

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 June 2024

DOCKET NUMBER: AR20230013279

APPLICANT REQUESTS: an upgrade of his under honorable conditions (general) discharge to an honorable discharge.

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) Rating Decision

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), Section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states he failed a urinalysis test because he was using marijuana as a means to help him sleep and to cope with post-traumatic stress disorder (PTSD) he incurred during a deployment to Iraq.
3. The applicant enlisted in the Regular Army on 14 August 2001 for a period of 3 years in the rank/grade of private (PV1)/E-1. Upon completion of initial entry training, he was awarded military occupational specialty 19D (Cavalry Scout) and assigned to a unit at Fort Benning, GA. He was advanced to the rank/grade of private first class (PFC)/E-3 on 14 August 2002, and that was the highest rank he held.
4. The applicant was counseled on 16 December 2003 regarding his positive test result for Tetrahydrocannabinol (the primary active ingredient in marijuana) following a unit urinalysis conducted on 2 December 2003. The applicant was advised that drug use is not tolerated in the U.S. Army and that he would be recommended for punishment and possible separation from the Army. He was further advised that any further misconduct could adversely impact the characterization of his service.

5. The applicant's duty status was changed from Present for Duty (PDY) to Absent Without Leave (AWOL) on 22 December 2003 and from AWOL to PDY on 4 January 2004.

6. On 8 January 2004, the applicant accepted nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (USMJ) for wrongfully using marijuana between on or about 16 November 2003 and on or about 2 December 2003. His punishment consisted of reduction to PV1/E-1; forfeiture of \$575.00 pay per month for 2 months; restriction for 45 days; and extra duty for 45 days.

7. On 8 January 2004, the applicant was counseled by his squad leader who advised him that receiving NJP was not the end of the world and there was no reason for him to go out and do something self-destructive. He further advised the applicant that if he stayed out of trouble, he would get his rank back. Finally, he advised the applicant that the chain of command would not tolerate any more misconduct and he could end up in confinement.

8. The applicant's duty status was changed from PDY to AWOL on 9 January 2020 and from AWOL to PDY on 20 January 2004.

9. On 20 January 2004, the applicant was counseled regarding his periods of AWOL and advised that his chain of command was considering initiating action under the UCMJ. He was further advised that this type of behavior could result in the initiation of action to have him administratively separated from the Army and the potential impact of such a separation.

10. On 20 January 2004, an administrative flag was imposed upon the applicant to prevent him from receiving favorable personnel actions because he was pending field initiated elimination.

11. The applicant underwent a command-directed mental status evaluation on 21 January 2004. It was determined that he had the mental capacity to understand and participate in the proceedings. No mental health problems were seen which required disposition through medical channels. The applicant was cleared for any administrative action deemed appropriate by command.

12. The applicant underwent a separation medical examination and was found to be qualified for administrative separation.

13. On 11 February 2004, the applicant's immediate commander informed the applicant that he was initiating action to separate him under the provisions of provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), paragraph 14-12c for misconduct-commission of a serious offense. The specific reason for this action

was the applicant's use of marijuana and his periods of AWOL. The applicant's commander informed him he was recommending that he receive an under honorable conditions (general) characterization of service. The applicant acknowledged receipt of the notification on the same day.

14. The applicant's immediate commander formally recommended approval of his separation and issuance of a general discharge.

15. The applicant consulted with counsel and rendered his election of rights. The applicant requested to be represented by counsel but elected not to submit statements in his own behalf.

16. A legal review determined all procedural requirements had been complied with and the intermediate commander concurred with the recommended separation action.

17. The separation authority approved the recommended separation and directed the applicant's service be characterized as general, under honorable conditions.

18. Orders and the applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) show he was discharged on 30 March 2004 in the rank/grade of PV1/E-1, under the provisions of Army Regulation 635-200, paragraph 14-12c, due to misconduct. His service was characterized as under honorable conditions (general). He was credited with completion of 2 years, 5 months, and 28 days of net active service. He had time lost due to AWOL from 22 December 2003 to 3 January 2004 and from 9 January 2004 to 19 January 2004. He did not complete his first full term of service.

19. The applicant provides a VA Rating Decision which shows, in part, the VA granted him a disability evaluation of 70 percent due to service connected PTSD effective 25 April 2019.

20. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition.

21. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under honorable conditions (general) discharge to an honorable discharge. The applicant contends PTSD mitigates his discharge.

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 14 August 2001.

- Applicant was counseled on 16 December 2003 regarding his positive test result for Tetrahydrocannabinol (the primary active ingredient in marijuana) following a unit urinalysis conducted on 2 December 2003. The applicant was advised that drug use is not tolerated in the U.S. Army and that he would be recommended for punishment and possible separation from the Army. He was further advised that any further misconduct could adversely impact the characterization of his service.
- Applicant's duty status was changed from Present for Duty (PDY) to Absent Without Leave (AWOL) on 22 December 2003 and from AWOL to PDY on 4 January 2004.
- On 8 January 2004, the applicant accepted nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (USMJ) for wrongfully using marijuana between on or about 16 November 2003 and on or about 2 December 2003.
- Applicant's duty status was changed from PDY to AWOL on 9 January 2004 and from AWOL to PDY on 20 January 2004.
- On 11 February 2004, the applicant's immediate commander informed him that he was initiating action to separate him under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), paragraph 14-12c for misconduct-commission of a serious offense. The specific reason for this action was the applicant's use of marijuana and his periods of AWOL. The applicant's commander informed him he was recommending that he receive an under honorable conditions (general) characterization of service. The applicant acknowledged receipt of the notification on the same day.
- Orders and the applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) show he was discharged on 30 March 2004 in the rank/grade of PV1/E-1, under the provisions of Army Regulation 635-200, paragraph 14-12c, due to Misconduct with Separation Code "JKK" and Reentry Code "3." His service was characterized as under honorable conditions (General).

c. Review of Available Records: The Army Review Boards Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant states he failed a urinalysis test because he was using marijuana as a means to help him sleep and to cope with post-traumatic stress disorder (PTSD) he incurred during a deployment to Iraq. Due to the period of service no active-duty electronic medical records were available for review. However, hardcopy documentation shows the applicant underwent a command-directed mental status evaluation on 21 January 2004. No significant mental health condition was noted, and it was determined that he had the mental capacity to understand and participate in the proceedings. The applicant was cleared for any administrative action deemed appropriate by command. The applicant underwent a separation medical examination and was found to be qualified for administrative separation. In his separation physical he did not endorse any mental health symptoms including depression, anxiety, or trouble sleeping.

d. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is 80% service connected including 70% for combat-related PTSD. He initially engaged in behavioral health services via the VA in April 2005 and participated in a specialized PTSD medication treatment program. The applicant disengaged from service in October 2005 and later re-engaged in treatment in April 2019. The applicant's record indicates he has been diagnosed with PTSD, Major Depressive Disorder, and Anxiety Disorder. He is primarily treated via medication management.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence the applicant had an experience and subsequent behavioral health condition during military service that mitigates his discharge.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts a mitigating condition.

(2) Did the condition exist or experience occur during military service? Yes. The applicant deployed to a combat zone, Iraq, and is 70% service-connected for combat-related PTSD.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. The applicant was discharged due use of marijuana and his periods of AWOL. Given the nexus between PTSD and the use of substances to alleviate/cope with the symptoms of his behavioral health condition, the applicant's use of marijuana is mitigated by his diagnosis of PTSD. In addition, given the nexus between PTSD and avoidance, the applicant's periods of AWOL are also mitigated by his BH condition.

BOARD DISCUSSION:

1. The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service to include deployment, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the applicant's PTSD claim and the review and conclusions of the ARBA Behavioral Health Advisor.

2. The Board concurred with the conclusion of the medical advising official regarding his misconduct being mitigated by PTSD. Based on a preponderance of the evidence, the Board determined the applicant's character of service should be changed to honorable.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

█	█	█	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

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 reissuing his DD Form 214 to show his character of service as honorable.

12/19/2024

X

CHAIRPERSON

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. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part to those conditions or experiences. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

6. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and BCM/NRs regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal

sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, Boards shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

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

//NOTHING FOLLOWS//