

IN THE CASE OF: ██████████

BOARD DATE: 18 April 2024

DOCKET NUMBER: AR20230010490

APPLICANT REQUESTS: an upgrade of his under honorable conditions (general) characterization of service.

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

DD Form 149 (Application for Correction of Military Record)

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 cannot receive Department of Veterans Affairs (VA) health benefits and asks the board to grant him relief so he can get mental health services. The applicant notes post-traumatic stress disorder (PTSD) as a condition related to his request.
3. The applicant enlisted in the Regular Army on 18 January 2007, for 4 years. The highest rank/grade he attained was private/E-2.
4. The applicant received developmental counseling on nine occasions between 20 January 2007 and 25 September 2007 for:
 - twice failure to attend physical training
 - failure to be at the appropriate location at the appropriate time
 - failure to obey a direct order, being arrested for possession of marijuana, and being late for morning duty
 - receiving a speeding ticket for going 27 miles per hour (mph) in a 15 mph school zone
 - receiving two traffic tickets for speeding (94 mph in a 55 mph zone) and parking in a fire lane
 - unacceptable behavior toward a fellow Soldier

5. A U.S. Department of Justice Form I-44 (Border Patrol Report of Apprehension or Seizure), dated 2 August 2007, shows the applicant was apprehended/arrested by border patrol agents for possession of .022 lbs. (pounds) of marijuana at a border patrol checkpoint near Pine Valley, CA.

6. Two electronic copies of DD Form 2624 (Specimen Custody Document – Drug Testing), dated 15 August 2007 and 3 October 2007, show the applicant tested positive for Tetrahydrocannabinol (THC) on two occasions, as a result of a command urinalysis conducted on 3 August 2007 and 24 September 2007.

7. On 4 October 2007, the applicant underwent a complete mental status evaluation and medical examination as part of his consideration for discharge due to his misconduct. His mental status evaluation noted, he met retention requirements, was mentally responsible, and had the mental capacity to understand and participate in the proceedings.

8. On an undisclosed date, the applicant's commander notified the applicant of his intent to initiate action to separate him from service under the provisions of Army Regulation 635-200 (Personnel Separations-Active Duty Enlisted Administrative Separations), Chapter 14 (Separation for Misconduct), paragraph 14-12c, for commission of a serious offense, misconduct-abuse of illegal drugs and recommended the issuance of a under honorable conditions (general) characterization of service. He acknowledged receipt of his commander's notification on 26 October 2007

9. On 2 November 2007:

a. The applicant consulted with counsel and was advised of the reason for separation and the rights available to him. He understood if he was issued a general discharge, he may encounter substantial prejudice in civilian life. He elected not to submit statements in his own behalf.

b. His immediate commander formally recommended the applicant's separation from the service, under the provisions of Army Regulation 635-200, paragraph 14-12c.

c. The separation authority approved the recommended discharge and directed the issuance of a General Discharge Certificate.

10. The applicant was discharged accordingly on 29 November 2007, under the provisions of Army Regulation 635-200, paragraph 14-12c (2), by reason of misconduct (drug abuse), with a under honorable conditions (general) characterization of service in the grade of E-1. His DD Form 214 contains the following entries:

a. He completed 10 months and 12 days of net active service during the period covered.

b. Block 13 (Decorations, Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized) the entries:

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

c. Block 18 (Remarks) the entry "MEMBER HAS NOT COMPLETED FIRST FULL TERM OF SERVICE."

11. There is no indication the applicant petitioned to the Army Discharge Review Board for an upgrade of his discharge within that Board's 15-year Statute of limitations.

12. Regulatory guidance in effect at the time provided a discharge under other than honorable conditions was normally considered appropriate for Soldier's discharged under the provisions of Army Regulation 635-200, Chapter 14. However, the separation authority could direct a general discharge if such were merited by the Soldier's overall record.

13. The Board should consider the applicant's argument and evidence, along with the overall record, in accordance with the published equity, injustice, or clemency determination guidance.

14. MEDICAL REVIEW:

a. The applicant requests an upgrade of his Under Honorable Conditions, General discharge to Honorable. He contends his misconduct was related to PTSD.

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 18 January 2007; 2) As outlined in the ROP the applicant received 9 negative counseling statements for various infractions between 20 January 2007 and 25 September 2007; 3) A U.S. Department of Justice Form I-44 (Border Patrol Report of Apprehension or Seizure), dated 2 August 2007, shows the applicant was apprehended/arrested by border patrol agents for possession of .022 lbs. (pounds) of marijuana at a border patrol checkpoint near Pine Valley, CA; 4) Two electronic copies of DD Form 2624 (Specimen Custody Document – Drug Testing), dated 15 August 2007 and 3 October 2007, show the applicant's tested positive for Tetrahydrocannabinol (THC) on two occasions, as a result of a command urinalysis conducted on 3 August 2007 and 24 September 2007; 5) On an undisclosed dated, the

applicant's commander notified the applicant of his intent to initiate action to separate him from service under the provisions of Army Regulation 635-200 (Personnel Separations-Active Duty Enlisted Administrative Separations), Chapter 14 (Separation for Misconduct), paragraph 14-12c; 6) On 2 November 2007 the applicant consulted with counsel and was advised of the reason for separation and the rights available to him. He understood if he was issued a general discharge, he may encounter substantial prejudice in civilian life. He elected not to submit statements in his own behalf. The separation authority approved the recommended discharge, on the same day, and directed the issuance of a General Discharge Certificate; 7) The applicant was discharged accordingly on 29 November 2007, under the provisions of Army Regulation 635-200, paragraph 14-12c.

c. The electronic military medical record (AHLTA), VA electronic medical record (JLV), ROP, and casefiles were reviewed. A review of AHLTA shows the applicant initial BH engagement occurred on 19 April 2007 whereby he was escorted from the TMC to BH with stress secondary to learning he contracted an STD. He reported a primary concern of how he would interact with his girlfriend. The encounter documentation was sparse on additional detail but shows the applicant was diagnosed with Adjustment Disorder with Anxiety and Depressed Mood and scheduled for follow-up. The applicant presented for follow-up on 25 April 2007 and reported better overall mood after having discussed the issue with his girlfriend. The applicant next and final BH-related engagement during service occurred on 4 October 2007, whereby he underwent a Chapter 14 MSE and was psychiatrically cleared for any administrative actions deemed appropriate by command. Records show the applicant was also found medically qualified for separation on the same day.

d. A review of JLV shows the applicant does not have a SC disability. Records show the applicant engaged the VA for housing assistance on 15 December 2022. It was noted the applicant was currently homeless after release from legal custody. The encounter shows the applicant was approved for the Grant Per Diem Program (GDP) and enrolled on 15 December 2022. Records show the applicant remained engaged in the GDP through 8 October 2023, at which time his enrollment was terminated due to current incarceration. JLV was void of any VA rendered BH diagnosis for the applicant. No civilian BH-related records were provided for review.

e. The applicant is requesting an upgrade of his Under Honorable Conditions, General discharge to Honorable and contends his misconduct was related to PTSD. A review of the records shows the applicant was diagnosed with Adjustment Disorder with Anxiety and Depressed Mood during service, secondary to contracting an STD. Post service records are void of any BH diagnosis for the applicant and he provided no documentation supporting his assertion of PTSD. In absence of documentation supporting his assertion of PTSD, there is insufficient evidence to establish his misconduct was related to or mitigated by PTSD.

f. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence that the applicant had an experience or condition during his time in service that mitigated his misconduct. However, he contends his misconduct was related to PTSD, and per liberal guidance his assertion is sufficient to warrant the Board's consideration.

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 contends his misconduct was related to PTSD.

(2) Did the condition exist or experience occur during military service? Yes.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of the records shows the applicant was diagnosed with Adjustment Disorder with Anxiety and Depressed Mood during service, secondary to contracting an STD. Post service records are void of any BH diagnosis for the applicant and he provided no documentation supporting his assertion of PTSD. In absence of documentation supporting his assertion of PTSD, there is insufficient evidence to establish his misconduct was related to or mitigated by PTSD.

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, 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 Army Review Boards Agency Behavioral Health 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.

9/3/2024

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, 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, U.S. Code, Section 1556, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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.

3. Army Regulation 635-200, sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

a. Chapter 14 established policy and prescribed procedures for separating members for misconduct. Specific categories included minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, or absences without leave. Action would be taken to separate a member for misconduct when it was clearly established that rehabilitation was impracticable or was 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.

b. 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. 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.

4. 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.

5. 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, 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//