

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 24 September 2024

DOCKET NUMBER: AR20230013920

APPLICANT REQUESTS:

- upgrade of his Bad Conduct Discharge (BCD) to either Honorable or Under Honorable Conditions (General)
- his Separation Program Designator (SPD) code and narrative reason for separation be amended to reflect "Secretarial Authority"
- recognition of his pre-stop loss period of service as honorable
- to appear in person at his own expense before the Board in Washington, DC

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Self-authored declaration
- Counsel Brief and 7 enclosures (715 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, when he got out of the Army, he tried to go to school. Since his junior year in high school his plan was to use his military service to pay for college. Instead, he ended up working his way through college at different places. He earned his associate degree and worked his way up to assistant project manager and other similar jobs in automated systems and robotics. Now he is a commissioning engineer. He has not had any legal trouble since leaving the service other than speeding tickets. He realizes he could have handled things better when he was in the Army. Now that he is older and more mature, he understands the mistakes he made. He remembers feeling like he had exhausted all of his options and was in a losing situation. He had to either let his mother down by failing to deal with the legal issues related to her car or fail to perform his military duty. He was supposed to be discharged early to go to school, even with the "Stop loss" policy in effect; but issues with processing some of the required

forms caused the request he submitted to his command to be sent back, and put him in the stop loss category. He was already enrolled in school for the Fall Semester of 2005.

3. Counsel provides a brief and seven enclosures, all of which are available in their entirety for the Board's consideration. Counsel states, he submits evidence and argument that clemency should be given, the applicant's BCD should be changed to either honorable or general and his narrative reason for discharge should be changed to secretarial discretion. The applicant was impacted by a mental health issue related to service in Iraq, the stress of family issues, and the extension of his service through stop loss. In the alternative, the applicant's service should be altered to show a general or honorable discharge on 15 October 2005, with a second period of service beginning on 16 October 2005, in order to establish a pre-stop loss period of service.

a. The applicant entered service on 16 October 2001 for a period of 4 years, with an expected discharge of 15 October 2005. He intended to attend college after his discharge from service. During his service, he earned an Army Commendation Medal (ARCOM) and two Army Good Conduct Medals (AGCM).

b. In early 2003, the applicant deployed as part of the initial combat operations of Operation Iraqi Freedom. This was difficult for him and involved exposure to enemy fire. While deployed, his mother had a health issue that required him to return home. While at home, he used marijuana to deal with the stress of his mother's situation. He felt he needed the marijuana to relax but had not felt that way previously. He did have issues with returning to Iraq at this time and was motivated to resume his duties. He performed additional overseas service in Iraq and Kuwait from 2003 to 2004.

c. The applicant was supposed to be given an early discharge in August 2005 and planned to attend a school that he had already been accepted to, but was involuntarily extended through stop loss when the discharge paperwork was not filed quickly enough. He found out about the continuation of his service after his deployment ended and learned that he was to be redeployed.

d. When he returned, he had an issue involving his mother's car. He was vocal in his representations that he would not return to Iraq immediately because he did not want to leave this issue unresolved. He felt that he would be killed when he went back to Iraq. His deployment would require him to perform ground surveillance and would involve driving on roads that would expose him to improvised explosive devices. He began having symptoms that would eventually be treated with anti-depressants and sleep aids.

e. The applicant went absent without leave (AWOL) in November 2005 and returned in December 2005. A Department of Veterans Affairs (VA) examination confirmed that he had both an adjustment disorder and depression while he was in the Army. An

independent medical opinion has noted the substantial effect these conditions had on the applicant's state of mind and behavior and shows a diagnosis of post deployment disorder in addition to an adjust disorder and depression.

f. The Board should grant clemency and change the applicant's discharge. He made a mistake related to his second deployment, but his misconduct is mitigated by the effects of mental health issues and stop loss. He has been sufficiently punished for his misconduct.

g. Through his initial periods of service, the applicant demonstrated good performance of duty and a willingness to sacrifice his life for his country. This experience took its toll; however, as did competing responsibilities between his mother, who had been ill, and his military duties. The conditions resulting from these stresses are well documented: depression, adjustment disorder, and stress disorder. As is the effect these conditions had on him: nightmares, insomnia, and anger.

h. The applicant enlisted for 4 years and was preparing for discharge on 15 October 2005, but was involuntarily extended under the stop loss policy. Stop loss extended Soldiers beyond their expected separation date and prevented the release of entire units, focusing on the needs of our country and the Armed Forces rather than the needs of any individual Soldier. This program was a controversial measure that was opposed by many high-ranking officials. In January 2007, the Secretary of Defense ordered the Armed Service to lessen the use of stop loss, and on 18 March 2007, the phased cessation of stop loss was announced. Had the applicant not been involuntarily extended, he would have been discharged under at least honorable conditions. Although his marijuana usage pre-dated the end of his enlistment contract, there is no indication that it was being considered sufficient to discharge him under less than honorable conditions.

i. To the extent the Board does not grant an upgrade of the applicant's discharge, it should create two periods of service to reflect the injustice of stop loss on his case. The Board should enter a period of service ending on 15 October 2005 with a reenlistment and second period following on 16 October 2005. The characterization of service for this initial period of service should be at least General.

j. Counsel provides the following documents in support of the brief:

(1) An expert medical opinion rendered by a licensed Clinical Psychologist who has had no previous professional or personal contact with the applicant. His expert opinion was based on his objective holistic review of an electronic version of the applicant's military and VA medical records. He found no reason to believe an in-person mental health examination would in any way change the opinions contained in the report. Based on his education, training, professional experience, holistic review as well

as careful consideration of the available documents and research, it is the author's professional opinion that the following are at least as likely as not true:

(a) He found no objective reliable evidence showing the applicant suffered from a mental health condition prior to military service.

(b) Service treatment records confirmed he suffered the onset of a Depressive Disorder, Adjustment Disorder, and Post deployment stress disorder during active service following his deployment to Iraq.

(c) He found no objective reliable evidence showing the applicant met criteria for any form of substance use disorder during active military service.

(d) The applicant's service-incurred Depressive Disorder, Adjustment Disorder, Post deployment stress disorder, and marijuana use are best understood as components of post-traumatic stress disorder (PTSD).

(e) The applicant's uncharacteristic deviations in military performance were directly caused by his service-connected PTSD and not willful misconduct.

(f) His service-connected PTSD directly caused him to be "insane" as defined by VA regulation at the time of his uncharacteristic deviations in military performance.

(g) The applicant's active service in the Army warrants a discharge recharacterization from Bad Conduct to Honorable in accordance with guidance provided in Department of Defense policy letters.

(2) Secretary of Defense Memorandum for Secretaries of the Military Departments, Subject: Supplemental Guidance to Military Boards for Correction of Military/Naval Records (BCM/NRs) Considering Discharge Upgrade Requests by Veterans Claiming PTSD, dated 3 September 2014 (referred to as the Hagel Memo)

(3) Office of the Under Secretary of Defense Memorandum for Secretaries of the Military Departments, Subject: Clarifying Guidance to Military Discharge Review Boards (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 (referred to as the Kurta Memo)

(4) Under Secretary of Defense Memorandum for Secretaries of the Military Departments, Subject: Guidance to Military DRBs and BCM/NRs Regarding Equity, Injustice, or Clemency Determinations, dated 25 July 2018 (referred to as the Wilkie Memo)

(5) Congressional Research Service, U.S. Military Stop Loss Program: Key Questions and Answers, dated 10 July 2009. (21 pages)

(6) The applicant's military personnel record. (52 pages)

(7) The applicant's claim for VA disability claim and multiple appeals to overturn the VA's decision to deny the applicant's request based on the fact that his BCD renders him ineligible to receive VA benefits. (596 pages)

4. On 21 September 2001, the applicant enlisted in the U.S. Army Reserve under the Delayed Entry Program with a projected Regular Army enlistment date of 16 October 2001.

a. However, he did not enlist in the Regular Army until 13 November 2001, for a period of 4 years, which established his expiration term of service (ETS) date as 12 November 2005.

b. Upon completion of initial entry training, he was awarded military occupational specialty (MOS) 96R (Ground Surveillance Systems Operator) and assigned to a unit at Fort Campbell, KY.

5. The applicant was advanced to the rank/grade of specialist (SPC)/E-4 on 1 May 2004, the highest rank he held while serving.

6. Permanent Orders 322-015 issued by 81st Brigade Troops Battalion, 3rd Brigade Combat Team, 101st Airborne Division (Air Assault), Fort Campbell, KY on 17 November 2004 shows the applicant was awarded the AGCM (1st Award) for exemplary behavior, efficiency, and fidelity in active federal military service from 13 November 2001 through 12 November 2004.

7. The applicant's record contains a Stipulation of Fact rendered in the Fifth Judicial, U.S. Army Contingency Operating Base Speicher, Iraq, for the case of the United States of America versus the applicant, dated 23 February 2006. This document shows, in part:

a. The Accused [the applicant] deployed with the 101st Airborne Division (Air Assault) in Operation Iraqi Freedom during initial combat operations in 2003. On 22 December 2005, he again deployed with the 3rd Brigade Combat Team to Iraq in support of Operation Iraqi Freedom. His unit had been stationed at three Forward Operating Bases in Iraq. He had been on continuous active duty since 13 November 2001. He had earned two ARCOMs for his service.

b. On 3 November 2005, the accused quit his place of duty at Fort Campbell, KY. Because he verbalized his intention not to deploy, he was being watched by two noncommissioned officers (NCOs) on 3 November 2005. He quickly walked away from these two Soldiers and out of a building to an awaiting vehicle. The applicant had arranged for a car to be waiting for him to help him get away from his unit the day before he was to deploy to Iraq. As the accused had arranged, an unknown person was waiting outside of the building in a running vehicle. The person was waiting for him to exit the building so he could help the accused leave his unit. After the accused left the building, Sergeant (SGT) Y\_\_ saw him and attempted to stop him from deserting the unit. The accused previously told SGT Y that he was not going to deploy with the unit. SGT Y stood between the accused and the passenger car door and told him that he did not need to do this. The accused responded, "I know." Although SGT Y was leaning on the car door, the accused pulled the car door open, forcing her to get out of his path. He entered the passenger side of the vehicle and rode away from his unit, not looking rearward to see who saw him leave. The accused intentionally remained absent from his unit until 2 December 2005.

c. The accused was listed on military orders and manifested to fly to Iraq from Fort Campbell on 4 November 2005 to deploy with his unit in support of Operation Iraqi Freedom. On 19 October 2005, his immediate commander formally counseled the accused to inform him that he was deploying to Iraq and that he needed to accomplish all pre-deployment preparations. The accused knew that he was scheduled to fly to Iraq and was ordered to do so by his immediate commander. He left his place of duty on 3 November 2005 to avoid deploying to Iraq on 4 November 2005 because he wanted to avoid the hazardous duty of serving in Iraq. He verbalized his intent to avoid the deployment because he knew it was hazardous duty. The accused told numerous Soldiers, NCOs, and his commander, that he did not want to go to Iraq because he thought he was going to be killed in action. He considered several methods to avoid the deployment, to include saying he was gay, saying he was a felon, that he was being administratively separated from the Army, or adopting a child. He was counseled by NCOs and his commander and advised that he could be charged with, among other offenses, Desertion if he chose not to deploy.

d. On 7 September 2005, the accused's company commander ordered him to produce a urine sample based on probable cause to believe that he had been using a controlled substance. The accused produced a sample of his urine on 7 September 2005. The U.S. Army Forensic Toxicology Drug Testing Laboratory analyzed the urine specimen and determined that it contained marijuana metabolites. The urinalysis and subsequent laboratory analysis were conducted in accordance with all applicable regulations and procedures, and there is no reason to doubt the accuracy or reliability of this test. His urine sample tested positive for marijuana because he used marijuana within one week of the urinalysis. The accused knew that he used marijuana because

he rolled the marijuana cigarette, lit it, placed it to his lips, and inhaled the smoke into his lungs.

8. A DA Form 4430 (Department of the Army Result of Trial) shows the applicant was tried and convicted by a General Court-Martial (GCM) on 6 March 2006. The court sentenced him to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 12 months, and to be discharged from the service with a BCD.

9. On 30 April 2006, the Staff Judge Advocate (SJA) recommended the GCM Convening Authority (GCMCA) approve the sentence.

10. On 23 May 2006, through his defense counsel, the applicant submitted a post-trial request for discharge in lieu of trial by court-martial under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 10.

11. On 31 May 2006, the applicant underwent a pre-separation medical examination and was found to be qualified for separation without any defects or diagnoses.

12. On 3 June 2006, the SJA rendered a revised post-trial recommendation wherein he recommended the GCMCA disapprove the applicant's request for a post-trial administrative separation under the provisions of Army Regulation 635-200, Chapter 10, and approve only so much of the sentence as provided for reduction from SPC/E-4 to private/E-1, forfeiture of all pay and allowances, confinement for 4 months, and a BCD. After considering the defense matters and all related testimony and correspondence, the GCMCA approved the recommendations of the SJA.

13. General Court-Martial Order (GCMO) Number 2, issued by Headquarters, 101st Airborne Division (Air Assault), Task Force Band of Brothers, Contingency Operating Base Speicher, Iraq on 3 June 2006 shows the applicant was tried and convicted by a GCM.

a. He pled guilty and was found guilty of the following charges and specifications in violation of the Uniform Code of Military Justice (UCMJ).

(1) Charge I, Article 85, UCMJ: The Specification: on or about 3 November 2005, with intent to avoid hazardous duty, quitting his unit and remaining so absent in desertion until on or about 2 December 2005.

(2) Charge III, Article 112, UCMJ: Specification 1: between on or about 7 August 2005 and 7 September 2005, wrongfully using marijuana.

b. The applicant's sentence consisted of reduction to PV1/E-1, forfeiture of all pay and allowances, confinement for 12 months, and a BCD. The sentence was adjudged on 6 March 2006.

c. Only so much of the sentence as provided for reduction to E-1, forfeiture of all pay and allowances, confinement for 4 months, and a BCD was approved, and, except for the BCD was ordered to be executed.

14. The U.S. Army Court of Criminal Appeals affirmed the sentence on 27 April 2006. The applicant and his counsel appealed the decision.

15. On 17 July 2007, the U.S. Court of Appeals for the Armed Forces denied the applicant's appeal.

16. GCMO Number 240 issued by Headquarters, U.S. Army Field Artillery Center and Fort Sill, Fort Sill, OK on 30 August 2007 shows the applicant's sentence had been finally affirmed. The portion of the sentence extending to confinement had been served, and the BCD was ordered to be duly executed.

17. Orders and the applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) show the applicant was discharged on 21 September 2007 under the provisions of Army Regulation 635-200, Chapter 3, as a result of "Court-Martial, Other." He was assigned SPD code "JJD" and Reentry code "4." His service was characterized as "Bad Conduct." He had 4 months and 11 days of lost time due to AWOL from 4 November 2005 until 5 December 2005 (1 month and 2 days) and due to confinement from 6 March 2006 until 14 June 2006 (3 months and 9 days). He did not complete his first full term of service. He was awarded or authorized the:

- Army Commendation Medal
- Army Good Conduct Medal (2nd Award)
- Army Service Ribbon
- Air Assault Badge

18. Although the applicant enlisted in the Regular Army on 13 November 2001, Item 12a (Date Entered Active Duty This Period) of his DD Form 214 erroneously indicates that he entered active duty on 16 October 2001. Since he was discharged on 21 September 2007, the erroneous entry date resulted in an erroneous entry in Item 12c (Net Active Service This Period) which credited him with completion of 5 years, 6 months, and 25 days of net active service instead of 5 years, 5 months, and 29 days after subtracting his non-creditable 4 months and 11 days of lost time. In view of these erroneous entries, the applicant's DD Form 214 should be corrected by:

- a. Deleting the entry in Item 12a and replacing it with the entry "2001 11 13."



- b. Deleting the entry in Item 12c and replacing it with the entry "0005 05 09."

19. The applicant was awarded the AGCM for the period from 13 November 2001 to 12 November 2004. However, evidence shows he departed his unit in an absent without leave status on 3 November 2005 to 2 December 2005 to avoid deploying because he wanted to avoid the hazardous duty of serving in Iraq. He was subsequently separated with a BCD. In view of these facts, the applicant did not complete his first full 4-year term of service in a continuously honorable manner. His record is void of evidence showing he reenlisted or that he was awarded a second AGCM by permanent orders. However, it is the policy of this Board to not disadvantage an applicant by making the situation any worse off for having applied for a correction to their record.

20. The applicant's DA Form 2-1 (Personnel Qualification Record - Part II), Enlisted Record Brief, and DD Form 214 are void of any indication that the applicant deployed to a hostile fire area.

21. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, USC, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Rather, it is only empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

22. Army Regulation 635-200 provides that a Soldier would be given a BCD pursuant only to an approved sentence of a general or special court-martial and that the appellate review must be completed, and the affirmed sentence ordered duly executed.

23. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition. By regulation, an applicant is not entitled to a hearing before the Board.

24. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his Bad Conduct Discharge (BCD) to either Honorable or Under Honorable Conditions (General). His Separation Program Designator (SPD) code and narrative reason for separation be amended to reflect "Secretarial Authority" and recognition of his pre-stop loss period of service as honorable. This opine will narrowly focus on the applicant's request for an upgrade of his characterization of service and will defer the remaining requests to the Board. 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:

- On 21 September 2001, the applicant enlisted in the U.S. Army Reserve under the Delayed Entry Program with a projected Regular Army (RA) enlistment date of 16 October 2001. However, he did not enlist in the RA until 13 November 2001, which established his ETS date as 12 November 2005.
- Applicant deployed with the 101st Airborne Division (Air Assault) in Operation Iraqi Freedom during initial combat operations in 2003. He again deployed with the 3rd Brigade Combat Team to Iraq in support of Operation Iraqi Freedom. His unit had been stationed at three Forward Operating Bases in Iraq. He had been on continuous active duty since 13 November 2001. He had earned two ARCOMs for his service.
- On 3 November 2005, the applicant quit his place of duty at Fort Campbell, Kentucky. Because he verbalized his intention not to deploy, he was being watched by two noncommissioned officers (NCOs) on 3 November 2005. He quickly walked away from these two Soldiers and out of a building to an awaiting vehicle. The applicant had arranged for a car to be waiting for him to help him get away from his unit the day before he was to deploy to Iraq.
- The applicant was listed on military orders and manifested to fly to Iraq from Fort Campbell on 4 November 2005 to deploy with his unit in support of Operation Iraqi Freedom. On 19 October 2005, his immediate commander formally counseled the applicant to inform him he was deploying to Iraq and needed to accomplish all pre-deployment preparations. The applicant knew he was scheduled to fly to Iraq and was ordered to do so by his immediate commander. He left his place of duty on 3 November 2005 to avoid deploying to Iraq on 4 November 2005 because he wanted to avoid the hazardous duty of serving in Iraq. He verbalized his intent to avoid the deployment because he knew it was hazardous duty. The applicant told numerous Soldiers, NCOs, and his commander, that he did not want to go to Iraq because he thought he was going to be killed in action. He considered several methods to avoid the deployment, to include saying he was gay, saying he was a felon, that he was being administratively separated from the Army, or adopting a child. He was counseled by NCOs and his commander and advised that he could be charged with, among other offenses, Desertion if he chose not to deploy.
- On 7 September 2005, the company commander ordered him to produce a urine sample based on probable cause to believe he had been using a controlled substance. His urine sample tested positive for marijuana because he used marijuana within one week of the urinalysis.
- A DA Form 4430 (Department of the Army Result of Trial) shows the applicant was tried and convicted by a General Court-Martial (GCM) on 6 March 2006. The court sentenced him to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 12 months, and to be discharged from the service with a BCD.
- On 23 May 2006, through his defense counsel, the applicant submitted a post-trial request for discharge in lieu of trial by court-martial under the provisions of

Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 10.

- Orders and the applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) show the applicant was discharged on 21 September 2007 under the provisions of Army Regulation 635-200, Chapter 3, as a result of "Court-Martial, Other." He was assigned SPD code "JJD" and Reentry code "4." His service was characterized as "Bad Conduct." He had 4 months and 11 days of lost time due to AWOL from 4 November 2005 until 5 December 2005 (1 month and 2 days) and due to confinement from 6 March 2006 until 14 June 2006 (3 months and 9 days). He did not complete his first full term of service.

b. Review of Available Records: The Army Review Board Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant states, "when he got out of the Army, he tried to go to school. Since his junior year in high school his plan was to use his military service to pay for college. Instead, he ended up working his way through college at different places. He earned his associate degree and worked his way up to assistant project manager and other similar jobs in automated systems and robotics. Now he is a commissioning engineer. He has not had any legal trouble since leaving the service other than speeding tickets. He realizes he could have handled things better when he was in the Army. Now that he is older and more mature, he understands the mistakes he made. He remembers feeling like he had exhausted all of his options and was in a losing situation. He had to either let his mother down by failing to deal with the legal issues related to her car or fail to perform his military duty. He was supposed to be discharged early to go to school, even with the "Stop loss" policy in effect; but issues with processing some of the required forms caused the request he submitted to his command to be sent back and put him in the stop loss category. He was already enrolled in school for the Fall Semester of 2005." Counsel states, he submits evidence and argument that clemency should be given, "the applicant's BCD should be changed to either honorable or general and his narrative reason for discharge should be changed to secretarial discretion. The applicant was impacted by a mental health issue related to service in Iraq, the stress of family issues, and the extension of his service through stop loss."

c. Active-duty electronic medical records available for review indicate the applicant sought mental health services on 23 August 2005 due to sleep disturbance, the note further indicates he also experienced increased irritability. The applicant once again sought mental health services on 13 December 2005, due to distressed about pending civilian legal charges, being deployed prior to resolution of his legal charges, and issues at work. He reported symptoms of irritability, nightmares, and disrupted appetite; he was diagnosed with Adjustment Disorder. An encounter dated 15 December 2005, diagnosed the applicant with Depression and Adjustment Disorder; he was started on psychotropic medication for his symptoms. A psychiatric assessment dated 18 April 2006, also diagnosed the applicant with Depression and Adjustment Disorder and

indicates ongoing treatment via medication management. A psychiatric assessment dated 1 June 2006, diagnosed the applicant with Adjustment Disorder with Depressed Mood and Post-deployment Stress Disorder, and indicates continued treatment via medication management.

d. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is not service connected, likely due to the characterization of his service. In a C and P examination dated 14 July 2022, the clinician notes the applicant's in-service diagnosis of Adjustment Disorder and Depression and indicates, based on a review of the record, the applicant "appears to have been using cannabis and alcohol in the setting of depression and adjustment disorder per his physician. Records support that veteran did meet criteria for these disorders; however, qualified that such disorders were not deemed to place him at risk of causing harm to self or others. He was described as having intact ability to function independently with no mention of loss of capacity or competence. As such, it is less likely than not that the veteran's misconduct which led to discharge was due to disease. According to the record he was aware of the rights and wrongs associated with volitional behavior to include the effects of drugs and alcohol."

e. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to support the applicant had a behavioral health condition during military service that mitigates his misconduct. 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, OMH.

(2) Did the condition exist or experience occur during military service? Yes. During military service the applicant was diagnosed with Adjustment Disorder, Depression, Adjustment Disorder with Depressed Mood, and Post-deployment Stress Disorder.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. The applicant was discharged due to desertion and marijuana use. Given the nexus between depression 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 condition. In addition, given the nexus between depression and avoidance, the applicant's AWOL/desertion is also mitigated by his BH condition.

#### BOARD DISCUSSION:

1. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

2. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was 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 evidence shows the applicant was convicted by a court-martial that sentenced him to a bad conduct discharge.

a. Discharge upgrade: Grant.

(1) The applicant's trial by a court-martial was warranted by the gravity of the offenses charged (with intent to avoid hazardous duty, quitting his unit and remaining so absent in desertion 2 December 2005 to 3 November 2005, and wrongful use of marijuana). The applicant's conviction and discharge were conducted in accordance with applicable laws and regulations and the discharge appropriately characterizes the misconduct for which he was convicted. He was given a bad conduct discharge pursuant to an approved sentence of a court-martial. The appellate review was completed, and the affirmed sentence was ordered duly executed. All requirements of law and regulation were met with respect to the conduct of the court-martial and the appellate review process, and the rights of the applicant were fully protected. The Board found no error or injustice in his separation processing.

(2) The Board also 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 sufficient evidence to support the applicant had a behavioral health condition during military service that mitigates his misconduct. Based on this finding, the Board determined that his service clearly did not rise to the level required for an honorable characterization (given his AWOL by quitting his unit to avoid hazardous duty, and use of illegal drugs); however, a general, under honorable conditions characterization of service is appropriate under published DoD guidance for liberal consideration of discharge upgrade requests. The Board determined that such upgrade did not change the underlying reason for separation and thus the narrative reason for separation and corresponding codes should not change.

b. Reason and associated Codes: Deny.

(1) The narrative reason for separation is governed by specific directives. The applicant was discharged due to conviction by a court-martial under the provisions of chapter 3 of AR 635-200. The narrative reason specified by Army Regulations for a discharge under this chapter for an enlisted Soldier is "Court-Martial," the separation code is "JJD," and the reentry code is "RE-4." AR 635-8, Separation Documents, governs preparation of the DD Form 214, and dictates that entry of the narrative reason for separation, entered in Block 28, separation code, entered in Block 26, and RE Code,

entered in Block 27 of the DD Form 214 will be entered exactly as listed in AR 635-5-1, Separation Program Designator Codes.

(2) While the Board noted that his misconduct is mitigated by a behavioral health condition, this does not change the fact that he was convicted by a court-martial due to this misconduct. The Board found no mitigating factors that would merit a change to the applicant's narrative reason for discharge or associated codes. In view of the foregoing, the Board determined that the reason for discharge, and associated codes, was both proper and equitable and there is no reason to change it.

c. Recognition of his pre-stop loss period of service as honorable: Deny. The governing regulation (AR 635-8) stipulates that for Soldiers who have previously reenlisted without being issued a DD Form 214 and are separated with any characterization of service except "Honorable", an entry is made for their "Continuous Honorable Active Service from" (first day of service for which DD Form 214 was not issued) Until (date before commencement of current enlistment). The applicant in this case did not reenlist. He was retained due to the needs of the Army. Additionally, since the DD Form 214 is a record of continuous active service and since the applicant did not reenlist, the Board determined an entry pertaining to the recognition of his pre-stop loss period of service on his DD Form 214 is not warranted.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

1. In addition to the correction addressed in Administrative Note(s) below, the Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending his DD Form 214 ending on 21 September 2007 to show Character of Service: Under Honorable Conditions (General).

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 Separation Authority, Separation Code, Reentry Code, Narrative Reason for Separation, and recognition of his pre-stop loss period of service as honorable.

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 NOTES:

The applicant enlisted in the Regular Army on 13 November 2001, Item 12a (Date Entered Active Duty This Period) of his DD Form 214 erroneously indicates that he entered active duty on 16 October 2001. Since he was discharged on 21 September 2007, the erroneous entry date resulted in an erroneous entry in Item 12c (Net Active Service This Period) which credited him with completion of 5 years, 6 months, and 25 days of net active service instead of 5 years, 5 months, and 29 days after subtracting his non-creditable 4 months and 11 days of lost time. In view of these erroneous entries, the applicant's DD Form 214 should be corrected by:

- Deleting the entry in Item 12a and replacing it with the entry "2001-11-13."
- Deleting the entry in Item 12c and replacing it with the entry "0005-05- 09"

#### REFERENCES:

1. Title 10, USC, Section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. 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. Title 10, USC, Section 1552(b), provides, with respect to courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under the Uniform Code of Military Justice (UCMJ), action to correct any military record of the Secretary's Department may extend only to actions taken by reviewing authorities under the UCMJ or action on the sentence of a court-martial for purposes of clemency. The Secretary of the Army shall make such corrections by acting through boards of civilians within the executive part of the Army.

4. Title 10, USC, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Court-martial convictions stand as adjudged or modified by appeal through the judicial process, it is only empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

5. 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. 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. The ABCMR may, in its discretion, hold a hearing. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

6. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. An honorable discharge was separation with honor. Issuance of an honorable discharge certificate was appropriate when the quality of the Soldier's service generally met the standards of acceptable conduct and performance of duty or was otherwise so meritorious that any other characterization would clearly be inappropriate. Where there were infractions of discipline, commanders were to consider the extent thereof, as well as the seriousness of the offense. Separation authorities could furnish an honorable discharge when subsequent honest and faithful service over a greater period outweighed disqualifying entries in the Soldier's military record. It was the pattern of behavior, and not the isolated instance, which commanders should consider as the governing factor.



b. A general discharge was a separation from the Army under honorable conditions. When authorized, separation authorities could issue a general discharge to Soldiers whose military record was satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. A discharge under other than honorable conditions (UOTHC) is an administrative separation from the Service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, homosexual conduct, security reasons, or in lieu of trial by court martial in the following circumstances.

(1) An under-other-than-honorable-conditions discharge will be directed only by a commander exercising general court-martial authority, a general officer in command who has a judge advocate or legal advisor available to his/her command, higher authority, or the commander exercising special court-martial convening authority over the Soldier who submitted a request for discharge in lieu of court-martial (see chapter 10) when delegated authority to approve such requests.

(2) When the reason for separation is based upon one or more acts or omissions that constitutes a significant departure from the conduct expected of Soldiers of the Army. Examples of factors that may be considered include the following:

- Use of force or violence to produce bodily injury or death
- Abuse of a position of trust
- Disregard by a superior of customary superior-subordinate relationships
- Acts or omissions that endanger the security of the United States or the health and welfare of other Soldiers of the Army
- Deliberate acts or omissions that seriously endanger the health and safety of other persons

d. A bad conduct discharge will be given to a Soldier pursuant only to an approved sentence of a general or special court-martial. The appellate review had to have been completed and the affirmed sentence then ordered duly executed. Questions concerning the finality of appellate review should be referred to the servicing staff judge advocate.

e. A dishonorable discharge will be given to a Soldier pursuant only to an approved sentence of a general court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed. Questions concerning the finality of appellate review should be referred to the servicing staff judge advocate.

f. Chapter 5, paragraph 5-3 states separation under this paragraph is the prerogative of the Secretary of the Army. Secretarial plenary separation authority

is exercised sparingly and seldom delegated. Ordinarily, it is used when no other provision of this regulation applies, and early separation is clearly in the best interest of the Army. Separations under this paragraph are effective only if approved in writing by the Secretary of the Army or the Secretary's approved designee as announced in updated memorandums.

7. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) implements the specific authorities and reasons for separating Soldiers from active duty. It also prescribes when to enter SPD codes on the DD Form 214.

a. Paragraph 2-1 provides that SPD codes are three-character alphabetic combinations that identify reasons for, and types of, separation from active duty. The primary purpose of SPD codes is to provide statistical accounting of reasons for separation. They are intended exclusively for the internal use of Department of Defense and the Military Services to assist in the collection and analysis of separation data. This analysis may, in turn, influence changes in separation policy. SPD codes are not intended to stigmatize an individual in any manner.

b. Table 2-3 provides the SPDs and narrative reasons for separation that are applicable to enlisted personnel. It shows, in part, SPD JJD is the appropriate code to assign to an enlisted Soldier who is involuntarily separated under the provisions of Army Regulation 635-200, Chapter 3, as a result of trial by court-martial. Additionally, the SPD/RE Code Cross Reference Table established RE code "4" as the proper reentry code to assign to Soldiers separated under this authority and for this reason. JFF is the appropriate SPD to assign to enlisted Soldiers who are voluntarily discharged under Secretarial authority.

8. On 3 September 2014, the Secretary of Defense directed the Service DRBs and Service BCM/NRs 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.

9. 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. 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.

10. 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, 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.

//NOTHING FOLLOWS//