

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 May 2025

DOCKET NUMBER: AR20240008877

APPLICANT REQUESTS: upgrade of his under other than honorable conditions (UOTHC) characterization of service to honorable

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

- DD Form 149 (Application for Correction of Military Record)
- Veterans Affairs (VA) Benefit Decision Letter, dated 6 December 2023

FACTS:

1. The applicant did not file within the three-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:

a. He is requesting an upgrade to his discharge due to mitigating factors. The VA has determined his overall service was honorable. The incident that led to his discharge was an isolated incident with no prior or subsequent disciplinary issue. Critically, he was suffering from service-connected Traumatic Brain Injury (TBI) and Post-Traumatic Stress Disorder (PTSD) while deployed in Iraq, which likely impaired his judgement.

b. Lastly, the combat-related injuries combined with his otherwise unblemished record present a compelling case for reconsideration. An upgrade would more accurately reflect his service and acknowledge the impact of his combat experience on the circumstances of his discharge.

3. The applicant enlisted in the Regular Army on 21 August 2001.

4. Before a General Court-martial adjudged on 26 October 2006, the applicant was found guilty of the following violations of the Uniform Code of Military Justice (UCMJ):

a. Article 134, for on or about 7 April 2006, indecent assault of a person not his wife, by rubbing his penis against Ms. K.H.'s vagina with the intent to gratify his sexual desires.

b. Article 134, for on or about 7 April 2006, committing an indecent assault upon Ms. K.H., a person not his wife, by digitally penetrating her vagina with his fingers, with intent to gratify his sexual desires.

c. The court sentenced him to be reduced to the grade of E-3; to forfeit \$1,000.00 pay per month for two months; and confinement for two months.

d. The applicant requested discharge in lieu of trial by court-martial under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10. The findings of guilty and the sentence was disapproved on 2 November 2006.

5. The company commander recommended approval of the request for discharge on the same date. The separation authority approved the request on 2 November 2006 and directed his discharge UOTHC.

6. The applicant was discharged on 17 November 2006. His DD Form 214 (Certificate of Release of Discharge from Active Duty) confirms he was discharged under the provisions of Army Regulation 635-200, Chapter 10, in lieu of trial by court-martial. He completed 5 years, 2 months, and 27 days of net active service this period.

7. The applicant provides a copy of his VA Decision Memorandum, dated 6 December 2023. The memorandum shows his evaluation for PTSD with mild alcohol use disorder and major depression disorder, which was currently 30 percent (%) disabling, was increased to 50% (overall 90%) effective 4 August 2023.

8. 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.

9. 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, and a Traumatic Brain Injury (TBI) 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 21 August 2001.
- The applicant deployed to Iraq from 14 February 2004 to 14 February 2005 and to Kosovo from 12 May 2002 to 10 November 2002.
- Before a General Court-martial adjudged on 26 October 2006, the applicant was found guilty of the following violations of the UCMJ: on or about 7 April 2006, indecent assault of a person not his wife, by rubbing his penis against Ms. K.H.'s vagina with the intent to gratify his sexual desires; and committing an indecent assault upon Ms. K.H. by digitally penetrating her vagina with his fingers. The applicant requested discharge in lieu of trial by courts-martial.
- The applicant was discharged on 17 November 2006 and completed 5 years, 2 months, and 27 days of net active service.

c. Review of Available Records: The Army Review Board Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts the incident that led to his discharge occurred while he was deployed and suffering from undiagnosed PTSD and TBI, which likely impaired his judgment. He indicated PTSD and TBI as issues or conditions related to his request. A VA Decision Letter dated 6 December 2023 showed the applicant is service connected for PTSD with mild alcohol use disorder at 50% disabling. VA records showing diagnoses from 2022 were included in the application and will be summarized below. There was insufficient evidence that the applicant was diagnosed with TBI, PTSD, or another psychiatric condition while on active service.

d. The Joint Legacy Viewer (JLV), which includes medical and mental health records from DoD and VA, was also reviewed and showed DoD records on 9 April 2006, which indicated the applicant was brought to the ER by his commander and chaplain following a break up with a girlfriend, a physical and verbal altercation, and pending CID investigation. The applicant had indicated suicidal ideation with a plan but no intent, sleep difficulty, and alcohol use, and he was diagnosed with Adjustment Disorder with Disturbance of Emotions and Conduct. The applicant was referred to Family Advocacy (FAP) and individual therapy, and he engaged in an anger management group as part of the FAP. His last session was on 10 August 2006 where it was discussed that he would likely face jail time and a dishonorable discharge. Documentation on 27 October 2006 showed a health examination for confinement. VA records showed a consult entered for TBI evaluation in 2019, but the applicant did not respond to scheduling efforts. However, a TBI evaluation was conducted on 14 August 2023, and the applicant reported one blast exposure from an IED but denied loss of consciousness, post-traumatic amnesia, or altered consciousness/confusion. It was noted that he did not meet criteria for mild TBI/concussion and that his mental health symptoms (i.e. fatigue, difficulty concentrating, memory problems, feeling anxious) were likely due to mental

health concerns and chronic pain. There was no indication of any mental health treatment. The applicant is 100% service connected for several physical health concerns and 50% for PTSD (original decision in 2015).

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 mitigates his misconduct.

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 PTSD and a TBI at the time of the misconduct. DoD documentation showed he received counseling following the event that resulted in his discharge, and he was diagnosed with an Adjustment Disorder. VA records showed he is 50% service connected for PTSD, and although there was indication of mental health symptoms, he has not received treatment. VA records showed he was evaluated for a TBI in 2023 and his symptoms were attributed to his mental health condition as opposed to a mild TBI/concussion.

(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. The applicant deployed to Iraq from 14 February 2004 to 14 February 2005 and to Kosovo from May to November 2002.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of military medical and mental health records revealed that the applicant received counseling services following the incident, which occurred on 7 April 2006, and he was diagnosed with an Adjustment Disorder while on active service. VA records showed he was diagnosed with PTSD and service connected for this condition since 2015. While both PTSD and TBI can cause increased irritability, anger, and impulsivity, there is no nexus between PTSD/TBI and his misconduct related to sexual assault: 1) these types of misconduct are not part of the natural history or sequelae of a mental health condition; 2) his asserted mental health conditions do not affect one's ability to distinguish right from wrong and act in accordance with the right.

g. However, the applicant contends he was experiencing a mental health condition or an experience that mitigates his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined partial relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the violent and criminal nature of the misconduct leading to the applicant's separation and the following findings outlined in the medical review:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes.

(2) Did the condition exist or experience occur during military service? Yes.

(3) Does the condition or experience actually excuse or mitigate the discharge? No,

the Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant's characterization of service. However, based upon the available documentation showing the applicant completed a period of honorable service which is not currently annotated on his DD Form 214, the Board recommended adding the period of Continuous Honorable Service to the applicant's DD Form 214.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:XXX	:XXX	:XXX	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant's DD Form 214 by adding in Remarks the statement, "Continuous Honorable Service from 21 August 2001 to 20 August 2004".
2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to upgrading the applicant's characterization of service.

//SIGNED//

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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, U.S. Code, 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, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. Paragraph 2-9 states 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.

4. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

a. 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.

b. 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.

c. Chapter 10 provided that a member who had committed an offense or offenses, for which the authorized punishment included a punitive discharge, could submit a request for discharge for the good of the service in lieu of trial by court-martial. The request could be submitted at any time after charges had been preferred and must have included the individual's admission of guilt. Although an honorable or general discharge was authorized, a UOTHC discharge was normally considered appropriate.

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 under other than honorable conditions 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 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NR) 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.

//NOTHING FOLLOWS//