

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 September 2024

DOCKET NUMBER: AR20240004537

APPLICANT REQUESTS: upgrade of his discharge under other than honorable conditions (UOTHC) and to appear before the Board via video/telephone.

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Self-authored statement (5 pages)
- Electronic mail (email) correspondence, dated 26 November 2003
- Superior Court [REDACTED] document, dated 4 October 2006
- Department of Veterans Affairs (VA) Behavioral Health Medical Opinion-Disability Benefits Questionnaire, dated 8 March 2018
- Army Review Boards Agency (ARBA) letter, dated 22 January 2019
- Character reference letter, dated 9 November 2020
- Email correspondence, dated 16 August 2022

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, in part, that he was a very good Soldier, and that fact was recognized by his battery commander who stated in a letter that he was "the very definition of honorable." He was hand-picked to serve in positions that would typically be filled by more senior individuals. He deployed twice and willingly risked his life for his country. He even volunteered for extra missions. During Operation Iraqi Freedom his unit was hit with artillery. He cared for wounded civilians, took prisoners of war, and many of his brothers-in-arms died.

a. Toward the end of their deployment, he was specifically chosen to go home early because his wartime conduct was beyond reproach. He was part of a group of Soldiers who had been in the Middle East the longest up until that time. When he got home,

things were not the same. Many of them were changed. Some teams were fortunate and did not see much action; other teams were less fortunate and saw more.

b. He found out later that a bunch of Soldiers who saw a lot of really nasty stuff had come up with a quick exit strategy out of the military. Their plan was to fail one urinalysis and receive nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) and then fail a second urinalysis to get kicked out of the Army and go home. Some of the Soldiers that came back hated themselves and hated the Army for what had happened.

c. At that time, he was married and lived off-post. The guys in his platoon would frequently come to his house to hang out because it was a safe place to get away from Fort Stewart, GA. On the weekends they would typically play cards, drink beer, and do things that Soldiers did. Following their deployment, it did not happen quite as much. He still had a few guys that came over, but not like it was before.

d. One Soldier in particular asked him if he knew anyone that could help him fail a urinalysis test. The Soldier told him how he was a driver on a Bradley fighting vehicle and they had a gunner who absolutely loved shooting people and watching them die. This particular gunner told him that he killed as many people as he could. Knowing that, his friend had to watch it from the driver's seat and could not do anything about it. He had to watch one person fall after another after another. When he told the applicant that, he could not even imagine the pain that he was feeling inside. He also knew he could call his friend across the street, and he could bring over what the Soldier needed to fail his test. How could he tell him no? To the applicant, he was just making a phone call and helping a friend go home and be able to live with himself again after serving his country.

e. Unfortunately, there were many other Soldiers who had the same plan; around 10 or 15 guys failed drug tests. The applicant had failed a drug test a year and a half earlier and he never did that again; he was drug free. The battalion had a new commander, and he was informed about what Soldiers were doing to get out of the Army. Their commander, obviously wanting to continue to move up in his career, could not have a battalion stained with failed drug tests after returning from the war. He would make everyone pay. And what he really needed was someone to make a really good example of; that person ended up being the applicant.

f. When his friend was approached by the battalion commander, he was told that he would not be receiving an Article 15 and extra duty for failing the test. Instead, they were going to send him to jail unless he told the commander how he was able to fail the drug test. So, the applicant told his battalion commander that the Soldier got the drugs from him. As a result, the commander decided to contact the [REDACTED] to bring a

case against the applicant. In addition, the military was going to file charges against him also because he was a Soldier.

g. With only about two weeks left in the military before his enlistment contract was over, he really was not left with a choice. Due process was thrown out the window. They told him they would either keep him in the military for up to another two years to go to court and fight it, or he could take a discharge UOTHC and go home very quickly. Since his wife and personal goods had already been shipped home, the decision was easy.

h. He knew he could still oppose the charges that were filed against him by the [REDACTED]. As a matter of fact, [REDACTED] knew that he was not the dealer. It was all recorded on tape. In fact, the court decided to abandon the charges against him under Nolle Prosequere. They knew who the drug dealer was and just asked the applicant to confirm his identity and it was over. He never got the opportunity to defend himself and prove he was not guilty to the Army, but the Motion and Order to Nolle Prosequere his case supports the fact that he could have won the case had he been afforded his right to due process.

i. Having his discharge upgraded would restore his honor and allow him to obtain educational benefits and to be buried with military honors when he dies. The applicant indicates on his DD Form 149, that post-traumatic stress disorder (PTSD) is related to his request.

3. On 16 November 2000, the applicant enlisted in the Regular Army for a period of 3 years. Upon completion of initial entry training, he was assigned to a unit at Fort Stewart, GA.

4. On 1 March 2002, the applicant was counseled by his first sergeant regarding him testing positive following a urinalysis administered on 22 January 2002. He was reminded of the Army's policy on drug use and advised that he was being recommended for maximum punishment under the UCMJ. He was further advised that conduct of this nature could result in the initiation of action for his administrative separation from the Army and the potential consequences of such a separation.

5. The applicant served in Kuwait during Operation Enduring Freedom from 29 March 2002 until 1 October 2002. In July 2002, the applicant accepted field grade NJP under the provisions of Article 15, of the UCMJ for wrongfully using cocaine between on or about 19 December 2001 and 22 January 2002. His punishment included reduction from the rank/grade of private first class/E-3 to private (PV1)/E-1, forfeiture of \$552.00 pay per month for 2 months, and extra duty for 45 days.

6. The applicant served in Iraq from on or about 27 January 2003 until 28 July 2003.

7. A Criminal Investigation Division (CID) Form 94 (Agent's Investigation Report), dated 9 September 2003, shows the applicant sold approximately 4 grams of cocaine to a CID Registered Source (RS) on 9 September 2003.

8. On 30 October 2003, the Provost Marshall for Fort Stewart, Georgia informed the applicant's brigade and battalion commanders that he appeared on the Military Police blotter for the offense of distribution of cocaine. He also mentioned the applicant's previous offense of wrongful use/possession of cocaine in 2002.

9. A DD Form 458 (Charge Sheet) shows on 20 November 2003 court-martial charges were preferred against the applicant for violation of the UCMJ by, on or about:

- 17 September 2003, wrongfully distributing approximately 5 grams of crack cocaine, a Schedule II controlled substance
- 9 September 2003, wrongfully distributing approximately 4 grams of cocaine, a Schedule II controlled substance

10. The applicant's company and battalion commanders recommended the charges be referred to a General Court-Martial.

11. A CID Form 94, dated 21 November 2003, provides the specific details of the applicant's offenses, investigation, and arrest.

12. A CID Report of Investigation - Final, dated 25 November 2003, shows the CID investigation established probable cause to believe the applicant committed the offense of wrongful use, possession, and distribution of a controlled substance when he sold cocaine to a CID RS on two separate occasions and confessed to using cocaine on numerous occasions. The Report of Investigation also lists the U.S. Government and the State of Georgia as victims of these offenses.

13. On or about 2 December 2003, 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 a statement in his own behalf.

14. On or about 15 December 2003, the applicant's chain of command recommended approval of his request for discharge with his service characterized as UOTHC.

15. On 17 December 2003, 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 and permanently barred from entering Fort Stewart.

16. Orders and the applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) show he was discharged on 30 December 2003, in the rank/pay grade of PV1/E-1, under the provisions of Army Regulation 635-200, Chapter 10, by reason of "In Lieu of Trial By Court-Martial." He was credited with completing 3 years, 1 month, and 15 days of net active service this period. He completed his first full term of service.

17. On 26 December 2017, the applicant petitioned the Army Discharge Review Board (ADRB) for relief. On 22 January 2019, the applicant was informed that after careful review of his application, military records, and all other available evidence, the ADRB determine that he was properly and equitably discharged and denied his request. He petitioned the ADRB for relief again on 26 April 2021. On 18 January 2023, he was informed the ADRB had denied his request.

18. The applicant provides the following documents that are available in their entirety for the Board's consideration:

a. An email, dated 26 November 2003, shows the applicant's civilian counsel expresses his dismay in the fact that when the applicant tested positive for drug use, he was not command referred to the Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) in addition to receiving disciplinary action. Counsel contends the second incident of testing positive could have been prevented if the applicant had been enrolled in ADAPCP following the first incident. Counsel also noted the applicant's deployments and duty performance.

b. A Superior Court of Liberty County, State of Georgia document, dated 4 October 2006, shows a Superior Court Judge ordered the charges against the applicant to be abandoned under nolle prosequi.

c. A VA Behavioral Health Medical Opinion-Disability Benefits Questionnaire, dated 8 March 2018, shows the applicant underwent an in-person examination for symptoms of PTSD, Major Depressive Disorder, and Alcohol and Cocaine Use Disorders, and it was opined the conditions were at least as likely as not incurred in or caused by the claimed in-service injury, event, or illness.

d. A character reference letter rendered by the applicant's former battery commander on 9 November 2020, shows he praised the applicant's performance during two combat zone deployments and his service during them was exemplary and honorable.

e. An email, dated 16 August 2022, shows the applicant was provided the status of his case that was being processed by the ADRB at the time.

19. 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.

20. 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.

21. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his discharge under other than honorable conditions (UOTHC). He contends he experienced 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 16 November 2000; 2) On 1 March 2002, the applicant was counseled regarding testing positive following a urinalysis administered; 3) The applicant served in Kuwait during Operation Enduring Freedom from 29 March 2002 until 1 October 2002; 4) In July 2002, the applicant accepted field grade NJP for wrongfully using cocaine; 5) The applicant served in Iraq from on or about 27 January 2003 until 28 July 2003; 6) On 20 November 2003, court-martial charges were preferred against the applicant for wrongfully distributing crack cocaine and wrongfully distributing cocaine; 7) The applicant was discharged on 30 December 2003, 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 supporting documents and the applicant's available military service and medical records. The VA's Joint Legacy Viewer (JLV) was also examined.

c. The applicant asserts he experienced PTSD, which mitigates his misconduct. There is insufficient evidence the applicant reported or was diagnosed with a mental health condition including PTSD while on active service. It is likely the applicant did not attend substance abuse treatment due to his upcoming deployment when his positive urinalysis test was identified. This type of treatment was not available in that environment.

d. A review of JLV provided evidence the applicant has been diagnosed with service-connected PTSD for treatment purposes, but he does not receive service-connected disability. There is insufficient evidence the applicant has engaged in any behavioral health treatment at the VA, but he has received assistance for homelessness in 2023.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to support the applicant had a condition or experience that partially 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 a PTSD while on active service that mitigates his misconduct. The applicant has been diagnosed with service-connected PTSD by the VA.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced a PTSD while on active service that mitigates his misconduct. The applicant has been diagnosed with service-connected PTSD by the VA.

(3) Does the condition experience actually excuse or mitigate the misconduct? Partially, there is sufficient evidence beyond self-report the applicant experiencing PTSD, while on active service. The applicant's drug use could be an attempt to self-medicate to avoid negative emotions which is a natural sequelae to PTSD. However, there is no nexus between his PTSD and his misconduct of selling illegal drugs: 1) this type of misconduct is not a part of the natural history or sequelae of PTSD; 2) PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right. 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:

1. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.

2. The Board carefully considered the applicant's request, supporting documents, 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 to include deployment, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the applicant's PTSD claim and the review and conclusions of the ARBA Behavioral Health Advisor. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding his misconduct being only partially mitigated by PTSD. 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:

Mr 1	Mr 2	Mr 3
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:	:	:	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.

3/6/2025

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. 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, 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//