11 October 1990 to 19 April 1999.
6. The applicant underwent a separation medical examination on 6 September 1991. He self-reported that there had been no change in his health since his previous medical

examination and he was not taking any prescription medications at the time. It was noted that he had no significant history of diagnoses.

7. A DD Form 458 (Charge Sheet) shows on 1 November 1991, court-martial charges were preferred against the applicant for violation of Article 112a of the Uniform Code of Military Justice (UCMJ) for wrongfully using cocaine between 25 August 1991 and 25 September 1991. The use of which was detected by biochemical testing of a urine sample he provided on 25 September 1991.

8. On 12 December 1991, the applicant voluntarily requested discharge under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10, for the good of the service 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 not to submit statements in his own behalf.

9. On 18 December 1991, the separation authority approved the applicant's request for discharge in lieu of trial by court-martial, with his service characterized as UOTHC. He further directed the applicant be reduced from PFC/E-3 to PV1/E-1 prior to the execution of the discharge. He was also barred from reentering Fort Hood, TX without prior written approval of the installation commander.

10. Orders and the applicant's DD Form 214 show he was discharged on 10 January 1992, in the rank/grade of PV1/E-1, under the provisions of Army Regulation 635-200, Chapter 10, by reason of "For the Good of the Service In Lieu of Trial by Court-Martial" with Separation Program Designator code "KFS" and Reentry Eligibility code "3." He was credited with completing 2 years, 2 months, and 15 days of net active service this period. He had time lost from 2 January 1992 until 10 January 1992. He did not complete his first full term of service.

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. The applicant provides pages 11-14 of a VA Form 21-526EZ he completed on 21 November 2023 as part of his claim for VA benefits. Page 11 of this form shows the applicant provided a list of eight ailments for which he was making his claim, to include PTSD. This document is available for the Board's consideration.

13. 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. Hearings may be authorized by a panel of the Board or by the Director of the ABCMR.

14. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) characterization of service. On his DD Form 293, he indicated he “served his country in its time of need. He fought bravely and never deserted his post when on duty. He needed help with his health problems and had a lot going on in his life when he returned to Fort Hood, TX. His wife left him so, he was alone and depressed. 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 17 October 1989, 2) he served in the Imminent Danger pay area of Southwest Asia from 11 October 1990 to 19 April 1991, 3) on 01 November 1991, court-martial charges were preferred against the applicant for wrongfully using cocaine between 25 August 1991 and September 1991, 4) orders and the applicant’s DD Form 214 show he was discharged on 10 January 1992 under the provisions of Army Regulation (AR) 635-200, Chapter 10, by reason of “For the Good of the Service in Lieu of Trial by Court-Martial,” with a separation program designator code of “KFS,” and reentry eligibility code of “3.” He had lost time from 02-10 January 1992.

b. The Army Review Board Agency (ARBA) Medical 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) and documents available via the Veterans Benefits Management System (VBMS) were also examined. The electronic military medical record (AHLTA) was not reviewed as it was not in use during the applicant’s time in service. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. Limited in-service medical records were available for review as part of the applicant’s application. As noted in the ROP, his separation medical examination dated 06 September 1991 shows he reported there had been no changes in his health since his last examination, he was not taking any prescription medications, and he had no significant history of diagnoses. A Report of Medical Examination dated 15 September 1989 for the purposes of enlistment shows that item number 42, psychiatric, was marked as ‘normal’ on clinical evaluation. An emergency room note dated 28 July 1990 shows that the applicant was in an altercation and reported experiencing head pain without loss of consciousness (LOC) or nausea. There were no BH-related medical records available for review.

d. A review of JLV was void of medical information and he is not service connected through the VA for any conditions. It is of note that his UOTHC discharge renders him ineligible for VA services.

e. A BH VA Compensation and Pension (C&P) examination available through the Veterans Benefits Management System (VBMS) dated 31 October 2024 was reviewed. The evaluating provider documented that the applicant did not meet criteria for PTSD nor any other BH condition at the time of the evaluation. It was also documented that the applicant denied any BH history pre, during, or post-military. The provider documented the applicant reported he was in combat and experienced incoming fire on many occasions while in the Gulf War; however, documented that he denied experiencing any symptoms of PTSD, except nightmares, which he experienced once every couple of months and was noted to not impact his functioning and therefore did not meet criteria for a BH diagnosis. The provider also documented that the applicant wrote a story about relationship issues he had while in the military (e.g., girlfriend had an abortion) which the provider noted 'seemed to indicate why he started having problems in the military and started abusing drugs.'

f. Based on the available information, it is the opinion of the Agency Medical Advisor that there is insufficient evidence that the applicant had a condition or experience 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.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends that 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 the 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. Furthermore, at the time of his separation medical physical, he did not indicate any current or history of BH concerns. However, he contends his misconduct was related to PTSD and Other Mental Health Issues, and per liberal guidance, his self-assertion alone is sufficient to warrant the Board's consideration. A VA C&P examination documented that he did not meet criteria for PTSD or any other BH conditions and review of JLV shows he is not service connected through the VA for any conditions. While it is acknowledged that a change in

behavior may be considered as evidence of the presence of a BH condition under Liberal Consideration, in this case use of cocaine following his service to Southwest Asia, there is insufficient medical documentation to establish a nexus between his misconduct and asserted diagnoses of PTSD or Other Mental Health Issues. As such, BH mitigation is not supported.

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 record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant's request, available military records and medical review, the Board concurred with the advising official finding insufficient evidence that the applicant had a condition or experience in-service that mitigated his misconduct. The opine also concluded at the time of his separation medical physical, he did not indicate any current or history of BH concerns.

2. The Board found insufficient evidence of in-service mitigating factors to overcome the misconduct of cocaine use. The Board noted the applicant provided no post service achievements or character letters of support that might have mitigated the discharge characterization. The Board agreed the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief, specifically an upgrade of the under other than honorable conditions (UOTHC) discharge. Therefore, the Board denied relief.

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.

X//Signed//

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. 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 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//