

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 15 January 2025

DOCKET NUMBER: AR20240004831

APPLICANT REQUESTS:

- upgrade of his character of service from under honorable conditions (general) to honorable
- change of reentry code and narrative reason for separation

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

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States), 14 March 2024
- Medical documentation, 2008
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 15 April 2009
- Department of Veterans Affairs Statement in Support Claim, 2015
- Department of Veterans Affairs Rating, 14 March 2024
- character reference, from Licensed Professional Counselor S.H., 28 March 2015
- S.H., professional resume
- Road Home patient treatment packet
- Family and Medical Leave Act form

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, he was discharged from the Army because of his misconduct (drug abuse). Before his discharge, he was trying to get help with his post-traumatic stress disorder (PTSD) that came from serving in the Army. He could not obtain the necessary help and he was later found to have PTSD.
3. On his DD Form 293, he indicates PTSD and other mental health are related to his request.

4. The applicant enlisted in the Regular Army on 20 October 2005. His Enlisted Record Brief shows the following:

a. He was awarded the military occupational specialty of 92F (Petroleum Supply Specialist).

b. The highest rank he attained was private first class/E-3.

c. He served in Afghanistan from 20 January 2007 to 9 April 2008, totaling 15 months.

5. Medical documentation dated 3 January 2008 shows the applicant received notification from his command of a command referral for a mental health evaluation. The commander consulted with the Division Mental Health regarding concerns with the applicant's behavior and/or verbal comments.

6. The applicant tested positive for the use of Tetrahydrocannabinol (THC) on a urinalysis test taken on 16 September 2008. The command was informed of the positive urinalysis test on 24 September 2008, and he received developmental counseling on 16 October 2008 informing him of his positive drug test results.

7. He was enrolled in the Army Substance Abuse Program (ASAP) on 21 October 2008. The command and the applicant concurred with the recommendation to enroll into the outpatient program and have monthly random uranalysis' testing.

8. On 24 October 2008, the applicant accepted non-judicial punishment, under the provisions of Article 15, of the Uniform Code of Military Justice (UCMJ), for wrongfully using marijuana between on or about 4 September 2008 and 16 September 2008. His punishment imposed was reduction to the grade of E-1, forfeiture of \$673.00 per month for two months, extra duty for 45 days, and restriction for 45 days.

9. On 28 October 2008, the applicant's command received notification the applicant was on a 24-hour watch, due to the result of evaluation, which indicated he was at some risk for self-harm or harm to others. The 24-hour watch was for both the applicant's support and safety.

10. He underwent mental health evaluation and on 24 November 2008. The relevant DA Form 3822-R (Report of Mental Status Evaluation) shows he was evaluated as a part of the Army Regulation (AR) 635-200 (Personnel Separations – Active Duty Enlisted Administrative Separations), Chapter 14-12 (Separation for Misconduct – Acts or Patterns of Misconduct) Separation. He was psychiatrically cleared for administrative action deemed appropriate by the command.

11. On 2 February 2009, the applicant's immediate commander notified the applicant of the intent to recommend him for separation under the provisions of AR 635-200, Chapter 14-12c, commission of a serious offense. The commander noted the specific reason as the applicant's wrongful use of marijuana on or about 4 September 2008 and 16 September 2008.

12. The applicant acknowledged receipt of the notification for separation and consulted with counsel on 2 February 2009 and was advised of the basis for the contemplated action to separate him and of the rights available to him. He understood he was not entitled to an administrative separation board and that he was not being considered for an under other than honorable conditions discharge. He elected to not submit statement on his own behalf.

13. On the same date, the applicant's immediate commander formally recommended him for separation under the provisions of AR 635-200, paragraph 14-12c, for commission of a serious offense.

14. On 3 February 2008, the applicant's intermediate commander recommended approval of the separation action and further recommended the applicant receive an under honorable conditions (general) discharge.

15. On 24 February 2009, the separation authority approved the recommended discharge for commission of a serious offense and directed the issuance of an under honorable conditions (general) discharge.

16. The applicant was discharged on 15 April 2009, under the provisions of AR 635-200, paragraph 14-12c (2), by reason of misconduct – drug abuse, in the grade of E-1. His DD Form 214 shows his service was characterized as under honorable conditions (general) with separation code JKK and reentry code 4. He was credited with 3 years, 5 months, and 26 days of net active service with no time lost. He was awarded or authorized the following decorations, medals, badges, citations, and campaign ribbons:

- Afghanistan Campaign Medal with Campaign Star
- National Defense Service Medal
- Global War on Terrorism Service Medal
- Army Service Ribbon
- Overseas Service Ribbon
- North Atlantic Treaty Organization Medal
- Parachutist Badge

17. The applicant additionally provides:

- a. Medical documentation from his 24-hour watch on 28 October 2008 to include an information paper for management of Soldiers with suicidal or homicidal ideation.
- b. Department of Veterans Affairs documentation which included a statement in support of his claim summarizing the applicant while deployed in support of Operation Enduring Freedom having an incident where he was witnessed in a 5-ton truck which began to roll and proceeded to roll off a mountain, before the truck reached the edge of a cliff the applicant dove to safety, the truck proceeded down the cliff. The applicant was found but then proceeded down the cliff to secure the 5-ton and fuel blivit.
- c. Department of Veterans Affairs rating decision showing he receives a combined rating of 100% for service-connected disabilities, which include but are not limited to sleep apnea, migraine headaches, lumbosacral strain, PTSD, cervical strain, left sciatic nerve radiculopathy, and left knee strain.
- d. Character reference statement from a Licensed Professional Counselor S.H. and resume, which summarized the applicant as a client under her care since 19 January 2015. S.H. described the applicant's military experience, deployment, different stressors, and his diagnosed PTSD and believes in her professional opinion his conditions are a direct result of almost dying in a truck crash and being held at gunpoint while in hostile territory.
- e. Intensive Outpatient Program patient acceptance and discharge documentation, which is a program designed to decrease the severity and improve the management of symptoms of PTSD and major depressive disorder. He participated in treatment groups, individual therapy, and pharmacotherapy. A reference statement from Assistance Research Director P.H. shows the applicant received a confirmed diagnosis of PTSD. Additional paperwork showing the applicant requested Family and Medical Leave Act.

18. Regulatory guidance provides when an individual is discharged under the provisions of AR 635-200, Chapter 14, the separation authority may direct a general discharge if such is merited by the Soldier's overall record. Characterization of service as honorable is not authorized unless the Soldier's record is otherwise so meritorious that any other characterization clearly would be inappropriate.

19. In reaching its determination, the Board can consider the applicant's petition, service record, and statements in light of the published guidance on equity, injustice, or clemency.

20. MEDICAL REVIEW:

- a. Background: The applicant is requesting an upgrade of his under honorable conditions (general) discharge to honorable as well as a change in his reentry code and

narrative reason for separation. The applicant selected PTSD and OMH on his application 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:

- Applicant enlisted in the Regular Army on 20 October 2005.
- He served in Afghanistan from 20 January 2007 to 9 April 2008, totaling 15 months.
- Applicant tested positive for the use of Tetrahydrocannabinol (THC) on a urinalysis on 16 September 2008. The command was informed of the positive urinalysis test on 24 September 2008, and he received developmental counseling on 16 October 2008 informing him of his positive drug test results.
- He was enrolled in the Army Substance Abuse Program (ASAP) on 21 October 2008. The command and the applicant concurred with the recommendation to enroll into the outpatient program and have monthly random urinalysis testing.
- On 24 October 2008, the applicant accepted non-judicial punishment, under the provisions of Article 15, of the Uniform Code of Military Justice (UCMJ), for wrongfully using marijuana between on or about 4 September 2008 and 16 September 2008.
- On 2 February 2009, the applicant's immediate commander notified him of the intent to recommend separation under the provisions of AR 635-200, Chapter 14-12c, commission of a serious offense. The commander noted the specific reason as the applicant's wrongful use of marijuana on or about 4 September 2008 and 16 September 2008.
- Applicant was discharged on 15 April 2009, under the provisions of AR 635-200, paragraph 14-12c (2), by reason of misconduct – drug abuse, in the grade of E-1. His DD Form 214 shows his service was characterized as under honorable conditions (general) with separation code JKK and reentry code 4. He was credited with 3 years, 5 months, and 26 days of net active service with no time lost.

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 was discharged from the Army because of his misconduct (drug abuse). Before his discharge, he was trying to get help with his post-traumatic stress disorder (PTSD) that came from serving in the Army. He could not obtain the necessary help and he was later found to have PTSD.

d. Hardcopy medical documentation, dated 3 January 2008, shows the applicant was notified of a command referral for a mental health evaluation due to concerns regarding the applicant's behavior and/or verbal comments. Active-duty electronic behavioral health records available for review indicate on 28 October 2008, the applicant was

assessed during a walk-in appointment where he complained of anger, irritability, and trouble sleeping. He reported reoccurring dreams related to an incident in Afghanistan as well as familial and work-related stressors. He further reported vague homicidal ideation and as a result was placed on a 24-hour watch. He was re-assessed the following day and denied any thoughts, intent, or plan to harm himself or others. He reported feeling distant from his family, anger, irritability, trouble sleeping, decreased appetite, and recurring disturbing memories of combat experiences. He was diagnosed with Cannabis-induced Anxiety Disorder. The applicant participated in a mental status evaluation on 24 November 2008 for the purpose of separation, no psychiatric condition was diagnosed, and he was cleared for 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 100% for PTSD and additional medical conditions. The applicant sought behavioral health services soon after his discharge from military service in December of 2009. The available treatment record evidence ongoing mental health treatment including specialty care within the PTSD clinic, participation in an intensive outpatient program, and one psychiatric hospitalization in December 2014.

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 misconduct.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant selected PTSD and OMH on his application as related to his request.

(2) Did the condition exist or experience occur during military service? Yes. The applicant is 100% service connected for PTSD. In addition, he was command referred for a mental health evaluation on 3 January 2008 and, on 28 October 2008, he was placed on a 24-hour watch due to risk of harm to self or others.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. The applicant was discharged due to the wrongful use of marijuana. Given the nexus between PTSD and the use of substances to alleviate/cope with the symptoms of his behavioral health condition, the applicant's use of marijuana is 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 not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. One potential outcome was to grant relief based on the advising opine finding sufficient evidence to support the applicant had a behavioral health condition during military service that mitigates his misconduct. Upon review of the applicant's petition, available military records and medical review, the Board considered the advising official finding sufficient evidence to support the applicant had a behavioral health condition during military service that mitigates his misconduct.
2. However, the Board determined there is insufficient evidence to support the applicant's contentions for a discharge upgrade. Notwithstanding, the medical advisory official finding a nexus between PTSD and the use of substances to alleviate/cope with the symptoms of his behavioral health condition. The Board found applicant's use of marijuana is not outweighed by his BH condition. The Board found the applicant was discharged for misconduct- drug abuse and was provided an under honorable conditions (General) characterization of service. The Board agreed that the applicant's discharge characterization is warranted as he did not meet the standards of acceptable conduct and performance of duty for Army personnel to receive an Honorable discharge. The Board determined under liberal consideration changes to the applicant's narrative reason are not warranted. Furthermore, the Board determined there was insufficient evidence of an error or injustice which would warrant a change in the applicant's RE-Code. Therefore, the Board denied relief.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>
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<input type="checkbox"/>	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	<input type="checkbox"/>	<input type="checkbox"/>	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.

[REDACTED]

[REDACTED]

[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.

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. Section 1556 of Title 10, U.S. Code, 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 ABCMR applicants (and/or their counsel) prior to adjudication.
3. Army Regulation 600-85 (The Army Substance Abuse Program), in effect at the time, identified Army policy on alcohol and other drug abuse and assigned responsibilities for implementation of the program. Paragraph 1-35 (Illegal Drugs and Sanctions) states administrative separation will be initiated and processed to the separation authority for decision on any Soldier with a positive drug test that could not have resulted from

legitimate medical use of a drug. Processing will be initiated within 30 calendar days of receipt of a positive drug test report.

4. Army Regulation 635-5-1 (Separation Program Designator Codes) provides the specific authorities, reasons for separating Soldiers from active duty, and the separation codes to be entered on the DD Form 214. Separation code "JKK" is the appropriate code to assign to Soldiers involuntarily separated under the provisions of Army Regulation 635-200, Chapter 14, Paragraph 14-12c(2), by reason of 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 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 such was merited by the Soldier's overall record.

6. 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; 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 sexual assault or sexual harassment was unreported, or 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. 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.

7. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and Service 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, 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.

//NOTHING FOLLOWS//