

IN THE CASE OF: [REDACTED]

BOARD DATE: 5 September 2024

DOCKET NUMBER: AR20240000128

APPLICANT REQUESTS: upgrade of his characterization of service, and the appropriate corrections to his narrative reason, separation code, and reentry code.

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

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States), 30 October 2023
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 4 January 2008

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, 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 after he served in Iraq he was dealing with a head injury and mental health problems; he ended up being mixed up with some Soldiers that set a car on fire. He felt as though he was forced to confess and did so out of fear, being young, and scared. He believes his traumatic-brain injury (TBI) and mental health disorder played a factor in his discharge.
3. The applicant enlisted in the Regular Army on 24 June 2004 for a 4-year period. He reenlisted on 17 November 2006 for an additional 6-year period.
4. His Enlisted Record Brief shows he was awarded military occupational specialty 25U (Signal Support Systems Specialist). The highest rank he attained was specialist/E-4.
5. The applicant served in Iraq from 9 September 2005 to 16 August 2006.
6. On 20 April 2007, the applicant was advised by counsel of the basis for the contemplated action to separate him under the provisions of Army Regulation (AR) 635-200 (Personnel Separation – Active Duty Enlisted Administrative Separations) Chapter

14-12c (Commission of a Serious Offense). He elected to waive consideration and a personal appearance before an administrative separation board. He elected to submit a statement in his own behalf. His official military personnel file is void of this statement, and he further understood he may encounter substantial prejudice in civilian life if he received an under other than honorable conditions (UOTHC) discharge.

7. The applicant entered into a pretrial agreement on 20 April 2007, after consulting with his defense counsel and being fully advised that he had a legal and moral right to plead not guilty, he offered to plead guilty to the following charges:

- conspiring with two Soldiers and a civilian to set fire to a privately owned vehicle to defraud the insurer between on or about 23 September 2006 and on or about 4 October 2006,
- making a false official statement to another Soldier on or about 5 October 2006,
- willfully and maliciously setting fire to a privately owned vehicle with intent to defraud the insurer on or about 4 October 2006.

8. A DA Form 3822-R (Report of Mental Status Evaluation) shows on 11 September 2007, the applicant was found mentally capable and responsible to understand and participate in the Chapter 14 proceedings.

9. The applicant's immediate commander notified him on 12 December 2007 of the intent to initiate separation action against him under the provisions of AR 635-200, paragraph 14-12c, by reason of commission of a serious offense. As the specific reasons, the commander cited the applicant conspired to defraud an insurance company between on or about 23 September 2006 and 4 October 2006, made a false official statement on or about 5 October 2006, and set fire to a personally owned vehicle with intent to defraud the insurer on or about 4 October 2006. The commander recommended he receive an UOTHC discharge. The applicant acknowledged receipt on the same date.

10. On the same date, the applicant's immediate commander formally recommended his separation under the provisions of AR 635-200, paragraph 14-12c. His intermediate commander recommended his service be characterized as UOTHC.

11. The separation authority approved the recommended separation action on 19 December 2007, and further directed the issuance of an UOTHC discharge and that the applicant be reduced to the lowest enlisted grade of E-1.

12. The applicant was discharged on 4 January 2008 under the provisions of AR 635-200, paragraph 14-12c, by reason of misconduct (serious offense), in the grade of E-1. His DD Form 214 confirms he received a character of service of UOTHC, with separation code JKQ and reentry code 3. He was credited with 3 years, 6 months, and

11 days of net active service. He was awarded or authorized the following decorations, medals, badges, citations, and campaign ribbons:

- Army Commendation Medal
- National Defense Service Medal
- Global War on Terrorism Service Medal
- Iraq Campaign Medal
- Army Service Ribbon
- Overseas Service Ribbon
- Air Assault Badge

13. Regulatory guidance provides:

a. When an individual is discharged under the provisions of AR 635-200, Chapter 14, the separation authority may direct a general discharge if such is merited by the Soldier's overall record. Characterization of service as honorable is not authorized unless the Soldier's record is otherwise so meritorious that any other characterization clearly would be inappropriate.

b. When an individual is discharged under the provisions of AR 635-200, paragraph 14-12c, by reason of misconduct – commission of a serious offense, "JKQ" is the appropriate separation code.

14. In reaching its determination, the Board can consider the applicant's petition, service record, and statements in light of the published guidance on equity, injustice, or clemency.

15. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his characterization of service. He contends he experienced mental health conditions and a traumatic brain injury (TBI) that mitigates his misconduct. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following: 1) The applicant enlisted in the Regular Army on 24 June 2004; 2) The applicant served in Iraq from 9 September 2005-16 August 2006; 3) The applicant plead guilty on 20 April 2007 for: A) conspiring with two Soldiers and a civilian to set fire to a privately owned vehicle to defraud the insurer; B) making a false statement; and C) setting fire to a privately owned car to defraud the insurer; 4) The applicant was discharged on 4 January 2008, Chapter 14-12c, by reason of misconduct (serious offense). His character of service was under other than other honorable conditions.

b. The Army Review Boards Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents and the applicant's available military service and medical records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical records were provided.

c. The applicant asserts he experienced mental health conditions and a TBI, which mitigate his misconduct. There is insufficient evidence the applicant reported or was diagnosed with a mental health condition or a TBI while on active service. The applicant underwent a mental status exam on 11 September 2007. He was not diagnosed with a mental health condition, and he was cleared for administrative action deemed appropriate by his Command.

d. A review of JLV provided insufficient evidence the applicant has been diagnosed with a mental health condition or a TBI by the VA. He also does not receive any service-connected disability.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a condition or experience that mitigates his misconduct.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant asserts he experienced a mental health condition and a TBI while on active service that mitigates his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced mental health conditions and a TBI while on active service that mitigates his misconduct.

(3) Does the condition experience actually excuse or mitigate the misconduct? No, there is insufficient evidence beyond self-report the applicant experiencing a mental health condition or a TBI, while on active service. In addition, there is no nexus between his reported mental health condition or a TBI and his misconduct of conspiring with others to defraud, making a false statement, and setting fire to a car in that: 1) these types of misconduct are not a part of the natural history or sequelae of his reported mental health condition or a TBI; 2) His reported mental health conditions or a TBI do not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing a 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:

The Board carefully considered the applicant's request, 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 TBI and mental health claim and the review and conclusions of the ARBA Behavioral Health Advisor. The applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding his misconduct not being mitigated by TBI or a mental health condition. Based on a preponderance of the evidence, the Board determined the character of service the applicant received, the reason for his separation, and the associated codes were not in error or unjust. The Board concurred with the correction described in Administrative Note(s) below.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

Other than the corrections addressed in Administrative Note(s) below, the Board determined 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 otherwise insufficient as a basis for correction of the records of the individual concerned.

2/26/2025

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.

ADMINISTRATIVE NOTE(S): a review of the applicant's record shows his DD Form 214, for the period ending 4 January 2008, is missing important entries that affect his eligibility for post-service benefits. As a result, amend the DD Form 214 by adding the following entries in Item 18 (Remarks):

- SOLDIER HAS COMPLETED FIRST FULL TERM OF SERVICE
- CONTINUOUS HONORABLE SERVICE FROM 20040624 UNTIL 20061116

REFERENCES:

1. Title 10, U.S. Code, 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. Section 1556 of Title 10, USC, requires the Secretary of the Army to ensure that an applicant seeking corrective action by ARBA be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office

recommendations, opinions (including advisory opinions), and reviews to ABCMR applicants (and/or their counsel) prior to adjudication.

3. Army Regulation (AR) 601-210 (Active and Reserve Components Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment and processing into the Regular Army, U.S. Army Reserve, and Army National Guard. Table 3-1 provides a list of reentry (RE) codes.

- RE code "1" applies to Soldiers completing their term of active service, who are considered qualified for enlistment if all other criteria are met
- RE code "2" is no longer in use but applied to Soldiers separated for the convenience of the government, when reenlistment is not contemplated, who are fully qualified for enlistment/reenlistment
- RE code "3" applies to Soldiers who are not considered fully qualified for reentry or continuous service at time of separation, whose disqualification is waivable – they are ineligible unless a waiver is granted
- RE code "4" applies to Soldiers separated from their last period of service with a non-waivable disqualification

4. AR 635-5-1 (Separation Program Designator Codes) provides the specific authorities, reasons for separating Soldiers from active duty, and the separation codes to be entered on the DD Form 214. Separation code "JKQ" is the appropriate code to assign to Soldiers separated under the provisions of AR 635-200, Chapter 14, Paragraph 14-12c, by reason of misconduct – commission of a serious offense.

5. AR 635-200 (Personnel Separations – Active Duty Enlisted Administrative Separations) sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

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 established policy and prescribed procedures for separating members for misconduct. Specific categories included minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, or absences without leave. Action would be taken to separate a member for misconduct

when it was clearly established that rehabilitation was impracticable or was unlikely to succeed. A discharge under other than honorable conditions (UOTHC) was normally considered appropriate. However, the separation authority could direct a general discharge if such was merited by the Soldier's overall record.

6. 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; TBI; sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences.

7. 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//