

IN THE CASE OF: [REDACTED]

BOARD DATE: 24 April 2025

DOCKET NUMBER: AR20240009882

APPLICANT REQUESTS:

- upgrade of his under other than honorable conditions (UOTHC) characterization of service
- a personal appearance before the board

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge)
- self-authored statement, dated 9 April 2024

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. His discharge was improper because the Army failed to follow proper procedures for screening for Post-Traumatic Stress Disorder (PTSD) prior to separation. Further, his discharge was inequitable because his mental health conditions rendered him incapable of service.

b. In addition, the discharge was equitable because he was dealing with severe family issues at the time. He was unable to manage or cope with the personal problems which is why he behaved like he did. He noted the following:

- in-service Traumatic Brain Injury (TBI) injury - several improvised explosive devices (IED) explosions which should be annotated in his medical records
- in-service PTSD experiences and events happening in wartime

- both were diagnosed in country around September-October 2007, and all should be documented in his medical records

c. Lastly, TBI and PTSD have been proven to affect behavior and how some deal with things in life. He came back wounded to get help with issues that were caused by his in-service injuries (TBI and PTSD). Instead, he was just given pills and then reprimanded/shunned/bullied for going to doctor appointments, which they were aware of but still coded him as Absent Without Leave (AWOL).

3. The applicant enlisted in the Regular Army on 9 May 2006. The highest grade he attained was E-4.

4. Court-martial charges were preferred against the applicant on 29 August 2008 for violations of the Uniform Code of Military Justice (UCMJ). The DD Form 458 (Charge Sheet) shows he was charged with the following:

- Charge 1 and Specification 1: On or about 22 July 2008, without authority, absent himself from his unit, and did remain so absent until on or about 29 July 2008

- Charge 1 and Specification 2: Without authority, go from his appointed place of duty, the Rest and Resilience Center, Darnall Army Medical Center on or about 5 August 2008

- Charge 2: Having received a lawful command from his superior commissioned officer, to hand her his identification card, or words to that effect, willfully disobeyed the same on or about 6 July 2008

- Charge 3 and Specification 1: Having received a lawful command from Staff Sergeant (SSG) [REDACTED] to hand him his identification card, or words to that effect, willfully disobeyed the same on or about 6 July 2008

- Charge 3 and Specification 2: Did treat with contempt and was disrespectful in language and/or deportment toward Sergeant (SGT) [REDACTED] by saying to him "what the fuck are you looking at," "I don't need to abide by those fucking rules," or words to that effect, and move toward SGT [REDACTED] in a threatening manner on or about 6 July 2008

- Charge 3 and Specification 3: Having received a lawful order from SSG [REDACTED] to put his arms out to allow SSG [REDACTED] to place restraints on him, an order which it was his duty to obey, willfully disobeyed the same on or about 18 August 2008

- Charge IV and Specification 1: Escaped from the custody of SSG [REDACTED] a person authorized to apprehend the accused on or about 12 August 2008

- Charge IV and Specification 2: Resisted being apprehended by Officer [REDACTED] an armed forces police officer, on or about 12 August 2008
- Charge IV and Specification 3: Resisted being apprehended by SSG [REDACTED] and Captain (CPT) [REDACTED] persons authorized to apprehend the accused on or about 18 August 2008
- Charge V and Specification 1: Unlawfully choked Private (PVT) [REDACTED] on the neck with his hands on or about 7 July 2008
- Charge V and Specification 2: Unlawfully choked PVT [REDACTED] on the neck with his hands on or about 7 July 2008
- Charge V and Specification 3: Committed an assault upon PVT [REDACTED] by striking her on the arm with a means likely to produce grievous bodily harm, to wit: slamming a door on her arm on or about 7 July 2008
- Charge VI and Specification: Wrongfully communicate to First Lieutenant (1LT) [REDACTED] a threat to injure First Sergeant (1SG) [REDACTED] by "putting a pen through his eye," or words to that effect on or about 6 August 2008

5. On 9 September 2008, the applicant consulted with legal counsel and was advised of the basis for the contemplated trial by court-martial; the maximum permissible punishment authorized under the UCMJ; the possible effects of a bad conduct discharge; and the procedures and rights that were available to him.

a. Subsequent to receiving legal counsel, the applicant voluntarily requested discharge under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10, request for discharge in lieu of trial by courts-martial. In his request for discharge, he acknowledged his understanding that by requesting discharge, he was admitting guilt to the charge against him, or of a lesser included offense that also authorized the imposition of a bad conduct or dishonorable discharge.

b. He further acknowledged he understood that if his discharge request was approved, he could be deprived of many or all Army benefits, he could be ineligible for many or all benefits administered by the Veterans Administration, and he could be deprived of his rights and benefits as a Veteran under both Federal and State laws. He did not submit a statement in his own behalf.

6. The applicant's commander recommended approval of the request for discharge.

7. The separation authority approved his request for discharge in lieu of trial by court-martial on 22 September 2008 and directed his discharge UOTHC.

8. The applicant was discharged on 6 October 2008. 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 2 years, 4 months, and 14 days of net active service this period.

9. 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.

10. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his other than honorable discharge to honorable. He contends he experienced posttraumatic stress disorder (PTSD) and traumatic brain injury (TBI) that mitigate 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 09 May 2006; 2) The applicant was deployed to Iraq from 20 October 2006 to 05 January 2008; 3) Court-martial charges were preferred against the applicant on 29 August 2008 for 2 counts of AWOL, 1 count of willfully disobeying a superior officer, 3 counts of insubordinate conduct, 3 counts of resisting apprehension, 3 counts of assault consummated by battery, and 1 count of communicating a threat; 4) The applicant was discharged on 6 October 2008, Chapter 10- In lieu of trial by court-martial. His character of service was under other than honorable conditions. He completed 2 years, 4 months, and 14 days of net active service.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the available supporting documents and the available military service records. The VA's Joint Legacy Viewer (JLV) was also reviewed. No additional medical documentation was provided. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. The applicant asserts he experienced PTSD and TBI that mitigate his misconduct. The applicant was initially prescribed Seroquel on 14 September 2007 while deployed, by active-duty medical providers for unreported symptoms. Subsequent deployment medical notes on 17 September 2007, 28 September 2007, and 03 October 2007 indicated that the applicant was diagnosed with chronic PTSD. He had also indicated on at least 2 different occasions having trauma-related hallucinations that the applicant attributed to a profound lack of sleep (later reported as 12 hours over the course of a week), which resolved after an increase in sleep. However, the applicant was not given any duty restrictions as a result of these difficulties. Following the applicant's deployment, the applicant was initially referred for TBI evaluation on 16 February 2008, which later expired without becoming scheduled. There was no documentation of TBI during the applicant's deployment, however, the applicant was documented as having TBI retrospectively and was reportedly treated in the field. The applicant was assessed again post-deployment, on

25 April 2008, where he reported experiencing several IED attacks while deployed with possible loss of consciousness in addition to headaches, tinnitus, and impulsivity following these incidents. The applicant was again referred for a TBI evaluation and treatment during this encounter. Per a mental health note on 27 May 2008, the applicant was command referred for evaluation after threatening suicide with a knife and perpetrating domestic violence against his pregnant wife, for which he was pending civilian charges. During this encounter, he was referred again to Family Advocacy Program (FAP) and for a TBI evaluation. There was insufficient documentation as to whether the applicant ever followed through with any TBI evaluation and treatment. It was noted that the couple was already connected with FAP due to a previous undocumented domestic violence incident. The documentation was unclear as to when the applicant was initially referred to FAP. The applicant and his spouse appeared to be engaged with FAP at minimum until the applicant's subsequent suicide attempts and hospitalizations on 24 July 2008 and 13 August 2008. The applicant was documented as being evaluated after a suicide attempt by ingesting iron multivitamins on 24 July 2008 and was released to command for observation. Command referred the applicant to be evaluated at the ER again for homicidal ideation on 04 August 2008 but was again released and expected to follow-up the following day. The applicant did not show for his follow-up appointment. He was again command referred for evaluation and treatment of a suicide attempt via overdose on 07 August 2008 and was admitted. Upon his discharge on 13 August 2008, the applicant found that they would not be able to immediately return home and escaped command custody in an attempt to flee the post. Upon arrival of military police, the applicant allegedly attempted to overdose on the bottle of 30 pills of Seroquel he received during his hospital discharge. The applicant was re-hospitalized the same day. He continued to be followed by mental health until his discharge from service. His final appointments on 01 October 2008 and 07 October 2008 were attempted phone contacts to connect the applicant with external resources. His final diagnoses were PTSD and anxiety disorder NOS.

d. A review of JLV did not result in any results post-discharge. There is insufficient evidence the applicant has connected with the VA for additional care, and he does not receive any VA service-connected disability for a mental health condition.

e. Based on the available information, it is the opinion of the Agency Medical Advisor that there is sufficient evidence that the applicant had a diagnosis of PTSD and a previous diagnosis or experience that may have led to a TBI that may partially mitigate some of the applicant's 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 TBI and PTSD, which mitigates his misconduct. The applicant was diagnosed with PTSD as early as 17 September 2007, during his deployment and was noted as experiencing symptoms and incidents consistent

with TBI as early as his post-deployment evaluation(s) on 16 February 2008 and 25 April 2008.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced a TBI and PTSD while on active service. The applicant reported that he was deployed to a combat zone his time in service that contributed to his experience of these conditions. The applicant was diagnosed with PTSD as early as 17 September 2007 during his deployment and was noted as experiencing symptoms and incidents consistent with TBI as early as his post-deployment evaluation(s) on 16 February 2008 and 25 April 2008.

(3) Does the condition experience actually excuse or mitigate the misconduct? Partially, there is sufficient evidence beyond self-report that the applicant has been diagnosed with a TBI and PTSD during his time in service related to his previous deployment. Avoidant and erratic behavior such as going AWOL, disobeying orders, and insubordinate behavior can be natural sequelae to PTSD. However, there is no nexus between the applicant's reported PTSD and TBI and the applicant's charges of resisting apprehension, assault/battery, and communicating a threat in that: 1) this type of misconduct is not a part of the natural history or sequelae of PTSD or TBI and; 2) PTSD and TBI broadly do not affect one's ability to distinguish right from wrong and act in accordance with the right. Yet, the applicant contends he experienced a mental health condition or experience while on active service that mitigates his misconduct and the applicant's contention is sufficient for consideration per the Liberal Consideration Policy.

#### 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 pending a court martial for multiple specifications, including assault and communicating a threat, 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 and denied relief.

2. The Board also noted the medical advisor's review that based on the available information, there was sufficient evidence that the applicant had a diagnosis of PTSD and a previous diagnosis or experience that may have led to a TBI that may partially mitigate

some of the applicant's misconduct. The medical review further stated:

(a) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant asserts he experienced a TBI and PTSD, which mitigates his misconduct. The applicant was diagnosed with PTSD as early as 17 September 2007, during his deployment and was noted as experiencing symptoms and incidents consistent with TBI as early as his post-deployment evaluation(s) on 16 February 2008 and 25 April 2008.

(b) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced a TBI and PTSD while on active service. The applicant reported that he was deployed to a combat zone his time in service that contributed to his experience of these conditions. The applicant was diagnosed with PTSD as early as 17 September 2007 during his deployment and was noted as experiencing symptoms and incidents consistent with TBI as early as his post-deployment evaluation(s) on 16 February 2008 and 25 April 2008.

(c) Does the condition experience actually excuse or mitigate the misconduct? Partially, there is sufficient evidence beyond self-report that the applicant has been diagnosed with a TBI and PTSD during his time in service related to his previous deployment. Avoidant and erratic behavior such as going AWOL, disobeying orders, and insubordinate behavior can be natural sequelae to PTSD. However, there is no nexus between the applicant's reported PTSD and TBI and the applicant's charges of resisting apprehension, assault/battery, and communicating a threat in that: 1) this type of misconduct is not a part of the natural history or sequelae of PTSD or TBI and; 2) PTSD and TBI broadly do not affect one's ability to distinguish right from wrong and act in accordance with the right. Yet, the applicant contends he experienced a mental health condition or experience while on active service that mitigates his misconduct and the applicant's contention is sufficient for consideration per the Liberal Consideration Policy.

3. The Board found insufficient evidence the applicant had a condition or experience during service that mitigated 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.

4. 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, 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.
3. 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.
4. 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.
5. 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.

6. 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.

7. 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.

8. 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//