

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 June 2024

DOCKET NUMBER: AR20230011316

APPLICANT REQUESTS: in effect,

- an upgrade of his under honorable conditions (general) discharge to an honorable discharge
- correction of his DD Form 214 (Certificate or Release or Discharge from Active Duty) to show:
  - the narrative reason and corresponding Separation Program Designator (SPD) code for his separation were due to disability
  - he held the rank/grade of private first class (PFC)/E-3 at the time of his separation
  - the awards and decorations to which he is entitled
- to appear before the Board in person.

APPLICANT'S SUPPORTING DOCUMENT CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Houston Department of Veterans Affairs (VA) Regional Office - Freedom of Information ACT (FOIA) Request form
- VA Rating Decision

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 undiagnosed at the time of his separation from the Army. He was not aware that he could request an upgrade of his discharge until August 2023. He indicates on his application that post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), and sexual assault/harassment are related to his petition.

3. The applicant enlisted in the Regular Army on 21 June 2005 for a period of 3 years and 19 weeks in the rank/grade of PFC/E-3. Upon completion of initial entry training, he was awarded military occupational specialty 11B (Infantryman) and assigned to a unit at Fort Polk, LA.

4. Permanent Orders 307-3045, issued by Headquarters, U.S. Army Infantry Center, Fort Benning, GA on 3 November 2005, show the applicant was awarded the Parachutist Badge effective 11 November 2005 or upon successful completion of Airborne training.

5. On 17 June 2006:

a. The applicant was arrested by civilian authorities for operating a motor vehicle while under the influence of an alcoholic beverage and/or a controlled dangerous substance; careless operation; and failure to use a turn signal. He posted bond and was returned to military control the same day.

b. The applicant was counseled and advised that he was being recommended for disciplinary action under the Uniform Code of Military Justice (UCMJ) and that continued misconduct on his behalf could result in the initiation of action to involuntarily separate him from the Army. The event-oriented counseling was regarding his:

- driving under the influence
- drinking underage
- possession and use of illegal drugs
- disobeying a direct order

c. The applicant's commander directed him to undergo an urinalysis.

6. On 19 June 2006, an administrative flag was imposed upon the applicant to prevent him from receiving any favorable personnel actions because he was pending adverse action.

7. On 22 June 2006, the applicant was counseled for failing to obey a direct order for underage drinking. It was noted that this seemed to be a recurring action and the applicant was advised that he was being recommended for disciplinary action under the UCMJ.

8. On 27 June 2006, the applicant's commander was informed his urinalysis sample tested positive for methamphetamine.

9. On 16 August 2006, the applicant accepted nonjudicial punishment under the provisions of Article 15, UCMJ for violating a lawful regulation by wrongfully consuming

alcohol while underage on or about 16 June 2006 and on or about 22 June 2006; and wrongfully using methamphetamine between on or about 17 May 2006 and on or about 17 June 2006. His punishment included: reduction to private (PV1)/E-1; forfeiture of \$636.00 pay per month for 2 months; extra duty for 45 days; and restriction for 45 days.

10. The applicant underwent a command-directed mental status evaluation on 17 August 2006. It was determined that he had the capacity to understand and participate in the evaluation and was mentally responsible. He was psychiatrically cleared for any administrative action deemed appropriate by command.

11. The applicant underwent a separation medical examination and was found to be psychiatrically cleared for administrative action deemed appropriate by his command.

12. The applicant's immediate commander informed the applicant that he was initiating action to separate him under the provisions of provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), paragraph 14-12c(2) due to misconduct – commission of a serious offense. The specific reasons for this action were the applicant's wrongful use of methamphetamines and his consumption of alcohol while underage. The applicant's commander informed him he was recommending that he receive a general, under honorable conditions discharge.

13. The applicant acknowledged receipt of the notification; consulted with counsel and rendered his election of rights. The applicant indicated he would submit statements in his own behalf, but his record is void of any such statements.

14. The applicant's immediate commander formally recommended approval of his separation and issuance of a general, under honorable conditions discharge; the intermediate commander concurred.

15. The separation authority approved the recommended separation and directed the issuance of a general, under honorable conditions discharge.

16. Orders and the applicant's DD Form 214 show he was discharged on 29 September 2006 in the rank/grade of PV1/E-1, under the provisions of Army Regulation 635-200, paragraph 14-12c(2), due to Misconduct (Drug Abuse) with SPD Code "JKK" and Reentry Eligibility Code "4." His service was characterized as Under Honorable Conditions (General). He was credited with completion of 1 year, 3 months, and 9 days of net active service. He had no time lost. He successfully completed the 3-week Airborne training in 2005. He did not complete his first full term of service. His decorations, medals, badges, citations, and campaign ribbons include the:

- Army Achievement Medal
- National Defense Service Medal

- Global War on Terrorism Service Medal
- Army Service Ribbon
- Parachutist Badge

17. The applicant's record is void of any indication that he was awarded or eligible to receive any awards and decorations in addition to those already documented on his DD Form 214.

18. The applicant provides the following documents that are available in their entirety for the Board's consideration:

a. A Houston VA Regional Office FOIA Request form shows the applicant requested copies of his Service Treatment Records, DD Form 214, and complete file from the VA on 22 August 2023.

b. A VA Rating Decision, dated 13 January 2024, shows in part, the applicant's evaluation for PTSD with drug and alcohol abuse was increased from 70 percent disabling to 100 percent effective 28 June 2023.

19. On 14 February 2024, in response to a written request, a member of the Army Criminal Investigation Division, Quantico, VA informed a staff member of the Case Management Division of the Army Review Boards Agency (ARBA), Arlington, VA that a search of the Army criminal file indexes revealed no Sexual Assault records pertaining to the applicant.

20. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition. By regulation, an applicant is not entitled to a hearing before the Board. Hearings may be authorized by a panel of the Board or by the Director of the ABCMR.

21. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting an upgrade of his 29 September 2006 discharge characterized as under honorable conditions (general). On

his DD Form 149, he has indicated that PTSD, TBI, and Sexual Assault/Harassment are issues related to his request.

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD 214 for the period of service under consideration shows he entered the regular Army on 21 June 2005 and was discharged on 29 September 2006 under the separation authority provided by paragraph 14-12c(2) of AR 635-200, Personnel Separations – Enlisted Personnel (6 June 2005): Commission of a serious offense – Abuse of illegal drugs. The DD 214 does not list a period of Service in a hazardous duty pay area.

d. The applicant was arrested by civilian law enforcement on 17 June 2006 for driving under the influence of alcohol.

e. The applicant was counseled several times for underage drinking.

f. After entering the Army Substance Abuse Program, the applicant tested positive for methamphetamines on 17 June 2006.

g. On 16 August 2006, he received an Article 15 for two specifications of underage drinking and one specification of wrongful use of methamphetamines.

h. The applicant underwent a mental status evaluation on 17 August 2006. The provider documented a normal examination and determined the applicant had no psychiatric condition, no personality disorder, and no social stressors. He opined the applicant had the mental capacity to understand and participate in the evaluation and was mentally responsible and he was cleared for "expeditious administrative separation" IAW paragraph 14-12c(2) of AR 635-200.

i. The applicant underwent his pre-separation physical examination on 23 August 2006. The only notes on the Report of Medical history were a history of a "cut" on his right ankle, his enrollment in ASAP, and his use of ecstasy. The provider documented a normal examination on the accompanying Report of Medical Examination, that the applicant was without diagnoses or defects, and he was cleared for separation.

j. In an undated memorandum, his company commander informed him of the initiation of action to separate him under paragraph 14-12c of AR 635-200:

"The reason for my proposed separation is as follows: You wrongfully used methamphetamines between on or about 17 May 2006 and 17 June 2006. You also violated a lawful general order by wrongfully consuming alcohol while underage on or about 16 June 2006."

k. In an undated memorandum, the Operations Group Commander at Ft. Polk approved his separation with an under honorable conditions (general) characterization of service.

l. JLV shows the applicant has been diagnosed with service-connected PTSD (100%).

m. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? YES: PTSD with documentation noting a history of military sexual trauma (MST)

(2) Did the condition exist or experience occur during military service? YES: The condition has been service connected by the VA

(3) Does the condition or experience actually excuse or mitigate the discharge? YES: As there is a nexus between both PTSD and MST per se with self-medicating with alcohol and/or illicit substances, both conditions mitigate the multiple incidents alcohol misuse and illegal drug use.

#### 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 her characterization of service. Upon review of the applicant's petition, available military record and medical review, the Board considered the advising official finding a nexus between both PTSD and MST per se with self-medicating with alcohol and/or illicit substances, both conditions mitigate the multiple incidents alcohol misuse and illegal drug use.

2. The Board notwithstanding the opine, determined the applicant underwent a mental status evaluation. The provider documented a normal examination and determined the applicant had no psychiatric condition, no personality disorder, and no social stressors. The opine also noted, applicant had the mental capacity to understand and participate in the evaluation and was mentally responsible. The Board found insufficient evidence of in-service mitigating factors to overcome the misconduct of driving under the influence and repeated illegal drug use. The Board determined the applicant's service record exhibits numerous instances of misconduct during his enlistment period for 1 year 3 months and 9 days of net service for this period. The Board determined under liberal consideration

changes to the applicant’s narrative reason, separation code and RE Code are not warranted.

3. Furthermore, the Board agreed the applicant did not accept responsibility for his actions and showed no remorse with his application. The applicant was discharged for commission of a serious offense – abuse of illegal drugs and was 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. 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.

[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.

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 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; TBI; 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.

7. On 4 April 2024, 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 eligibility for medical retirement or separation benefits. This guidance is being promulgated in light of *Doyon v. United States* and is consistent with that decision. Accordingly, the BCM/NR will apply liberal consideration to the eligible applicant's assertion that combat- or military sexual trauma -related PTSD or TBI potentially contributed to the circumstances resulting in their discharge or dismissal to determine whether any discharge relief is appropriate. After making that determination, the BCM/NR will then separately assess the individual's claim of medical unfitness for continued service due to that PTSD or TBI condition as a discreet issue, without applying liberal consideration to the unfitness claim or carryover of any of the findings made when applying liberal consideration.

//NOTHING FOLLOWS//