

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 July 2024

DOCKET NUMBER: AR20230012465

APPLICANT REQUESTS:

- reconsideration of his previous request to upgrade of his already upgraded under honorable conditions (general) discharge
- as a new issue, assign a different, presumably more favorable, narrative reason for separation
- as a new issue, removal of his military ban from base

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

DD Form 149 (Application for Correction of Military Record) (2)

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20210005245 on 4 June 2021.
2. The applicant states his post-traumatic stress disorder (PTSD) went untreated and was not addressed properly by his first sergeant. He was untreated until his hospitalization. His mental health journey has been a long journey. He believes the ban should be removed.
3. A portion of the applicant's request concerns a change to his military base ban. This issue is outside the ABCMR's purview; therefore, it will not be further addressed.
4. Having had previous service in the Army National Guard, the applicant enlisted in the Regular Army on 17 April 2007. The highest grade he attained was E-4.
5. The applicant served in Iraq from 7 September 2007 to 30 October 2008.
6. A military police report shows that on 26 September 2009, the applicant was arrested and charged with willfully discharging a firearm as to endanger human life; criminal possession of a weapon 4th degree; wrongful damage to private property;

failure to obey a lawful order or written regulation; endangering the welfare of a child; and domestic disturbance.

7. Court-martial charges were preferred against the applicant on 7 January 2010, for violations of the Uniform Code Military Justice. His DD Form 458 (Charge Sheet) shows he was charged with:

- one specification of failing to obey a lawful order on or about 26 September 2009
- one specification of wrongfully discharging a firearm on or about 26 September 2009
- and one specification of knowingly and wrongfully possessing a weapon on or about 26 September 2009.

8. Before a summary court-martial on 22 January 2010, at Fort Drum, NY, the applicant was found guilty of disobeying a lawful order; willfully and wrongfully discharging a firearm; and knowingly and wrongfully possessing a weapon. The court sentenced the applicant to reduction in grade to E-1 and forfeiture of \$724.00. The sentence was approved, and ordered to be duly executed.

9. On 4 February 2010, the applicant underwent a mental status evaluation. He was psychiatrically cleared to participate in any administrative action deemed appropriate by the command. However, he was diagnosed with adjustment disorder and alcohol abuse.

10. The applicant's commander notified the applicant on 19 February 2010, that he was initiating actions to separate him under the provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), Chapter 14-12c, for commission of a serious offense. As specific reasons, the commander noted the applicant had pled and was found guilty at his summary court-martial.

11. On 23 February 2010, the applicant acknowledged he received notification of the basis for the contemplated action to separate him, its potential effects, and the rights available to him. He declined the opportunity to consult with counsel and submit a statement in his own behalf. He unconditionally waived his right to appear before an administrative separation board. He indicated he understood that by electing the unconditional waiver, it is possible the Army will discharge him with a character of service as under other than honorable conditions (UOTHC). He indicated he understood that he may expect to encounter substantial prejudice in civilian life if a discharge/character of service that is less than honorable was issued to him.

12. The applicant's commander formally recommended his separation under the provisions of AR 635-200, Chapter 14-12c.

13. Consistent with the chain of command's recommendations, the separation authority directed the applicant's separation on 3 March 2010, with an UOTHC characterization of service.

14. The applicant was discharged on 8 March 2010, in the rank/grade of private/E-1. He was credited with 2 years, 11 months, and 26 days of net active service this period. His DD Form 214 (Certificate of Release or Discharge from Active Duty) contains the following entries in:

- Item 24 (Character of Service) – Under Honorable Conditions (General)
- item 25 (Separation Authority) – AR [Army Regulation] 635-200, Chapter 14-12c
- item 26 (Separation Code) – JKQ
- item 27 (Reentry Code) – RE-3
- item 28 (Narrative Reason for Separation) – Misconduct (Serious Offense)

15. Additionally his DD Form 214 shows he was awarded or authorized the:

- Army Achievement Medal
- National Defense Service Medal
- Global War on Terrorism Service Medal
- Iraq Campaign Medal with Campaign Star
- Army Service Ribbon
- Overseas Service Ribbon

16. The applicant petitioned the Army Discharge Review Board requesting upgrade of his UOTHC discharge. On 29 August 2012, the Board voted to deny relief and determined his discharge was both proper and equitable.

17. The applicant petitioned the ABCMR requesting upgrade of his UOTHC discharge. On 4 June 2021, After reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined relief was warranted. The Board considered the applicant's statement, his record of service to include deployment, the frequency and nature of his misconduct, a court-martial and the reason for his separation. The Board considered the review and conclusions of the medical advisor and the applicant's diagnoses. Based upon the lengthy term of honorable service completed prior to a single incident of misconduct leading to the applicant's separation and sufficient evidence of mitigating factors, the Board concluded granting clemency by upgrading the applicant's characterization of service to General, Under Honorable Conditions was appropriate.

18. On 17 November 2021, the applicant was reissued a DD Form 214, adding to item 24 (Character of Service): under honorable conditions (general).

19. 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.

20. MEDICAL REVIEW:

1. The applicant is applying to the ABCMR requesting to update his DD 214 to reflect his previous upgrade to Under Honorable Conditions (General), update his narrative reason for separation and removal of his ban from military bases. The ROP specifies that the applicant is requesting an upgrade to his characterization of service; however, per this Advisor's review of the applicant's application, there is no indication that the applicant is requesting an additional upgrade in characterization of service. The request to remove his ban from military bases is outside of the purview of the ABCMR and therefore will not be addressed by this advisor. He contends he experienced Posttraumatic Stress Disorder (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 Army National Guard (ARNG) on 17 April 2007 and achieved the rank of E-4, 2) the applicant served in Iraq from 07 September 2007 to 30 October 2008, 3) on 26 September 2009, the applicant was arrested for willfully discharging a firearm to endanger human life; criminal possession of a weapon 4th degree; wrongful damage to private property; failure to obey a lawful order or written regulation, endangering the welfare of a child; and domestic disturbance, 4) at a summary court-martial on 22 January 2010, the applicant was found guilty of disobeying a lawful order, willfully and wrongfully discharging a firearm, and knowingly and wrongfully possessing a weapon, 5) the applicant was psychiatrically cleared for administrative separation on 04 February 2010 and was diagnosed with Adjustment Disorder and Alcohol Abuse, 6) the applicant earned several medals and ribbons during his service, notably an Army Achievement Medal and Iraq Campaign Medal with Campaign Star, 7) the applicant was discharged on 08 March 2010 under the provisions of Army Regulation (AR) 635-200, Chapter 14-12c, Commission of a Serious Offense, 8) the applicant previously petitioned the ABCMR requesting an upgrade of his UOTHC discharge and on 04 June 2021 the board granted relief and upgraded his discharge to Under Honorable Conditions (general).

2. The Army Review Board Agency (ARBA) Medical Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

3. Review of his military service record reflects that he was discharged from the ARNG on 01 December 2006 under the provisions of NGR 600-200, 8-35c due to failure to meet medical procurement standards and service was uncharacterized. There is no

additional information available as to the specified reason for failure to meet medical procurement standards. Records show the applicant's DD 214 dated 17 November 2021 was re-issued with an updated characterization of service as under honorable conditions (general).

4. Sworn statements from the incident that led to the applicant's discharge were reviewed. Per statements from multiple witnesses, the day of the incident applicant had been drinking alcohol and was handling the firearm he had purchased from another Soldier. The applicant was storing the firearm at his friend's house, where the incident occurred.

5. The applicant's in-service medical record shows he first sought treatment as a walk-in on 29 May 2009 due to irritability, poor sleep, poor concentration, poor short-term memory, and episodes of crying. During the visit he also endorsed anhedonia, amotivation, fatigue, nightmares, hypervigilance, and exaggerated startle response. He denied suicidal ideation (SI) at the time of the visit though endorsed fleeting homicidal ideation (HI). At the time of the visit the applicant's commander was contacted and it was recommended that access to weapons be temporarily denied. He was diagnosed with Adjustment Disorder with Anxiety at the time of the visit. The applicant was psychiatrically hospitalized for six days in July 2009. The applicant was psychiatrically hospitalized again in September 2009 following the incident with the gun. Following his psychiatric hospitalization, the applicant was referred to the Army Substance Abuse Program (ASAP) on 06 October 2009 due to reported heavy drinking. The applicant appeared to complete all appointments required through ASAP while enrolled and maintained his abstinence from alcohol during that time. It was documented in February 2010 that the applicant reported after having not drunk alcohol for several months that he recognized there was an association between his behavior and use of alcohol. While in-service the applicant was treated with numerous medications to include Gabapentin, Mirtazapine, Trazodone, Citalopram, Nortriptyline, and Quetiapine.

6. An in-service Report of Medical Examination on DD Form 2808 dated 26 January 2010 recorded psychiatric as 'normal' on clinical evaluation. It was also documented that he had 'behavioral health issues' on item number 77, summary of defects and diagnoses. On DD Form 2807-1 dated 26 January 2010, the applicant endorsed feeling nervous, having difficulty sleeping, having received counseling, and had been evaluated for a mental condition. The applicant underwent a Mental Status Examination in conjunction with his Chapter 14 separation and was diagnosed with Adjustment Disorder and Alcohol Abuse. It was documented that the applicant met retention standards and was cleared for administrative action deemed appropriate by his commander.

7. Review of JLV shows the applicant is 70% service-connected (SC) through the VA for PTSD. He is also SC for tinnitus, traumatic arthritis, limited motion of arm, hiatal

hernia, and asthma-bronchial. The disability benefits questionnaire (DBQ) dated 28 November 2011 cites the traumatic event(s) as worried about getting killed by IEDs or mortars with one IED hitting his vehicle, attacked by small arms fire and civilian casualties. The VA examination cited military treatment records as part of the evidence establishing SC for PTSD. Specifically, it was cited that the applicant was diagnosed with PTSD, Depressive Disorder NOS and History of Alcohol Abuse on 21 July 2009 following his inpatient psychiatric hospitalization. It was also noted that his in-service treatment record dated 21 December 2009 documented that the applicant was "likely suffering from post-traumatic stress disorder." The records documenting these diagnoses were not available to this Advisor.

8. The previous medical opine in 2021 determined that the applicant's BH diagnoses did not mitigate the behavior that led to discharge and that he did not have a condition at the time of discharge that would have warranted disposition through medical channels. The applicant's in-service diagnosis of PTSD was also noted in the opine; however, the in-service records diagnosing PTSD are not available to this writer though the report is consistent with the VA C&P documentation.

9. The applicant is petitioning the Board update his DD 214 to reflect his previous upgrade to Under Honorable Conditions (General) and update his narrative reason for separation. The applicant contends he had PTSD and that mitigates his misconduct. After review of all available information, the applicant is diagnosed and service connected by the VA with PTSD, which is a mitigating BH condition. The applicant was diagnosed with Adjustment Disorder with Anxiety in-service in 2009 following his return from Iraq and the symptoms that were documented at the time of diagnosis are consistent with PTSD (e.g., irritability, poor sleep, poor concentration, poor short-term memory, episodes of crying, anhedonia, amotivation, fatigue, nightmares, hypervigilance, and exaggerated startle response) prior to the incident that led to his discharge. The applicant was also psychiatrically hospitalized twice while on active duty, once prior to the incident and once after.

10. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant is 70% SC through the VA for PTSD. The applicant exhibited symptoms consistent with PTSD while in-service and was diagnosed with Adjustment Disorder with Anxiety.

(2) Did the condition exist or experience occur during military service? Yes, the applicant is diagnosed with PTSD and exhibited symptoms consistent with PTSD while in-service.

(3) Does the condition experience actually excuse or mitigate the discharge? No. The applicant asserts mitigation due to PTSD at the time of his discharge and has been

awarded 70% VA service connection for PTSD. Although PTSD is a BH mitigating condition, specific to the misconduct that resulted in the applicant's discharge, disobeying a lawful order (i.e., failing to register his firearm at Ft. Drum), wrongful possession of a firearm, and willfully and wrongfully discharging a firearm, these behaviors are not consistent with the natural sequelae of PTSD. As PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right, consistent with the previous advisor's opine, BH medical mitigation is not supported.

11. Regarding his request to upgrade his narrative reason for separation, his narrative reason for discharge and separation code appear equitable based on the circumstances of his discharge. VA examinations are based on different standards and parameters; they do not address whether a medical condition met or failed Army retention criteria or if it was a ratable condition during the period of service. Therefore, a VA disability rating does not imply failure to meet Army retention standards at the time of service or that a different diagnosis rendered on active duty is inaccurate. A subsequent diagnosis of PTSD through the VA is not indicative of a misdiagnosis or other injustice at the time of service. Furthermore, even an in-service diagnosis of PTSD is not automatically unfitting per AR 40-501 and would not automatically result in medical separation processing. Specific to this applicant, review of records shows he was not placed on a profile for behavioral health reasons at the time of discharge. Furthermore, his chapter separation evaluation determined that he met retention standards and did not require disposition through medical channels. Records indicate the applicant required restriction of firearms in May 2009 due to homicidal ideation and was psychiatrically hospitalized in July 2009 and September 2009. Despite his duty limitations and psychiatric hospitalizations, documentation indicated that the applicant's condition improved with treatment, abstinence from alcohol, and pending his separation from the military. As such, there is no indication that the applicant met the medical determination retention point (MRDP) and thus no indication that referral to IDES was warranted at the time of his discharge.

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.

a. Discharge Upgrade: Deny. The evidence shows the applicant committed a serious offense. As a result, his chain of command, initiated separation action against him. He received a general discharge. The Board found no error or injustice in his separation processing. The Board noted that he completed 2 years and 11 months of service, and determined a general discharge is the appropriate characterization given the applicant's serious misconduct. Also, the applicant provided no evidence of post-service achievements or letters of reference of a persuasive nature in support of a

clemency determination. Based on a preponderance of evidence, the Board determined that the character of service and reason for separation the applicant received upon separation were not in error or unjust.

b. Narrative Rason for Separation: Deny. The Board noted that the applicant's narrative reason for separation was assigned based on the fact that he was discharged under chapter 14 of AR 635-200 due to serious misconduct. 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 14-12c is "Misconduct" and the appropriate separation code associated with this discharge is JKQ. The Board found no error or injustice.

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.

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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, U.S. Code, Section 1556, 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.

2. Army Regulation 635-5-1 (Separation Program Designator (SPD) 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. At the time, this regulation prescribed the separation code "JKQ" is the appropriate code to assign Soldiers separated under the provisions of Army Regulation 635-200, for misconduct (serious offense).

3. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel.

a. 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. 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 (Separation for Misconduct) established policy and prescribed procedures for separating members for misconduct. It states that action will be initiated to separate a Soldier for misconduct when it was clearly established that rehabilitation was impracticable or unlikely to succeed. Paragraph 14-12c (Commission of a Serious Offense) applied to commission of a serious military or civil offense, if the specific circumstances of the offense warrant separation and a punitive discharge is, or would be, authorized for the same or a closely related offense. First time offenders below the grade of sergeant, and with less than 3 years of total military service, may be processed for separation as appropriate.

4. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR), on 3 September 2014, to carefully consider the revised 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.

5. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating 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 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//