

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 24 May 2024

DOCKET NUMBER: AR20230012059

APPLICANT REQUESTS:

- upgrade of his under honorable conditions (general) discharge
- his narrative reason for separation and Separation Program Designator (SPD) code be changed to show he was separated under "Secretarial Authority"

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- Counsel brief and 19 Exhibits (161 pages)

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 respectfully requests a discharge upgrade based upon grounds of propriety, equity, and or clemency as he was experiencing service-related post-traumatic stress disorder (PTSD) when he used cocaine. Granting him relief would be consistent with prior Board decisions that granted upgrades to service members in similar situations.

3. On behalf of the applicant, counsel provides a legal brief and 19 exhibits that are available in their entirety for the Board's consideration. Counsel states the applicant is an Army Veteran who served meritoriously in Iraq, he received praise from his supervisors and a number of medals and awards, including the Army Commendation Medal (ARCOM). However, his traumatic experiences in Iraq, including witnessing the aftermath of the death of a close friend, resulted in service-connected PTSD, which went undiagnosed while he was in the Army. The applicant's struggles with PTSD, which has been corroborated by a team of clinicians from the University of Tennessee. This led him to self-medicate with alcohol and, on one occasion while in service, to use

cocaine. This one-time use of cocaine occurred during a period of isolation after he had returned from Iraq and while he was inebriated. Soon after, he was discharged from the Army with a general, under honorable conditions discharge and a narrative reason for discharge of "misconduct (drug abuse)."

a. Since his discharge, the applicant has continued to battle with the crippling effects of mental illness, including PTSD with alcohol use disorder, for which he has been rated as 100 percent (%) disabled by the Department of Veterans Affairs (VA). The stigma of having received a general discharge for misconduct continues to cause him considerable embarrassment. However, he has been making great efforts at recovery in recent years. He has been receiving treatment for his mental health issues and some of his conditions, such as Bipolar I Disorder, are in full remission. He has been sober for more than a year and his Alcohol Use Disorder is in sustained remission. He stays in touch with his adult children, with whom he is close, and currently lives with his girlfriend of 11 years and her children.

b. The applicant regrets using cocaine while he was in the Army, but respectfully submits that his struggles with his mental health, including his service-related PTSD with alcohol use disorder, directly contributed to the conduct that led to his discharge. The applicant petitions the Board for a discharge upgrade to Honorable and a change in the narrative reason for his separation to reflect "Secretarial Authority" based on his meritorious record of service and the fact that his one-time use of cocaine was a direct result of his service connected PTSD. Granting this petition is consistent with Army guidance and Board precedents and will help the applicant move on from his experiences in Iraq and build a better future for himself and his family.

c. Counsel provides a synopsis of the applicant's upbringing and life as a young adult prior to joining the Army at the age of 34 years old.

d. Counsel provides a synopsis of the applicant's experiences in Iraq which included his good friend being killed in action. Although the applicant was on leave in the U.S. at the time, his friend's dead body was photographed by the enemy and was displayed as part of a photo montage on an Al Jazeera website. The applicant recognized the bodies of his friends in these photos. To this day, he questions whether he would have been able to do something to save his friend's life if he had been on duty in Iraq that day. Despite the stresses he was under, the applicant performed extremely well in Iraq. His performance was described by Captain (CPT) BE, one of his supervisors at the time, as "outstanding." According to CPT BE, the applicant had the "ability to meet and even exceed almost every deadline," and his work was "completed to the highest level of competence." He had a "hard work ethic," and a "great personality." Another supervisor, CPT MG, said that he worked "extremely well under pressure and [was] a very competent leader." He "[led] by example and many fellow Soldiers [found] his enthusiasm and dedication both inspiring and motivating." CPT MC described the

applicant as "a take-charge Soldier," who managed "radio communications in over 100 combat missions and 45 combat engagements." According to CPT MC, the applicant was "inspiring and motivating" and "a team player. In fact, for his service during his time in Iraq, he was awarded an ARCOM. In recommending him for this award, his command noted his "meritorious service while serving as [an] aviation operations specialist during Operation Iraqi freedom."

e. In the words of his brother, RT, before his combat tour in Iraq, the applicant was very happy, fun loving, outgoing, and handled daily challenges with a very positive attitude. He returned from his combat experience a very different person and he felt alone. Many of the Soldiers that he served with in Iraq spent their time with their families and girlfriends. The applicant's family was located on the East Coast, and it was difficult for him to see them. He was in a dark place. He stopped caring about his job and could not see the point in anything anymore. He neglected himself, was no longer shaving on a daily basis, and started to shut himself off from other people.

f. In fact, although he didn't know it at the time, the applicant was suffering from the undiagnosed effects of service-connected PTSD, of which he would not be diagnosed until well after his discharge from the Army. The connection between his traumatic experiences in Iraq and PTSD has been established by the VA and confirmed by LH, a Master of Science, Licensed Professional Counselor; Doctor AF, Doctor of Philosophy (PhD) and Doctor LF, PhD, clinicians at the University of Tennessee. Based on numerous tests and evaluations of the applicant, they found that the applicant was experiencing severe PTSD symptoms, starting in October of 2007 after he returned from deployment and increasing in severity and intensity leading up to February 2008. He knew that he was suffering, but he tried to hide what he was feeling. He understood that his fellow Soldiers had similar experiences in Iraq, and he did not want to be a bother to them. Due to pride, he did not seek the help and turned to alcohol to deal with his feelings. On 30 January 2008, the applicant went out with a group of Soldiers that he casually knew from another division, and he became heavily intoxicated. While intoxicated, he was offered cocaine by one of the Soldiers in the group. Due to the PTSD symptoms, he was experiencing at that time, he disregarded the potential consequences of his actions and used the cocaine that was offered to him. This was the sole time that he used cocaine or any other illegal drug while he served. He tested positive for cocaine on a urinalysis and was subsequently discharged from the Army.

g. After being discharged from the Army, the applicant continued to struggle with his mental health. For some time, he worked as a landscaper while he continued to deal with the symptoms of PTSD and alcohol use disorder. However, his declining mental health ultimately led to his unemployment. In fact, the symptoms of his declining mental health became so severe that he was admitted to the VA hospital in Memphis, TN, on a number of occasions and during one of these hospitalizations he was finally appropriately diagnosed with PTSD, along with Bipolar Disorder, and his conditions are

now properly being managed with both pharmaceutical and non-pharmaceutical methods. As a result of this treatment his alcohol use disorder is in sustained remission and his Bipolar I Disorder is in full remission. As of 19 August 2020, the VA rated the applicant as 100% disabled due to service-connected PTSD and alcohol use disorder.

h. The applicant's case meets the criteria outlined in the Hagel Memorandum, as expanded by the February 2016 Carson Memorandum and August 2017 Kurta Memorandum, that expanded on and clarified the Hagel Memorandum. The August 2017 guidance laid out four criteria by which the Board should evaluate the applicant's petition.

i. Counsel provides the following exhibits in support of the petition:

- Exhibit 1 - DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Exhibit 2 - Declaration by the applicant
- Exhibit 3 - VA Rating Decision, dated 11 March 2021, which shows he was granted a combined disability rating of 100% for PTSD with alcohol use disorder
- Exhibit 4 - Civilian Psychological Evaluation which shows he was clinically tested for his various mental health conditions
- Exhibit 5 - Statement from CPT BE, as discussed by counsel above
- Exhibit 6 - Statement from CPT MG, as discussed by counsel above
- Exhibit 7 - Statement from CPT MC, as discussed by counsel above
- Exhibit 8 - Awards received by the applicant
- Exhibit 9 - Declaration by the applicant's brother, RT, as discussed by counsel above
- Exhibit 10 - VA diagnosis showing the applicant's treatment for PTSD and substance abuse
- Exhibit 11 - Documentation of the applicant's administrative separation, which will be summarized later in this record of proceedings
- Exhibit 12 - VA Rating Decision, dated 21 July 2020, which shows he was granted a combined disability rating of 70 percent for PTSD with alcohol use disorder from 31 October 2019
- Exhibit 13 - Report of Medical History at Discharge
- Exhibit 14 - Under Secretary of Defense, Washington, DC memorandum, Subject: Guidance to Military Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) Considering requests for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment, dated 25 August 2012 (Wilkie Memorandum), which will be summarized later in this record of proceedings
- Exhibit 15 - Principal Deputy Under Secretary of Defense, Washington, DC memorandum, Subject: Supplemental Guidance to Military BCM/NRs

Considering Discharge Upgrades for Veterans Claiming PTSD or Traumatic Brain Injury (TBI), dated 24 February 2016 (Carson Memorandum), which will be summarized later in this record of proceedings

- Exhibit 15 - Office of the Under Secretary of Defense, Washington, DC memorandum, Subject: Clarifying Guidance to Military DRBs and BCM/NRs Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment, dated 25 August 2017. (Kurta Memorandum), which will be summarized later in this record of proceedings
- Exhibit 16 - Separation Mental Health Evaluation, which will be summarized later in this record of proceedings
- Exhibit 17- Army Discharge Review Board (ADRB) Docket Number AR20210002703 depicting the case of another Soldier
- Exhibit 18 - ADRB Docket Number AR20200000584 depicting the case of another Soldier
- Exhibit 19 - ADRB Docket Number AR20200009667 depicting the case of another Soldier

4. The applicant enlisted in the Regular Army on 12 May 2005, for a period of 4 years in the rank/grade of private first class (PFC)/E-3. Upon completion of training, he was assigned to a unit in Hawaii. He served in Iraq from 3 September 2006 until 12 October 2007. He was advanced to the rank/grade of specialist (SPC)/E-4 on 12 May 2007 and that was the highest rank he held while serving.

5. On 20 February 2008, the applicant was counseled by his immediate commander regarding his positive test for cocaine as a result of a urinalysis conducted on 4 February 2008. He was advised that separation action could be initiated and the potential consequences of such a separation. An administrative flag was imposed upon the applicant to prevent him from receiving any favorable personnel action while he was pending adverse action.

6. On 28 February 2008, the applicant accepted filed grade nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for, wrongfully using cocaine, a controlled substance, between on or about 1 February 2008 and 4 February 2008; and for with intent to deceive, making a false official statement to an investigator on or about 20 February 2008. His punishment included reduction from SPC/E-4 to private (PV2)/E-2; forfeiture of \$754.00 pay per month for two months, suspended to be automatically remitted if not vacated before 28 August 2008; and extra duty for 45 days.

7. The applicant underwent a separation medical exam and was found to be qualified for service.

8. On 29 July 2008, the applicant underwent a Mental Status Evaluation, and he was determined to:

- have no evidence of a psychiatric condition which would prevent him from participating in any legal or administrative actions
- meet regulatory retention requirements and not meet the criteria for a Medical Evaluation Board due to no evidence of an emotional or mental conditions of sufficient severity to warrant disposition through medical channels
- not have any positive PTSD or Traumatic Brain Injury symptoms medically sufficient to warrant disposition through medical channels
- be mentally responsible for his behavior
- possess the ability to distinguish right from wrong
- possess the mental capacity to understand and participate in any administrative or judicial procedures

9. On 29 July 2008, the applicant's immediate commander notified the applicant he was initiating actions to separate him under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 14, paragraph 14-12c(2), for Misconduct (Drug Abuse). The specific reason for this action was the applicant's use of cocaine between on or about 1 February and 4 February 2008. He was advised that he was being recommended for a general, under honorable conditions discharge. The applicant acknowledged receipt of the proposed separation notification on the same day.

10. On 29 July 2008, the applicant rendered his election of rights wherein he accepted the opportunity to consult with counsel. He had been advised by counsel of the basis for the contemplated action to separate him under the provisions of Army Regulation 635-200, Chapter 14, and its effect; of the rights available to him; and the effect of any action by him in waiving his rights. He elected not to submit statements in his own behalf.

11. On 30 July 2008, the applicant's immediate commander formally recommended his separation from service prior to the expiration of his term of service, under the provisions of Army Regulation 635-200, paragraph 14-12c(2), by reason of Misconduct (Drug Abuse).

12. On 31 July 2008, the applicant's intermediate commander concurred with the recommendation for separation with the issuance of a general, under honorable conditions discharge. The separation packet underwent a legal review on 4 August 2008 and was found to be legally sufficient.

13. On 5 August 2008, the separation authority approved the recommendation for separation, and directed the applicant be issued a general, under honorable conditions discharge.

14. Orders and the applicant's DD Form 214 show he was discharged from the Regular Army on 28 August 2008, under the provisions of Army Regulation 635-200, paragraph 14-12c(2), by reason of Misconduct (Drug Abuse), with separation code "JKK" and reentry code "4." His service was characterized as Under Honorable Conditions (General). He was credited with completion of 3 years, 3 months, and 17 days of net active service this period. He did complete his first full term of service. He was awarded or authorized the Iraq Campaign Medal, ARCOM, National Defense Service Medal, Global War on Terrorism Service Medal, Army Service Ribbon, Sharpshooter Marksmanship Qualification Badge with Rifle Bar, and Driver and Mechanic Badge with Wheeled Vehicle(s) Clasp.

15. 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.

16. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under honorable conditions (general) discharge and change his narrative reason for separation. He contends he experienced PTSD that mitigates his misconduct. 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 12 May 2005; 2) The applicant deployed to Iraq from 3 September 2006-12 October 2007; 3) On 28 February 2008, the applicant accepted filed grade nonjudicial punishment (NJP) for wrongfully using cocaine and making a false official statement to an investigator on 20 February 2008; 4) The applicant was discharged on 28 August 2008, Chapter 14-12c(2), by reason of Misconduct (Drug Abuse), with separation code "JKK" and reentry code "4." His service was characterized as Under Honorable Conditions (General).

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service and available medical records. The Armed Forces Health Longitudinal Technology Application (AHLTA), the VA's Joint Legacy Viewer (JLV), VA documentation, and civilian medical documentation were also examined.

c. The applicant asserts he was experiencing PTSD while on active service, which mitigates his misconduct. There is evidence the applicant was seen by behavioral health services initially for a Command referral to the Army Substance Abuse Program (ASAP) after testing positive for cocaine on 21 February 2008. He was recommended to attend substance abuse treatment and later diagnosed with Alcohol Abuse. He attended a few sessions and was reported to have maintained sobriety. The applicant was not able to complete the program due to his military discharge, but he was not diagnosed

with a mental health condition during his time at ASAP. On 29 July 2008, the applicant was provided a mental status evaluation as part of his Chapter 14 separation proceedings. The applicant reported using cocaine to get out of the Army to attend his daughter's surgery, which he was not approved to go on leave to attend. The applicant was found to meet psychiatric retention standards and was cleared to participate in administratively proceedings. Lastly, the applicant was not diagnosed with any mental health condition.

d. A review of JLV provided evidence the applicant began to engage with the VA for behavioral health care in 2017. Later in 2019, the applicant was diagnosed with service-connected PTSD, and he has been engaged in care at the VA for PTSD and support for his sobriety. Currently, the applicant has been found to be 100% disabled due to his service-connected PTSD.

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

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant asserts he experienced PTSD that mitigates his misconduct. There is evidence the applicant has been diagnosed by the VA in 2019 with service-connected PTSD.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced PTSD that mitigates his misconduct while on active service. The VA has diagnosed the applicant with service-connected PTSD.

(3) Does the condition experience actually excuse or mitigate the discharge? Partially, there is sufficient evidence beyond self-report the applicant was experiencing PTSD while on active service. The applicant did use illegal substances while on active service following his deployment. Substance abuse can be avoidant behavior or self-medicating behavior, which is a natural sequelae to PTSD. However, there is no nexus between the applicant's PTSD and his misconduct of making a false official statement to an investigator in that: 1) this type of misconduct is not part of the natural history or sequelae of PTSD; 2) PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing a mental health condition that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.



**BOARD DISCUSSION:**

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was/was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests.

a. The evidence shows the applicant wrongfully used illegal drugs. As a result, his chain of command separated him with a general discharge. The Board found no error or injustice in his separation processing. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewing official. The Board concurred with the medical official's finding evidence to support the applicant had condition or experience that partially mitigated his misconduct. Given this mitigation, the Board determined that an honorable characterization of service is appropriate under published DoD guidance for liberal consideration of discharge upgrade requests.

b. The Board noted that the applicant's narrative reason for separation was assigned based on the fact that he was discharged under chapter 14-12c of AR 635-200 due to his misconduct - commission of a serious offense. Absent his misconduct, there was no reason to process him for separation. The underlying reason for his discharge was his misconduct. The only valid narrative reason for separation permitted under chapter 14 is "Misconduct" and the appropriate separation code associated with this discharge is JKK. Although the Board determined a discharge upgrade is appropriate due to partial mitigation, the Board also determine that this action did not change the underlying reason for separation, and as a result determined that his narrative reason for separation is not in error or unjust.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:            :            :            GRANT FULL RELIEF

█           █           █           GRANT PARTIAL RELIEF

:            :            :            GRANT FORMAL HEARING

:            :            :            DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant a DD Form 214 for the period ending 28 August 2008 to show his Character of Service: Honorable.

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to changing the Narrative Reason for Separation.



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.
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. Army Regulation 635-5-1 (Separation Program Designator Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the separation codes to be entered on the DD Form 214. It states that the separation code "JKA" is an appropriate code to assign to Soldiers separated under the provisions of Army Regulation 635-200, Chapter 14, by reason of misconduct.

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//