

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 11 September 2024

DOCKET NUMBER: AR20230014664

APPLICANT REQUESTS:

- an upgrade of his characterization of service from General, under honorable conditions to Honorable
- restoration of his rank/grade to specialist (SPC)/E-4

APPLICANT'S SUPPORTING DOCUMENT CONSIDERED BY THE BOARD:

DD Form 149 (Application for Correction of Military Record Under the Provisions of Title 10, U.S. Code, Section 1552)

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, in effect, his misconduct was the direct result of his undiagnosed conditions of post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI) that he incurred as a result of his deployment to Iraq. He currently has a 70 percent disability rating for PTSD.
3. The applicant enlisted in the Regular Army in the grade of E-1 on 6 June 2006, for a period of 3 years and 18 weeks. Upon completion of training, he was awarded military occupational specialty 19D (Cavalry Scout) and assigned to a unit at Fort Hood, TX.
4. A DA Form 4856 (Developmental Counseling Form) shows the applicant was counseled on 1 July 2007 for disobeying a lawful order from a noncommissioned officer (NCO) to properly clear his crew served weapon; and falsifying a report to an NCO that he had done so. Both of these transgressions became obvious when the applicant dropped his weapon and it fired. He was advised that conduct of this nature could result in disciplinary action under the Uniform Code of Military Justice (UCMJ) and/or the

initiation of action to have him administratively separated from the Army and the potential consequences of such a separation.

5. On 17 October 2007, field grade nonjudicial punishment (NJP) was imposed upon the applicant under the provisions of Article 15, of the UCMJ for between on or about 14 July 2007 and 13 August 2007, wrongfully using Tetrahydrocannabinol, a substance found in marijuana; and on or about 30 June 2007, through negligence, discharge a .50 caliber service rifle under circumstances such as to endanger human life. His punishment consisted of reduction from private first class/E-3 to private (PV1)/E-1; forfeiture of \$650.00 pay for 2 months, suspended to be automatically remitted if not vacated on or before 17 January 2007; extra duty for 45 days; and restriction for 21 days.

6. The applicant served in Iraq from 25 October 2007 to 7 January 2009. He was advanced to SPC/E-4 on 1 September 2008.

7. On 9 June 2009, field grade NJP was imposed upon the applicant under the provisions of Article 15, UCMJ for between on or about 8 May 2009 and 11 May 2009, wrongfully using cocaine; and for between on or about 9 May 2009 and 11 May 2009, wrongfully using MDMA [Methylenedioxymethamphetamine], commonly known as ecstasy (tablet form), and molly or mandy (crystal form). His punishment consisted of reduction from E-4 to E-1; forfeiture of \$699.00 pay for 2 months, suspended to be automatically remitted if not vacated on or before 10 October 2009; extra duty for 45 days; and restriction for 45 days. He appealed this punishment, and his appeal was denied on 17 June 2009. He was reduced to PV1/E-1 effective 10 June 2009.

8. A DA Form 4856 shows the applicant was counseled by his Troop Commander on 22 June 2009 regarding his substandard performance and the initiation of action to have him administratively separated from the Army for commission of a serious offense and the potential consequences of such a separation.

9. On 29 June 2009 an administrative flag was imposed upon the applicant to prevent him from receiving favorable personnel actions while he was pending elimination.

10. On 7 July 2009, the applicant's immediate commander notified the applicant of his intent to initiate action to separate him under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 14, paragraph 14-12c, for commission of a serious offense. The specific reasons for this action were the applicant's wrongful use of cocaine, MDMA, and marijuana; and his receipt of a field grade Article 15 for endangering human life with a .50 caliber service rifle. He was advised that he was being recommended for a General (Under Honorable Conditions) characterization of service, but the final determination of his characterization of service

would be made by the separation authority. The applicant acknowledged receipt of the proposed separation notification on the same date.

11. On 7 July 2009, the applicant's immediate commander formally recommended his separation prior to the expiration of his term of service under the provisions of Army Regulation 635-200, Chapter 14, by reason of commission of a serious offense.

12. On 8 July 2009, the applicant acknowledged that he was advised of the reasons for separation and of the rights available to him. He consulted with counsel and submitted a conditional election of rights wherein he elected to waive consideration of his case by an administrative separation board conditioned upon his receipt of a general discharge, and not to submit statements in his own behalf.

13. On 9 July 2009, the applicant's intermediate recommended approval of the applicant's discharge and that his service be characterized as General, under honorable conditions.

14. On 13 July 2009, the separation authority approved the request and directed the applicant be discharged with a General, under honorable conditions characterization of service.

15. Orders and the applicant's DD Form 214 show he was discharged on 23 July 2009 in the grade of E-1, under the provisions of Army Regulation 635-200, paragraph 14-12c (2), by reason of Misconduct (Drug Abuse) with separation code "JKK" and reentry code "4." His service was characterized as Under Honorable Conditions (General). He was credited with completion of 3 years, 1 month, and 16 days of net active service this period. He had lost time from 9 October 2007 to 10 October 2007. He did not complete his first full term of service. He was awarded or authorized to wear the:

- Army Commendation 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 (ADRB) for relief. On 9 December 2009, the applicant was informed that after careful consideration of his military records and all other available evidence, the ADRB determined that he was properly and equitably discharged and denied his petition.

17. On 5 January 2024, a member of the Army Review Boards Agency (ARBA) staff requested the applicant provide a copy of medical documents in support of his issues with PTSD and TBI and afforded him an opportunity to comply. To date, the applicant has not provided a response.

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

19. MEDICAL REVIEW:

1. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available records in the Interactive Personnel Electronic Records Management System (iPERMS), the Health Artifacts Image Management Solutions (HAIMS) and the VA's Joint Legacy Viewer (JLV). The applicant requests discharge upgrade from Under Honorable Conditions, General to Honorable. He indicated that PTSD and TBI conditions were related to his claim.

2. The ABCMR ROP summarized the applicant's record and circumstances surrounding the case. The applicant enlisted in the Army Reserve 07Apr2006. He entered a period of active duty 06Jun2006. His MOS was 19D10 Calvary Scout. He was deployed to Iraq from 20071025 to 20090107. He was discharged 23Jul2009 under provisions of AR 635-200 para 14-12c(2) for misconduct (drug abuse). The offenses listed in the 07Jul2009 notification included wrongful use of cocaine and MDMA between on or about 08May2009 and 11May2009; wrongful use of marijuana between on or about 14Jul2007 and 13Aug2007; and through negligence, endangered human life with a .50 caliber service rifle on or about 30Jun2007. MDMA is also known as ecstasy, both a stimulant and hallucinogenic agent.

3. Six months after entry into service, the applicant was seen for complaints of depression and insomnia (31Jan2007). He was diagnosed with Adjustment Disorder with Depressed Mood and briefly took an antidepressant. He also had frequent conflict with superiors and had needed to attend anger group. He reported a history of depression (with suicide attempt of cutting both wrists) starting in middle school and prior treatment on an antidepressant (05Feb2007 and 15May2007 Psychology Counseling Center Darnall AMC). He also reported his mother had a history of Bipolar Disorder. Several months prior to his combat deployment, a 5-17 chapter separation was considered and he was command referred for a mental status evaluation (MSE). The applicant reported that he was depressed, and he wanted to get out of the Army to care for his mother who was sick and unable to care for herself. The BH specialist indicated that mental health was not the primary concern; the service member was requesting a hardship discharge. After discussion with the applicant's leadership, it was determined a MSE was not necessary at the time (15May2007).

4. He was seen in October 2009 for pre-deployment BH assessment in the context of prior treatment for Adjustment Disorder with Depressed Mood, having prior disciplinary issues, and previous substance use and negligent discharge of a weapon. These had been resolved and the applicant endorsed that he was ready and looking forward to deployment. He was cleared by BH to deploy.

5. Shortly after return from deployment he was command directed for BH evaluation for possible chapter 14 processing for substance use (29May2009). The applicant stated that he was a victim of a drug OD during a party where his drink was spiked. The BH examiner noted symptoms suggestive of mild PTSD and symptoms consistent with TBI or post-concussion influence. Details of the official MSE report were not available for this review, but the BH clinic note indicated he was cleared to be processed under chapter 14.

6. The applicant was service connected by the VA for Anxiety Disorder at 30% in 2009, the year he was discharged. It was deemed that he did not meet full criteria for PTSD at the time. He was ultimately diagnosed with PTSD in 2012, three years after discharge from service. The PTSD was due to combat stressors: His life was in constant danger in Iraq. He had to carry and discharge weapons. They had been under attack, and he had been very close to IED blasts. In addition, he witnessed his buddy hit by shrapnel, saw him lose his legs and die.

7. Concerning traumatic brain injury, the applicant reported a head injury in middle school (age 14, 15 or 16) when he fell off his skateboard. He was reportedly unconscious for one hour. He reported being persecuted in middle school for being a slow learner (14Nov2007). During 28Dec2009 TBI Consult, a fall and exposure to 4 IEDs blasts in 2008 were reported. Mild TBI was diagnosed during that encounter and affirmed during the 11Jan2010 C&P Exam. During the latter exam, the applicant complained of decreased attention and concentration, and short-term memory issues.

8. Substance use issues were documented while in service. The applicant endorsed having participated in a drug program early in his career while in the Army (10Jan2011 MH Outpatient Note). Liberal Consideration guidance policy was considered. The applicant was diagnosed with PTSD and TBI which under Liberal Consideration, is mitigating for the drug offences which led to his Under Honorable Conditions, General discharge.

9. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant was diagnosed with PTSD and TBI.

(2) Did the condition exist, or did the experience occur during military service? Yes. The applicant was diagnosed with PTSD with the stressor being related to combat. In addition, the record indicated the applicant entered service with a history of depression, suicide attempt and prior BH treatment including psychotropic medication, and traumatic brain injury as well.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. Self-treatment with substances, is a common sequela of PTSD and TBI. Under Liberal Consideration the applicant's substance abuse offenses (cocaine, MDMA and marijuana), the immediate cause of his discharge, are mitigated by his BH conditions.

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 medial review, the Board considered the advising official finding the applicant's drug use is mitigated by his behavioral health conditions. The opine noted, the applicant entered service with a history of depression, suicide attempt and prior BH treatment including psychotropic medication, and traumatic brain injury as well.

2. The Board agreed, there is insufficient evidence to support restoration of the applicant's rank to specialist (SPC)/E-4. Furthermore, the Board determined the applicant had prior drug use before his deployment to Iraq and was being considered for separation. The Board notwithstanding the advising opine found insufficient evidence of in-service mitigating factors to overcome the misconduct of continued illegal drug use. The Board noted, the applicant's self-authored statement that his drink was spiked at a party with the same drugs he used in the past. The Board determined, based on the preponderance of evidence there is not an issue of avoidance but more one of poor judgment. The Board carefully considered the applicant's deployments and his decorations and awards under liberal consideration; however, the applicant provided no post service achievements or character letters of support for the Board to weigh a clemency determination.

3. The applicant was discharged for Misconduct (Drug Abuse) and was provided a under honorable (general) conditions characterization of service. The Board agreed that the applicant's discharge characterization is warranted as he did not meet the

standards of acceptable conduct and performance of duty for Army personnel to receive an Honorable discharge. Based on this, 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. 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. 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 (Active Duty Enlisted Administrative Separations) 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 post-traumatic stress

disorder (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.

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//