

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 5 June 2024

DOCKET NUMBER: AR20230012310

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions discharge to honorable.

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

- DD Form 149 (Application for Correction of Military Record)
- Jail Progress Evaluation Note (pages 1 and 2 of 5)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states he served honorably for his first enlistment, prior to his reenlistment, then upon returning to the U.S., he did not realize he was suffering from post-traumatic stress disorder (PTSD). He deployed during his first enlistment and served an honorable period of service before being deployed a second time. He served his country to the best of his ability and has a total of four tours to Iraq. He believes an honorable discharge will allow him to get treatment for his PTSD and other issues from the Department of Veterans Affairs. He served many years in combat and is looking to receive service connected disability.
3. The applicant provides a Jail Progress Evaluation Note, dated 22 July 2022 which shows the applicant was diagnosed with PTSD and a secondary diagnosis of cannabis use. The evaluation is available for review by the Board.
4. A review of the applicant's service record shows:
 - a. He enlisted in the Regular Army on 1 February 2001. He reenlisted on 9 March 2009. He served in Korea from approximately 22 July 2001 to 16 July 2002.
 - b. He accepted nonjudicial punishment on/for:

(1) 22 January 2004 - for one specification of false official statement and one specification of unlawfully choking another Soldier.

(2) 29 September 2005 - for one specification of stealing a Department of Defense Decal, the property of a commissioned officer. His punishment included reduction to specialist/E-4.

(3) 22 May 2006 - for the specifications listed below. His punishment included reduction to private first class/E-3.

- two specifications of failure to be at his appointed place of duty
- one specification of being disrespectful in department to a senior noncommissioned officer (NCO)
- one specification of being disrespectful in language to a senior NCO
- two specifications of false official statement
- one specification of uttering a check for \$550 and dishonorably maintaining sufficient funds

(4) 14 August 2006 - for one specification of wrongful use of marijuana between on or about 6 June 2006 and 6 July 2006. His punishment included reduction to private/E-1.

c. The service record includes the applicant's medical examinations for the purpose of administrative separation which indicated he was generally in good health. The physician did note the applicant was experiencing PTSD, post Iraq, among other diagnoses. He was marked qualified for service and separation.

- DD Form 2807-1 (Report of Medical History), 1 August 2006
- DD Form 2808 (Report of Medical Examination), 9 August 2006

d. A DA Form 3822-R (Report of Mental Status Evaluations) shows on 17 August 2006 he underwent a mental status evaluation which indicated there was no psychiatric disease or defect that warranted disposition through medical channels. He was cleared for any administrative action deemed appropriate by the command, to include separation.

e. On 13 September 2006, the applicant's immediate commander notified the applicant of his intent to separate him under the provisions of Chapter 14, Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations) for serious misconduct. The specific reasons for his proposed recommendation were his use of marijuana, disrespectful behavior towards a senior NCO, false official statements, uttering a check without sufficient funds, and stealing military property. He acknowledged receipt on the same day.

f. On 14 September 2006, after consulting with legal counsel, he acknowledged:

- the rights available to him and the effect of waiving said rights
- he may encounter substantial prejudice in civilian life if an under other than honorable conditions discharge is issued to him
- he may be ineligible for many or all benefits as a veteran under both Federal and State laws
- he may apply to the ADRB or the ABCMR for upgrading
- he elected not to submit matters

g. The immediate commander initiated separation action against the applicant for serious misconduct. He recommended that his period of service be characterized as under other than honorable conditions. The intermediate commanders recommended approval.

h. On 28 September 2006, consistent with the chain of command recommendations, the separation authority approved the discharge recommendation for immediate separation, under the provisions of Chapter 14, AR 635-200, paragraph 14-12c for serious misconduct. He would be issued an under other than honorable conditions characterization of service.

i. On 11 October 2006, he was discharged from active duty with an under other than honorable conditions characterization of service. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 5 years, 8 months, and 11 days of active service. He served two tours in Iraq from 22 October 2002 to 3 July 2003 and from 18 January 2004 to 23 December 2004. He was assigned separation code JKK and the narrative reason for separation listed as "Misconduct (Drug Abuse)," with reentry code 4.

(1) His DD Form 214 shows he was awarded or authorized:

- Army Commendation Medal (2nd Award)
- Army Achievement Medal
- Army Good Conduct Medal
- National Defense Service Medal
- Global War on Terrorism Expeditionary Medal
- Global War on Terrorism Service Medal
- Korea Defense Service Medal
- Army Service Ribbon
- Overseas Service Ribbon

(2) The Remarks Block did not list his continuous honorable service.

5. A review of the applicant's service record confirms an administrative entry and awards were omitted from his DD Form 214. The entries will be added to his DD Form 214 as administrative corrections and will not be considered by the Board.
6. There is no evidence the applicant has applied to the Army Discharge Review Board for review of his discharge within that board's 15-year statute of limitations.
7. By regulation, action will be taken to separate a Soldier for misconduct when it is clearly established that despite attempts to rehabilitate or develop him or her as a satisfactory Soldier, further effort is unlikely to succeed.
8. In reaching its determination, the Board can consider the applicants petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.
9. MEDICAL REVIEW:
 - a. The applicant requests upgrade of his UOTHC discharge to Honorable. He contends his misconduct was related to PTSD.
 - b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following:
 - The applicant enlisted in the Regular Army on 1 February 2001. He reenlisted on 9 March 2009.
 - He accepted nonjudicial punishment on 22 January 2004 for making a false official statement and unlawful choking another Soldier; On 29 September 2005 for stealing a Department of Defense Decal; On 22 May 2006 for multiple specifications as outline in the ROP, to include failure to report, disrespect to an NCO, making a false statement, and uttering a check for \$550.00 with insufficient funds; On 14 August 2006 for wrongful use of marijuana between 6 June 2006 and 6 July 2006.
 - On 13 September 2006, the applicant's immediate commander notified the applicant of his intent to separate him under the provisions of Chapter 14, Army Regulation 635-200, for serious misconduct.
 - On 28 September 2006, consistent with the chain of command recommendations, the separation authority approved the discharge recommendation for immediate separation, under the provisions of Chapter 14, AR 635-200, paragraph 14-12c for serious misconduct.
 - On 11 October 2006, he was discharged from active duty with an under other than honorable conditions characterization of service.

c. The military electronic medical record (AHLTA), VA electronic medical record (JLV), ROP, and casefiles were reviewed. A review of AHLTA shows the applicant's initial BH-related engagement occurred on 28 July 2005 whereby he contacted the psychiatry clinic with complaints of situational stressors, to include financial problems, learning that a child he believed was his was not, pending divorce, problems at work, and dealing with issues related to returning from deployment. He reported symptoms of insomnia, depressed mood, anxiety, nightmares, and increased alcohol use. He was diagnosed with Adjustment Disorder and scheduled for follow-up. Records show the applicant failed to attend the 4 August 2005 follow-up appointment, reportedly do to work requirements. The applicant's next BH encounter occurred on 16 April 2006 whereby he complained of stress related to a pending PCS to Fort Drum and denial of a compassionate reassignment request to Fort Rucker to be closer to his family. The applicant had reportedly come to attention of command for being significantly delayed in his out-process, which he attributed to work demands. He was offered the opportunity to engage in outpatient treatment until PCS, but decline, stating he would not be in the area long enough to benefit from therapy. On 17 August 2006 the applicant underwent a Chapter 14 MSE. He was diagnosed with Adjustment Disorder with Disturbance in Emotion and Conduct, the provider determined there was no psychiatric disease or defect that warranted disposition through medical channels. He was cleared for any administrative action deemed appropriate by the command, to include separation. AHLTA appears void of additional BH records, subsequent the MSE appointment.

d. A review of JLV shows the applicant is 70 SC for PTSD. PTSD DBQ, dated 30 August 2023, shows the applicant reported traumatizing experiences characterized by frequent rocket and mortar fire in Iraq, witnessed the vehicle in front of him in a convoy hit an IED wounding several Soldier, and witnessing a Soldier crushed between two vehicles. The examiner noted the applicant endorsed sufficient symptoms to continue meeting PTSD. He further noted the applicant was first diagnosed with PTSD, in 2022, while incarcerated for 1-year secondary to choking his partner. Records show that applicant's Initial PTSD DBQ, dated 4 June 2015, showed the applicant did not meet diagnostic criteria for PTSD. That provider noted that although the applicant reported potentially traumatizing experiences characterized by rocket and mortar attacks, and being on the FOB whereby a Soldier threw a grenade in a tent, killing the occupant, the applicant did not endorse bothersome re-experiencing or avoidant behavior.

e. Records show the applicant's initial BH engagement at the VA occurred on 6 March 2019, whereby he presented for an assessment for enrollment in the Strength at Home Program, a 12-week CBT program for applicants with relationship anger. The applicant reported currently being on probation after choking his girlfriend during an argument. He was diagnosed with Problems in Relationship with Spouse or Partner and was enrolled in the program. Encounter note dated 14 March 2019 shows the applicant

sought housing assistants after being disallowed to return to his friend home who had grown frustrated with the applicant's probation officer making random visits to his home. He was referred to the HCHV program. Encounter noted dated 18 March 2019 shows the applicant was informed that because of his UOTHC discharge he was not available for service.

f. The applicant sought assistance with homelessness, again, on 2 February 2022, and reported currently sleeping in a friend's vehicle for the past two months after returning to the area for NC. He was, again, referred to the HCHV program and provided housing at the Veterans' House. Encounter note dated 28 February 2022 shows he was kicked out of the Veterans' House for violating curfew. Records show the applicant engaged Veterans Justice Outreach between April 2022 and June 2022, while incarcerated at the Albany County Jail for violation of probation. The purpose for the engagement was to ensure housing and treatment access upon release from jail. Upon release, the applicant next BH-related engagement appears to have occurred on 30 August 2023 whereby he underwent a PTSD DBQ Examination and was found to meet criteria for PTSD related to military service. JLV shows the applicant with multiple additional encounters related to homelessness and engagement in the HUD/VASH program, but JLV appeared void of any specific BH treatment encounter.

g. The applicant requests upgrade of his UOTHC discharge to Honorable and contends his misconduct was related to PTSD. A review of the records shows the applicant diagnosed with Adjustment Disorder with Disturbance in Emotion and Conduct during service. Post-service records show his is 70 percent SC for PTSD related to combat exposure during his tour in Iraq. Although the applicant's Initial DBQ reflects he did not meet diagnostic criteria for PTSD due to denying re-experience and avoidance criteria, records show he later met diagnostic criteria while incarcerated in 2022 and, again, during his VA PTSD DBQ administered in 2023. As such, in applying liberal guidance, given there is an association between PTSD and avoidance and PTSD and problems with authority, there is a nexus between the applicant's misconduct characterized by FTR and disrespect in comportment to an NCO. However, the applicant's misconduct characterized by unlawful choking, theft of a decal, making official false statements, and uttering checks with insufficient funds is not mitigated as the behavior is not normal sequela of PTSD or Adjustment Disorder with Disturbance in Emotion and Conduct, and he did not have a condition that rendered him unable to differentiate between right and wrong and adhere to the right.

h. Based on the available information, it is the opinion of the Agency BH Advisor that there is sufficient evidence that the applicant had a condition or experience during his time in service that partially mitigated his misconduct.

i. 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 is diagnosed with PTSD secondary to a tank explosion during military service.

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

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. A review of the records shows the applicant diagnosed with Adjustment Disorder with Disturbance in Emotion and Conduct during service. Post-service records show his is 70 percent SC for PTSD related to combat exposure during his tour in Iraq. Although the applicant's Initial DBQ reflects he did not meet diagnostic criteria for PTSD due to denying re-experience and avoidance criteria, records show he later met diagnostic criteria while incarcerated in 2022 and, again, during his VA PTSD DBQ administered in 2023. As such, in applying liberal guidance, given there is an association between PTSD and avoidance and PTSD and problems with authority, there is a nexus between the applicant's misconduct characterized by FTR and disrespect in comportment to an NCO. However, the applicant's misconduct characterized by unlawful choking, theft of a decal, making official false statements, and uttering checks with insufficient funds is not mitigated as the behavior is not normal sequela of PTSD or Adjustment Disorder with Disturbance in Emotion and Conduct, and he did not have a condition that rendered him unable to differentiate between right and wrong and adhere to the right.

BOARD DISCUSSION:

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 request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The applicant tested positive for illegal drugs and committed other misconduct. As a result, his chain of command, initiated separation action against him for commission of a serious offense (his use of marijuana, disrespectful behavior towards a senior NCO, false official statements, uttering a check without sufficient funds, and stealing military property). He received an under other than honorable conditions 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 advising official. The Board concurred with the medical official's finding sufficient evidence to support the applicant had condition or experience that partially mitigated his misconduct. Although there may be a nexus between the applicant's misconduct characterized by FTR and disrespect in comportment to an NCO; however, his misconduct characterized by unlawful choking, theft of a decal, making official false statements, and uttering checks with insufficient funds is not mitigated as the behavior is not normal sequela of PTSD or Adjustment Disorder with Disturbance in Emotion and Conduct, and he did not have a condition that rendered him

unable to differentiate between right and wrong and adhere to the right. Therefore, based on a preponderance of available evidence, the Board determined that the character of service the applicant received upon separation were not in error or unjust.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
█	█	█	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

Except for the correction addressed in Administrative Note(s) below, 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.

ADMINISTRATIVE NOTE(S):

A review of the applicant's service record shows his DD Form 214 omitted an administrative entry and awards. As a result, amend the DD Form 214 as follows:

- Iraq Campaign Medal with two bronze service stars
- Item 18 (Remarks) - "Continuous Honorable Active Service from 20010201 to 20060308."

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.
 - a. Paragraph 3-7a (Honorable Discharge) states an honorable discharge is a separation with honor. 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 (General Discharge) states a general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.
 - c. Chapter 14 of the regulation states action will be taken to separate a Soldier for misconduct when it is clearly established that despite attempts to rehabilitate or develop him or her as a satisfactory Soldier, further effort is unlikely to succeed.
3. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to carefully consider the revised post-traumatic stress disorder (PTSD) criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged under other than honorable conditions and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.
4. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to 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, on 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.

5. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (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 based on equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

6. Section 1556 of Title 10, United States Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (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.

//NOTHING FOLLOWS//