

IN THE CASE OF: [REDACTED]

BOARD DATE: 14 March 2024

DOCKET NUMBER: AR20230008688

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

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)

FACTS:

1. The applicant did not file within the three-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 he was exposed to a lot of death while he was deployed to Iraq. He took drugs as a stress reliever to help him cope with the violence and death. The drugs also helped him maintain his sanity despite all the madness and bombings he experienced while deployed. They labeled it drug abuse, and he was wrongfully discharged from the military. The applicant indicated on his DD Form 149 that post-traumatic stress disorder (PTSD) and other mental health conditions are related to his request.
3. The applicant enlisted in the Regular Army on 6 January 2004, for a period of 3 years. Upon completion of initial entry training, he was initially stationed in South Korea and then subsequently assigned to a unit at Fort Hood, TX. He was advanced to the rank/grade of private first class/E-3 on 1 November 2004.
4. The applicant deployed to Iraq on 15 October 2005.
5. On 13 January 2006, the applicant accepted company grade nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for, on or about on or about 27 December 2005, assaulting another Soldier, by picking

up a shovel and approaching him in an aggressive manner. His punishment consisted of reduction to private/E-2, suspended, to be automatically remitted if not vacated on or before 10 July 2006; forfeiture of \$333.00, suspended, to be automatically remitted if not vacated on or before 10 July 2006; extra duty for 14 days; restriction for 14 days; and an oral reprimand.

6. On 20 May 2006, the applicant accepted field grade NJP under the provisions of Article 15, of the UCMJ for, on or about on or about 21 February 2006, wrongfully possessing some amount of codeine, a controlled substance; on or about 21 February 2006, wrongfully possessing some amount of diazepam, a controlled substance; between on or about 1 November 2005 and 31 January 2006, wrongfully distributing some amount of valium, a controlled substance; and between on or about 1 November 2005 and 31 January 2006, wrongfully distributing some amount of codeine, a controlled substance. His punishment consisted of reduction to private/E-1, that portion of the punishment in excess of reduction to E-2 suspended, to be automatically remitted if not vacated on or before 20 August 2006; forfeiture of \$636.00, suspended, to be automatically remitted if not vacated on or before 20 August 2006; extra duty for 45 days; and restriction for 45 days.

7. On 31 May 2006, an administrative flag was imposed on the applicant to prevent him from receiving any favorable personnel actions while he was pending field initiated elimination.

8. On 31 May 2006, the applicant underwent a separation medical examination and was determined to be qualified for service.

9. on 2 June 2006, the applicant underwent a behavioral health evaluation and was found to be mentally responsible and to possess the mental capacity to understand and participate in the proceedings.

10. On 1 August 2006, the applicant's battalion commander recommended the applicant be administratively separated under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), paragraph 14-12c, for commission of a serious offense. The specific reasons cited were the applicant's NJP and a subsequent incident on 21 June 2006, when inspectors found Viagra hidden beneath the rim of the applicant's trashcan as well as what appeared to be marijuana plant material in the same can. The substance was analyzed and determined to contain tetrahydrocannabinol (THC), the active ingredient in marijuana. He stated the applicant's company commander had notified him that he was initiating separation proceedings against him on 28 June 2006. Shortly thereafter, the applicant affirmed he did not use drugs in a signed statement. On 12 July 2006, the company received the results of a urinalysis taken on 24 June 2006, these results indicated the applicant

tested positive for THC. The applicant's brigade commander recommended approval of his separation with a discharge UOTHC.

11. On 12 August 2006, the separation authority approved the recommended separation. She also directed the applicant be reduced to E-1 and issued a discharge UOTHC.

12. Orders and the applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) show he was discharged on 14 September 2006, under the provisions of Army Regulation 635-200, paragraph 14-12c, by reason of misconduct (Drug Abuse). His service was characterized as UOTHC. He was credited with completion of 2 years, 8 months, and 9 days of net active service this period. He had no lost time. He served in Iraq from 15 October 2005 to 4 September 2006.

13. 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.

14. On 26 October 2023, a staff member of the Army Review Boards Agency requested the applicant provide a copy of medical documents that support his PTSD and other mental health conditions. To date, the applicant has not provided medical documentation in support of his petition.

15. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under other than honorable conditions (UOTHC) discharge to an under honorable conditions (general) discharge.

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 Regular Army on 6 January 2004.
- Applicant deployed to Iraq on 15 October 2005.
- On 13 January 2006, the applicant accepted company grade nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for, on or about 27 December 2005, assaulting another Soldier, by picking up a shovel and approaching him in an aggressive manner.
- On 20 May 2006, the applicant accepted field grade NJP under the provisions of Article 15, of the UCMJ for, on or about 21 February 2006, wrongfully possessing some amount of codeine, a controlled substance; on or about 21 February 2006, wrongfully possessing some amount of diazepam, a controlled substance; between on or about 1 November 2005 and 31 January 2006, wrongfully distributing some amount of valium, a controlled substance; and between on or

about 1 November 2005 and 31 January 2006, wrongfully distributing some amount of codeine, a controlled substance.

- On 1 August 2006, the applicant's battalion commander recommended the applicant be administratively separated under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), paragraph 14-12c, for commission of a serious offense. The specific reasons cited were the applicant's NJP and a subsequent incident on 21 June 2006, when inspectors found Viagra hidden beneath the rim of the applicant's trashcan as well as what appeared to be marijuana plant material in the same can. The substance was analyzed and determined to contain tetrahydrocannabinol (THC), the active ingredient in marijuana. He stated the applicant's company commander had notified him that he was initiating separation proceedings against him on 28 June 2006. Shortly thereafter, the applicant affirmed he did not use drugs in a signed statement. On 12 July 2006, the company received the results of a urinalysis taken on 24 June 2006, these results indicated the applicant tested positive for THC. The applicant's brigade commander recommended approval of his separation with a discharge UOTHC.
- Orders and the applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) show he was discharged on 14 September 2006, under the provisions of Army Regulation 635-200, paragraph 14-12c, by reason of misconduct (Drug Abuse), with separation code "JKK" and reentry code "4." His service was characterized as UOTHC.

c. Review of Available Records Including Medical:

The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 149, DD Form 293, DD Form 214, ABCMR Record of Proceedings (ROP), and documents from his service record and separation. 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.

The applicant states he was exposed to a lot of death while he was deployed to Iraq. He took drugs as a stress reliever to help him cope with the violence and death. The drugs also helped him maintain his sanity despite all the madness and bombings he experienced while deployed. They labeled it drug abuse, and he was wrongfully discharged from the military. The applicant indicated on his DD Form 149 that post-traumatic stress disorder (PTSD) and other mental health conditions are related to his request.

d. Due to the period of service, limited active-duty electronic medical records were available for review, evidencing medical appointments but no behavioral health encounters. The applicant submitted hardcopy documentation from his time in service. On 31 May 2006, the applicant underwent a separation medical examination and was determined to be qualified for service. On 2 June 2006, the applicant underwent a

mental status evaluation as part of the separation process and no behavioral health condition or diagnosis was identified. The applicant was found to be mentally responsible and to possess the mental capacity to understand and participate in the proceedings.

e. No VA electronic medical records were available for review and the applicant is not service connected. On 26 October 2023, the ARBA Case Management Division requested the applicant provide medical documentation supporting his contention of PTSD and other mental health condition; no response was provided. In addition, the applicant did not submit any medical documentation post-military service substantiating his assertion of PTSD and other mental health condition.

f. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a behavioral health condition that mitigates his misconduct. Regardless, it is unlikely any BH condition would mitigate his misconduct of assault and wrongfully distributing controlled substances.

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 self-asserts a mitigating condition.

(2) Did the condition exist or experience occur during military service? Yes. There is evidence the applicant deployed to Iraq but there is no evidence of any mitigating condition during military service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant provides no medical documentation substantiating any BH diagnosis. There is no evidence of any in-service BH diagnoses, and the VA has not service-connected the applicant for any BH condition. Although per Liberal Consideration guidelines, the applicant's self-assertion of PTSD merits consideration by the Board, PTSD would not mitigate assault and wrongfully distributing controlled substances. His misconduct is not part of the natural history or sequelae of PTSD and, even if PTSD symptoms were present at the time of his misconduct, they do not affect one's ability to distinguish right from wrong and act in accordance with the right.

BOARD DISCUSSION:

The Board carefully considered the applicant's request, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his

record of service to include deployment, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the applicant's PTSD claim and the review and conclusions of the ARBA BH Advisor. The applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding his misconduct not being mitigated by PTSD. Based on a preponderance of the evidence, the Board determined 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 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.

6/25/2024

X █

CHAIRPERSON
█

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 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. The ABCMR may, in its discretion, hold a hearing. 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. 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 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Navy Records (BCM/NR) to carefully consider the revised PTSD criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged under other than honorable conditions (UOTHC) 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.

6. 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 to those conditions or experiences.

7. 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. 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, 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//