

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 May 2024

DOCKET NUMBER: AR20230011921

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 (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, in effect, he would like to get medical benefits to fix injuries from active-duty service. He has post-traumatic stress disorder (PTSD). He was a good Soldier, who made some dumb decisions as a kid. His first line leadership (sergeants and lieutenants) asked that he not be discharged.
3. The applicant enlisted in the Regular Army on 15 April 2003 for a 3-year period. Upon the completion of initial entry training, he was awarded military occupational specialty 21B (Combat Engineer). The highest rank he attained was private first class/ E-3.
4. A DD Form 2624 (Specimen Custody Document – Drug Testing) shows that a urine sample collected from the applicant on 14 October 2003 tested positive for tetrahydrocannabinol (THC).
5. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) on 18 December 2003, for wrongfully using marijuana, between on or about 14 September 2003 and 14 October 2003. His punishment consisted of reduction to private/E-1, forfeiture of \$575.00 pay, 45 days of extra duty, and 45 days restriction.

6. A DD Form 2624 shows that a urine sample collected from the applicant on 5 January 2004 tested positive for THC.
7. The applicant was formally counseled on 5 January 2004 for driving under the influence (DUI), possession of drug paraphernalia, breaking restriction, and drinking underage.
8. Before a summary court-martial on 11 February 2004, at Fort Hood, TX, the applicant pled guilty to and was found guilty of violating a lawful order by drinking under the age of 21, wrongfully possessing marijuana, and breaking restriction, on or about 4 January 2004, and for the wrongful use of marijuana, between on or about 5 December 2003 and 5 January 2004. His sentence consisted of confinement for 30 days and forfeiture of \$795.00 pay. The court-martial proceedings, findings of guilty, and sentence were deemed legally sufficient on 24 February 2004.
9. The applicant served in Iraq from 15 March 2004 to 18 March 2005.
10. The applicant was formally counseled on four occasions between 21 July 2004 and 26 May 2005. Areas of emphasis covered in the counseling include:
  - loss of accountability of his weapon
  - two occasions of failure to obey orders or regulations
  - sleeping on guard duty
  - missing movement
  - being drunk on duty
  - DUI
11. Before a summary court-martial on 8 June 2005, at Fort Hood, TX, the applicant pled guilty to and was found guilty of being drunk on duty, on or about 16 May 2005. His sentence consisted of reduction to private/E-1, confinement for 30 days, and forfeiture of \$823.00 pay. The court-martial proceedings, findings of guilty, and sentence were deemed legally sufficient on 15 June 2005.
12. The applicant's immediate commander notified the applicant on 9 August 2005 of his intent to initiate separation action against him under the provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), paragraph 14-12c, by reason of commission of a serious offense. As the specific reasons for the recommended separation action, the commander cited the applicant's underage consumption of alcohol, possession of marijuana, breaking restriction, positive urinalysis for marijuana, and being drunk on duty. The applicant acknowledged receipt of the notification.

13. The applicant consulted with legal counsel and was advised of the basis for the contemplated separation action and its effects; of the rights available to him; and the effect of any action taken by him to waive his rights. He elected not to submit a statement in his own behalf.

14. The immediate commander formally recommended the applicant's separation, prior to the expiration of his term of service, under the provisions of AR 635-200, paragraph 14-12c, with a service characterization of under honorable conditions (general).

15. The applicant's intermediate commander recommended approval of the separation action and characterization of service on 16 August 2005.

16. The separation authority approved the recommended separation action on 23 August 2005 waived further rehabilitative and counseling requirements, and directed the issuance of a Under Honorable Conditions (General) Discharge Certificate.

17. The applicant was discharged on 15 September 2005, under the provisions of AR 635-200, paragraph 14-12c (2), by reason of misconduct (abuse of illegal drugs). His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms his character of service was under honorable conditions (general), with separation code JKK and reentry code RE-4. He was credited with 2 years, 5 months, and 1 day of net active service. He was authorized or awarded the following:

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

18. In the processing of this case, the Army Review Boards Agency (ARBA) sent the applicant a letter on 3 November 2023, requesting medical documentation to support his contention of PTSD. To date, no additional documentation has been received.

19. Regulatory guidance provides when an individual is discharged under the provisions of AR 635-200, Chapter 14, the separation authority may direct a general discharge if such is merited by the Soldier's overall record. Characterization of service as honorable is not authorized unless the Soldier's record is otherwise so meritorious that any other characterization clearly would be inappropriate.

20. The Board should consider the applicant's overall record in accordance with the published equity, injustice, or clemency determination guidance.

## 21. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under honorable conditions (general) characterization of service. He contends PTSD mitigates his 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 15 April 2003.
- Applicant accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) on 18 December 2003, for wrongfully using marijuana, between on or about 14 September 2003 and 14 October 2003.
- A DD Form 2624 shows that a urine sample collected from the applicant on 5 January 2004 tested positive for THC.
- Applicant was formally counseled on 5 January 2004 for driving under the influence (DUI), possession of drug paraphernalia, breaking restriction, and drinking underage.
- Before a summary court-martial on 11 February 2004, at Fort Hood, TX, the applicant pled guilty to and was found guilty of violating a lawful order by drinking under the age of 21, wrongfully possessing marijuana, and breaking restriction, on or about 4 January 2004, and for the wrongful use of marijuana, between on or about 5 December 2003 and 5 January 2004.
- Applicant served in Iraq from 15 March 2004 to 18 March 2005.
- Applicant was formally counseled on four occasions between 21 July 2004 and 26 May 2005. Areas of emphasis covered in the counseling include:
  - loss of accountability of his weapon
  - two occasions of failure to obey orders or regulations
  - sleeping on guard duty
  - missing movement
  - being drunk on duty
  - DUI
- Before a summary court-martial on 8 June 2005, at Fort Hood, TX, the applicant pled guilty to and was found guilty of being drunk on duty, on or about 16 May 2005.
- Applicant was discharged on 15 September 2005, under the provisions of AR 635-200, paragraph 14-12c (2), by reason of misconduct (abuse of illegal drugs). His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms his character of service was under honorable conditions (general), with separation code JKK and reentry code RE-4.

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 214, ABCMR Record of Proceedings (ROP), 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.

d. The applicant states he would like to get medical benefits to fix injuries from active-duty service. He has post-traumatic stress disorder (PTSD). He was a good Soldier, who made some dumb decisions as a kid. His first line leadership (sergeants and lieutenants) asked that he not be discharged.

e. Due to the period of service, no active-duty electronic medical records were available for review. In addition, the applicant submitted no hardcopy medical documentation from his time of service evidencing a behavioral health condition, treatment, or diagnosis.

f. No VA electronic medical records were available for review, the applicant is not service connected, and he did not submit any medical documentation post-military service substantiating his assertion of PTSD. Of note, the applicant's discharge status does not prevent him from obtaining medical care via the VA. On 3 November 2023, the applicant was notified by the Army Review Boards Agency that he was required to provide medical documentation to support his contention of PTSD. To date, no medical documentation has been received.

g. 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 diagnosis that mitigates his misconduct. However, per Liberal Consideration guidelines, the applicant's self-assertion of PTSD merits consideration by the Board

h. 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? No. There is no medical documentation indicating the applicant has been diagnosed with any BH condition.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is insufficient evidence of any mitigating BH condition. There is no evidence of

any in-service BH diagnoses, the VA has not service-connected the applicant for any BH condition, and there is no VA electronic record indicating he has been treated for any BH condition. And while the applicant self-asserted PTSD, he did not provide any medical documentation substantiating any BH diagnosis or condition. Of note, the applicant does not indicate the rationale for his assertion of PTSD. However, if his traumatic incident was related to his deployment to Iraq, it would not provide full mitigation since much of his misconduct occurred prior to his deployment.

#### 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 concurred with the advising official finding insufficient evidence to support the applicant had a behavioral health diagnosis that mitigates his misconduct. The opine noted the applicant's traumatic incident was related to his deployment to Iraq, however, it would not provide full mitigation since much of his misconduct occurred prior to his deployment.
2. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the pattern of misconduct and illegal drug use. The applicant provided no post service achievements or character letters of support for the Board consideration. The Board agreed the applicant was discharged for misconduct and was provided an under honorable (general) conditions 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. Therefore, the Board denied relief.

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.



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 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, USC, 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. 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 635-40 (Physical Evaluation for Retention, Retirement, or Separation) establishes the Physical Disability Evaluation System (PDES) and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his or her office, grade, rank, or rating. It provides for a medical evaluation board that is convened to document a Soldier's medical status and duty limitations insofar as duty is affected by the Soldier's status. A decision is made as to the Soldier's medical qualifications for retention based on the criteria in Army Regulation 40-501 (Standards of Medical Fitness), Chapter 3. Disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in service.

a. Paragraph 2-1 provides that the mere presence of impairment does not of itself justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the member reasonably may be expected to perform because of his or her office, rank, grade, or rating. The Army must find that a service member is physically unfit to reasonably perform his or her duties and assign an appropriate disability rating before he or she can be medically retired or separated.

b. Paragraph 2-2b (1) provides that when a member is being processed for separation for reasons other than physical disability (e.g., retirement, resignation, reduction in force, relief from active duty, administrative separation, discharge, etc.), his or her continued performance of duty (until he or she is referred to the PDES for evaluation for separation for reasons indicated above) creates a presumption that the member is fit for duty. Except for a member who was previously found unfit and retained in a limited assignment duty status in accordance with chapter 6 of this regulation, such a member should not be referred to the PDES unless his or her physical defects raise substantial doubt that he or she is fit to continue to perform the duties of his or her office, grade, rank, or rating.

c. Paragraph 2-2b (2) provides that when a member is being processed for separation for reasons other than physical disability, the presumption of fitness may be overcome if the evidence establishes that the member, in fact, was physically unable to adequately perform the duties of his or her office, grade, rank, or rating even though he



or she was improperly retained in that office, grade, rank, or rating for a period of time and/or acute, grave illness or injury or other deterioration of physical condition that occurred immediately prior to or coincidentally with the member's separation for reasons other than physical disability rendered him or her unfit for further duty.

4. AR 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

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; 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. 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//