

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

r IN THE CASE OF: [REDACTED]

BOARD DATE: 11 September 2024

DOCKET NUMBER: AR20230013930

APPLICANT REQUESTS: in effect, correction to his DD Form 214 (Certificate of Release or Discharge from Active Duty) to show:

- his rank/pay grade as either private first class (PFC)/E-3 or specialist (SPC)/E-4
- he was discharged due to disability
- he received a general, under honorable conditions characterization of service

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

- DD Form 149, Application for Correction of Military Record
- DD Form 214

FACTS:

1. The applicant indicates that his request is related to post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), and other mental health conditions. He states, in effect,

a. His rank and pay grade are incorrect and should be either PFC/E-3 or SPC/E-4.

b. His DD Form 214 incorrectly lists the narrative reason for his separation as misconduct due to civil conviction. He contends that there were a series of medical events leading up to his civil conviction. These conditions were not properly considered during his separation processing nor were his mental health conditions evaluated during his period of service.

2. The applicant served in the Regular Army from 4 August 2015 to 13 November 2015. His DD Form 214 for this period shows he was discharged due to entry level performance and conduct, and his service was uncharacterized.

3. On 27 December 2018, he reenlisted in the Regular Army. The highest grade he held was SPC/E-4, effective 17 September 2020.

4. A civilian Police Incident Report shows that on 27 September 2021, the applicant, a married man at the time, was charged with assaulting his girlfriend. The investigation revealed he assaulted the victim in this case by strangling her and pointing a gun at her head, which caused her fear of imminent serious physical injury or death. The applicant was intoxicated at the time of the incident. The victim indicated in her statement that the applicant had mentioned wanting to kill himself before, so she was attempting to keep the weapon away from him.

5. On 28 September 2021, the applicant's platoon sergeant informed him that he was being flagged for adverse action and that he was being considered for involuntary separation.

6. On 13 July 2023 –

a. The applicant completed a physical examination for the purpose of separation. He reported having ankle surgery at the age of 25 and that he was in good health. The medical physician found the applicant medically qualified for separation.

b. The applicant's company commander informed the applicant that he was initiating action to separate him for under the provisions of Army Regulation (AR) 635-200, Active Duty Enlisted Administrative Separations, paragraph 14-5, conviction by a civil court, with a characterization of service of under other than honorable conditions (UOTHC). His commander cited the applicant's conviction on 24 February 2023 of second-degree assault and his sentence of three years in a correctional facility located in Alaska.

c. The applicant acknowledged receipt of notification of the basis for the contemplated action to separate him and of the rights available to him, including his right to consult with counsel prior to submitting his election of rights.

d. After consulting with counsel, he elected to voluntarily waive consideration of his case by an administrative separation board contingent upon receiving a characterization of service or description of separation no less favorable than general, under honorable conditions. He elected not to submit statements in his own behalf. However, if the separation authority refused to accept the conditional waiver of a hearing before an administrative separation board, his case would be referred to an administrative separation board. In that case, he requested a personal appearance before an administrative separation board and requested representation by counsel.

e. He acknowledged that he could expect to encounter substantial prejudice in civilian life if an UOTHC discharge was issued to him.

8. The applicant's chain of command concurred with the recommendation to separate him before his expiration term of service with an UOTHC characterization of service.

9. The applicant's company commander requested a waiver for separation history and physical examination on 28 August 2023 due to the applicant being outside of military control. The commander stated that the applicant had been living at a halfway house since his conviction on 24 February 2023.

10. On 15 September 2023, the separation authority directed the applicant be separated under the provisions of AR 635-200, paragraph 14-5, and that his service be characterized as UOTHC. The separation authority indicated that he had reviewed the medical examination and had determined the applicant's medical conditions did not constitute matters in extenuation that relate to the basis for administrative separation or overall characterization of service of the member other than honorable. However, he did not review a mental status evaluation because the applicant was not being processed for separation under chapter 14, section III, Acts of Patterns of Misconduct. And the applicant had not deployed overseas in support of a contingency operation nor had he alleged to have been sexually assaulted.

11. His DD Form 214 shows, on 29 September 2023, he was involuntarily discharged under the provisions of Army Regulation 635-200, by reason of misconduct (Civil Conviction), with an under other than honorable conditions character of service, with a separation code of "JKB" and a reentry code of "4." Additionally, this form shows his rank and grade as private (PVT)/E-1, effective 15 September 2023, and item 18 (Remarks) notes he served in Iraq from 1 September 2019 to 29 June 2020.

12. Regulatory guidance provides, a Soldier convicted by a civil court will be reduced or considered for reduction. When Soldiers are under investigation for, or charged with, a civil criminal offense (misdemeanor or felony) and they are incarcerated in civilian confinement, pre or post-trial, or are being held pending psychiatric evaluation or treatment, they are ineligible to continue any phase of the Disability Evaluation System.

13. The Board should consider the applicant's statement in accordance with the published equity, injustice, or clemency determination guidance.

14. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to his characterization of service from under other than honorable conditions (UOTHC) to Under Honorable Conditions (general). He contends he experienced an undiagnosed mental health condition, including PTSD and Traumatic Brain Injury (TBI), that mitigates his misconduct.

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 into the Regular Army on 27 December 2018 after serving from 4 August 2015 to 13 November 2015 and being discharged due to entry level performance and conduct (uncharacterized discharge).
- The applicant was charged with assault, and the investigation revealed he assaulted the victim in this case by strangling her and pointing a gun at her head. The applicant was intoxicated at the time of the incident. The victim indicated in her statement that the applicant had mentioned wanting to kill himself.
- The applicant was discharged on 29 September 2023. His DD214 showed he served in Iraq from 1 September 2019 to 29 June 2020.

c. Review of Available Records: The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts there were a series of medical events that led up to his civil conviction, and these events were not properly considered during his separation process. A Report of Medical History dated 13 April 2023 showed the applicant did not endorse any psychiatric symptoms or diagnoses. There was insufficient evidence that the applicant was diagnosed with PTSD, TBI, or another psychiatric condition while on active service.

d. The Joint Legacy Viewer (JLV), which includes records from DoD and VA, was also reviewed and showed an ER note dated 31 July 2021 indicating the applicant was taken to the ER after drinking to intoxication and passing out. He was found with a loaded, personal weapon next to him. He was seen by behavioral health the following day and explained that his wife had left him, and the weapon was for protection. At follow up in August and September 2021, he expressed a desire to improve his relationships, which were complicated by his alcohol use, and he reported a history of physical abuse by his mother and sexual abuse as a child. It was noted he experienced a ballistic missile attack in Iraq but denied his symptoms were deployment related. Documentation of a separation physical dated 13 July 2023 noted that the applicant denied any behavioral health related symptoms or problems. There is no indication of any medication history for mental health, and he is not service connected for any conditions.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support that the applicant had a condition or experience that mitigates his misconduct. The applicant's encounter with behavioral health was primarily associated with his alcohol intoxication and relationship difficulties. He was not profiled for this experience and documentation does not support that the applicant was psychiatrically unfit at the time of discharge for any boardable mental health condition as he did not have persistent or reoccurring symptoms requiring extended or recurrent psychiatric hospitalization or persistent and reoccurring symptoms that interfered with duty performance or necessitated duty limitations (AR 40-501, para 3-33c).

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts he had an undiagnosed mental health condition, including PTSD and TBI, at the time of the misconduct. Documentation showed he had an alcohol related incident that prompted referral to behavioral health, and he was seen for four therapy sessions in 2021 where he discussed relationship difficulties.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition while on active service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant was diagnosed with alcohol intoxication and associated relationship problems, but he did not have a diagnosis of PTSD, TBI, or a psychiatric condition. Additionally, there is no nexus between his asserted mental health conditions, including PTSD and TBI, and his misconduct related to assault by strangulation and pointing a weapon at the victim's head: 1) these types of misconduct are not part of the natural history or sequelae of a mental health condition; 2) his asserted mental health conditions do not affect one's ability to distinguish right from wrong and act in accordance with the right.

g. However, the applicant contends he was experiencing mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

1. 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 record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant's petition, available military records and the medical advisory the Board concurred with the advising official finding insufficient evidence to support that the applicant had a condition or experience that mitigates his misconduct. The opine noted, the applicant was not profiled for this experience and documentation does not support that the applicant was psychiatrically unfit at the time of discharge for any boardable mental health condition as he did not have persistent or reoccurring symptoms requiring extended or recurrent psychiatric hospitalization or persistent and reoccurring symptoms that interfered with duty performance or necessitated duty limitations.

2. The Board found the applicant's record is absent sufficient evidence to support his contentions to show his rank/pay grade as either private first class (PFC)/E-3 or specialist (SPC)/E-4. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the egregious misconduct of assault. The Board agreed, the applicant did not have a diagnosis of PTSD, TBI, or a psychiatric condition. Furthermore, there is no nexus between the applicant's asserted mental health conditions, including PTSD and TBI, and his misconduct related to assault by strangulation and pointing a weapon at the victim's head. The Board determined the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief, specifically an upgrade of the under other than honorable conditions (UOTHC) discharge to a general under honorable conditions discharge. Therefore, the Board denied relief.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	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.

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. Army Regulation (AR) 635-200 (Personnel Separations-Active Duty Enlisted Administrative Separations), sets forth the basic authority for the separation of enlisted personnel. This regulation states:

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 14-5 prescribes the conditions that subject a Soldier to discharge and reduction in grade. It states a Soldier may be considered for discharge when convicted by civil authorities, or when action is taken that is tantamount to a finding of guilty, if one of the following conditions is present: (1) A punitive discharge would be authorized for the same or a closely related offense under the Manual for Courts-Martial, as amended. (2) The sentence by civil authorities includes confinement for 6 months or more, without regard to suspension or probation. If civil custody exists, such as parole or probation, which would substantially interfere with the Soldier's military duties, the command will request that the civil authorities relinquish custody during the Soldier's term of military service. If the civil authorities decline to relinquish custody, and such declination will cause an undue burden to the Army, the Soldier will be processed for administrative separation. A Soldier convicted by a civil court will be reduced or considered for reduction.

2. AR 635-40 (Personnel Separations-Disability Evaluation for Retention, Retirement, or Separation), prescribes Army policy and responsibilities for the disability evaluation and disposition of Soldiers who may be unfit to perform their military duties due to physical disability. It states –

a. The Disability Evaluation System (DES) begins for a Soldier when either of the events below occurs: (1) The Soldier is issued a permanent profile approved in accordance with the provisions of AR 40–501, Medical Services-Standards of Medical Fitness, and the profile contains a numerical designator of P3/P4 in any of the serial profile factors for a condition that appears not to meet medical retention standards in accordance with AR 40–501 (see glossary). Within (but not later than) one year of diagnosis, the Soldier must be assigned a P3/P4 profile to refer the Soldier to the DES.

b. When Soldiers are under investigation for, or charged with, a civil criminal offense (misdemeanor or felony) and they are incarcerated in civilian confinement, pre or post-trial, or are being held pending psychiatric evaluation or treatment, they are ineligible to continue any phase of the DES. If they are present for duty (on bail), they are eligible to complete the MEB. The Soldier, to include if on bail, becomes eligible for the PEB or disability disposition when the Soldier is cleared of the offense and has a military status (continues on active duty or in a Reserve Component active status), or the command, after conviction, specifically declines in writing to separate the Soldier on the basis of conviction by civil court.

3. AR 635-8 (Personnel Separations-Separation Processing and Documents), states to verify that active duty grade or rank and pay grade are accurate at time of separation for Block 4: Grade, Rate, or Rank.

4. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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.

5. Title 10, U.S. Code, section 1556 of requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by

ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

6. AR 15-185, ABCMR, prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR will decide cases on the evidence of record. The applicant has the burden of proof. The Board is not an investigative body.

//NOTHING FOLLOWS//