

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 October 2024

DOCKET NUMBER: AR20240000977

APPLICANT REQUESTS:

- an upgrade his under other than honorable conditions discharge
- separation Pay

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) letter

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 is currently rated by the DVA as having diagnosed service-connected post-traumatic stress disorder (PTSD). He notes that the onset of this condition occurred following his return from deployment on 8 August 2018.
3. A review of the applicant's service record shows:
  - a. On 26 June 2006, the applicant enlisted in the Regular Army.
  - b. He served in Iraq from 14 January 2007 to 31 March 2008.
  - c. On or about 28 October 2008, the applicant's immediate commander initiated separation action for the commission of a serious offense (Assault with an Unloaded Firearm) in accordance with Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), Chapter 14, Paragraph 12c. The applicant was alleged to have assaulted his spouse. He was subsequently charged with battery. On or about 4 July 2008, the applicant was alleged to have driven by his apartment, extending an automatic pistol out of the window of his car, and pulling the trigger; no round was fired.

The applicant acknowledged receipt of the notification and was informed of his right to seek legal counsel. The applicant waived his rights for consideration by an administrative separation board contingent upon the separation authority approving a characterization of service no less favorable than a General, Under Honorable Conditions discharge.

d. On 11 February 2009, an Administrative Separation Board was conducted regarding the incident occurring on or about 4 July 2008 wherein the applicant brandished an unloaded firearm and proceeded to squeeze the trigger. The applicant was represented by legal counsel. The board concluded that based upon a preponderance of evidence, the evidence presented did warrant the applicant's separation. The board further recommended that the applicant be separated with an other than honorable characterization of service.

e. On 27 March 2009, the Commander, Headquarters, 3rd Infantry Division and Fort Stewart, approved the boards findings and further directed that the applicant be discharged in accordance with AR 635-200, Chapter 14, Paragraph 14-12c. His characterization of service would be under other than honorable conditions and he would be reduced to the lowest pay grade in accordance with AR 600-8-19 (Enlisted Promotions and Reductions), paragraph 10-15a.

f. On 13 April 2009, the applicant was discharged from active duty under the provisions of AR 635-200, paragraph 14-12c with an under other than honorable conditions characterization of service. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows in:

- Item 12c (Net Active Service this Period): 2 years, 9 months, and 18 days
- Item 26 (Separation Code): JKQ
- Item 27 (Reentry Code): 3
- Item 28 (Narrative Reason for Separation): Misconduct (Serious Offense)

4. The applicant provides a DVA letter reflective of the applicant's various service-connected rated conditions to include PTSD.

#### 5. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under other than honorable conditions (UOTHC) discharge and a change in his separation pay grade. This opine will narrowly focus on the applicant's request for an upgrade and defer the remaining request to the Board.

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 26 June 2006.
- On or about 14 January 2007, the applicant deployed to Iraq where he remained until 31 March 2008.
- On or about 28 October 2008, the applicant's immediate commander initiated separation action for the commission of a serious offense (Assault with an Unloaded Firearm) in accordance with Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), Chapter 14, Paragraph 12c. The applicant was alleged to have assaulted his spouse. He was subsequently charged with battery. On or about 4 July 2008, the applicant was alleged to have driven by his apartment, extending an automatic pistol out of the window of his car, and pulling the trigger; no round was fired. The applicant acknowledged receipt of the notification and was informed of his right to seek legal counsel. The applicant waived his rights for consideration by an administrative separation board contingent upon the separation authority approving a characterization of service no less favorable than a General, Under Honorable Conditions discharge.
- On 11 February 2009, an Administrative Separation Board was conducted regarding the incident occurring on or about 4 July 2008 wherein the applicant brandished an unloaded firearm and proceeded to squeeze the trigger. The applicant was represented by legal counsel. The board concluded that based upon a preponderance of evidence, the evidence presented did warrant the applicant's separation. The board further recommended that the applicant be separated with an Other than Honorable Characterization of Service.
- On 13 April 2009, the applicant was discharged from active duty under the provisions of AR 635-200, paragraph 14-12c with an Under Other than Honorable Conditions characterization of service. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows his narrative reason for separation was Misconduct (Serious Offense), his separation code was JKQ, and his reentry code 3.

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 is currently rated by the DVA as having diagnosed service-connected Post-Traumatic Stress Disorder (PTSD). He notes that the onset of this condition occurred following his return from deployment on 8 August 2018."

d. Active-duty electronic medical records available for review show the applicant presented to the Family Advocacy Program (FAP) on 10 July 2008 following the incident with his spouse, the note indicates he was disrespectful and laughed at the issue. He took no accountability and evidenced no remorse. The applicant was assessed by behavioral health services on 11 July 2008 since he was "accused of spousal abuse and having allegedly conducted a drive by shooting". The applicant admitted a history of exhibiting anti-social behavior. He was diagnosed with Adjustment Disorder with Disturbance of Conduct. The record shows he started anger management group

therapy on 14 July 2008. On 25 August 2008 he started treatment related to domestic violence via FAP.

e. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is service connected for PTSD, for treatment purposes only.

f. A C and P examination, dated 18 May 2018, diagnosed the applicant with PTSD, Alcohol Use Disorder, Stimulant Use Disorder (Cocaine), and Cannabis Use Disorder.

g. 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 an experience of deployment to a combat zone and subsequent BH condition. However, his BH condition does not mitigate his misconduct.

h. Kurta Questions:

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

(2) Did the condition exist or experience occur during military service? Yes. The applicant is service connected for treatment purposes only for PTSD.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant was discharged due to physically assaulting his spouse, he was subsequently charged with battery, since he also extended an automatic pistol out of the window of his car and pulled the trigger; no round was fired. While the applicant has been diagnosed with PTSD, for treatment purposes, there is no nexus between his BH condition and domestic violence. Specifically, PTSD does not impair an individual's ability to know right from wrong, understand consequences, and make purposeful, conscious decisions. In addition, PTSD does not propel an individual to subsequently victimize another by physically assaulting them and terrorizing them with a firearm/weapon.

#### 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 assault with an unloaded firearm. 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. Based on a preponderance of the evidence, the Board concluded that the characterization of service the applicant received upon separation was appropriate.

2. The Board carefully considered the applicant's request for separation pay and found that relief was not warranted. The Board determined the narrative reason, SPD code, reentry code, and characterization of service assigned during separation processing were appropriate as well as the involuntary separation and therefore separation pay was not warranted.

BOARD VOTE:

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:	:	:	GRANT FULL RELIEF
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■	■	■	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.

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, 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. AR 40-501 (Standards of Medical Fitness), paragraph 3-3 (Disposition) provides that Soldiers pending separation in accordance with provisions of AR 635-200 or AR 600-8-24 authorizing separation under other than honorable conditions who do not meet medical retention standards will be referred to a Medical Evaluation Board. In the case of enlisted Soldiers, the physical disability processing and the administrative separation processing will be conducted in accordance with the provisions of AR 635-200 and AR 635-40. Table 8-2 (Schedule of Separation Medical Examination or Separation Physical Assessment) provides that Soldiers pending separation in accordance with AR 635-200, chapter 14 are required to have a medical examination prior to be separated.

3. Department of Defense Instruction 1332.29 (Involuntary Separation) provides that to be eligible for Involuntary Separation pay, the servicemember must have:

- completed at least 6 years but fewer than 20 years of active-duty service
- Characterization of Service is characterized as "honorable"

Half Separation Pay of Non-Disability is authorized to servicemembers of the Active and Reserve Components who are involuntarily separated from active duty and who meet each of the conditions in the following paragraphs:

- completed at least 6 years but fewer than 20 years of active-duty service
- Characterization of Service is characterized as "honorable" or "General Under Honorable Conditions"

4. AR 635-200 (Active Duty Enlisted Administrative Separations) sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a provides that 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. Paragraph 3-7b provides that 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. Paragraph 3-7c provides that 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, homosexual conduct, security reasons, or in lieu of trial by court martial in the following circumstances: use of force or violence, pattern of behavior that constitutes a significant departure from the conduct expected of Soldiers of the Army or deliberate acts or omissions that seriously endanger the health and safety of other persons. An under-other-than-honorable-conditions discharge will be directed only by a commander exercising general court martial authority or a general officer in command who has a judge advocate or legal advisor available to his/her command. No Soldier will be discharged per this regulation under other than honorable conditions unless afforded the right to present his/her case before an administrative discharge board.

5. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, 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 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.

6. 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 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. 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 (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 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.

//NOTHING FOLLOWS//