

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 29 October 2024

DOCKET NUMBER: AR20240000971

APPLICANT REQUESTS:

- upgrade of his under honorable conditions (general) discharge
- a different narrative reason for separation
- personal 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)
- Veterans Affairs (VA) medical document
- letter of recommendation
- professional resume

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 correction is warranted because the VA has diagnosed and treated him for multiple injuries and illnesses, including post-traumatic stress disorder (PTSD). He has worked for multiple companies as a government contractor.
3. On 6 June 2000, the applicant enlisted in the Regular Army. Upon completion of training, he was awarded military occupational specialty 15R (Attack Helicopter Repairer). The highest grade he attained was E-5.
4. He served in Afghanistan from 2 February 2002 until 1 September 2002.
5. He began service in Iraq on 28 August 2005.
6. He reenlisted in the Regular Army on 8 March 2006.

7. He departed Iraq on 8 September 2006.
8. On 30 January 2007, the applicant tested positive for marijuana.
9. On 5 March 2007, the applicant underwent a mental status evaluation. He was psychiatrically cleared to participate in any administrative action deemed appropriate by the command.
10. Before a summary court-martial on 13 July 2007 at Fort Campbell, KY, the applicant was found guilty of one specification of failing to report to his appointed place of duty, on or about 18 March 2007; one specification of dereliction of duty for failing to return to staff duty, on or about 3 February 2007; and one specification of wrongfully using marijuana between on or about 11 December 2007, and on or about 10 January 2007.
11. The court sentenced the applicant to reduction to E-4 and forfeiture of \$500.00 pay per month for one month. The sentence was approved 13 July 2007; however, only so much of the sentence extending to reduction to E-4 and forfeiture of \$500.00 pay per month for one month. The record of trial was forwarded for appellate review.
12. The applicant's commander notified the applicant on 22 August 2007, that he was initiating actions to separate him under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 14, paragraph 14-12c(2), for commission of a serious offense – abuse of illegal drugs. He noted the applicant's positive test for marijuana.
13. The applicant's commander formally recommended his separation, prior to his expiration term of service, under the provisions of Army Regulation 635-200, Chapter 14.
14. On 23 August 2007, the applicant acknowledged that he had been advised by counsel of the contemplated separation action, the possible effects of the discharge, and the rights available to him.
 - a. He indicated he understood he could expect to encounter substantial prejudice in civilian life if a under honorable conditions (general) discharge was issued to him.
 - b. He waived consideration of his case by an administrative separation board.
 - c. He declined to submit a statement in his own behalf.

15. Consistent with the chain of command's recommendations, the separation authority directed the applicant's separation from the Army on 27 August 2007, with an under honorable conditions (general) characterization of service.

16. The applicant was discharged on 7 September 2007. He was credited with 7 years, 3 months, and 2 days of net active service this period. His DD Form 214 (Certificate of Release or Discharge from Active Duty) contains the following entries in:

- Item 24 (Character of Service) – under honorable conditions (general)
- item 25 (Separation Authority) – AR [Army Regulation] 635-200, PARA 14-12c(2)
- item 26 (Separation Code) – JKK
- item 27 (Reentry Code) – 4
- item 28 (Narrative Reason for Separation) – Misconduct (Drug Abuse)

17. Additionally his DD Form 214 shows he was awarded or authorized the:

- Army Commendation Medal (3rd Award)
- Army Achievement Medal (2nd Award)
- Army Good Conduct Medal (2nd Award)
- National Defense Service Medal
- Global War on Terrorism Expeditionary Medal
- Global War on Terrorism Service Medal
- Iraq Campaign Medal
- Noncommissioned Officer Professional Development Ribbon
- Army Service Ribbon
- Overseas Service Ribbon (2nd Award)
- Driver and Mechanic Badge – Mechanic
- Air Assault Badge

18. The applicant petitioned the Army Discharge Review Board requesting upgrade of his under honorable conditions (general) discharge. On 19 January 2011, the Board voted to deny relief and determined his discharge was both proper and equitable.

19. The applicant provides the following (provided in entirety for the Board):

- a. A VA medical document that shows he was granted a combined 100% rating evaluation for service-connected various disabilities, including PTSD.
- b. Letter of recommendation that speaks to his exceptional leadership and management abilities.

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

21. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under honorable conditions (general) discharge and a change in his narrative reason for separation.

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 6 June 2000 and reenlisted on 8 March 2006.
- He served in Afghanistan from 2 February 2002 until 1 September 2002.
- He began service in Iraq on 28 August 2005 and departed on 8 September 2006.
- On 30 January 2007, the applicant tested positive for marijuana.
- Before a summary court-martial on 13 July 2007 at Fort Campbell, KY, the applicant was found guilty of one specification of failing to report to his appointed place of duty, on or about 18 March 2007; one specification of dereliction of duty for failing to return to staff duty, on or about 3 February 2007; and one specification of wrongfully using marijuana between on or about 11 December 2007 and on or about 10 January 2007.
- Applicant's commander notified the applicant on 22 August 2007, that he was initiating actions to separate him under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 14, paragraph 14-12c(2), for commission of a serious offense – abuse of illegal drugs. He noted the applicant's positive test for marijuana.
- Applicant was discharged on 7 September 2007. He was credited with 7 years, 3 months, and 2 days of net active service this period. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of AR 635-200, paragraph 14-12c(2), with Narrative Reason for Separation - Misconduct (Drug Abuse), Separation Code JKK, and Reentry Code 4.

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, the "correction is warranted because the VA has diagnosed and treated him for multiple injuries and illnesses, including post-traumatic stress disorder (PTSD). He has worked for multiple companies as a government contractor."

d. Active-duty electronic medical records available for review show on 27 September 2006 the applicant presented for support due to relational issues. On 24 January 2007, he was once again seen related to marital problems. On 5 March 2007, the applicant underwent a mental status evaluation for the purpose of separation. He was psychiatrically cleared to participate in any administrative action deemed appropriate by the command.

e. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is 100% service connected, including 30% for PTSD. On 9 April 2014, a C and P examination, notes his deployments and history of PTSD with depression and anxiety. The report references a C and P initial evaluation for PTSD, on 30 July 2009, where the applicant was diagnosed with PTSD. A third C and P examination, dated 21 January 2016, diagnosed the applicant with PTSD and Alcohol Use Disorder. The applicant initially sought behavioral health services via the VA in March 2009 and has been treated intermittently for his symptoms of PTSD via therapy and medication management.

f. 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 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 combat-related PTSD.

(2) Did the condition exist or experience occur during military service? Yes. The applicant is 100% service connected, including 30% for PTSD.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. The applicant was discharged due to one specification of failing to report to his appointed place of duty, one specification of dereliction of duty for failing to return to staff duty, and one specification of wrongfully using marijuana. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is 30% service connected for PTSD. Given the association between PTSD and avoidance, the applicant's misconduct of failing to report and dereliction of duty are both mitigated by his BH condition. In addition, given the association between PTSD and the use of substances to cope with the symptoms of the condition, the applicant's misconduct of wrongfully using marijuana is also mitigated by his BH condition.

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.
2. The Board carefully considered the applicant's and published DoD policy for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record and length of service, to include his deployment history, his military record, the frequency and nature of his misconduct and the reason for his separation. The Board considered the review and conclusions of the medical advising official and the applicant's VA service-connected conditions. The Board concurred with the medical review, finding evidence of a behavioral health condition that mitigated his misconduct. Based on a preponderance of evidence, the Board determined that the requested discharge upgrade and change to the narrative reason was warranted as a matter of liberal consideration.
3. 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

<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	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 7 September 2007 to show in:

- item 24 (Character of Service): Honorable

- item 25 (Separation Authority): Army Regulation 635-200
- item 26 (Separation Code): JFF
- item 27 (Reentry Code): 1
- item 28 (Narrative Reason for Separation): Secretarial Authority

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. Title 10, U.S. Code, Section 1556, requires the Secretary of the Army to ensure that an applicant seeking corrective action by ARBA be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.
3. 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.
 - a. Paragraph 2-9 states the ABCMR begins its consideration of each case with the presumption of administrative regularity. 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.

4. 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 separation codes to be entered on the DD Form 214. At the time, this regulation prescribed the separation code "JKK" as the appropriate code to assign to Soldiers separated under the provisions of Army Regulation 635-200, for misconduct (drug abuse).

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

a. An honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

b. A general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 14 (Separation for Misconduct) established policy and prescribed procedures for separating members for misconduct. It states that action will be initiated to separate a Soldier for misconduct when it was clearly established that rehabilitation was impracticable or unlikely to succeed.

6. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Navy Records (BCM/NR), on 3 September 2014, to carefully consider the revised 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.

7. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters

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

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

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

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

//NOTHING FOLLOWS//