

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 31 July 2024

DOCKET NUMBER: AR20240000440

APPLICANT REQUESTS:

- reconsideration of his previous request to upgrade of his under other than honorable conditions discharge to honorable
- an upgrade of his separation code
- an upgrade of his reentry code
- his rank be restored from private/E-1 to staff sergeant/E-6
- his separation date be changed from 2 March 2004 to 27 June 2004
- removal of DA Form 2166-7 (NCO Evaluation Report) for the period 2002 11 thru 2003 10
- removal of memorandum, Subject: Request for Discharge in Lieu of Trial by Court-Martial, dated 4 February 2004
- removal of memorandum, Subject: Decision on Request for Discharge in Lieu of Trial by Court-Martial, dated 14 February 2004
- removal of unsigned DD Form 214 (Certificate of Release or Discharge from Active Duty) effective 2 March 2004
- a personal, video, and/or telephonic appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Letter
- Two Character References
- Certificate of Training, Master Driver Course 24 – 28 March 2003
- Two DA Forms 1059 (Service School Academic Evaluation Report)
- Two DA Forms 2166-7 (NCOER)
- Two DA Forms 4836 (Oath of Extension of Enlistment or Reenlistment)
- DA Form 5984-E (Operator's Permit)
- Orders 324-100 dated 20 November 2003
- Discharge Packet
- 13 Letters from the Department of Veteran Affairs (VA), from 4 May 2010 to 4 March 2022
- VA Rating Decision dated 2 October 2003

- Hagel Memorandum, 3 September 2014
- Carson Memorandum, 24 February 2016
- Kurta Memorandum, 25 August 2017
- Wilkie Memorandum, 25 July 2018
- Extracts from the Manual for Court-Martials referencing Articles 91, 117, and 128
- VA Medical Records (36 pages)
- Mayo Clinic Online Article on Anxiety and PTSD Disorders (53 Pages)
- Extracts of the Lincoln Memorial University Law Review: PTSD is a Limited Defense in Federal Court, Volume 8, Issue 2, Spring 2021
- DD Form 214 effective 2 March 2004
- ABCMR Docket Number AR20220012134, 19 July 2023

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20220012134 on 19 July 2023.

2. The applicant states in effect, he is requesting his DD Form 214 and National Guard Bureau (NGB) Form 22 (Report of Separation and Record of Service) for the period ending 2 March 2004, be corrected to show his characterization of service as honorable vice under other than honorable conditions. He believes these corrections should be made because a second DD Form 214 and NGB Form 22 were re-issued several months after his discharge instead of a DD Form 215 (Correction to DD Form 214). He contends his service was honorable and any other discharged would not have been warranted for his actions. During his service, he suffered from mental and medical issues, to include complex post-traumatic stress disorder (PTSD), head concussions (traumatic brain injury (TBI)), personality disorders, and anxiety and social disorders. He also states that his NCOER rated his discharge type and not inclusive of his period of rated service. Additionally, it was completed 5 months later. Memorandums "Request for Discharge in Lieu of Trial by Court-Martial" dated 4 February 2004 and "Decision on Request for Discharge in Lieu of Trial by Court-Martial" dated 14 February 2004 contain several errors, mistakes, and were not followed. He did not receive legal counsel after signing the request for discharge, causing him to lose protected rights. His date of discharge is incorrect per Orders 324-100 dated 20 November 2003. The applicant provides new and relevant medical records and legal information about his conditions that were not previously considered. He further noted in his self-authored statement:

a. He is 50 years old, married to his third wife of 11 years and they have 2 children ages 5 and 2. He is a former staff sergeant in the Army National Guard (ARNG). He initially enlisted into the Washington ARNG on or about 5 February 2001 as a 11M (Mechanized Infantryman). He later transferred to the Oregon ARNG where he was

awarded the 11B (Infantryman) military occupational specialty (MOS) as his primary MOS. He was assigned to Company Alpha, 1-162nd Infantry Regiment as a squad leader. After his selection for promotion, he was transferred to the 82nd Rear Operations Center (ROC) as a liaison sergeant. The 82nd ROC was commanded by a colonel/O6 and comprised of 50 members, evenly split between officers and enlisted members.

b. He was on his second enlistment when his unit was mobilized under Title 10 orders to Iraq on or about 7 February 2003. In March 2003, the applicant reminded his chain of command of his end of active service (EAS) date. He was told that he could not be discharged due to a "stop loss". While unaware of what a "stop loss" was, the applicant was given the option to reenlist. He reluctantly reenlisted for a third time because he was told he did not have a choice and could not be discharged due to the "stop loss".

c. After reenlisting, this dramatically changed for the applicant and how he was treated within the unit. He questioned the command a couple times about being transferred and when they might go home. He was always told, "when we are done." The real start of his problems came when he "requested mast." The command had no clue what that was, so he explained to them that is the process of speaking to the commanding officers reporting senior when the commanding officer is unable to address an issue, or the problem was with said named commanding officer. He was told there was no way he was going to speak to the area Commanding General (CG). He asked if he had a right to speak to the CG and was told, "No" by his commanding officer Colonel C.Y. (NOTE: In the Navy and Marine Corps, "Request Mast" is a formal process that includes the right of the service member to directly communicate grievances to the Commanding Officer and the requirement of the Commanding Officer to consider the matter and personally respond to the member requesting Mast.)

d. The only army formal school the applicant attended was Fighting Vehicle Infantryman, where he was recognized as the "Distinguished Honor" graduate and "train the trainer". His NCO evaluations prior to this command were outstanding and without flaws. Not having been to Army bootcamp or any other formal Army school I did not know the rules and how to do things in accordance with the army rules.

e. During the days he worked inside the wire filling generators and doing menial tasks like spending time in the base burn pits. Sometimes during the day, he would go out in the villages as a convoy escort or part of a security detail. At night he would go outside the wire and into the red zone with a Florida National Guard unit, an infantry unit. Where they conducted infantry operations like MOUNT, looking for targets and operational over watch for base protection. This is where he experienced what war really was. This is where he saw first-hand the death of Americans as well as enemy combatants. This changed his life forever and how he viewed things. After being forced

to move where he was living and come back and stay with his command, things really changed for him; the way he saw the war, what was happening and how people at his command had no real clue and understand of the lives that were being lost.

f. After returning to command, he expressed his anger and frustration about how they acted. This is where his mental health issues, like complex PTSD, personality disorder, somatic disorder, depressive disorder, and anxiety disorders really affected the applicant. It was unknown to the applicant, his command, and medical doctors at that time. All these conditions have a direct correlation to how he acted in an insane way. Instead, he was sent to see the mental health doctors. Unknown what the doctors said to the command, but he was told that he should not have access to weapons and classified materials. The applicant carried his weapon every time he left the wire and up to the point of talking to the social worker and then later other mental health doctors.

g. Seeing the social worker and doctors did not happen until after the things he was accused of happened. He was never restricted from classified material at any time and had his weapon until late November. Without a weapon, the applicant felt defenseless in a place he had no control over and never wanted to be after his enlistment contract was up.

h. The unit he was assigned, had many members to include officers, who at night would run down where the rockets and mortars were hitting and exploding to get pictures. After feeling the concussion from an improvised explosive device, rocket-propelled grenade, mortar, grenade, bomb, artillery, or anything else, you never need to experience that again. The smell of burnt flesh of service members and enemies burned, sometimes alive, weighs on him. The sounds of stuff whistling over your head or the buzz, the snap of rounds flying by reminds you that this is no joke. While many in his unit did not experience actual combat, he can still never understand why they wanted pictures of the destructiveness of war. Everything he did and said after returning to this command was a direct reflection of what he experienced and a complete lack of empathy and understanding by the individuals who were members of this command. While he said things that came off as harsh and mean, they were said with the intent to make others understand what he was feeling and not a threat.

i. His NCOERs and SSAERs from prior to this command show the complete opposite Soldier. His evaluations while assigned to the 82nd ROC, they show him as a bad Soldier, yet they wanted and made him reenlist. The evaluations state how the problems can be corrected and overcome yet he was given no help except to see mental health.

j. He knows he was not perfect, and he was dealing with some mental health issues. In November, instead of helping him as he had requested, his chain of command failed him and did everything they could to get rid of him. Based on the

charge sheet, the command claims he did things that from 8 to 20 November, a two-week period after returning to the unit and seeing how Soldiers of this command acted towards war. He felt disrespected, ashamed, embarrassed, and betrayed by their actions. He felt like American servicemen died and they didn't care. It was scary and stressful to see Soldiers acting as they did.

k. He does not recall seeing the charge sheet against him. He does recall seeing and signing the memorandum, "Request for Discharge in Lieu of Trial by Court-Martial" dated 4 February 2004. He did sign this statement. He wishes he had a better opportunity to review it and more than one chance to see an attorney. He feels after reading the statement and seeing the charge sheet, it is not correct.

l. He has the following issues with the memorandum requesting discharge:

(1) According to the Manual for Courts-Martial (2019 Edition) none of the charges would have warranted a discharge. There are not even four charges listed for violation of article 117, instead, there are only three.

(2) The memorandum states he is admitting guilt to one or more of the charges against me but does not explain which one or ones. The memorandum also states he "may" be discharged under other than honorable conditions and reduced to "(Private E1)", however, it was his understanding that this was not going to happen because of the seriousness of the charges. Finally, it lists his rank as SGT/E-5 when he was a SSG/E-6, as stated on the charge sheet.

m. He never saw memorandum, subject: Decision on Request for Discharge in Lieu of Trial by Court-Martial, dated 14 February 2004, approving his discharge until he received copies of his service record on 3 September 2022. This document was not followed because he was not discharged within the 10 working days of the memorandum; therefore, he should have been allowed to have this process reevaluated.

n. He was sent back to Ft. Lewis, WA, where he did not have an opportunity to speak to anyone from legal, let alone an attorney, where he could have exercised his right to withdraw the request for discharge.

o. He lists the charges against him and provides the following statements:

(1) Article 91 – SSG J. was the same rank as him and not a superior noncommission officer. SSG J. was an admin clerk who was also the colonel's driver.

(2) Article 117 – While he may have said these things, they were in response to what was happening around him, such as mental health saying he should not have a

weapon anymore or the blatant disregard for Soldiers' own lives as they ran towards the nightly impacts on base with their cameras to get pictures. It was sickening, chilling, and appalling that they would do this while Soldiers on the outside were losing their lives. He incorrectly that and poorly worded that if someone from that unit was killed then they would understand that this was not a game. Even though at times he wished it was him or that he could get wounded bad enough to get out of there.

(3) Article 128 – He does not recall this ever happening. The charge does not state that he said anything to the Soldier or that he made a threat, which is why he does not believe this ever happened.

p. The DD Form 214 he enclosed shows his service as honorable, but the VA and Army says that is not correct after several years of showing it was and issuing him a DD Form 214 stating otherwise. He would like this issue to be resolved. The copy of the DD Form 214 he provided is the only copy he has, and he has not seen the one that states otherwise.

q. He believes the relief and corrections he is seeking should be made in order to correct an injustice and as an act of fairness. He does not think that if these same issues happened today, they would have received as harsh a punishment. He also believes this punishment was unfair just due to the fact it happened in a combat zone and not at peace time. He believes he had a TBI; he suffers from PTSD as well as an ongoing battle with chronic depression and social anxiety. These issues are well documented in his medical records. These issues still affect him today and he is trying to get the proper help for them. He also enclosed copies of the Hagel, Carson, Kutra, and Wilkie memoranda, which he feels relate to his case and would warrant a review. His medical issues should also serve as mitigating factors in his behavior. There will never be an excuse for his behavior, but his medical conditions most undoubtedly played a significant role in his situation. At the time of his discharge these factors were never considered.

3. The applicant provides:

a. Two-character references from his wife Mrs. E.A., undated and Mr. J.R., Business Manager, Laborer's International Union of North America, dated 2 September 2014. Mrs. E.A. first met the applicant in 2001 and they later married 23 December 2011. She states that after the applicant returned from Iraq, she noticed several changes in his behavior and mental and physical health. Mr. J.R. describes the applicant as a committed member and great asset of their local labor union since April 2001.

b. A DA Form 87 showing the applicant completed the Master Driver Course, given at Ft. Lewis, WA, 24 – 28 March 2003.

c. Two DA Forms 1059 showing the applicant completed phases 1 and 2, Fighting Vehicle Infantryman Course from 10 – 31 March 2001. He was recognized as the “Distinguished Honor” graduate of phase 1, exceeding the course standards.

d. Two DA Forms 2166-7 showing:

(1) The NCOER for the rated period December 2000 thru November 2001, shows he successfully met the standard in all rated areas, he was fully capable, and he was rated as Successful - 2 for senior rater overall performance and potential.

(2) The NCOER for the rated period November 2002 thru October 2003, shows he successfully met the standards in the areas of Competence and Responsibilities & Accountability, needed some improvement in Physical Fitness & Military Bearing and Training, needed much improvement in leadership. His overall potential for promotion and/or service was marginal, and he was rated as Poor – 5 for senior rater overall performance and potential.

e. Two DA Forms 4836 showing:

(1) The DA Form 4836 dated 5 March 2002 indicates the applicant extended for a period of 1 year, changing his expiration term of service (ETS) date from 5 June 2002 to 5 June 2003.

(2) The DA Form 4836 dated 5 March 2003 indicates the applicant extended for a period of 3 years, changing his EST date from 5 June 2003 to 6 June 2006.

f. A DA Form 5984-E, the applicant’s U.S. Army Motor Vehicle Operator’s Identification Card issued 10 October 2003, allowing the applicant to operate government vehicles.

g. Orders 324-100, published by the ORARNG on 20 November 2003 amended Orders 037-558, dated 6 February 2003 (NOTE: the service record is void of Orders 037-558) to show:

- As reads - Period of Active Duty: 7 February 2003 to 6 February 2004
- How changed - Period of Active Duty: 7 February 2003 to 27 June 2004

h. Thirteen letters from the VA and a VA rating decision, dated from 4 May 2010 to 22 August 2022, showing he has a service-connected disability rating of 70%. The VA did not grant a service connection disability for the period of service between 7 February 2003 to 2 March 2004, because the applicant's service was characterized as other than honorable.

i. A VA Rating Decision letter dated 2 October 2023, showing he has a service-connected disability rating of 100% effective 10 January 2023.

j. Four military memorandums, from September 2014 to July 2018, published by the Office of the Secretary Defense, providing guidance to Military Discharge Review Boards pertaining to requests for modification of discharges from Veterans due to mental health conditions, PTSD, and TBI (available for the Board to read in the supporting documents file).

k. Thirty-six pages of his VA Medical Records, detailing his treatment and medication history from 2022 through 2023.

l. Fifty-three pages printed from the online Mayo Clinic, describing the symptoms, treatment, and complications of anxiety and PTSD.

m. An extract of the Lincoln Memorial University Law Review outlining how PTSD can be used as a limited defense in Federal court.

n. A copy (Member-4) of his DD Form 214 containing the same general information as the record copy, with the following exceptions:

- the characterization of service is honorable
- both the applicant and the authorized official signed the form
- a stamp signed and dated by a Veterans Service Officer on 23 July 2018, which certifies the completion of the VA-prescribed training on certification of evidence for proof of service and this is a true and exact copy of either an original document of a copy issued by the service department or custodian of records

4. A review of the applicant's service record shows:

a. He enlisted in the Washington ARNG on 5 February 2001 in the rank of sergeant/E-5 for a period of 1 years and 17 weeks. He executed an interstate transfer to the Oregon ARNG, date unknown.

b. He served in Iraq from 29 April 2003 to 23 February 2004.

c. His NCOER for the rated period November 2002 thru October 2003. The rating chain signed the evaluation on 1 March 2004, but the applicant did not sign, as he was "not available for signature." Additionally, this NCOER was not forwarded to the applicant until 17 March 2004, which was after his discharge. His NCOER contains the following entries or information:



(1) Part IV - Values/NCO Responsibilities

(a) The following was marked "No" by his rater:

- places dedication and commitment to the goals and missions of the army and the nation above personal welfare
- is committed to and shows a sense of pride in the unit - works as a member of the team
- is disciplined and obedient to the spirit and letter of a lawful order
- is honest and truthful in word and deed
- maintains a high standard of personal conduct on and off duty
- has the courage of convictions and ability to overcome fear - stands up for and does what is right
- supports EO/EEO

(b) His rater included the following bullet comments:

- does not treat fellow soldiers in the unit with respect
- personal conduct and actions are far below the standards of Army Values
- failure to fulfill obligations to the unit and fellow soldiers

(c) His rated made the following block marks and bullet comments:

- Physical Fitness and Military Bearing - Needs Some Improvement, "Military Bearing is far below standards of an NCO"
- Leadership - Needs Much Improvement - "disrespectful to fellow NCO's and assigned supervisors," "personal conduct unbecoming of an NCO," and "provides a poor example of an NCO to subordinate Soldiers"
- Training - Needs Some Improvement - "Refusal to teach a class when directed at Camp Virginia, Kuwait," "Failure to focus on overall unit mission regardless of MOS training," and "Has ability but fails initiative to follow instructions and complete assigned tasks"

(2) Part V - Overall Performance and Potential

a. His rater marked the block "Marginal."

b. His senior rater marked the 5-Poor blocks for both overall performance and for overall potential and included the following bullet comments:

- "personal leadership and respect for his leaders needs great improvement"
- "has not participated in unit efforts to train and mentor each other"

- "problem areas listed above can be corrected and overcome with extensive
- personal effort and command guidance"

d. On 24 November 2003, the following court-martial charges were preferred against the applicant:

(1) Charge 1: Article 91 (Insubordinate conduct) - specification: the applicant did at or near Life Support Area (LSA) Anaconda, Iraq, on or about 13 November 2003, was disrespectful in language and deportment toward SSG J., an NCO, then known to be a superior NCO, by staring at SSG J. and saying to him "I don't trust you," or words to that effect.

(2) Charge 2: Article 117 (Provoking speeches or gestures)

- specification 1: the applicant did at or near LSA Anaconda, Iraq, on or about 8 November 2003, wrongfully use provoking words, to wit: "Your lucky the unit took my weapon. I don't know what I would do if I had it," or words to that effect, towards Master Sergeant (MSG) L.
- specification 2: the applicant did at or near LSA Anaconda, Iraq, on or about 15 November 2003, wrongfully use provoking words, to wit: "Would it be wrong to want terrorists to blow up this base?" and "I would like to make a napalm bomb and explode it over certain locations so that it would stick to and kill certain people," or words to that effect towards Specialist (SPC) C.
- specification 3: the applicant did at or near LSA Anaconda, Iraq, on or about 16 November 2003, wrongfully use provoking words, to wit: "I am glad that more American soldiers were killed," or words to that effect, towards SSG J.

(3) Charge 3: Article 128 (Assault) - specification: the applicant did at or near LSA Anaconda, Iraq, on or about 20 November 2003, commit and assault on SPC C. by pointing at him with a dangerous weapon, a knife.

e. A memorandum dated 4 February 2004, on letterhead from the U.S Army Trial Defense Service, Central Iraq Field Office (Office Symbol - AETV-JA-BLD-TDS), Subject: Request for Discharge in Lieu of Trial by Court-Martial [SGT Applicant], which was signed by the applicant and Defense counsel reads:

...I SGT [Applicant]... voluntarily request discharge in lieu of trial by court-martial IAW... [Army Regulation] 635-200 [Active Duty Enlisted Administrative Separations], Chapter 10. I understand that I may request discharge in lieu of trial by court-martial because of the following charges, which have been

preferred against me under the Uniform Code of Military Justice, each of which authorizes the imposition of a bad conduct or dishonorable discharge: Article 91, Article 117 x 4, Article 128.

...I am making this request of my own free will and have not been subjected to any coercion whatsoever by any person. I have been advised of the implications that are attached to it. By submitting this request for discharge, acknowledge that I understand the element of the offense(s) charged, and I am guilty of (one or more of) the charge(s) against me or of (a) lesser included offense(s) therein contained, which also authorize the imposition of a bad conduct or dishonorable discharge. Moreover, I hereby state that under no circumstances do I desire further rehabilitation, for I have no desire to perform further military service.

...Prior to completing this form, I was afforded the opportunity to consult with appointed Defense Counsel for consultation. I have consulted with counsel for consultation who has fully advised me of the nature of my rights under the Uniform Code of Military Justice, the elements of the offenses with which I am charged, any relevant lesser included offenses thereto, and the facts that must be established by competent evidence beyond a reasonable doubt to sustain a finding of guilty; the possible defenses that appear to be available at this time; and the maximum permissible punishment if found guilty. Although he has furnished me legal advice, this decision is my own.

...I understand that if my request for discharge is accepted, I may be discharged under conditions other than honorable. I have been advised and understand the possible effects of an Under Other Than Honorable Conditions Discharge and that as a result of the issuance of such a discharge I will be deprived of many or all Army benefits, that I may be ineligible for many or all benefits administered by the Department of Veterans Affairs, and that I may be deprived of my rights and benefits as a veteran under both Federal and State law. I also understand that I may expect to encounter substantial prejudice in civilian life because of an Under Other Than Honorable Conditions Discharge...

...I understand that once my request for discharge is submitted, it may be withdrawn only with consent of the commander exercising General Court-Martial Authority or without that Commander's consent, in the event trial results in an acquittal or the sentence does not include a punitive discharge even though one could have been adjudged by the Court...

...I have been advised that I may submit any statements I desire in my own behalf, which will accompany my request for discharge. Statements in my own behalf are not submitted with this request...I hereby acknowledge receipt of a copy of this request for discharge.

Having been advised by me of... The basis for his contemplated trial by court-martial and the maximum permissible punishment authorized under the Uniform Code of Military Justice; ...The possible effects of an Under Other Than Honorable Conditions Discharge if this request is approved including but not limited to the reduction to the lowest enlisted grade (Private E1) by operation of law and the loss of benefits administered by both the Army and other Federal agencies; and ...The procedures and rights available to him; ...SGT [Applicant], personally made the choices indicated in the foregoing request for discharge in lieu of trial by court-martial.

f. On 14 February 2004, the separation approval authority (Office Symbol AFZF-CG) approved the applicant's request for discharge in lieu of trial by court martial under the provisions of Army Regulation (AR) 635-200, (Active Duty Enlisted Administrative Separations), chapter 10. He directed the applicant to be reduced to rank/grade of Private (PV1)/E-1 and be issued an under other than honorable conditions characterization of service discharge. The memorandum also states, "You will be separated from the Army no later than ten (10) working days from the dated of this memorandum [27 February 2004]."

g. Orders 329-1, published by the ORARNG on 24 November 2004 amended Orders 103-42, dated 12 April 2004 (NOTE: the service record is void of Orders 329-1) to show:

- As reads – Type of Discharge: Honorable (NGB Form 22)
- How changed – Is amended to read: Under Other Than Honorable

h. The applicant's record contains a DD Form 214 which shows he was discharged on 2 March 2004 (12 working days after the issuance of the aforementioned memorandum), under the provisions of Army Regulation 635-200, chapter 10, in lieu of trial by court-martial, in the rank/grade of PV1/E-1, with an under other than honorable conditions character of service discharge. He completed 1 years and 26 days of net active service this period with no lost time. He was assigned separation code KFS and the narrative reason for separation listed as "In Lieu of Trial by Court-Martial," with reentry code 4. Neither the applicant nor the authorized official signed The DD Form 214 of record. Additionally, his DD Form 214 list the following decorations or awards:

- Navy Achievement Medal
- Meritorious Unit Commendation
- Marine Corps Good Conduct Medal (2nd award)
- National Defense Service Medal (2nd award)
- Armed Forces Reserve Medal with "M" device
- Overseas service bar

- Sea Service Deployment Ribbon (2nd award)

i. On 5 January 2007, A DD Form 215, correcting the applicant's DD Form 214 for the period ending 2 March 2004, was issued to add the Iraq Campaign Medal.

5. There is no evidence the applicant has applied to the Army Discharge Review Board for review of his discharge within that board's 15-year statute of limitations.

6. On 19 July 2023, the ABCMR rendered a decision in Docket Number AR20220012134. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding insufficient evidence to support the applicant had condition or experience that mitigated his misconduct. The Board found insufficient evidence of in-service mitigating factors for the serious misconduct to weigh a clemency determination. The Board agreed the applicant's record is void of any available record of his behavioral health evaluation or treatment due to the time of the applicant's service and the availability of medical records at that time. However, the Board noted the applicant was recommended to not be allowed access to weapons or classified materials. This recommendation was also discussed in the applicant's response to his charges. Although, there is sufficient evidence the applicant was determined to be at significant risk for harm to others or himself while serving in an austere combat environment. The Board determined based on liberal consideration, the evidence provided was insufficient to support relief. Furthermore, the Board determined the applicant had not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief, for restoration of his rank/grade private (PV1)/E-1 to staff sergeant (SSG)/E-6, upgrade of his separation code from KFS to KNL, upgrade of his reentry code from "4" to "1" nor an upgrade of the under other than honorable conditions (UOTHC) discharge to an honorable discharge. Therefore, the Board denied the requested relief.

7. By regulation (AR 15-185), an applicant is not entitled to a hearing before the ABCMR. Hearings may be authorized by a panel of the ABCMR or by the Director of the ABCMR.

8. By regulation (AR 635-200), a discharge under other than honorable conditions is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, security reasons, or in lieu of trial by court martial.

9. By regulation (AR 635-5-1), the SPD code of "KFS" is the appropriate code to assign enlisted Soldiers who are discharged under the provisions of Army Regulation 635-200, Chapter 10, "Discharge in Lieu of Court-Martial."

10. By regulation (AR 635-5), the DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of release from active duty, retirement, or discharge. The information entered thereon reflects the conditions as they existed at the time of separation.

11. By regulation (AR 601-210), which covers eligibility criteria, policies, and procedures for enlistment and processing into the RA and the United States Army Reserve, reentry code 4 applies to Soldiers ineligible for reentry.

12. In reaching its determination, the Board can consider the applicant's petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

13. MEDICAL REVIEW:

a. Background: The applicant is requesting reconsideration of his previous request to upgrade his under other than honorable conditions discharge to honorable. In addition to, an upgrade of his separation code, an upgrade of his reentry code, his rank restored from private/E-1 to staff sergeant/E-6, his separation date be changed from 2 March 2004 to 27 June 2004, removal of DA Form 2166-7 (NCO Evaluation Report) for the period 2002 11 thru 2003 10, removal of memorandum, Subject: Request for Discharge in Lieu of Trial by Court-Martial, dated 4 February 2004, removal of memorandum, Subject: Decision on Request for Discharge in Lieu of Trial by Court-Martial, dated 14 February 2004, and removal of unsigned DD Form 214 (Certificate of Release or Discharge from Active Duty) effective 2 March 2004.

b. This opine will narrowly focus on the applicant's request for an upgrade of his characterization of service. The applicant's remaining requests are deferred to the Board.

c. 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:

- With prior active-duty United States Marine Corps service, the applicant enlisted in the Washington ARNG on 5 February 2001. He executed an interstate transfer to the Oregon ARN.
- Applicant served in Iraq from 29 April 2003 to 23 February 2004.
- On 24 November 2003, the following court-martial charges were preferred against the applicant:

d. Charge 1, Article 91 (Insubordinate conduct) - specification: the applicant did at or near Life Support Area (LSA) Anaconda, Iraq, on or about 13 November 2003, was disrespectful in language and deportment toward SSG J., an NCO, then known to be a

superior NCO, by staring at SSG J. and saying to him "I don't trust you," or words to that effect.

e. Charge 2, Article 117, (Provoking speeches or gestures)

f. Specification 1: the applicant did at or near LSA Anaconda, Iraq, on or about 8 November 2003, wrongfully use provoking words, to wit: "Your lucky the unit took my weapon. I don't know what I would do if I had it," or words to that effect, towards Master Sergeant (MSG) L.

g. Specification 2: the applicant did at or near LSA Anaconda, Iraq, on or about 15 November 2003, wrongfully use provoking words, to wit: "Would it be wrong to want terrorists to blow up this base?" and "I would like to make a napalm bomb and explode it over certain locations so that it would stick to and kill certain people," or words to that effect towards Specialist (SPC) C.

h. Specification 3: the applicant did at or near LSA Anaconda, Iraq, on or about 16 November 2003, wrongfully use provoking words, to wit: "I am glad that more American soldiers were killed," or words to that effect, towards SSG J.

i. Charge 3, Article 128 (Assault) - specification: the applicant did at or near LSA Anaconda, Iraq, on or about 20 November 2003, commit and assault on SPC C. by pointing at him with a dangerous weapon, a knife.

- On 14 February 2004, the separation approval authority (Office Symbol AFZF-CG) approved the applicant's request for discharge in lieu of trial by court martial under the provisions of Army Regulation (AR) 635-200, (Active Duty Enlisted Administrative Separations), chapter 10. He directed the applicant to be reduced to rank/grade of Private (PV1)/E-1 and be issued an under other than honorable conditions characterization of service discharge.
- The applicant's record contains a DD Form 214 which shows he was discharged on 2 March 2004 (12 working days after the issuance of the aforementioned memorandum), under the provisions of Army Regulation 635-200, chapter 10, in lieu of trial by court-martial, in the rank/grade of PV1/E-1, with an under other than honorable conditions character of service discharge. He completed 1 years and 26 days of net active service this period with no lost time. He was assigned separation code KFS and the narrative reason for separation listed as "In Lieu of Trial by Court-Martial," with reentry code 4. Neither the applicant nor the authorized official signed the DD Form 214 of record.
- On 19 July 2023, the ABCMR rendered a decision in Docket Number AR20220012134. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding insufficient evidence to support the applicant had a condition or experience that mitigated his misconduct. Therefore, the Board denied the requested relief.

j. Review of Available Records: The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents contained in the applicant's file. The applicant states, "during his service, he suffered from mental and medical issues, to include complex post-traumatic stress disorder (PTSD), head concussions (traumatic brain injury (TBI)), personality disorders, and anxiety and social disorders. He also states that his NCOER rated his discharge type and not inclusive of his period of rated service. Additionally, it was completed 5 months later. Memorandums "Request for Discharge in Lieu of Trial by Court-Martial" dated 4 February 2004 and "Decision on Request for Discharge in Lieu of Trial by Court-Martial" dated 14 February 2004 contain several errors, mistakes, and were not followed. He did not receive legal counsel after signing the request for discharge, causing him to lose protected rights. His date of discharge is incorrect per Orders 324-100 dated 20 November 2003." The applicant provides new medical records and legal information about his conditions that were not previously considered. In addition, the applicant states, "the relief and corrections he is seeking should be made in order to correct an injustice and as an act of fairness. He does not think that if these same issues happened today, they would have received as harsh a punishment. He also believes this punishment was unfair just due to the fact it happened in a combat zone and not at peace time. He believes he had a TBI; he suffers from PTSD as well as an ongoing battle with chronic depression and social anxiety. These issues are well documented in his medical records. These issues still affect him today and he is trying to get the proper help for them. He also enclosed copies of the Hagel, Carson, Kutra, and Wilkie memoranda, which he feels relate to his case and would warrant a review. His medical issues should also serve as mitigating factors in his behavior. There will never be an excuse for his behavior, but his medical conditions most undoubtedly played a significant role in his situation. At the time of his discharge these factors were never considered."

k. Due to the period of service no active-duty electronic medical records were available for review. However, in Docket Number AR20220012134, the Board noted that during his deployment the applicant was recommended to not be allowed access to weapons or classified materials since he was deemed to be at significant risk for harm to self or others while serving in an austere combat environment.

l. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is 100% service connected, including 70% for PTSD.

m. Two Compensation and Pension Examinations are present in the applicant's VA electronic medical record, one, dated 6 May 2022, diagnosed the applicant with Generalized Anxiety Disorder and Persistent Depressive Disorder. The report specifically states the applicant did not have a diagnosis of TBI. The second evaluation is dated 18 April 2023 and diagnosed the applicant with Posttraumatic Stress Disorder (PTSD), Generalized Anxiety Disorder, and Persistent Depressive Disorder. This report also notes the applicant does not have a diagnosis of TBI.



n. 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. However, his BH condition of PTSD only partially mitigates his discharge, with his more serious offenses not being mitigated.

o. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts multiple mitigating conditions, including, complex post-traumatic stress disorder (PTSD), head concussions (traumatic brain injury (TBI), anxiety and social disorders.

(2) Did the condition exist or experience occur during military service? Yes. The applicant is service connected for PTSD and the record indicates he struggled with anxiety and depression with the symptoms subsumed under his diagnosis of PTSD. However, the medical record specifically states the applicant does not have a TBI and he is not service connected for this condition.

(3) Does the condition or experience actually excuse or mitigate the discharge? Partial. Court-martial charges were preferred against the applicant for insubordinate conduct, wrongfully using provoking words, and assault with a dangerous weapon. Given the nexus between PTSD and defiance toward authority, his charge of insubordinate conduct would be mitigated by his BH condition. However, his more serious misconduct of threatening communications and assault with a dangerous weapon, are not mitigated by his BH condition. Such behaviors are not part of the natural history or sequelae of PTSD, as such, his BH condition would not mitigate this misconduct under Liberal Consideration. In addition, PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right.

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 review, the Board noted the advising official finding is sufficient evidence to support the applicant had a behavioral health condition during military service. However, his BH condition of PTSD only partially mitigates his discharge, with his more serious offenses not being mitigated.

2. The Board determined under liberal consideration changes to the applicant's separation code and RE Code are not warranted. The Board determined there is insufficient evidence to support the applicant's contentions to have his rank be restored from private/E-1 to staff sergeant/E-6 nor amendment of his separation date being changed from 2 March 2004 to 27 June 2004. The Board considered the applicant statement, his record of service and documents provided by the applicant. However, the Board found the NCOER represented the considered opinions and objective judgment of the rating officials at the time of preparation. The Board agreed removal of DA Form 2166-7 (NCO Evaluation Report) for the period 2002 11 thru 2003 10 is without merit. Furthermore, the Board found removal of memorandum, Subject: Request for Discharge in Lieu of Trial by Court-Martial, dated 4 February 2004 and removal of memorandum, Subject: Decision on Request for Discharge in Lieu of Trial by Court-Martial, dated 14 February 2004 is unwarranted based on insufficient evidence to support the applicant's request for removal.

3. The Board found insufficient evidence to support upgrading the applicant's discharge. The Army has an interest in maintaining the integrity of its records for historical purposes. The information in those records must reflect the conditions and circumstances that existed at the time the records were created. In the absence of evidence that shows a material error or injustice, there is a reluctance to recommend that those records be changed. The Board determined the applicant's DD Form 214 unsigned is a source document within his official military records and removal of the unsigned DD Form 214 with an effective date of 2 March 2004 is without merit. The Board determined, notwithstanding the advising opine finding partial mitigation, the Board considered all factors but found reversal of the previous Board decision is not warranted and denied relief.

4. The applicant's request for a personal appearance hearing was carefully considered. In this case, 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.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:            :            :            GRANT FULL RELIEF

:            :            :            GRANT PARTIAL RELIEF

:            :            :            GRANT FORMAL HEARING

█           █           █            DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board found 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 to amend the decision of the ABCMR set forth in Docket Number AR20220012134 on 19 July 2023.

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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 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 begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that 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.

2. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations) sets policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons.

a. An honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the soldier'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. A discharge under other than honorable conditions is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, security reasons, or in lieu of trial by court martial.

(1) Commanders will ensure that a soldier is not coerced into submitting a request for discharge in lieu of trial by court-martial. The soldier will be given a reasonable time (not less than 72 hours) to consult with consulting counsel and to consider the wisdom of submitting such a request for discharge.

(2) Consulting counsel will advise the soldier concerning: the elements of the offense/s charged; the burden of proof; possible defenses and possible punishments; the requirements of volunteerism; type of discharge normally given under the provisions of this chapter; the rights regarding the withdrawal of the soldier's request; the loss of Veterans' benefits; and prejudice in civilian life based upon the characterization of discharge. Consulting counsel may advise the soldier regarding the merits of this separation action and the offense pending against the soldier. The soldier also must be advised that pursuant to a delegation of authority, a request for discharge in lieu of trial by court-martial may be approved by the commander exercising special court-martial convening authority, but the authority to disapprove a request for discharge in lieu of trial by court-martial may not be delegated.

(3) After receiving counseling, the soldier may elect to submit a request for discharge in lieu of trial by court-martial. The soldier will sign a written request, certifying that he/she has been counseled, understands his/her rights; may receive a discharge under other than honorable conditions; and understands the adverse nature of such a discharge and the possible consequences. The soldier's written request will also include an acknowledgment that he/she understands the elements of the offense/s charged and is guilty of the charge/s or of a lesser included offense/s therein contained which also authorizes the imposition of a punitive discharge.

(4) A discharge under other than honorable conditions normally is appropriate for a soldier who is discharged in lieu of trial by court-martial. However, the separation authority may direct a general discharge if such is merited by the soldier's overall record during the current enlistment. When a soldier is to be discharged under other than honorable conditions, the separation authority will direct an immediate reduction to the lowest enlisted grade.

3. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the SPD codes to be entered on the DD Form 214. It identifies the SPD code of "KFS" as the appropriate code to assign enlisted Soldiers who are discharged under the provisions of Army Regulation 635-200, Chapter 10, Discharge in Lieu of Trial by Court-Martial. The SPD Code/RE Code Cross Reference Table shows that a Soldier assigned an SPD Code of "KFS" will be assigned an RE Code of 4.

4. Army Regulation 635-5 (Separation Documents) states the DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of release from active duty, retirement, or discharge. The information entered thereon reflects the conditions as they existed at the time of separation.

5. Army Regulation 601-210 (Regular Army and Army Reserve Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment and processing into the RA and the United States Army Reserve. Table 3-1 included a list of the RA RE codes. RE codes are numbered 1, 3, and 4.

- RE-1 applies to Soldiers completing their term of active service who are considered qualified to reenter the U.S. Army; they are qualified for enlistment if all other criteria are met
- RE-3 applies to Soldiers who are not considered fully qualified for reentry or continuous service at the time of separation, but the disqualification is waivable; those individuals are ineligible unless a waiver is granted
- RE-4 applies to Soldiers ineligible for reentry

6. Army Regulation 600-8-104 (Army Military Human Resource Records Management) states that the OMPF is defined as permanent documentation within the AMHRR that documents facts related to a Soldier during the course of his or her entire Army career, from time of accession into the Army until final separation, discharge, or retirement. The purpose of the OMPF is to preserve permanent documents pertaining to enlistment, appointment, duty stations, assignments, training, qualifications, performance, awards, medals, disciplinary actions, insurance, emergency data, separation, retirement, casualty, and any other personnel actions. Once properly filed in the AMHRR the document will not be removed from the record unless directed by selected authorities such as the ABCMR, Army Discharge Review Board, Department of the Army Suitability Evaluation Board, and Army Special Review Board.

7. Army Regulation 600-37 (Unfavorable Information) sets forth policies and procedures to authorize placement of unfavorable information about Army members in individual official personnel files. The intent of this regulation is to ensure that unfavorable information that is unsubstantiated, irrelevant, untimely, or incomplete is not filed in individual official personnel files; and, to ensure that the best interest of both the Army and the Soldiers are served by authorizing unfavorable information to be placed in and, when appropriate, removed from official personnel files.

a. Chapter 3 states a memorandum, regardless of the issuing authority, may be filed in the Army Military Human Resource Record (AMHRR), and managed by Human Resource Command. The General Officer directing filing must exercise General Court-Martial Convening Authority (GCMCA) over the recipient, be the designee or delegate of the individual exercising GCMCA over the recipient, been a filing authority from the recipient's losing command, or be the chief of any designated special branch acting pursuant to their statutory authority. Memoranda filed in the AMHRR will be filed in the performance folder.

b. Chapter 7 states once an official document has been properly filed in the AMHRR, it is presumed to be administratively correct, and to have been filed pursuant to an objective decision by a competent authority. The recipient has the burden of proof to show, by clear and convincing evidence, to support assertion that the document is either untrue or unjust, in whole or in part. Evidence submitted in support of the appeal may include, but is not limited to: an official investigation showing the initial investigation was untrue or unjust; decisions made by an authority above the imposing authority overturning the basis for the adverse documents; notarized witness statements; historical records; official documents; and/or legal opinions. The Deputy Assistant Secretary of the Army (Review Boards) is the final decision authority for removal of unfavorable information from the AMHRR. This authority will not be further delegated.

8. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records

(BCM/NRs) to carefully consider the revised post-traumatic stress disorder (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; TBI; sexual assault; sexual harassment. Boards were directed 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 that misconduct which led to the discharge.

10. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records 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. This guidance does not mandate relief but provides standards and principles to guide Boards in application of their equitable relief authority.

a. 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.

11. Section 1556 of Title 10, United States Code, 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.

//NOTHING FOLLOWS//