

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 February 2024

DOCKET NUMBER: AR20230005051

APPLICANT REQUESTS: an upgrade of his under honorable conditions (General) discharge.

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), for the period ending 19 December 2007
- Civilian Medical Records
- Washington State Vocational Rehabilitation Statement

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 sustained a traumatic brain injury (TBI) that led to his discharge. At the time, no examination or testing was made when he had a vehicular accident resulting in a concussion and TBI. Had this not happened, he would have been able to complete his term of service and even go on to fulfill new service contracts.
3. On the applicant's DD Form 149, he indicates having post-traumatic stress disorder (PTSD) from a TBI, as contributing and mitigating factors in the circumstances that resulted in his separation. However, he has not provided any documentation to support these diagnoses.
4. He enlisted in the U.S. Army Reserve (USAR) on 24 February 2006, completed training and was awarded the military occupational specialty 31B (Military Police). He was released from active duty having completed 4 months and 21 days of initial active duty for training.
5. The applicant enlisted in the Regular Army on 19 April 2007.

6. The applicant received adverse counseling on 11 occasions between 25 June 2007 and 3 October 2007, primarily for alcohol related incidents and a vehicular accident (for which he was found at fault), revocation of his driver's license, disrespect toward a noncommissioned officer, failure of the Army Physical Fitness Test, failure to report for duty, failure to obey a lawful order, missing and/or being late for an Army Substance Abuse Program (ASAP) appointment, and disenrollment from the ASAP.
7. In his statement related to the vehicular accident on 3 August 2007, the applicant reported falling asleep at the wheel and colliding with a parked car. He reported minor burns to his hands (for which he received no medical treatment), but no further injuries. The accident report is not of record.
8. The applicant was afforded a medical examination on 24 August 2007 that found no abnormalities or complaints of head trauma.
9. The applicant was declared an alcohol rehabilitation failure on 28 August 2007.
10. A Mental Status Report, dated 19 September 2007 shows he was found to be mentally responsible, able to distinguish right from wrong and to adhere to the right, and had the mental capacity to understand and participate in board proceedings. There were no disqualifying mental defects sufficient to warrant disposition through medical channels. It was recommended that he be administratively discharged. He was reported as having an alcohol dependence and an anti-social personality disorder.
11. The applicant's immediate commander notified the applicant on 8 November 2007, that he was initiating separation action under Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), Chapter 9, for ASAP rehabilitative failure and recommending he receive a general discharge due to his ASAP failure. The unit commander also submitted full page fact sheet and a separate memorandum outlining why he was recommending the general discharge.
12. The applicant consulted with legal counsel on 16 November 2007 and was advised of the basis for the contemplated separation action, his rights, and election options.
  - a. Subsequent to receiving legal counsel, the applicant acknowledged the proposed discharge under the provision of AR 635-200, Chapter 9, as an alcohol rehabilitation failure. He acknowledged he might expect to encounter substantial prejudice in civilian life if a general discharge was issued.
  - b. He waived his right to submit a statement on his own behalf.
13. The applicant's immediate commander formally recommended on 20 November 2007, that the applicant be separated under AR 635-200, Chapter 9, due to his failure in

the outpatient alcohol treatment program. The commander stated the applicant had demonstrated that he could not conform to military standards and he showed no desire to be rehabilitated as indicated in his rehabilitative failure, and that an expeditious discharge from the service would be in the best interest of the command and the United States Army.

14. On 3 December 2007, the separation authority approved the recommendation for separation under AR 635-200, Chapter 9, and directed the applicant's service be characterized as general, under honorable conditions.

15. The applicant was discharged on 19 December 2007. His DD Form 214 shows he was discharged under the provisions of AR 635-200, Chapter 9, and his service characterization was under honorable conditions (General). His DD Form 214 further shows he completed 8 months and 1 day of active duty service. He was awarded or authorized:

- National Defense Service Medal
- Global War of Terrorism Service Medal
- Army Service Ribbon

16. The applicant provided:

a. A copy of a July 2020 Neuropsychological Evaluation. In this evaluation the applicant is reported to have had 2 years of active service and was dishonorably discharged. He reported having lost consciousness as a result of the in service accident as well as having received head injuries in at least four post service incidents.

b. A 19 August 2007, Department of Social and Health Services, Division of Vocational Rehabilitation letter to the applicant's employer requesting a temporary accommodation due the medications that lowers his heat tolerance and puts him at risk of heatstroke and extreme dehydration.

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

#### MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under honorable conditions (general) discharge to an honorable discharge. He contends he experienced 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: 1) The applicant enlisted in the U.S. Army Reserve on 24 February 2006 and completed training as a 31B (Military Police). He was released from active duty after having completed initial active duty for training. The applicant enlisted in the Regular Army on 19 April 2007; 2) The applicant received adverse counseling on 11 occasions between 25 June-3 October 2007 primarily for alcohol related incidents and a vehicular accident (for which he was found at fault), revocation of his driver's license, disrespect toward a noncommissioned officer, failure of the Army Physical Fitness Test, failure to report for duty, failure to obey a lawful order, missing and/or being late for an Army Substance Abuse Program (ASAP) appointments, and disenrollment from the ASAP; 3) The applicant was declared an alcohol rehabilitation failure on 28 August 2007; 4) The applicant was discharged on 19 December 2007, Chapter 9, and his service characterization was under honorable conditions (general).

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and military service and available medical records. The Armed Forces Health Longitudinal Technology Application (AHLTA) and the VA's Joint Legacy Viewer (JLV) were also examined. The applicant provided additional civilian medical documentation for review.

d. The applicant noted a TBI as a contributing and mitigating factor in the circumstances that resulted in his separation. The applicant had a history of misconduct prior to his reported car accident. There is evidence the applicant was provided substance abuse counseling while on active service related to his ongoing alcohol abuse. He was also diagnosed with an Adjustment Disorder with Anxiety and an Antisocial Personality Disorder. The applicant was provided a Mental Status Report on 19 September 2007, as part of his separation proceedings. The application was found to be mentally responsible, able to distinguish right from wrong and to adhere to the right, and had the mental capacity to understand and participate in board proceedings. In addition, there was no evidence the applicant was experiencing a disqualifying mental health condition sufficient to warrant disposition through medical channels. It was recommended that he be administratively discharged. He was again reported as having Alcohol Dependence and an Antisocial Personality Disorder.

e. A review of JLV provided evidence the applicant has not been diagnosed with a mental health condition or a TBI related to his military service, and the applicant receives no service-connected disability. The applicant provided a civilian neuropsychological evaluation completed in 2020. His report of his military career and vehicle accident was inconsistent with his military record. Also, the applicant reported experiencing multiple TBIs after his military discharge. However, he was not diagnosed with a significant TBI as the result of this neuropsychological evaluation.

f. 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, the applicant contends he was experiencing a TBI that contributed to his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant reports he experienced a TBI while on active service.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is insufficient evidence beyond self-report the applicant was experiencing a TBI while on active service or currently. However, the applicant contends he was experiencing a TBI 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. Based on a preponderance of the evidence, the applicant's statement regarding TBI, and the reasons for his discharge, the Board determined that the characterization of service the applicant received upon separation was not in error or unjust. The Board concurred with the medical advisor's review finding insufficient evidence to support the applicant had a condition or experience that mitigated his misconduct.

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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[REDACTED]

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[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. Title 10, USC, section 1556 provides the Secretary of the Army shall ensure that an applicant seeking corrective action by the Army Review Boards Agency (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 (Active Duty Enlisted Administrative Separations) 635-200, 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 Soldiers whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 9 provides the basic authority for the separation of enlisted personnel due to alcohol or other drug abuse and/or rehabilitation failure. A member who had been referred to ADAPCP for alcohol/drug abuse could be separated because of inability or refusal to participate in, cooperate in, or successfully complete such a program, if there is a lack of potential for continued Army service, and/or rehabilitation efforts were no longer practical. The service of Soldiers discharged under this section would be characterized as honorable or under honorable conditions unless the Soldier was in entry-level status and an uncharacterized description of service was required.

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.

//NOTHING FOLLOWS//