

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 September 2024

DOCKET NUMBER: AR20240000478

APPLICANT REQUESTS: his under honorable conditions (General) discharge be upgraded to honorable. Additionally, he requests an appearance before the Board via video/telephone.

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

DD Form 149 (Application for Correction of Military Record)

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 he had undiagnosed post-traumatic stress disorder (PTSD), mental health issues, and substance abuse when he was discharged. He was told by his first sergeant during his discharge that he wasn't eligible for any of this, so he did not try until now to upgrade his discharge.
3. The applicant enlisted in the Regular Army on 20 February 1997. His military occupational specialty was 11B (Infantryman).
4. The applicant reenlisted on 8 March 1999, for 4 years.
5. He served in Germany from 8 September 1999 through on or about 7 September 2002.
6. The applicant was counseled on numerous occasions between 14 March 2001 and 7 January 2002 for:
 - disrespect to a noncommissioned (NCO)
 - misconduct and assault
 - conspiracy, commander revoked leave, evidence, punishment, shoplifting

- insubordinate conduct toward an NCO (two), provoking speeches or gestures assault and continuing misconduct and insubordination
- informative counseling for lack of respect
- disrespectful language or deportment toward a warrant officer, noncommissioned officer, or petty officer while that officer was in the execution of his office

7. The applicant's sworn statement, dated 24 March 2001 shows the applicant was intoxicated, had an altercation, and was asked to leave the club.

8. The applicant accepted nonjudicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ) on 24 April 2001 for being disrespectful in language toward an NCO on or about 19 March 2001; and assault of an NCO by hitting him in the chest with his hand on or about 23 March 2001. His punishment consisted of reduction to private/E-1 (suspended), forfeiture of \$521.00, extra duty and restriction.

9. The Criminal Investigation Division Report and Agent's Report shows on 30 August 2001 the applicant was in a house where the military police were called for possible child abuse. The little girl at this location was not being abused. The officers observed five American service members inside who were smoking what they believed to be controlled substances through a "bong" type smoking device. The applicant was one of the five service members. The applicant was released to his unit and informed that a command directed urinalysis needed to be conducted.

a. The investigation revealed the applicant was the subject of file for wrongful use of a controlled substance, and for aggravated assault.

b. On 31 August 2001 the applicant's urinalysis tested positive for tetrahydrocannabinol (THC), the active ingredient in marijuana.

10. The applicant's Report of Medical History, dated 1 September 2001 shows in:

- item 29 (Explanation of "Yes" Answers) the applicant had been in a military hospital for attempted suicide, and had numerous mental health counselors
- Item 30 (Examiner's Summary) adjustment disorder, substance abuse alcohol and THC; misconduct, hospitalized for suicidal ideations at Fort Hood, TX
- the applicant's psychical examination shows a recommendation of discharge from service

11. The applicant accepted NJP under Article 15 of the UCMJ Justice on 6 December 2001 for wrongful use of marijuana, on or about 30 August 2001. His punishment consisted of reduction to private/E-1, forfeiture of \$521.00 per month for 2 months, extra duty and restriction.

12. The applicant was counseled by his commander on 7 January 2002 that he was being recommended for separation from the Army under the provisions of Army Regulation (AR) 635-200 (Active-Duty Enlisted Administrative Separations), Chapter 14, for misconduct.

13. A Report of Mental Status Evaluation, dated 14 January 2002, shows the applicant had the mental capacity to understand and participate in the proceedings, was mentally responsible, and met retention requirements. There was no evidence of mental disease or defect of psychiatric significance to warrant disposition through medical channels. The applicant denied homicidal and failed to endorse current suicidal ideation, intent, or plans. He was cleared for any administrative action deemed appropriate by command.

14. The applicant's commander notified him on 26 January 2002, that he was initiating action under the provisions of AR 635-200, Chapter 14-12b, to separate the applicant for a pattern of misconduct. The applicant was disrespectful toward an NCO, he used marijuana and he assaulted an NCO. The commander recommended a under honorable conditions (general) discharge. The applicant acknowledged receipt on the same date.

15. The applicant consulted with legal counsel on 26 January 2002 and was advised of the basis for the contemplated actions to separate him and of the rights available to him. He understood that he may expect to encounter substantial prejudice in civilian life if a under honorable conditions (general) was issued to him. He waived representation and he elected not to submit statements in his own behalf.

16. The applicant's commander formally recommended him for separation from service under the provisions of AR 635-200, paragraph 14-12b. In the commander's opinion it is neither feasible nor appropriate to expend any further time or effort towards rehabilitating the applicant to an acceptable level of performance and conduct. The chain of command recommended approval with a under honorable conditions (general) discharge.

17. The separation authority approved the recommended separation and directed the issuance of a under honorable conditions (general) discharge. The applicant was ineligible for transfer to the individual ready reserve and would be discharged.

18. The applicant was discharged on 2 February 2002. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of AR 635-200, paragraph 14-12b, by reason of misconduct with Separation Code JKA and Reentry Code 3. His service was characterized as under honorable conditions (general). He completed 4 years, 11 months, and 13 days of net active service. He was awarded the Army Service Ribbon, and the Overseas Service Ribbon.

19. Soldiers are subject to separation under the provisions AR 635-200, Chapter 14, for misconduct. 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 such is merited by the overall record.

20. On 16 July 2002, the Army Review Boards Agency (ARBA) recommended that all of the Department of the Army records regarding the applicant in this case be corrected and issued a DD Form 215 (Correction to DD Form 214) dated 18 December 2002, that shows:

- Item 13 (Awards and Decorations) added the Army Good Conduct Medal
- Item 18 (Remarks) deleted member has not completed first term full term of service and added member has completed first full term of service

21. On 18 December 2002, ARBA notified the applicant his records had been corrected.

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

23. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under honorable conditions (general) discharge to honorable. He contends PTSD and OMH mitigate his discharge.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following:

- Applicant enlisted in the Regular Army on 20 February 1997 and reenlisted on 8 March 1999.
- He served in Germany from 8 September 1999 through on or about 7 September 2002.
- Applicant was counseled on numerous occasions between 14 March 2001 and 7 January 2002 for:
 - disrespect to a noncommissioned (NCO)
 - misconduct and assault
 - conspiracy, commander revoked leave, evidence, punishment, shoplifting
 - insubordinate conduct toward an NCO (two), provoking speeches or gestures assault and continuing misconduct and insubordination
 - informative counseling for lack of respect

- disrespectful language or deportment toward a warrant officer, noncommissioned officer, or petty officer while that officer was in the execution of his office
- A sworn statement, dated 24 March 2001 shows the applicant was intoxicated, had an altercation, and was asked to leave a club.
- Applicant accepted nonjudicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ) on 24 April 2001 for being disrespectful in language toward an NCO on or about 19 March 2001; and assault of an NCO by hitting him in the chest with his hand on or about 23 March 2001.
- A Criminal Investigation Division Report and Agent's Report shows on 30 August 2001 the applicant was in a house where the military police were called for possible child abuse. The little girl at this location was not being abused. The officers observed five American service members inside who were smoking what they believed to be controlled substances through a "bong" type smoking device. The applicant was one of the five service members. The applicant was released to his unit and informed that a command directed urinalysis needed to be conducted. The investigation revealed the applicant was the subject of file for wrongful use of a controlled substance, and for aggravated assault. On 31 August 2001 the applicant's urinalysis tested positive for tetrahydrocannabinol (THC), the active ingredient in marijuana.
- Applicant accepted NJP under Article 15 of the UCMJ Justice on 6 December 2001 for wrongful use of marijuana, on or about 30 August 2001. His punishment consisted of reduction to private/E-1, forfeiture of \$521.00 per month for 2 months, extra duty and restriction.
- The applicant's commander notified him on 26 January 2002, that he was initiating action under the provisions of AR 635-200, Chapter 14-12b, to separate the applicant for a pattern of misconduct. The applicant was disrespectful toward an NCO, he used marijuana and he assaulted an NCO. The commander recommended a under honorable conditions (general) discharge. The applicant acknowledged receipt on the same date.
- Applicant was discharged on 2 February 2002. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of AR 635-200, paragraph 14-12b, by reason of misconduct with Separation Code JKA and Reentry Code 3. His service was characterized as under honorable conditions (general). He completed 4 years, 11 months, and 13 days of net active service.

c. Review of Available Records: The Army Review Board Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant states, "he had undiagnosed post-traumatic stress disorder (PTSD), mental health issues, and substance abuse when he was discharged. He was told by his first sergeant during his discharge that he wasn't eligible for any of this, so he did not try until now to upgrade his discharge".

d. Due to the period of service no active-duty electronic medical records were available for review. Hardcopy documentation provided by the applicant's shows a physical examination dated 1 September 2001. In the examination the applicant self-reported having been psychiatrically hospitalized while in service for suicidal ideation along with treatment via numerous mental health counselors. He further endorsed having been diagnosed with adjustment disorder as well as substance and alcohol abuse, and engaging in misconduct while at Fort Hood, TX. The examiner recommended discharge from military service. A mental status evaluation for the purpose of separation, dated 14 January 2002, shows the applicant had the mental capacity to understand and participate in the proceedings, was mentally responsible, and met retention requirements. There was no evidence of mental disease or defect of psychiatric significance to warrant disposition through medical channels. The applicant denied homicidal and suicidal ideation, intent, or plan. He was cleared for any administrative action deemed appropriate by command.

e. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is 70% service connected, including 50% for Chronic Adjustment Disorder effective August 2023. The applicant initiated behavioral health services with the VA in July 2023 due to depressive thoughts and feelings. During an intake session dated 21 August 2023, the applicant was diagnosed with PTSD, disclosed a history of childhood trauma and disclosed engaging in misconduct in order to get out of the military. Applicant participates intermittently in mental health services, primarily via medication management.

f. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is evidence the applicant had a BH condition during military service. The applicant's BH condition partially mitigates his misconduct, however, the more serious offense of assault against an NCO is not mitigated.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts mitigating conditions of PTSD and OMH.

(2) Did the condition exist or experience occur during military service? Yes. The applicant is service-connected for Chronic Adjustment Disorder.

(3) Does the condition or experience actually excuse or mitigate the discharge? Partial. The applicant was discharge from military service due to being disrespectful towards an NCO, use of marijuana, and assault of an NCO. The applicant's VA medical record shows he is service connected for Chronic Adjustment Disorder and has been treated for PTSD. Given the nexus between PTSD and difficulty with authority, the applicant's charge of being disrespectful towards an NCO is mitigated by his BH

condition. In addition, given the nexus between the use of substances to cope with the symptoms of his BH condition, his use of marijuana is also mitigated by his BH condition. However, his more serious offense of physical assault is not mitigated by any of his BH conditions, including Chronic Adjustment Disorder or PTSD. Assault is not a natural history or sequelae of any of his BH conditions and, as such, would not mitigate his discharge. In addition, his BH conditions do not impact the 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 request, supporting documents, evidence in the records, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was separated for misconduct with the commander citing a positive urinalysis for marijuana, disrespect, and assault of a commissioned officer. The Board found no error or injustice in the separation proceedings and designated characterization of service assigned during separation. The Board noted the applicant provided no documentation to support his request, including post-service achievements or letters of reference to support clemency. The Board reviewed and concurred with the medical advisor's review finding evidence of a behavioral health condition while in service; however, finding it only partially mitigated his misconduct. Based on a preponderance of the evidence, the Board concluded that the characterization of service the applicant received upon separation was appropriate.
2. 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 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.

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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. Title 10, U.S. Code (USC), Section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. Title 10, USC, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.
3. Army Regulation 15-185 (ABCMR) sets forth procedures for processing requests for the correction of military records. Paragraph 2-15a governs requests for reconsideration. This provision of the regulation allows an applicant to request reconsideration of an earlier decision of the ABCMR. The applicant must provide new relevant evidence or argument that was not considered at the time of the ABCMR's prior consideration. 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.
4. Army Regulation 635-200 (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 was normally considered

appropriate. However, the separation authority could 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; traumatic brain injury (TBI); 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.

6. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and BCM/NRs on 25 July 2018, 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 court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, Boards shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

//NOTHING FOLLOWS//