

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 30 November 2023

DOCKET NUMBER: AR20230002841

APPLICANT REQUESTS: an upgrade of his general, under honorable conditions discharge to honorable.

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 from Active Duty)
- Department of Veterans Affairs (VA) Rating Decision, 8 January 2018

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 is requesting a change in his general, under honorable conditions discharge to honorable. He believes the post-traumatic stress disorder (PTSD) from his deployment caused his "bad behavior" and he was self-medicating to avoid thinking about the events. It caused additional problems in his life that further shifted his life in the wrong direction. It has taken him a long time to get his life back on track and he is seeking treatment through the VA. He has received the right help and believes it is working.

3. The applicant provides:

a. His DD Form 214 for his active service from 9 January 2002 to 7 December 2005, to be referenced in his service record.

b. A VA Rating Decision dated 8 January 2018, shows the applicant is 70% service connected for combat incurred PTSD, 10% for lumbosacral strain, 10% for shoulder impingement with history of dislocation, post-surgical repair for the left shoulder, and 0% for his cervical strain, with an 80% combined evaluation effective 1 January 2016.

c. The below listed documents were referenced in the DD Form 149 as attachments, but were not included:

- VA Code Sheet
- VA Medical Records
- Military Medical Records

4. A review of the applicant's service record shows:

a. He enlisted in the Regular Army on 9 January 2002. He served in Kuwait/Iraq from 10 April 2003 to 3 March 2004.

b. The service record contained two documents that outlined the nature of charges initiated on the applicant to include the restraining order violation and multiple additional charges subsequently dismissed.

- El Paso County – Sherriff Inmate Details
- Colorado Court Database, Register of Action

c. On 10 November 2005, the applicant's immediate commander notified the applicant of his intent to separate him under the provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), Chapter 14 for conviction by a civil court. The applicant acknowledged receipt of the notification of separation action on 17 November 2005. The reasons for his proposed action were for his conviction by a civil court for violating a restraining order and his sentence to six months in jail.

d. On 17 November 2005, after declining consultation with legal counsel, he acknowledged:

- the rights available to him and the effect of waiving said rights
- he had been afforded the opportunity to consult with counsel
- he waived consulting counsel and representation by a military/civilian counsel
- he elected not to submit statements on his own behalf

e. The immediate commander initiated separation action against the applicant for conviction by a civil court. He recommended that his period of service be characterized as general, under honorable conditions. The intermediate commander recommended approval.

f. The separation authority approved the discharge recommendation for immediate separation, consistent with the chain of command recommendations, under the provisions of AR 635-200, Chapter 14, paragraph 14-5 for conviction by a civil court. He would be issued a general, under honorable conditions discharge.

g. Orders 334-0005 dated 30 November 2005, discharged the applicant from active duty with an effective date of 7 December 2005.

h. On 7 December 2005, he was discharged from active duty. His DD Form 214 shows he was discharged under the provisions of chapter 14 of AR 635-200 with a general, under honorable conditions characterization of service. He completed 3 years, 5 months, and 6 days of active service with 170 days of lost time. He was assigned separation code JKB and the narrative reason for separation listed as "Misconduct, Conviction by Civil Court," with a reentry code of 3. It also shows he was awarded or authorized: National Defense Service Medal, Army Service Ribbon, Global War on Terrorism Service Medal, Global War on Terrorism Expeditionary Medal.

5. On 5 July 2023, a member of the Army Review Boards Agency staff notified the applicant by email, the supporting documents referenced in his online application were not included. His case would be placed on a 30 day hold to allow him an opportunity to provide the missing documents. The applicant has not provided a response to date.

6. There is no evidence the applicant has applied to the Army Discharge Review Board for review of his discharge within that board's 15-year statute of limitations.

7. By regulation (AR 15-185), the ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application.

8. By regulation (AR 635-200), action will be taken to separate a Soldier for misconduct, such conviction by a civil court, when initially convicted by civil authorities, or when action is taken that is tantamount to a finding of guilty.

9. In reaching its determination, the Board can consider the applicant's petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

10. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his general, under honorable conditions discharge to honorable. He contends he had a PTSD that mitigated 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: 1) The applicant enlisted in the Regular Army on 9 January 2002; 2) He served in Kuwait/Iraq from 10 April 2003-3 March 2004; 3) On 10 November 2005, the applicant's immediate

commander notified the applicant of his intent to separate for conviction by a civil court. The reasons for his proposed action were for his conviction by a civil court for violating a restraining order and his sentence to six months in jail; 4) The applicant was discharged on 7 December 2005, Chapter 14, paragraph 14-5 for conviction by a civil court. His nature of service was general, under honorable conditions.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service and medical records. The VA's Joint Legacy Viewer (JLV) and hardcopy VA medical documentation provided by the applicant were also examined. On his application, the applicant noted PTSD is related to his request, as a contributing and mitigating factor in the circumstances that resulted in his separation. There is insufficient evidence the applicant reported or was diagnosed with a mental health condition while on active service. A review of JLV and hardcopy VA medical documentation provided evidence the applicant has been diagnosed with service-connected PTSD since 2017, and he receives 70% service-connected disability for this condition.

d. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence to support the applicant had condition or experience that mitigated his misconduct.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, there is sufficient evidence the applicant has been diagnosed with service-connected PTSD. The applicant contends this condition contributed to his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant has been diagnosed with service-connected PTSD.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is sufficient evidence the applicant was experiencing PTSD while on active service. However, there is no nexus between the applicant's PTSD and violating a restraining order and civilian conviction given that: 1) these types of misconduct is not 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 that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

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 DoD guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, the applicant's record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was discharged from active duty due to Misconduct – Conviction by Civil Court. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the advising official. The Board concurred with the medical advisory opinion finding insufficient evidence of in-service mitigating factors to overcome the misconduct. The applicant provided no evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination. Based on a preponderance of evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

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.

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

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. 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 ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

3. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.

a. An honorable discharge is a separation with honor. 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 member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 14 of the regulation states action will be taken to separate a Soldier for misconduct when it is clearly established that despite attempts to rehabilitate or develop him or her as a satisfactory Soldier, further effort is unlikely to succeed. Paragraph 14-5 further states a Soldier may be considered for discharge when initially convicted by civil authorities, or when action is taken that is tantamount to a finding of guilty, if one of the below conditions is present. This includes similar adjudication in juvenile proceedings:

(1) A punitive discharge authorized for the same or a closely related offense under the MCM 2002, as amended.

(2) The sentence by civil authorities includes confinement for 6 months or more, without regard to suspension or probation. Adjudication in juvenile proceedings includes adjudication as a juvenile delinquent, wayward minor, or youthful offender.

4. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) 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.
5. 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, on 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.
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/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 based on 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.

7. Section 1556 of Title 10, United States Code, 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.

//NOTHING FOLLOWS//