

IN THE CASE OF: ██████████

BOARD DATE: 15 December 2023

DOCKET NUMBER: AR20230005341

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions (UOTHC) discharge.

APPLICANT'S SUPPORTING DOCUMENT CONSIDERED BY THE BOARD:

DD Form 293 (Application for the Review of Discharger from the Armed Forces of the United States)

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 prior to deployment, he had no drug use or legal problems. After returning from Afghanistan, he was suffering from post-traumatic stress disorder (PTSD) and began to self-medicate. On his DD Form 293, the applicant indicates he deployed in support of Operation Enduring Freedom from 18 August 2003 to 4 June 2004.
3. The applicant enlisted in the Regular Army on 21 January 2003 for a period of 3 years. He was advanced to the rank/pay grade of private first class (PFC)/E-3 on 21 January 2004.
4. The applicant's record is void of documentation showing the facts and circumstances regarding his administrative separation under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 14, for a Pattern of Misconduct. The available record shows:
  - a. An Enlisted Record Brief, which shows he was reduced from PFC to private/E-2 on 4 March 2004.
  - b. A DD Form 2329 (Record of Trial by Summary Court-Martial) shows the applicant was arraigned at a trial proceeding on 15 July 2005 where he pled guilty and was found

guilty of the below listed charges in violation of the Uniform Code of Military Justice (UCMJ). His sentence included reduction from E-2 to private (PV1)/E-1, forfeiture of \$823.00, and confinement for 30 days. The sentence was reviewed and deemed legal on 4 August 2005.

- two specifications of violating article 86 for failure to report
- one specification of violating article 90 for disobeying a lawful command
- one specification of violating article 92 for failing to obey a general order
- one specification of violating Article 112a for wrongful possession, use, manufacturing, importing, or distribution of a controlled substance

c. Orders 264-1020, issued by Headquarters, 10th Mountain Division (Light Infantry) and Fort Drum, Fort Drum, NY on 21 September 2005 show he was to be discharged from the Regular Army in the rank/grade of PV1/E-1, effective 23 September 2005.

d. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged on 23 September 2005 in the grade of E-1, under the provisions of Army Regulation 635-200, Paragraph 14-12b, due to a Pattern of Misconduct with Separation Code "JKA" and Reentry Code "4." His service was characterized as UOTHC. He was credited with completion of 2 years, 8 months, and 3 days of net active service. He did not complete his first full term of service. He was issued a DD Form 215 (Correction to DD Form 214) that changed his Reentry Code from "4" to "3" on 4 December 2008.

e. The available record is void of any indication that he served in an overseas area.

5. Army Regulation 635-200, Chapter 14 establishes policy and prescribes procedures for separating members for misconduct. Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. A discharge UOTHC is normally appropriate for a Soldier discharged under this chapter; however, the separation authority may direct a general discharge if merited by the Soldier's overall record.

6. Army Regulation 15-185 (ABCMR) 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 has occurred by a preponderance of the evidence. It is not an investigative body.

7. On 9 June 2023, a member of the Army Review Boards Agency staff requested the applicant provide a copy of medical documents in support of his PTSD and other mental health conditions and afforded him a 30-day window to respond. To date, the applicant has not responded.

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. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) discharge. He contends that he that he was experiencing PTSD, which 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 21 January 2003; 2) The applicant's record is void of documentation showing the facts and circumstances regarding his administrative separation. However, there was a Record of Trial by Summary Court-Martial, which shows the applicant was found guilty, on 15 July 2005, of: A) two specifications of failure to report; B) one specification of disobeying a lawful command; C) failing to obey a general order, and D) one specification of wrongful possession, use, manufacturing, importing, or distribution of a controlled substance; 3) The applicant was discharged on 23 September 2005, Chapter 14-12b, due to a Pattern of Misconduct. His service was characterized as UOTHC.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service records. The VA's Joint Legacy Viewer (JLV) was also examined.

d. On his application, the applicant noted PTSD as the result of his deployment to Afghanistan was related to his request, as a contributing and mitigating factor in the circumstances that resulted in his separation. There was insufficient evidence the applicant ever deployed to Afghanistan, and there was insufficient evidence he ever reported or was diagnosed with a mental health disorder while on active service. A review of JLV was void of any behavioral health documentation, and the applicant does not receive any service-connected disability.

e. 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 PTSD that contributed to his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant reports experiencing PTSD while on active service.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is insufficient evidence the applicant was ever diagnosed with PTSD, and there is insufficient evidence he was deployed to Afghanistan. The applicant did engage in misconduct of failure to report and failure to follow orders, which can be a sequela of PTSD, but this is not sufficient to establish a history of a condition during active service. Also, there is no nexus between the applicant's report of PTSD and wrongful possession, use, manufacturing, importing, or distribution of a controlled substance given that: 1) this type of misconduct is not part of the natural history or sequela 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 PTSD 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 consideration of discharge upgrade requests. The Board considered the applicant's his record of service, the frequency and nature of his misconduct, the reason for his separation and whether to apply clemency. The Board found insufficient evidence of in-service mitigating factors for the misconduct and the applicant provided no evidence of post-service achievements or letters of support to weigh a clemency determination. After due consideration of the case, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined 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.

2/28/2024

X [REDACTED]

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CHAIRPERSON  
[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, 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 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 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.

4. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a provides that 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. Paragraph 3-7b states 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 14 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions (a pattern of misconduct consisting solely of minor military disciplinary infractions), a pattern of misconduct (consisting of discreditable involvement with civil or military authorities or conduct prejudicial to good order and discipline). Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter; however, the separation authority may direct a general discharge if merited by the Soldier's overall record.

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 Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder; 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.

6. 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.

//NOTHING FOLLOWS//