

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 March 2024

DOCKET NUMBER: AR20230008068

APPLICANT REQUESTS: an upgrade of his characterization of service from under honorable conditions (general) to honorable and a personal appearance before the Board via video/telephone.

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

- DD Form 149 (Application for Correction of Military Record), 1 May 2023
- Department of Veterans Affairs (VA) decision, 29 March 2023
- VA disability ratings, 1 May 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 served honorably until April of 2002. He was mourning the loss of his fiancé and unborn child, who were killed by a drunk driver, he made a bad decision due to not thinking clearly. The applicant notes, post-traumatic stress disorder (PTSD) is related to his request.
3. The applicant enlisted in the Regular Army on 29 February 1996, for a 3-year period. He reenlisted on 3 September 1998, for an additional 4-year period. He was awarded the military occupational specialty of 13F (Fire Support Specialist) and the highest rank he attained was Sergeant/E-5.
4. A DD Form 2624 (Specimen Custody Document – Drug Testing) shows on 13 March 2002 the applicant tested positive for THC (tetrahydrocannabinol).
5. A DA Form 3881 (Rights Warning Procedure/Waiver Certificate) shows on 20 March 2002, the applicant was investigated by the Criminal Investigation Command for wrongful use, possession, distribution, and/or smuggling of a controlled substance. The

agent's investigation report states the applicant tested positive for THC on a urinalysis conducted on 26 February 2002.

6. On 3 April 2002, the applicant accepted nonjudicial punishment under the provisions of Article 15, Uniform Code of Military Justice (UCMJ), for wrongfully using marijuana between on or about 26 January 2002 to on or about 26 February 2002. His punishment was reduction to the grade of specialist (E-4), forfeiture of \$876.00 pay per month for two months, extra duty for 45 days, and restriction for 45 days.

7. The applicant underwent a mental evaluation on 8 May 2002, where the psychologist cleared him for any administrative or judicial action deemed appropriate by the command.

8. The applicant's immediate commander notified the applicant on 10 September 2002, of the intent to recommend him for separation under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 14-12c (Commission of a Serious Offense), stating the reasoning for the proposed separation was because the applicant tested positive for marijuana between on or about 26 January and 26 February 2002. Additionally, it states on 16 August 2002, the German Polizei stopped him for driving under the influence of alcohol. The commander recommended a general discharge.

9. On 16 September 2002, the applicant consulted with counsel and was advised of the basis for the contemplated action to separate him and of the rights available to him. He waived consideration of his case before an administrative separation board, conditioned that he be discharged with nothing less than a general discharge. He requested a personal appearance before an administrative separation board if the condition was not met by his chain of command. He requested a consulting counsel and representation by military and/or civilian counsel. He understood he may encounter substantial prejudice in his civilian life and elected to not submit a statement in his own behalf.

10. On the same date, after consulting with counsel the applicant requested a conditional waiver of an administrative separation board. Stating the waiver was conditional upon being discharged with nothing less than a general discharge.

11. On 16 September 2002, the applicant's immediate and intermediate commander formally recommended the applicant be separated under AR 635-200, Chapter 14-12c, for serious misconduct, and recommended a general discharge.

12. On the same date, the separation authority approved the conditional discharge under the provisions of AR 635-200, paragraph 14-12c, for commission of a serious offense. He further directed the issuance of a general characterization of service. The applicant would not be transferred to the Individual Ready Reserve.

13. The applicant was discharged on 21 September 2002. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of AR 635-200, paragraph 14-12c, by reason of misconduct, in the grade of E-4. His service was characterized as under honorable conditions (general) and he received a separation code of JKQ and reentry code 3. He completed 6 years and 6 months of net active service with time served in Kosovo from 13 March 2001 to 1 June 2001.

a. The Remarks block listed his continuous honorable service and indicated that the applicant has completed first term of service.

b. He was awarded or authorized the following decorations, medals, badges, citations, and campaign ribbons:

- Good Conduct Medal National Defense Service Medal I
- Armed Forces Expeditionary Medal Armed Forces Service Medal
- Non-Commissioned Officer Professional Development Ribbon
- Army Service Ribbon North Atlantic Treaty Organization Medal
- Kosovo Campaign Medal

14. He additionally provides his VA decision letter and VA disability rating which show he is a disabled Veteran and receives serviced connected disability entitlement of 90%:

- PTSD
- bilateral flat foot with hallux valgus
- radiculopathy, left lower extremity (anterior tibial nerve)
- radiculopathy, right lower extremity (anterior tibial nerve)
- right foot frost nip residuals of arthralgia or other pain, cold sensitivity, locally impaired sensation, numbness and color changes
- left foot frost nip residuals of arthralgia or other pain, cold sensitivity, locally impaired sensation, numbness and color changes

15. There is no indication the applicant applied to the Army Discharge Review Board within that Board's 15-year statute of limitations.

16. Regulatory guidance states when an individual is discharged under the provisions of AR 635-200 Chapter 14, for misconduct, an under other than honorable conditions characterization of service is normally appropriate. However, the separation authority may direct a general discharge if such is merited by the Soldier's overall record.

17. In reaching its determination, the Board can consider the applicant's petition, service record, and statements in light of the published guidance on equity, injustice, or clemency.

18. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under honorable conditions (general) characterization of service to honorable. 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 29 February 1996.
- A DD Form 2624 (Specimen Custody Document – Drug Testing) shows on 13 March 2002 the applicant tested positive for THC (tetrahydrocannabinol).
- A DA Form 3881 (Rights Warning Procedure/Waiver Certificate) shows on 20 March 2002, the applicant was investigated by the Criminal Investigation Command for wrongful use, possession, distribution, and/or smuggling of a controlled substance. The agent's investigation report states the applicant tested positive for THC on a urinalysis conducted on 26 February 2002.
- On 3 April 2002, the applicant accepted nonjudicial punishment under the provisions of Article 15, Uniform Code of Military Justice (UCMJ), for wrongfully using marijuana on an unknown date between on or about 26 January 2002 to on or about 26 February 2002.
- Applicant's immediate commander notified the applicant on 10 September 2002, of the intent to recommend him for separation under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 14-12c (Commission of a Serious Offense), stating the reasoning for the proposed separation was because the applicant tested positive for marijuana between on or about 26 January and 26 February 2002. Additionally, it states on 16 August 2002, the German Polizei stopped him for driving under the influence of alcohol. The commander recommended a general discharge.
- Applicant was discharged on 21 September 2002. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of AR 635-200, paragraph 14-12c, by reason of misconduct, in the grade of E-4. His service was characterized as under honorable conditions (general) and he received a separation code of JKQ and reentry code 3.

b. 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 disability rating, 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.

c. The applicant states he served honorably until April of 2002. He was mourning the loss of his fiancé and unborn child, who were killed by a drunk driver, he made a bad decision due to not thinking clearly. The applicant notes, post-traumatic stress disorder

(PTSD) as related to his request. Due to the time of service no active-duty electronic medical records were available for review. The applicant's hardcopy documentation show he underwent a mental status evaluation on 8 May 2002, where the psychologist cleared him for any administrative or judicial action deemed appropriate by the command and no behavioral health condition or diagnosis was noted other than Cannabis Abuse. The applicant is 90% service connected, including 50% for PTSD. The VA electronic record does not evidence treatment for mental health related symptoms, but the applicant's service connection provides sufficient evidence.

f. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence the applicant had a 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 50% service-connected for PTSD.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. The applicant was discharged due to testing positive for marijuana. Given the nexus between PTSD and the use of substances to alleviate/cope with the symptoms of his behavioral health condition, the applicant's use of marijuana is mitigated by his diagnosis of PTSD.

BOARD DISCUSSION:

1. The Board determined 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.

2. 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 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 discharged for misconduct following his commission of a serious offense (marijuana and driving under the influence). He completed 6 year and 6 months of active service and received a characterization of service as general under honorable conditions. The Board found no error or injustice in his separation processing. 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 reviewer's finding sufficient evidence to support the applicant had condition or experience that mitigated his misconduct, and thus determined an honorable characterization of service is appropriate under published DoD guidance for liberal consideration of discharge upgrade requests. The Board also determined that such upgrade includes a change to the reason for his separation to Secretarial Authority with corresponding codes

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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:	:	:	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 amending the applicant's DD Form 214 for the period ending 21 September 2002, showing:

- Character of Service: Honorable
- Separation Authority: AR 635-200
- Separation Code: JFF
- Reentry Code: 1
- Narrative Reason for Separation: Secretarial Authority

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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 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.

3. AR 15-185 (ABCMR), the regulation governing this Board, states applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

4. AR 635-200 sets policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons.

a. Chapter 3, section II (Type of Characterization or Description) provides a description of the states the following types of characterization of service or description of service are authorized: separation with characterization of service as Honorable, General (under honorable conditions), or Under Other Than Honorable Conditions, and Uncharacterized (for entry level status) are authorized. These separation types will be used in appropriate circumstances unless limited by the reason for separation.

(1) Paragraph 3-7a states an honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier'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.

(2) 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.

b. Chapter 14 (Separation for Misconduct) establishes policy and prescribes procedures for separating personnel for misconduct because of minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, and absence without leave.

(1) 14-12c(2) – Soldiers are subject to discharge for *Commission of a serious offense*. Commission of a serious military or civil offense, if the specific circumstances of the offense warrant separation and a punitive discharge is, or would be, authorized for the same or a closely related offense under the MCM. Specific instances of serious offenses include abuse of illegal drugs or alcohol

(2) 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 such is 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 PTSD; traumatic brain injury; sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. 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.

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.

a. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, Boards 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//