

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 24 February 2025

DOCKET NUMBER: AR20240007576

APPLICANT REQUESTS: an upgrade of his Under Honorable Conditions (General) characterization of service, and to appear before the Board via video/telephone.

APPLICANT'S SUPPORTING DOCUMENT CONSIDERED BY THE BOARD:

DD Form 149 (Application for Correction of Military Record)

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 in spite of showing symptoms of post-traumatic stress disorder (PTSD) and Sleep Apnea following his deployment, he was never diagnosed during his period of service. He contends these conditions contributed to his misconduct and resulted in his early separation from the Army.
3. The applicant enlisted in the Regular Army on 5 June 2000 in the rank/grade of private (PV1)/E-1 for a period of 4 years. Upon completion of initial entry training, he was awarded military occupational specialty 31R (Multichannel Transmission System Operator) and assigned to a unit at Fort Bliss, TX. He was advanced to the rank/grade of specialist (SPC)/E-4 effective 5 August 2002. He served in Southwest Asia from 27 February 2003 to 6 April 2004.
4. On 16 December 2002, the applicant accepted company grade nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for failing to go at the time prescribed to his appointed place of duty on two occasions. His punishment was reduction from SPC/E-4 to private first class (PFC)/E-3 (suspended); forfeiture of \$354.00 (suspended); extra duty for 14 days; and restriction for 14 days.

5. On 25 June 2003, the applicant accepted company grade NJP under the provisions of Article 15, of the UCMJ for failing to go at the time prescribed to his appointed place of duty on four occasions and failing to obey a lawful order on two occasions. His punishment was reduction from SPC/E-4 to PFC/E-3; forfeiture of \$356.00 (suspended); extra duty for 14 days; and restriction for 14 days.

6. The applicant underwent a separation medical examination on 12 August 2003 and was found to be qualified for service.

7. The applicant underwent a mental status evaluation on 16 September 2003. It was determined that he had the mental capacity to understand and participate in the proceedings and was mentally responsible. There was no evidence of any mental disease or defect which would warrant disposition through medical channels. He was psychiatrically cleared for any administrative action deemed appropriate by command. He was diagnosed with alcohol dependence.

8. On 2 December 2003, an administrative flag was imposed upon the applicant to prevent him from receiving any favorable actions while he was pending adverse action.

9. On 26 December 2003, the applicant was counseled for misconduct. He was advised that misconduct of this nature could not be tolerated and could result in disciplinary action and/or the initiation of action for his administrative separation from the Army. He was counseled for the following infractions:

- Absence without leave
- Insubordinate conduct toward a warrant officer or noncommissioned officer
- Failure to obey an order or regulation

10. On 24 March 2004, the applicant's immediate commander notified the applicant of his intent to initiate action to separate him under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 14, paragraph 14-12c for Commission of a Serious Offense. He was advised that he was being recommended for an Under Honorable Conditions (General) discharge. The specific reasons for this action were his aforementioned receipt of NJP under the provisions of Article 15 on two occasions; failure to pay a debt; being arrested off post for outstanding warrants; and being arrested for driving under the influence. The applicant acknowledged receipt of the notification.

11. On 24 March 2004, the applicant waived his right to consult with an attorney concerning the separation proceedings pending against him. He rendered an Election of Rights wherein he acknowledged receipt of the notification and that he was advised of the reasons for separation, of the rights available to him, and the effect of any action taken by him in waiving his rights. He elected to waive consideration of his case by an

administrative separation board, personal appearance before and administrative separation board, to submit statements in his own behalf, and consulting counsel and representation by counsel.

12. On 24 March 2004, the applicant's immediate commander formally recommended his 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. The intermediate commander concurred with the recommendation.

13. On 26 March 2004, the separation authority approved the recommendation. He directed the applicant's service be characterized as General, Under Honorable Conditions.

14. Orders and the applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) show he was discharged in the rank/grade of PFC/E-3 on 6 April 2004, under the provisions of Army Regulation 635-200, paragraph 14-12c, by reason of Misconduct with separation code "JKQ" and reentry code "3." His service was characterized as Under Honorable Conditions (General). He was credited with completion of 3 years, 10 months, and 2 days of net active service this period. He did not complete his first full term of service.

15. The applicant petitioned the Army Discharge Review Board (ADRB) for relief. On 14 June 2011, the applicant was informed that after careful review of his application, military records, and all other available evidence, the ADRB determined that he was properly and equitably discharged and denied his request.

16. 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. By regulation, an applicant is not entitled to a hearing before the Board.

17. 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 5 Jun 2000. His DD Form 214 showed service in Southwest Asia from 27 Feb 2003 to 28 May 2003.

- The applicant had nonjudicial charges under Article 15 preferred against him on 16 Dec 2002 for violations of the Uniform Code of Military Justice. The applicant was charged with failure to go to place of duty on two occasions. He was subsequently charged on 25 Jun 2003 for the same type of violations on four more occasions, as well as disobeying orders on two occasions.
- The applicant was counseled on 26 Dec 2003 for misconduct that could result in administrative separation. The noted infractions were AWOL, insubordinate conduct with a warrant officer or NCO and disobeying an order.
- On 24 Mar 2004, applicant's immediate commander advised him that he intended to initiate separation actions under Chapter 14 due to applicant's failure to pay a debt, being arrested for outstanding warrants, and a DUI.
- The applicant was discharged on 6 Apr 2004, and he was credited with 3 years, 10 months and 2 days of net 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 he was never diagnosed with PTSD or Sleep Apnea despite positive indicators following his deployment, which consequently led to his misconduct and premature separation from the Army. A Report of Medical History (12 Aug 2003) indicated positive responses for sleeping difficulties and depression or excessive worry. He maintained that he often worried about work and felt sleep apnea may be causing his sleep difficulties. He was awaiting the results of his sleep study. A Report of Mental Status Evaluation (16 Sep 2003) determined he had normal behavior and thought content as well as unremarkable mood or affect. He also was found to be fully oriented and alert. The evaluating psychologist concluded the applicant did not meet the criteria for any diagnosis and was cleared for any administrative action. It was noted that there was no evidence of any mental disease or defect that would warrant disposition through medical/psychiatric channels. There was insufficient evidence that the applicant was diagnosed with any mental health conditions while on active service.

d. The VA's Joint Legacy Viewer (JLV), which includes medical and mental health records from DoD and VA, was also reviewed and showed the applicant was awarded a service-connected disability of 100% for PTSD. His initial VA mental health session (3 Nov 2009) was focused on his combat experiences in Iraq (Feb-Nov 2002) where he identified two traumatic experiences while deployed. The first one involved the explosion of a British plane his unit accidentally targeted. The second incident involved some gunfire that compelled his group to take cover in a manmade crater where they stayed for eight hours without having any weapons to defend themselves with. His anger toward the deployment experience led to marital problems resulting in divorce. Applicant reported depressive symptoms, poor sleep, nightmares, and waking up gasping for air. He reported previous alcohol abuse, barfights and unemployment. His screening for PTSD was indicative of the presence of PTSD symptoms. He was diagnosed with Impulse Control Disorder, Depressive Disorder NOS, Anxiety Disorder

NOS, rule out PTSD, and marital problems. He had six more individual sessions with the same provider in 2009-2010 in which cognitive behavioral therapy was employed. The provider referred him for psychological testing and a psychiatric evaluation for use of medications on 29 Jun 2010. Subsequent notes do not indicate follow-up with a psychiatrist. During a VA (24 Aug 2010) session, applicant reported a continuation of nightmares and anger toward the military for deployment and being chaptered out. A psychological evaluation on 28 Oct 2010 indicated applicant presented with symptoms of depression, irritability, anger outbursts, nightmares, exaggerated startle response, sleep problems, social isolation and chronic pain. Applicant reported two Article 15's while deployed for missing formation. His alcohol consumption increased considerably once back stateside. The testing results indicated pronounced depression and anxiety, although the personality test proved invalid due to over-endorsement of uncommon responses. Further testing was recommended once heightened distress was reduced. His diagnosis was only a rule out for Alcohol Dependence. On 24 Jan 2011, applicant met a second time with the psychologist who had conducted the psychological testing, but testing did not occur because a greater level of stability was emphasized as the first priority. Applicant reported he had stopped drinking a couple of months ago. He was diagnosed with Depressive Disorder NOS and Anxiety Disorder NOS. A PTSD Disability Benefits Questionnaire, Compensation and Pension Examination (C&P) was conducted on 30 Aug 2012. He was diagnosed with PTSD and Depressive Disorder NOS. It was noted that his mental status appeared to be worsening and his unkempt appearance was quite apparent. The initial C&P exam of Dec 2010 reportedly had the same diagnosis of PTSD as this current one. Another provider reviewing the results of the C&P exam on 02 Nov 2012 concurred with the findings on 30 Aug 2012. Since the C&P exam, the next documented session occurred four and a half years later (06 Jun 2017) when he sought assistance from Veterans Justice Outreach (VJO) to have his records expunged. Two more documented encounters have occurred up to present. On 6 Jul 2018, applicant was primarily dealing with mood/anxiety instability, struggles to be successful, interpersonal conflict and some psychotic ideation. On 03 Mar 2020, a psychiatry outpatient note indicated he was referred to the clinic due to significant suicidal ideation. Applicant denied being actively suicidal and the provider determined this to be accurate with no further action required. A final BH entry (20 Jun 2024) indicated an attempt failed to reach the applicant regarding a missed appointment.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is evidence to support that the applicant had a condition or experience, PTSD, that partially 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 mental health condition, PTSD, at the time of the misconduct. A Mental Status Evaluation was conducted while

in service, which showed no mental health diagnosis. However, VA documents including the findings of a Compensation and Pension Examination with diagnoses of PTSD and Depressive Disorder NOS and a 100% SC disability of PTSD.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition (PTSD) while on active service. This was based on his response to traumatic events during his deployment to a combat zone in Southwest Asia from 27 Feb 2003-6 Apr 2004.

(3) Does the condition or experience excuse or mitigate the discharge? Partial. A review of military medical and mental health records revealed no documentation of any mental health condition(s) while on active service. VA records provided evidence of a mental health diagnosis, PTSD that occurred due to combat trauma. This was further corroborated by the findings of a Compensation and Pension Examination and a 100% SC for PTSD. His failure to report for duty, disobeying orders, insubordination, AWOL episode and DUI can be mitigated. As there is an association between PTSD and substandard performance, avoidant behavior, self-medicating substance abuse and disrespectful behavior toward authority, there is a nexus between this condition and noted misconduct. However, being arrested for outstanding warrants and failure to pay a debt are not associated with PTSD, and therefore cannot be mitigated. The two incidents of failure to report for duty that occurred prior to his deployment are also not mitigated. In addition, the applicant contends he was experiencing mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

#### BOARD DISCUSSION:

After reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the pattern of misconduct leading to the applicant's separation and the findings of only partial mitigation for that misconduct found in the medical review, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant's characterization of service.

BOARD VOTE:

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

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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.

REFERENCES:

1. Title 10, USC, Section 1552(b), provides that applications for correction of military records must be filed within three 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 three-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Title 10, USC, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

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. The regulation provides that 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. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing. 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 635-200 (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 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.

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 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. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part to 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 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//