

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 16 August 2024

DOCKET NUMBER: AR20240000769

APPLICANT REQUESTS:

- an upgrade of his under honorable conditions (General) discharge
- a video/telephonic appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) Benefit Letter
- VA Medical Records (1490 pages)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states with the current level of discharge he is ineligible for his educational benefits. Due to his service-connected disability, an upgrade to his discharge would provide him with the required character of service to become eligible for his educational benefits. He is requesting his discharge be upgraded too honorable.
3. The applicant provides the following documents:
  - a. A VA benefits letter that shows the applicant is rated 100 percent totally and permanently disabled and has one or more service-connected disability, effective 15 November 2022.
  - b. A copy of his VA medical records (1490 pages) that show he was treated from approximately from 26 November 2012 to 8 May 2024.
4. A review of the applicant's service record shows:

- a. The applicant enlisted in the Regular Army on 20 November 2002.
- b. On 10 August 2004, he accepted nonjudicial punishment for wrongfully possessing two pills of valium, a controlled substance. His punishment included reduction to private (PVT)/E-1.
- c. On 17 August 2004, the applicant underwent a mental evaluation. The DA Form 3822-R (Report of Mental Status Evaluation) shows he was psychiatrically cleared for any administrative action deemed appropriate by the command.
- d. On 18 August 2004, the service record includes the applicant's medical examination for the purpose of administrative separation which indicated he was generally in good health. The applicant was marked qualified for separation.
  - DA Form 2808 (Report of Medical Examination)
  - DA Form 2807-1 (Report of Medical History)
- e. On 16 September 2004, the applicant's immediate commander notified the applicant of his intent to separate him under the provisions of Chapter 14-12c, Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separation) for commission of a serious offense. The specific reasons for his proposed recommendation were based upon his wrongful possession of a controlled substance.
- f. On 16 September 2004, after consulting with legal counsel, he acknowledged:
  - the rights available to him and the effect of waiving said rights
  - he may encounter substantial prejudice in civilian life if a discharge under other than honorable conditions is issued to him
  - he may apply to the Army Discharge Review Board or the ABCMR for upgrading
  - he is ineligible to apply for enlistment in the U.S. Army for a period of 2 years following his discharge
  - he elected to submit matters; however, not available in the service record
- g. On 16 September 2004, the immediate commander initiated separation action against the applicant for commission of a serious offense. He recommended that his period of service be characterized as general, under honorable conditions. The intermediate commander recommended approval.
- h. On 20 September 2004, consistent with the chain of command recommendations, the separation authority approved the discharge recommendation for immediate separation under the provisions of Chapter 14, AR 635-200, paragraph 14-

12c for commission of a serious offense. He would be issued a general, under honorable conditions discharge.

i. On 29 September 2004, the applicant was discharged from active duty with an under honorable conditions (General) characterization of service. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 1 year, 10 months, and 10 days of active service. Block 18 (Remarks) shows he served in Kuwait/Iraq from 21 July 2003 through 15 February 2004. He was assigned separation code JKK and the narrative reason for separation listed as "Misconduct." It also shows he was awarded or authorized:

- Global War on Terrorism Expeditionary Medal
- Global War on Terrorism Service Medal
- National Defense Service Medal
- Army Service Ribbon
- Overseas Service Ribbon

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. 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.

7. By regulation (AR 635-200), action will be taken to separate a Soldier for misconduct, such as commission of a serious offense, when it is clearly established that despite attempts to rehabilitate or develop him or her as a satisfactory Soldier, further effort is unlikely to succeed.

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

9. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to his characterization of service from under honorable conditions (general) to honorable. He contends he experienced undiagnosed PTSD that mitigates his misconduct.

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 into the Regular Army on 20 November 2002.
- The applicant's DD214 shows he served in Kuwait/Iraq from 21 July 2003 to 15 February 2004.
- The applicant accepted NJP for wrongfully possessing two pills of Valium, a controlled substance, and 16 September 2004, the applicant's immediate commander notified the applicant of his intent to separate him under the provisions of Chapter 14-12c, Army Regulation (AR) 635-200 for commission of a serious offense. The specific reasons for his proposed recommendation were based upon his wrongful possession of a controlled substance.
- The applicant was discharged on 29 September 2004, and he completed 1 year, 10 months, and 10 days of active service.

c. Review of Available Records: The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts PTSD as a mitigating factor in his discharge. A VA summary of benefits letter dated 8 May 2024 showed the applicant is 100% service connected and considered totally and permanently disabled. The applicant included 1,490 pages of VA medical and mental health documentation, which will be summarized below. A Mental Status Evaluation was conducted on 17 August 2004 and indicated that the applicant met retention standards and was psychiatrically cleared for administrative action. There was insufficient evidence that the applicant was diagnosed with PTSD or another psychiatric condition while on active service.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed the applicant initially engaged VA for mental health and substance abuse treatment on 21 June 2010. He reported symptoms of PTSD, but his primary complaint was need for suboxone and history of polysubstance abuse. He was initially diagnosed with Anxiety Disorder, not otherwise specified, and prescribed an antidepressant. He did not keep follow up appointments, but he reengaged with VA in October of 2012. Documentation outlines trauma exposure in Iraq as a truck driver with the infantry: a best friend killed by an IED in front of him; his commander being killed; and witnessing 17 people die when a Blackhawk crashed. He reported significant PTSD symptoms and self-medicating through substance abuse with most recent drug of choice being heroin. He was diagnosed with PTSD and Opioid Dependence, started on an antidepressant medication, and referred for assessment for the Methadone Program. In 2013, following an arrest for possession of heroin, he again engaged the VA for medication assisted addiction treatment. He utilized the Veterans Justice Outreach program and was able to get into the Tarrant County Veterans Court program. On 1 May 2013, he completed a compensation and pension evaluation for PTSD where he reported the trauma exposure from his time in Iraq and the requisite number of symptoms for a PTSD diagnosis. He continued to engage in addiction treatment with some relapse until being admitted to a residential treatment program in November 2013. He engaged in group and individual therapy, and he completed an evidence-based psychotherapy treatment

for PTSD. He had two relapses, and he was eventually discharged from the program in May 2014. In June 2014, he was terminated from the Veterans Court Program because he had been arrested for possession of a controlled substance (marijuana). In 2016, the applicant engaged the VA again utilizing their homeless/housing program, but he was eventually able to obtain housing on his own. The most recent note was dated 5 August 2024 and was a request to start psychotherapy for anxiety and depression. Documentation indicated that the applicant reported sobriety for the past three years.

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

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts he had an undiagnosed PTSD at the time of the misconduct. While there is insufficient evidence of a mental health diagnosis when the applicant was in active service, the applicant had a deployment to Iraq in 2003-2004, and he is 100% service connected at the VA for PTSD as related to trauma exposure on that deployment.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition while on active service. The trauma exposure associated with his PTSD diagnosis are experiences that occurred during military service.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. A review of military medical and mental health records revealed no documentation of any mental health condition(s) while on active service. However, there is sufficient evidence that the applicant was diagnosed with PTSD due to a service-connected traumatic event. The applicant's history of polysubstance abuse, including medications such as Valium, is a common self-medicating strategy for avoiding uncomfortable emotions and memories related to trauma exposure, and possession of a controlled substance (Valium) can be a natural sequela to mental health conditions associated with exposure to traumatic and stressful events. Given the nexus between trauma exposure, avoidance, and substance use and in accordance with liberal consideration, the basis for separation is mitigated.

#### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was 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 possession of valium and recommending an under honorable conditions (General) characterization of service. The Board found no error or injustice in the separation proceedings and designated characterization of service assigned during separation. However, the Board reviewed and concurred with the medical advisor's review finding sufficient evidence to support the applicant had a condition or experience that mitigated his misconduct. Based on the applicant's contention and the medical review, the Board granted relief.

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 Board determined the evidence presented is sufficient to warrant relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant's DD Form 214, for the period ending 29 September 2004 to show an honorable characterization of service.

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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, 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. 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.

3. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.

a. An honorable discharge is a separation with honor. 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 member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 14 of the regulation states action will be taken to separate a Soldier for misconduct when it is clearly established that despite attempts to rehabilitate or develop him or her as a satisfactory Soldier, further effort is unlikely to succeed. Paragraph 14-12c further states commission of a serious offense includes abuse of illegal drugs or alcohol.



4. 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.

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 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, traumatic brain injury, sexual assault, or sexual harassment. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based, in whole or in part, on those conditions or experiences. The guidance further describes evidence sources and criteria and requires boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

6. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NRs) regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief based on equity, injustice, or clemency grounds, BCM/NRs 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.

7. 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//