

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 February 2024

DOCKET NUMBER: AR20230007054

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)
- Department of Veterans Affairs (VA) Letter, dated 13 April 2023

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 suffered from an undiagnosed post-traumatic stress disorder (PTSD). He was unaware he could request a change to the characterization of his service. He is attempting to make the change so he can utilize education benefits.
3. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) does not reflect his deployed service nor the associated awards. There is sufficient evidence to administratively correct these errors without action by the Board.
4. The applicant enlisted in the Regular Army on 21 August 2001. Upon completion of his training, he was assigned to the 51st Transportation Company, Mannheim, Germany. Evidence provided by the Defense Finance and Accounting Service shows he received hostile fire/imminent danger pay for service in Kuwait from 27 February to 18 November 2003.
5. On 25 July 2002, he received nonjudicial punishment (NJP) under the provisions of Article 15, Uniform Code of Military Justice (UCMJ) for on or about 8 July 2002, without authority, failing to go at the time prescribed to his appointed place of duty. The applicant's punishment consisted of 7 days extra duty.

6. On 1 July 2003, he was counseled by a noncommissioned officer (NCO) for disobeying an NCO and for disrespect towards an NCO.
7. Drug Testing Results, dated 21 July 2004, show the applicant's urine sample, which was collected on 6 July 2004, tested positive for the presence of Tetrahydrocannabinol (THC). The applicant's commander was notified via memorandum of the test results on 22 July 2004. The memorandum required the commander to notify the Criminal Investigation Division (CID) office within 72 hours of receipt.
8. On 2 September 2004, the applicant's squad leader counseled him regarding his positive urinalysis results for THC.
9. On 14 September 2004, he underwent a medical examination for separation. He was found medically qualified for service.
10. On 18 September 2004, he was counseled by his platoon sergeant for failure to go to his appointed place of duty during a unit alert, after receiving prior notification the alert would occur.
11. A mental status report, dated 21 September 2004, psychiatrically cleared the applicant for any administrative action deemed appropriate by the commander. This report shows there was no psychiatric diagnosis.
12. A CID Report, dated 22 September 2004, shows, a CID investigation established probable cause to believe the applicant committed the offense of wrongful use and possession of a controlled substance when he tested positive for THC during a unit urinalysis and the applicant subsequently admitted he possessed and used marijuana on various occasions in Germany.
13. On 5 November 2004, he received NJP under the provisions of Article 15, UCMJ for between on or about 6 June and 6 July 2004, wrongfully using marijuana. His punishment consisted of forfeiture of \$597.00 pay per month for 2 months, suspended, to be automatically remitted, if not vacated before 8 January 2005; restriction for 45 days; and extra duty for 45 days.
14. On 7 December 2004, the applicant's immediate commander notified him of his intent to initiate separation action against him in accordance with Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), paragraph 14-12c, for misconduct – commission of a serious offense. The specific reasons for the proposed action were his wrongful use and possession of marijuana; failing to go to his appointed place of duty; being disrespectful; and failing to obey a direct order from a NCO. His commander recommended the issuance of an under honorable conditions (General) discharge.

15. On 10 December 2004, the applicant acknowledged receipt of the commander's intent to separate him. He consulted with legal counsel, and he was advised of the basis for the contemplated separation action for misconduct, the type of discharge he could receive and its effect on further enlistment or reenlistment, the possible effects of this discharge, and of the procedures/rights that were available to him. He acknowledged he understood that he could expect to encounter substantial prejudice in civilian life if an under honorable conditions (General) discharge was issued to him. He did not submit statements in his own behalf, and he requested consulting counsel and representation by military counsel.

16. Subsequent to his acknowledgement, the applicant's immediate commander initiated separation action against him in accordance with AR 635-200, paragraph 14-12c, for commission of a serious offense. The applicant's chain of command also recommended approval of the discharge action with a general (under honorable conditions) discharge.

17. On 18 December 2004, the separation authority approved the applicant's discharge under the provisions of AR 635-200, paragraph 14-12c, by reason of misconduct – commission of a serious offense, and directed he be discharged with a general (Under Honorable Conditions) characterization of service.

18. On 23 December 2004, the applicant was discharged accordingly. His DD Form 214 shows he was discharged under the provisions of AR 635-200, paragraph 14-12c, by reason of misconduct with an under honorable conditions (General) discharge. He completed 3 years, 4 months, and 3 days of active service. He received a separation code of "JKQ" and a reentry code of "3." Additionally, his DD Form 214 shows in:

- block 13 (Decorations, Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized) does not reflect the Global War on Terrorism Expeditionary Medal
- block 18 (Remarks) - does not show his deployed service

19. On 20 March 2010, the applicant applied to the Army Discharge Review Board (ADRB) to upgrade his discharge. After carefully examining the applicant's record of service the ADRB determined the characterization of his discharge was both proper and equitable and voted unanimously not to grant relief in the form of an upgrade of the characterization of his service to honorable.

20. On 15 April 2010, his DD Form 214 was amended by DD Form 215 (Correction to DD Form 214) by adding the Purple Heart.

21. The applicant provides a letter from the VA dated 13 April 2023, which states he has one or more service-connected disabilities with a combined service-connected evaluation of 70 percent.

22. 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. Background: The applicant is requesting an upgrade of his under honorable conditions (general) characterization of service to honorable.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Below is a summary of information pertinent to this advisory:

- Applicant enlisted in the RA on 21 August 2001.
- On 25 July 2002, he received nonjudicial punishment (NJP) under the provisions of Article 15, Uniform Code of Military Justice (UCMJ) for on or about 8 July 2002, without authority, failing to go at the time prescribed to his appointed place of duty.
- On 1 July 2003, he was counseled by a noncommissioned officer (NCO) for disobeying an NCO and for disrespect towards an NCO.
- Drug Testing Results, dated 21 July 2004, show the applicant's urine sample, which was collected on 6 July 2004, tested positive for the presence of Tetrahydrocannabinol (THC). The applicant's commander was notified via memorandum of the test results on 22 July 2004. The memorandum required the commander to notify the Criminal Investigation Division (CID) office within 72 hours of receipt.
- On 14 September 2004, he underwent a medical examination for separation. He was found medically qualified for service.
- A CID Report, dated 22 September 2004, shows, a CID investigation established probable cause to believe the applicant committed the offense of wrongful use and possession of a controlled substance when he tested positive for THC during a unit urinalysis and subsequently admitted he possessed and used marijuana on various occasions in Germany.
- On 5 November 2004, he received NJP under the provisions of Article 15, UCMJ for between on or about 6 June and 6 July 2004, wrongfully using marijuana.

- On 23 December 2004, the applicant was discharged under the provisions of Army Regulation 635-200, paragraph 14-12c, by reason of misconduct with an under honorable conditions (general) discharge. His DD Form 214 confirms he received a separation code of "JKQ" and a reentry code of "3."
- On 20 March 2010, the applicant applied to the ADRB to upgrade his discharge. The Board denied his request.
- On 15 April 2010, his DD Form 214 was corrected by DD Form 215 (Correction to DD Form 214) by adding the Purple Heart.

c. The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 149, his ABCMR Record of Proceedings (ROP), DD Form 214, VA letter, and documents from his service record and separation packet. The VA electronic medical record and DoD health record were reviewed through Joint Longitudinal View (JLV). Lack of citation or discussion in this section should not be interpreted as lack of consideration.

d. The applicant states he suffered from undiagnosed post-traumatic stress disorder and was unaware he could request a change to the characterization of his service. He is attempting to make the change so he can utilize education benefits. The applicant's DD Form 214 does not reflect his deployment service nor the associated award. There is sufficient evidence to administratively correct these errors without action by the Board. Evidence provided by the Defense Finance and Accounting Service shows he received hostile fire/imminent danger pay for service in Kuwait from 27 February to 18 November 2003.

e. Active-duty electronic medical records available for review show a mental status report, dated 21 September 2004. During that encounter, the applicant reported two prior Article 15's that led to his demotion. His mood was described as good, he reported no psychiatric symptoms and stated wanting out of the military. He denied any prior psychiatric history, other than three counseling sessions related to coping with the stressors of deployment. This report shows there was no psychiatric diagnosis, and the applicant was psychiatrically cleared for any administrative action deemed appropriate by command.

f. The applicant is 90% service connected, including 70% for PTSD effective 29 January 2010. The VA electronic medical records (JLV) available for review evidence a mental health note, dated 22 June 2010 where the applicant is diagnosed with PTSD. The applicant participated in a TBI evaluation on 01 July 2010. He reported that on 18 September 2003 there was an IED blast as he returned on convoy. He recalled seeing the blast and being knocked unconscious. He felt his shoulder, at that time, because of a shrapnel wound. The entire unit was driven out of the blast zone. Due to his injuries, he was kept from full duty the remainder of his deployment and was sent to Germany.

The TBI evaluation on 01 July 2010 shows the applicant was diagnosed with a mild Traumatic Brain Injury and the provider opined that his clinical presentation was most consistent with a combination of TBI and behavioral health condition (PTSD). He was referred to the Polytrauma treatment team for care. The applicant has participated intermittently in behavioral health care via the VA. He has opted for treatment primarily via medication management.

g. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence the applicant had an experience and subsequent behavioral health condition during military service that mitigates his discharge.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes. The applicant asserts a mitigating condition.

(2) Did the condition exist or experience occur during military service? Yes. The applicant is 70% service-connected for PTSD.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. The applicant was discharged due to the wrongful use and possession of a controlled substance. Given the nexus between PTSD and the use of substances to alleviate/cope with the symptoms of his behavioral health condition, the reason for his discharge is fully mitigated by his diagnosis of PTSD.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was 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 concurred with the medical advisor's review finding sufficient evidence the applicant had an experience and a subsequent behavioral health condition during military service that mitigates his discharge. The Board determined the characterization of service the applicant received upon separation should be corrected.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by reissuing the applicant a DD Form 214, for the period ending 23 December 2004, showing a characterization of service as honorable.

[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.

ADMINISTRATIVE NOTE:

The applicant's records contain sufficient evidence to support corrections not shown on his DD Form 214. His DD Form 214, for the period ending 23 December 2004, will be administratively corrected without Board action to show in:

- block 13 (Decorations, Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized) - Global War on Terrorism Expeditionary Medal
- block 18 (Remarks) - "SERVICE IN KUWAIT FROM 20030227- 20031118"

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 (AR) 635-200 (Active Duty Enlisted Administrative Separations) sets forth the basic authority for the separation of enlisted personnel.

a. Chapter 14 establishes policy and prescribes procedures for separating members for misconduct. Specific categories included minor disciplinary infractions, a pattern of misconduct, and commission of a serious offense, to include abuse of illegal drugs, convictions by civil authorities and desertion or absence without leave. Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impractical or unlikely to succeed. Army policy states that an under other than honorable conditions discharge is normally considered appropriate for a Soldier discharged for misconduct. However, a discharge under honorable conditions (general) or an honorable discharge may be granted.

b. 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.

c. Paragraph 3-7b provides that 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.

3. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards 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.

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 on the basis of 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.

4. Army Regulation 600-8-22 (Military Awards) states the Global War on Terrorism Expeditionary Medal is authorized for award to members of the Armed Forces of the United States who deployed abroad for service in the Global War on Terrorism operations on or after 11 September 2001 to a date to be determined. Under no conditions will units or personnel within the United States or the general region excluded above be deemed eligible for the Global War on Terrorism Expeditionary Medal.

5. Army Regulation 635-5 (Personnel Separations) provided instructions for completing the various entries on the DD Form 214. This regulations states, the following entry is required for an Active Duty Soldier who deployed with their unit during the period covered by their DD Form 214, "SERVICE IN (NAME OF COUNTRY DEPLOYED) FROM (inclusive dates for example, YYYYMMDD - YYYYMMDD)."

6. 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.

//NOTHING FOLLOWS//