

IN THE CASE OF: ██████████

BOARD DATE: 17 April 2024

DOCKET NUMBER: AR20230010742

APPLICANT REQUESTS:

- an upgrade of his under honorable conditions (general) discharge to an honorable discharge
- restoration of his rank/pay grade to sergeant (SGT)/E-5
- to appear before the Board via video/telephone

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- documents of military achievements, awards, and decorations (67 pages)
- Armed Forces of the United States Identification Card
- Driver's License (2)
- U.S. Army Europe Certificate of License

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 he was honorably discharged from the ██████████ Army National Guard (█ ARNG) so he could enlist in the Regular Army after he graduated from high school. He completed his first enlistment honorably and extended his enlistment for a period of 18 months at the needs of the Army under the Bonus Enlistment and Retention (BEAR) program as he transitioned from military occupational specialty (MOS) 63S (Heavy-Wheel Vehicle Mechanic) to MOS 18C (Special Forces Engineer Sergeant). A noncommissioned officer (NCO), Staff Sergeant (SSG) ██████████ told him not to go to any formations and then he was punished for not going to formation the next day by the same NCO who told him not to report. SSG ██████████ witnessed SSG ██████████ telling him this and the aftermath. SSG ██████████ had words with SSG ██████████ after the applicant was demoted in rank, was forced to sell 60 days of leave, and lost 6 days of leave. He was put on extra duty, and had all of his belongings stolen. He is still trying to contact SSG

██████ to request a nexus letter. He was unaware of the existence of post-traumatic stress disorder (PTSD) until he was diagnosed with it in 2021.

3. Following an uncharacterized period of service in the █████ ARNG, the applicant enlisted in the Regular Army on 18 July 2000 for a period of 4 years. Upon completion of initial entry training, he was assigned to a unit located in Germany. He was promoted to specialist (SPC)/E-4 on 7 August 2001.

4. A DA Form 1059 (Service School Academic Evaluation Report (AER)) shows the applicant successfully completed the Primary Leadership Course. He exceeded course standards and graduated on the Commandant's List on 3 July 2002.

5. On 2 October 2002, the applicant extended his enlistment to meet service remaining requirements under the BEAR program in MOS 18C. He acknowledged his understanding that if he failed to complete the school course, he would be required to complete the period of service for which extended and would be reassigned in accordance with the needs of the Army.

6. The applicant was sent to Fort Bragg, NC, for Special Forces and Selection training. An AER shows he successfully completed the Special Forces Qualification Course (SFQC) Basic NCO Course Common Core phase of SFQC on 14 February 2003. His record is void of evidence showing he successfully completed the remaining phases of training for qualification in MOS 18C or was awarded a Special Forces Tab.

7. The applicant was reassigned on a permanent change of station to Germany with a reporting date of 20 October 2003.

8. He was promoted to SGT in MOS 63S effective 1 October 2004 and that was the highest rank he held while serving.

9. On 5 January 2005, an administrative flag was imposed on the applicant to prevent him from receiving favorable actions because he was pending adverse action.

10. On 23 March 2005, the applicant accepted company grade nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for being drunk and disorderly and for using provoking speech/gestures towards gate guards. A breathalyzer test revealed he had a blood/alcohol content of 0.155, almost three times the legal limit according to German Law and American standards. As a result, his alcohol privileges were revoked effective 2 April 2005.

11. The applicant was counseled on 4 April 2005 for failing to report to extra duty as prescribed and for having his third alcohol related incident. He was advised that

continued behavior of this kind could result disciplinary action under the provisions of the UCMJ and/or initiation of involuntary separation from the service.

12. On 7 April 2005, the applicant was detained by German police prior to being released to U.S. Army Military Police and advised of his rights. He was charged with Aggravated Assault – with Grievous Bodily Harm for pushing another Soldier down a flight of stairs. The Soldier fell on his face and sustained a fractured nose and four broken teeth.

13. The applicant was counseled on the following dates for the reasons shown:

- 10 April 2005 – Drinking while on alcohol restriction; disobeying a lawful order from a senior NCO; being out of the prescribed uniform, and leaving post while pass privileges were revoked
- 14 April 2005 – Leaving work early and failing to report for first formation the following day
- 15 April 2005 – Failing to report to three accountability formations, violating restriction, and failing to follow instructions
- 22 April 2005 – Failing to report to morning formation

14. On 10 May 2005, the applicant began the separation medical examination process.

15. The applicant was counseled on 10 May and 11 May 2005 for failing to report to his appointed place of duty at the time prescribed.

16. Headquarters, V Corp, Darmstadt Legal Center memoranda shows the applicant, and his defense counsel were served charges that were preferred against the applicant. The DD Form 458 (Charge Sheet) is not present in his record. However, a Checklist for Pretrial Confinement shows he was charged with the following offenses:

- two specifications of assault with intent to commit grievous bodily harm; simple assault
- two specifications of failure to obey a lawful order
- two specifications of failure to repair
- three specifications of drunk and disorderly; communicating a threat (twice)

17. The applicant's separation medical examination was completed and he was found to be qualified for separation.

18. On 5 October 2005, the applicant underwent a mental status evaluation and was determined to be responsible for his actions, have the mental capacity to understand and participate in the proceedings, and meet regulatory retention standards. He was

psychiatrically cleared for any administrative action deemed appropriate by the commander.

19. On 24 October 2005, the applicant's immediate commander notified the applicant of his intent to initiate actions to separate him under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 14, for a pattern of misconduct. The specific reasons for this action were the applicant's constant failure to report to his appointed place of duty at the prescribed time, consistent disobedience of direct orders from his supervising NCOs, and being drunk and disorderly on at least one occasion. He was advised that he was being recommended for a general, under honorable conditions discharge. The applicant acknowledged receipt of the proposed separation notification.

20. On 24 October 2005, the applicant acknowledged that he was advised of the reasons for separation and of the rights available to him. He consulted with counsel and submitted a conditional election of rights wherein he elected:

- to waive consideration of his case by an administrative separation board (ASB) conditioned upon his receipt of a general discharge
- to waive personal appearance before an ASB conditioned upon his receipt of a general discharge
- to submit statements in his own behalf (statement is not available)
- to request consulting counsel and representation by military counsel and/or civilian counsel at no expense to the Government

21. The applicant's immediate commander formally recommended his separation prior to the expiration of his term of service, under the provisions of Army Regulation 635-200, paragraph 14-12b, by reason of a pattern of misconduct. A handwritten entry on this document shows the applicant was reduced to SPC/E-4 on 19 October 2005 as the result of a field grade NJP. The interim command concurred with the recommendation for separation with a under honorable conditions (general) discharge.

22. The separation authority approved the recommendation for separation, and directed the applicant be issued a under honorable conditions (general) discharge.

23. Orders and the applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) show he was discharged on 7 December 2005, under the provisions of Army Regulation 635-200, paragraph 14-12b, by reason of Pattern of Misconduct, with separation code "JKA" and reentry code "3." His service was characterized as under honorable conditions (general). He was credited with completion of 5 years, 4 months, and 20 days of net active service this period. He had continuous honorable active service from 18 July 2000 to 17 July 2004. He had lost time due to confinement from

20 May 2005 to 14 September 2005. He completed his first full term of service. He was discharged in the rank/grade of SPC/E-4.

24. The applicant's record is void of evidence showing he was promoted to SGT following his reduction to SPC on 19 October 2005.

25. The applicant provides 67 pages of documents depicting his achievements, training, awards and decorations, Army Physical Fitness Test results, and weapons qualifications (available in entirety for the Board's consideration).

26. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition.

27. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under honorable conditions (general) discharge to an honorable discharge and restoration of his rank/pay grade to sergeant (SGT)/E-5.

b. This opine will narrowly focus on the applicant's request for a discharge upgrade.

c. 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:

- Following an uncharacterized period of service in the ■ ARNG, the applicant enlisted in the Regular Army on 18 July 2000.
- On 5 January 2005, an administrative flag was imposed on the applicant to prevent him from receiving favorable actions because he was pending adverse action.
- On 23 March 2005, the applicant accepted company grade nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for being drunk and disorderly and for using provoking speech/gestures towards gate guards. A breathalyzer test revealed he had a blood/alcohol content of 0.155, almost three times the legal limit according to German Law and American standards. As a result, his alcohol privileges were revoked effective 2 April 2005.
- Applicant was counseled on 4 April 2005 for failing to report to extra duty as prescribed and for having his third alcohol related incident. He was advised that continued behavior of this kind could result in disciplinary action under the provisions of the UCMJ and/or initiation of involuntary separation from the service.
- On 7 April 2005, the applicant was detained by German police prior to being released to U.S. Army Military Police and advised of his rights. He was charged

with Aggravated Assault – with Grievous Bodily Harm for pushing another Soldier down a flight of stairs. The Soldier fell on his face and sustained a fractured nose and four broken teeth.

- Applicant was counseled on the following dates for the reasons shown:
- 10 April 2005 – Drinking while on alcohol restriction; disobeying a lawful order from a senior NCO; being out of the prescribed uniform, and leaving post while pass privileges were revoked
- 14 April 2005 – Leaving work early and failing to report for first formation the following day
- 15 April 2005 – Failing to report to three accountability formations, violating restriction, and failing to follow instructions
- 22 April 2005 – Failing to report to morning formation
- Headquarters, V Corp, Darmstadt Legal Center memoranda shows the applicant, and his defense counsel were served charges that were preferred against the applicant. The DD Form 458 (Charge Sheet) is not present in his record. However, a Checklist for Pretrial Confinement shows he was charged with the following offenses:
- two specifications of assault with intent to commit grievous bodily harm; simple assault
- two specifications of failure to obey a lawful order
- two specifications of failure to repair
- three specifications of drunk and disorderly; communicating a threat (twice)
- Orders and the applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) show he was discharged on 7 December 2005, under the provisions of Army Regulation 635-200, paragraph 14-12b, by reason of Pattern of Misconduct, with separation code "JKA" and reentry code "3." His service was characterized as under honorable conditions (general).

d. 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 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.

e. The applicant states he was honorably discharged from the [REDACTED] Army National Guard (ARNG) so he could enlist in the Regular Army after he graduated from high school. He completed his first enlistment honorably and extended his enlistment for a period of 18 months at the needs of the Army under the Bonus Enlistment and Retention (BEAR) program as he transitioned from military occupational specialty (MOS) 63S (Heavy-Wheel Vehicle Mechanic) to MOS 18C (Special Forces Engineer Sergeant). A noncommissioned officer (NCO), Staff Sergeant (SSG) [REDACTED] told him not to

go to any formations and then he was punished for not going to formation the next day by the same NCO who told him not to report. SSG [REDACTED] witnessed SSG [REDACTED] telling him this and the aftermath. SSG [REDACTED] had words with SSG [REDACTED] after the applicant was demoted in rank, was forced to sell 60 days of leave, and lost 6 days of leave. He was put on extra duty and had all of his belongings stolen. He is still trying to contact SSG [REDACTED] to request a nexus letter. He was unaware of the existence of post-traumatic stress disorder (PTSD) until he was diagnosed with it in 2021.

f. Active-duty electronic medical records available for review indicate that on 5 October 2005, the applicant underwent a mental status evaluation. The applicant reported experiencing daily feelings of depression but denied feelings of anxiety. He further reported excessive daily alcohol use and it was recommended he seek treatment for alcohol dependence. The applicant was diagnosed with Alcohol Dependence (Alcoholism) and Adjustment Disorder with Depressed Mood. A medical encounter on 14 September 2005 had also diagnosed the applicant with Alcohol Dependence (Alcoholism) and recommended follow-up with the ASAP clinic.

g. The VA electronic medical records available for review, indicate the applicant is 90% service connected including 70% for PTSD. The applicant-initiated services with the VA in January 2013 due to Alcohol Dependence. At the time, the applicant reported a desire to stop drinking and shared he had been drinking heavily since he returned from Iraq in 2004. He had a DUI that resulted in the loss of employment and was requesting an inpatient program. The clinician noted, the applicant evidenced symptoms of depression, anxiety, and PTSD. The applicant's medical record evidence ongoing treatment for symptoms of PTSD and Alcohol Dependence, including three episodes of care in inpatient detox programs. In addition, the applicant has received supportive services via the VA for issues of homelessness.

h. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to support the applicant had a behavioral health condition that partially mitigates his misconduct.

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. The applicant is 70% service connected for PTSD.

(3) Does the condition or experience actually excuse or mitigate the discharge? Partially. The applicant's failure to report to his appointed place of duty at the prescribed time, consistent disobedience of direct orders from his supervising NCOs, and being

drunk and disorderly are mitigated by his diagnosis of PTSD. As there is a nexus between PTSD and avoidance as well as difficulty with authority. In addition, his excessive alcohol use would also be mitigated since there is a nexus with substance use and PTSD as a mechanism to cope with the symptoms of the disorder. However, his two specifications of assault with intent to commit grievous bodily harm and communicating a threat (twice) would not be mitigated by PTSD. Assault and communicating a threat are not a natural sequela of this BH condition, and PTSD does not impact the ability to distinguish right from wrong and act in accordance with the right.

BOARD DISCUSSION:

1. 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 record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant's petition, available military records and medical review, the Board considered the advising official finding sufficient evidence to support the applicant had a behavioral health condition that partially mitigates his misconduct. The Board noted the opine review of there being a nexus with substance use and PTSD as a mechanism to cope with the symptoms of the disorder.
2. The Board determined found under liberal consideration the applicant's two specifications of assault with intent to commit grievous bodily harm and communicating a threat (twice) would not be mitigated by PTSD. The Board agreed, assault and communicating a threat are not a natural sequela of this BH condition, and PTSD does not impact the ability to distinguish right from wrong and act in accordance with the right. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the misconduct of assault and driving under the influence. The Board recognizes the applicant is 90% service connected including 70% for PTSD. It was noted the applicant-initiated services with the VA in January 2013 due to Alcohol Dependence. Evidence shows the applicant was discharged for misconduct and provided an under honorable conditions (General) characterization of service. The Board agreed that the applicant's discharge characterization is warranted as he did not meet the standards of acceptable conduct and performance of duty for Army personnel to receive an Honorable discharge.
3. The Board agreed, notwithstanding the advising official finding partial mitigation for his misconduct, the Board determined based on the seriousness of his misconduct that put the lives of others in jeopardy with operating a motor vehicle to include assault is not

mitigable. The Board determined restoration of the applicant rank to sergeant is not warranted. Furthermore, the applicant provided no post service achievements or character letters of support the Board to weigh a clemency determination. Based on the preponderance of evidence the Board denied relief.

4. The applicant's request for a personal appearance hearing was carefully considered. In this case, 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.

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.

4/19/2024

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.
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. Paragraph 5-13 provides, in part, a Soldier may be separated for personality disorder (not amounting to disability that interferes with assignment or with performance of duty when this condition is a deeply ingrained maladaptive pattern of behavior of long duration that interferes with the Soldier's ability to perform duty. The diagnosis of personality disorder must have been established by a psychiatrist or doctoral-level clinical psychologist with necessary and appropriate professional credentials who is privileged to conduct mental health evaluations for the Department of Defense

components. Separation for personality disorder is not appropriate when separation is warranted under chapters 4,5,7, 9, 10, 11, 13, 14, 15, or 18 of this regulation.

d. 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 (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. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

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. 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//