

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 5 February 2025

DOCKET NUMBER: AR20240006875

APPLICANT REQUESTS: an upgrade of his under honorable conditions (general) character of service and an appearance before the Board via video or telephone.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty), for the period ending 20 March 2009
- Department of Veterans Affairs (VA) Rating Decision, dated 25 September 2019
- statement of support, undated

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 that after returning from Iraq he had a hard time coping and was using different avenues to try and do so. After seeking medical help, he was diagnosed with post-traumatic stress disorder (PTSD).
3. The applicant enlisted in the Regular Army on 12 October 2005. Upon completion of initial entry training, he was awarded military occupational specialty 74D (Chemical Operations Specialist). The highest rank he attained was specialist/E-4.
4. The applicant served in Iraq from 13 January 2007 to 27 March 2008. While in Iraq, he reenlisted on 26 February 2008 for a 6-year period.
5. A memorandum for the Army Substance Abuse Program (ASAP), dated 25 August 2008, shows that a urine specimen, collected from the applicant on 18 August 2008, tested positive for tetrahydrocannabinol (THC).

6. On 15 September 2008, the applicant was formally counseled for drug and/or alcohol abuse and the possible initiation of separation action for misconduct.

7. The applicant underwent a medical examination on 3 November 2008. A DD Form 2807-1 (Report of Medical History) and the corresponding DD Form 2808 (Report of Medical Examination) shows the applicant reported being in good health. The examining provider cleared him with no physical limitations.

8. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice on 24 November 2008, for wrongfully using marijuana, between on or about 18 July 2008 and 18 August 2008. His punishment consisted of reduction to private/E-1, forfeiture of \$673.00 pay per month for two months, 45 days of extra duty, and 45 days of restriction.

9. The applicant underwent a mental status evaluation on 4 February 2009. The evaluating provider noted diagnoses of cannabis dependence and alcohol abuse. The applicant successfully completed ASAP. He had no history of psychiatric disorders or outpatient/inpatient mental health treatment. As of the date of evaluation, he did not meet the criteria for a mood disorder, PTSD, or a thought disorder. He was psychiatrically cleared for chapter proceedings.

10. The applicant's immediate commander notified the applicant on 11 February 2009 of his intent to initiate separation action against him under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), paragraph 14-12c, by reason of commission of a serious offense. As the specific reason, the commander cited the applicant's positive urinalysis for marijuana. The commander also noted that he intended to recommend the applicant be retained in service. The applicant acknowledged receipt of the notification on that same date.

11. The applicant consulted with counsel and was advised of the basis for the contemplated action to separate him and its effects; of the rights available to him; and the effect of any action taken by him to waive his rights. He was advised he could submit statements in his own behalf. A statement from defense counsel, written in the applicant's behalf, requested that separation action be deferred or suspended. Counsel noted that combat stress affects Soldiers differently. First time drug use as a result of combat experiences could be symptomatic of PTSD. The applicant completed two phases of ASAP and learned his lesson. He wanted to remain on active duty.

12. The applicant's immediate commander forwarded the separation packet to the intermediate commander for consideration of the applicant's separation, prior to the expiration of his term of service, under the provisions of Army Regulation 635-200, paragraph 14-12c, by reason of commission of a serious offense. In an additional memorandum, the commander recommended the applicant be retained in service.

However, if separation were deemed appropriate, he recommended further rehabilitation requirements be waived.

13. On 23 February 2009, the intermediate commander recommended approval of the proposed separation action and further recommended a waiver of rehabilitation requirements and the issuance of an under honorable conditions (general) character of service.

14. The separation authority approved the recommended separation action on 6 March 2009, waived the rehabilitative requirements, and directed the issuance of an under honorable conditions (general) character of service.

15. The applicant was discharged on 20 March 2009, under the provisions of Army Regulation 635-200, paragraph 14-12c, by reason of misconduct (serious offense). His DD Form 214 shows his service was characterized as under honorable conditions (general), with separation code JKQ and reentry code 3. He completed 3 years, 5 months, and 9 days of net active service. He was awarded or authorized the following:

- Army Commendation Medal
- National Defense Service Medal
- Global War on Terrorism Service Medal
- Iraq Campaign Medal with on campaign star
- Army Service Ribbon
- Overseas Service Ribbon

16. The applicant provides:

a. A VA Rating Decision, dated 25 September 2019, shows the applicant has a 70 percent (%) service-connected disability rating for PTSD.

b. In an undated statement of support, the applicant's mother attests to the issues he had coping after returning from Iraq. He turned to alcohol and or cannabis. It took years before he sought help and was diagnosed with PTSD.

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

18. The Board should consider the applicant's overall record in accordance with the published equity, injustice, or clemency determination guidance.

19. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under honorable conditions (general) characterization of service. On his DD Form 149, the applicant indicated that Posttraumatic Stress Disorder (PTSD) is related to his request. 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: 1) the applicant enlisted in the Regular Army (RA) on 12 October 2005, 2) he served in Iraq from 13 January 2007 through 27 March 2008 and re-enlisted while in Iraq on 26 February 2008, 3) an ASAP memorandum dated 25 August 2008 shows that a urine specimen collected from on 18 August 2008 tested positive for tetrahydrocannabinol (THC), 4) The applicant underwent a medical examination on 3 November 2008 and the examining provider cleared him with no physical limitations, 5) he received an Article 15 on 24 November 2008 for wrongful use of marijuana between on or about 18 July 2008 and 18 August 2008, 6) The applicant underwent a mental status evaluation (MSE) on 4 February 2009 showing he was diagnosed with Cannabis Dependence and Alcohol Abuse. He was psychiatrically cleared for chapter proceedings, 7) the applicant was discharged on 20 March 2009 under the provisions of Army Regulation (AR) 635-200, paragraph 14-12c, by reason of misconduct (serious offense), with a separation code of JKQ and reentry code of '3.'

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. In-service medical records were available for review via JLV from 07 November 2005 through 04 February 2009. He presented to BH on 31 October 2006 due to anger and depression noting home, work, and interpersonal problems. The diagnosis was documented as Phase of Life or Circumstance Problem, and he was referred to anger management group. The applicant had two case staffing notes from the substance abuse clinic case 02 November 2006 and 05 December 2006 showing his diagnoses as Cannabis Abuse and Alcohol Abuse; however, there was not any additional information available for review. There were no additional ASAP or BH notes available for review until 19 September 2008 when the applicant was seen at the ASAP counseling center as a walk-in and his diagnosis was noted as Cannabis Abuse. A Rehabilitation Team Meeting (RTM) dated 02 December 2008 shows the applicant was to continue outpatient treatment in the substance abuse clinic, with his diagnoses documented as Alcohol Abuse and Cannabis Abuse. His cannabis-related diagnosis was updated to Cannabis Dependence on 03 December 2008 by his individual ASAP counselor. He continued individual and group treatment through ASAP until a subsequent RTM was conducted on 29 January 2009 showing the applicant completed outpatient treatment and that his case would be staffed for closure. A DA Form 3822 (MSE) dated 04 February 2009 conducted for the purposes of misconduct shows all domains of the

MSE were within normal limits (WNL). The provider documented that the applicant had no history of psychiatric disorders or history of psychiatric treatment. It was noted that he has a history of substance abuse and successfully completed ASAP. The provider documented that he did not meet criteria for a mood disorder, PTSD, or thought disorder. At the time of the evaluation, he was diagnosed with Cannabis Dependence and Alcohol Abuse, per ASAP. The provider documented that he met retention standards in accordance with (IAW) AR 40-501 and that he was psychiatrically cleared for chapter proceedings.

d. A VA Rating Decision Letter dated 25 September 2019 shows the applicant's service connection for PTSD was increased from 30% to 70%. The applicant completed a BH Compensation and Pension (C&P) examination on 29 January 2019 showing he was diagnosed with PTSD. There were three in-service stressors associated with his diagnosis of PTSD to include his compound coming under enemy mortar and rocket attacks, during a convoy another vehicle was hit by an IED resulting in severe injuries to a friend, and involvement in small arms fire and witnessing other Soldiers get wounded. The provider documented that the applicant reported experiencing ongoing PTSD symptoms of re-experiencing, avoidance of reminders, negative alterations in cognitions and mood associated with the traumatic event(s), and marked alterations in arousal and reactivity. Furthermore, the provider noted that the applicant has experienced relationship and occupational problems as a result of his PTSD symptoms.

e. An undated letter submitted by the applicant's mother as part of his application was reviewed. She asserted that after the applicant returned from Iraq, he had difficulty coping, which ultimately resulted in him turning to alcohol and/or cannabis.

f. Based on the available information, it is the opinion of the Agency Medical Advisor that there is sufficient evidence that the applicant has been diagnosed with a potentially mitigating BH condition since being discharged from the military, PTSD. This Advisor would contend that the applicant's misconduct of wrongful use of marijuana is mitigated by his VA service-connected diagnosis of PTSD.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant is diagnosed and 70% service-connected through the VA for PTSD.

(2) Did the condition exist or experience occur during military service? Yes, the applicant is diagnosed and 70% service-connected through the VA for PTSD. Service connection establishes that the condition existed in-service.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. Review of the applicant's in-service medical records show he was diagnosed with Alcohol Abuse, Cannabis Abuse, and Cannabis Dependence, which do not constitute mitigating conditions. Since being discharged from the military, he has been diagnosed and 70% service-connected through the VA with PTSD. Self-medicating with substances may be used to avoid and mask symptoms which can be associated with the natural history and sequelae of numerous conditions, to include trauma-related conditions. As there is an association between avoidance behaviors, self-medicating with substances, and trauma, there is a nexus between the applicant's misconduct of wrongful use of marijuana and diagnosis of PTSD. As such, BH mitigation is supported.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was 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. Upon review of the applicant's petition, available military records and the medical review, the Board considered the advising opinion of the Agency Medical Advisor that there is sufficient evidence that the applicant has been diagnosed with a potentially mitigating BH condition since being discharged from the military, PTSD. This Advisor would contend that the applicant's misconduct of wrongful use of marijuana is mitigated by his VA service-connected diagnosis of PTSD.

2. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant is diagnosed and 70% service-connected through the VA for PTSD.

(2) Did the condition exist or experience occur during military service? Yes, the applicant is diagnosed and 70% service-connected through the VA for PTSD. Service connection establishes that the condition existed in-service.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. Review of the applicant's in-service medical records show he was diagnosed with Alcohol Abuse, Cannabis Abuse, and Cannabis Dependence, which do not constitute mitigating conditions. Since being discharged from the military, he has been diagnosed and 70% service-connected through the VA with PTSD. Self-medicating with

substances may be used to avoid and mask symptoms which can be associated with the natural history and sequelae of numerous conditions, to include trauma-related conditions. As there is an association between avoidance behaviors, self-medicating with substances, and trauma, there is a nexus between the applicant's misconduct of wrongful use of marijuana and diagnosis of PTSD. As such, BH mitigation is supported.

3. The Board determined there is sufficient evidence of in-service mitigating factors to overcome the misconduct of wrongful use of marijuana. The Board agreed the applicant's misconduct is mitigatable by his mental health conditions or an experience while on active service. However, the Board noted the applicant provided no post service achievements or character letters of support for the Board to weight a clemency determination. The applicant was discharged for misconduct and was provided an under honorable (general) conditions 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. Furthermore, the Board found the applicant's misconduct was minor and warranted amending his narrative reason for separation to misconduct with his separation code as JKA.

4. During deliberation, the Board found the applicant's DD Form 214 omitted recognition of his continuous honorable service from 12 October 2005 through 25 February 2008, prior to the reenlistment and subsequent misconduct. This period included combat service in Iraq and reflects commendable performance. Therefore, the Board granted partial relief by amendment of the narrative reason for separation to misconduct, his separation code to JKA and inclusion of the applicant's honorable service from 20051012 to 20080225 on his DD Form 214.

5. Prior to closing the case, the Board did note the analyst of record administrative notes below, and recommended the correction is completed to more accurately depict the military service of the applicant. 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:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
XXX	XXX	XXX	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial 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 20 March 2009 to show

- following entry in item 18 (Remarks): "CONTINUOUS HONORABLE SERVICE FROM 20051012 UNTIL 20080225."
- Item 26 (Separation Code): JKA
- Item 28 (Narrative Reason for Separation) Misconduct

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to an upgrade of his under honorable conditions (general) character of service

X //SIGNED//

CHAIRPERSON

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):

A review of the applicant's record shows his DD Form 214, for the period ending 20 March 2009 is missing an important entry that may affect his eligibility for post-service benefits. As a result, amend the DD Form 214 by:

- Item 12 f (Foreign Service) 1 year 02 months and 16 days
- Item 18 (Remarks) SERVICE IN IRAQ (Operation SURGE)

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 Army Board for Correction of Military Records (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, USC, 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 ABCMR 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. Applicants do not have a right to a hearing before the ABCMR. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. The Director or the ABCMR may grant a formal hearing whenever justice requires.

4. Army Regulation 635-5 (Separation Documents) establishes the standardized policy for preparing and distributing the DD Form 214 (Certificate of Release or Discharge from Active Duty). Regulatory guidance provides for an additional entry for continuous honorable active service when a Soldier who previously reenlisted without being issued a DD Form 214 was discharged with any characterization of service except honorable.

5. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), still in effect, 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 states 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 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions (a pattern of misconduct consisting solely of minor military disciplinary infractions), a pattern of misconduct (consisting of discreditable involvement with civil or military authorities or conduct prejudicial to good order and discipline). Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. 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 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 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//