

IN THE CASE OF: [REDACTED]

BOARD DATE: 5 September 2024

DOCKET NUMBER: AR20240000485

APPLICANT REQUESTS: his under honorable conditions (general) discharge be upgraded.

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

- DD Form 293 (Application for the Review of Discharge)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)

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 his discharge was improper. He was not convicted of a felony nor misdemeanor at the time of discharge. He served in Iraq, upon returning he suffered a drinking problem, and he had a post-traumatic stress order (PTSD) episode which led to an arrest during leave. The courts pardoned his charges. The Army thought he was going to have a felony, so they discharged him. He wants the board to reconsider. He would like this upgrade to utilize Veterans Affairs benefits.
3. The applicant enlisted in the Regular Army on 4 January 2007 for 3 years and 17 weeks. His military occupational specialty was 19K (M1 Armor Crewman).
4. The applicant reenlisted on 26 November 2008 for 6 years.
5. The Superior Court [REDACTED], County [REDACTED], Probation Officer's Report shows on 20 March 2009 the applicant was driving a vehicle on a public street when he discharged a loaded firearm numerous times. The applicant was arrested and charged with discharge of firearm in a public place, special allegation use of firearm.
 - a. It was recommended that probation be granted and that he serve the maximum amount of time in the county jail.

b. The evaluation shows the applicant's actions in this case reflect that he poses a threat to the safety of others, a recommendation for state prison was strongly considered; however, he has no prior criminal record, and no one was injured as a result of the offense; nevertheless, the probation officer believes that the offense is serious. Probation appears appropriate in this case; however, the probation officer is requesting that the court order state prison and that execution of sentence be suspended. Further, as a condition of probation the applicant should serve the maximum time allowed in the county jail.

c. The terms of probation are available for review.

6. The attorney letter to the applicant's commander and first sergeant, dated 1 June 2009 shows the Deputy District Attorney in charge of the case considered illegal firearm discharge a very serious crime and refused to lower the charge from a felony to a misdemeanor, and requested that the court set the case for a preliminary hearing on 12 June 2009.

a. His case was transferred for trial on 12 June 2009. Trial date was set for 26 June 2009.

b. An attorney letter to the applicant's commander and first sergeant, dated 29 June 2009 shows the new Deputy District Attorney said that she was inclined to lower the charge to a misdemeanor, but she could not do so without the transcript of the preliminary hearing. The case was continued to 24 July 2009. The applicant wanted it made clear that he would rather be with his fellow Soldiers in Iraq.

7. The applicant was counseled by his commander on 28 July 2009 to inform him that he was being separated from the Army under the provisions of Army Regulation (AR) 635-200 (Active-Duty Enlisted Administrative Separations), Chapter 14-12c, for commission of a serious offense.

8. A Report of Mental Status Evaluation, dated 16 June 2009, 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 any psychiatric disorder or problem that would result in disposition through medical channels. The applicant denied current suicidal or homicidal ideation. He was cleared for any other administrative action deemed necessary by command.

9. The applicant was medically qualified for separation on 16 June 2009.

10. The applicant's commander notified him on 30 July 2009 that he was initiating action to separate the applicant from the Army under the provisions of AR 635-200, Chapter 14-12c, for commission of a serious offense. He recommended an under

honorable conditions (general) discharge. The applicant acknowledged receipt on the same date.

11. The applicant consulted with legal counsel on 11 August 2009 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 elected not to submit statements in his own behalf.

12. The applicant's commander formally recommended him for separation from service on 17 August 2009, under the provisions of AR 635-200, paragraph 14-12c, by reason of commission of a serious offense. The commander recommended a under honorable conditions (general) discharge. The chain of command recommended approval with a general discharge.

13. The separation authority approved the recommended separation on 26 August 2009 under the provisions of AR 635-200, Chapter 14-12c, commission of a serious offense and directed the issuance of a under honorable conditions (general) discharge.

14. The applicant was discharged on 3 September 2009. His DD Form 214 shows he was discharged under the provisions of AR 635-200, paragraph 14-12c, by reason of misconduct (serious offense). His service was characterized as under honorable conditions (general). He completed 2 years and 8 months of net active service. He was awarded the National Defense Service Medal, Global War on Terrorism Service Medal, Iraq Campaign Medal with campaign star, Army Service Ribbon, and the Overseas Service Ribbon.

15. 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.

16. 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.

17. MEDICAL REVIEW:

a. Background: The applicant is requesting upgrade of his under honorable conditions (general) discharge. The applicant contends PTSD as related to his request.

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

- The applicant enlisted in the Regular Army on 4 January 2007 and reenlisted on 26 November 2008.
- The Superior Court [REDACTED], County [REDACTED], Probation Officer's Report shows on 20 March 2009 the applicant was driving a vehicle on a public street when he discharged a loaded firearm numerous times. The applicant was arrested and charged with discharge of firearm in a public place, special allegation use of firearm.
- The attorney letter to the applicant's commander and first sergeant, dated 1 June 2009 shows the Deputy District Attorney in charge of the case considered illegal firearm discharge a very serious crime and refused to lower the charge from a felony to a misdemeanor, and requested that the court set the case for a preliminary hearing on 12 June 2009.
- The applicant was counseled by his commander on 28 July 2009 to inform him that he was being separated from the Army under the provisions of Army Regulation (AR) 635-200 (Active-Duty Enlisted Administrative Separations), Chapter 14-12c, for commission of a serious offense.
- The applicant's commander notified him on 30 July 2009 that he was initiating action to separate the applicant from the Army under the provisions of AR 635-200, Chapter 14-12c, for commission of a serious offense. He recommended an under honorable conditions (general) discharge. The applicant acknowledged receipt on the same date.
- The applicant was discharged on 3 September 2009. His DD Form 214 shows he was discharged under the provisions of AR 635-200, paragraph 14-12c, by reason of misconduct (serious offense) with Separation Code JKQ and Reentry Code 3. His service was characterized as under honorable conditions (general). He completed 2 years and 8 months of net active service. He was awarded the National Defense Service Medal, Global War on terrorism Service Medal, Iraq Campaign Medal with campaign star, Army Service Ribbon, and the Overseas Service Ribbon.

c. Review of Available Records: The Army Review Boards Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant states, "his discharge was improper. He was not convicted of a felony nor misdemeanor at the time of discharge. He served in Iraq, upon returning he suffered a drinking problem, and he had a post-traumatic stress disorder (PTSD) episode which led to an arrest during leave. The courts pardoned his charges. The Army thought he was going to have a felony, so they discharged him. He wants the board to reconsider. He would like this upgrade to utilize Veterans Affairs benefits.

d. Active-duty electronic medical record available for review indicate the applicant participated in a mental status evaluation for the purpose of separation on 16 June 2009. Contrary to the applicant's statement that he "had a post-traumatic stress disorder (PTSD) episode," the applicant reported during that evaluation that while home on

leave, he was arrested by LAPD for discharging a firearm out of a car. When asked if this behavior was gang-related, he reported "yeah, kinda". The applicant was facing felony charges, as well as disciplinary separation from the Army. During the evaluation he only indicated stress related to his legal situation. The applicant denied any psychiatric problems or mental health issues. When assessed specifically related to his deployment to Iraq in 2007, he stated, "it was pretty cool", and denied any distress or problems related to combat exposure. No symptoms of PTSD or post-combat related anxiety or mood problems were reported. The applicant was not diagnosed with any condition and the clinician stated, "there was no evidence of any psychiatric problems that would result in disposition through medical channels".

e. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is not service connected and there is no evidence of the applicant receiving treatment for any BH condition. A note dated 10 December 2020, indicates the applicant was arrested on 23 June 2020 for a felony charge and was convicted and sentenced to state prison via the California Department of Corrections. The record evidences five encounters from December 2023 to August 2024 via the Veteran Justice Outreach Re-entry Program with a focus on supporting the applicant with re-entry planning prior to his release from state prison.

f. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a behavioral health condition during military service that mitigates his discharge.

g. Kurta Questions:

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

(2) Did the condition exist or experience occur during military service? No. There is no medical documentation indicating the applicant was diagnosed with any BH condition during military service or after his discharge.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is no evidence of any mitigating BH condition. There is no evidence of any in-service BH diagnoses, the VA has not service-connected the applicant for any BH condition, and there is no VA electronic record indicating he has been treated for any mental health condition. In addition, the applicant provides no post-service medical documentation substantiating his assertion of PTSD. However, regardless of diagnosis, PTSD would not provide mitigation for his misconduct. PTSD does not have a natural history or sequelae with discharge of a firearm in a public space, nor does it impact the capacity to distinguish right from wrong and act in accordance with the right.

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 PTSD 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 PTSD. Based on a preponderance of the evidence, the Board determined the character of service the applicant received upon separation was not in error or unjust. The Board concurred with the corrections 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

 [REDACTED]CHAIRPERSON
[REDACTED]

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): Based on his reenlistment, the applicant's DD Form 214 contains an erroneous entry and is missing two entries. Please correct the DD Form 214, item 18, as follows:

- Delete – “MEMBER HAS NOT COMPLETED FIRST FULL TERM OF SERVICE”
- Add – “CONTINUOUS HONORABLE ACTIVE SERVICE 20070104-20081125//MEMBER HAS COMPLETED FIRST FULL TERM OF SERVICE”

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 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.

4. 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.

5. 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//