

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 5 March 2025

DOCKET NUMBER: AR20240010192

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions characterization of services.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
DD Form 149 (Application for Correction of Military Record), 3 May 2024

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 good Soldier. While on deployment for Operation Iraqi Freedom/ Operation Enduring Freedom, his first sergeant had his weapon taken away from him while in a combat zone.
3. A review of the applicant's record shows:
 - a. He enlisted in the Regular Army on 7 September 2000.
 - b. The DD Form 2646 (Specimen Custody Document), 10 September 2004, shows the applicant tested positive for Tetrahydrocannabinol (THC) during a unit urinalysis test collected on 2 September 2004.
 - c. On 4 October 2004, the applicant accepted nonjudicial punishment (NJP) under the provisions of Article 15, Uniform Code of Military Justice (UCMJ), for, between on or about 3 August 2004 and on or about 2 September 2004, use marijuana. His punishment included reduction to the rank/grade of specialist/E-4, forfeiture of \$907.00 per month for a period of two months, 45 days extra duty, and 45 days restriction.
 - d. Three DA Forms 4187 (Personnel Action), show his duty status changed on the following dates:

- resent for Duty (PDY) to Absent Without Leave (AWOL) – 15 December 2004
- AWOL to Dropped from Rolls (DFR) – 15 January 2005
- DFR to PDY – 11 July 2005

e. On 8 August 2005, the applicant accepted NJP under the provisions of Article 15, UCMJ, for, on or about 15 December 2004, without authority, absent himself from his unit and did remain so absent until 11 July 2005, and for, on or about 11 July 2005 and on or about 2 August 2005, wrongfully and willfully impersonate a noncommissioned officer of the Army by publicly wearing a uniform and insignia rank of a sergeant (E-5). His punishment included reduction to the rank/grade of private first class/E-3, forfeiture of \$820.00 per month for a period of two months, 45 days extra duty, and 45 days restriction (suspended, to be remitted if not vacated before 30 September 2005.)

f. On 11 January 2007, the applicant underwent a mental status evaluation for the purpose of separation. The examining official did not note any mental health issues and found the applicant was psychiatrically cleared for any administrative action deemed appropriate by his command.

g. Two DD Forms 2646, show the applicant tested positive for THC during a unit urinalysis test collected on 29 January 2007 and 12 February 2007.

h. The DA Form 458 (Charge Sheet), 28 February 2007, shows the applicant was charged with three specifications of violation of Article 112a (wrongful use, possession, etc, of controlled substances), UCMJ:

(1) Specification 1: the applicant did, on or about 7 December 2006, wrongfully possess more than thirty grams of marijuana.

(2) Specification 2: the applicant did, on or about 6 January 2007, wrongfully possess more than thirty grams of marijuana.

(3) Specification 3: the applicant did, on or about 29 December 2006 and 29 January 2007, wrongfully use marijuana.

i. On 1 March 2007, after having examined the charges preferred against him and after consulting with his defense counsel, the applicant offered to:

(1) Plead guilty to the charge of violation of Article 112a, UCMJ, use and or possession of marijuana, and its specifications.

(2) To accept an other than honorable discharge in the action initiated to separate him pursuant of Army Regulation (AR) 635-200 (Active Duty Enlisted

Administrative Separations), chapter 14, paragraph 12 and to waive his right to demand a separation board.

(3) He acknowledged that was he was advised by his defense counsel of the meaning and effect of his guilty plea, and he understood the meaning and effect thereof. No person or persons made any attempt to force or coerce him into making the offer to plead guilty.

(4) On 21 March 2007, the applicant's offer to plead guilty was accepted.

j. On 19 April 2007, the applicant's company level commander notified the applicant he was initiating action to separate him under the provisions of AR 635-200, chapter 14, paragraph 14-12c, for commission of a serious offense, abuse of illegal drugs, with an other than honorable discharge.

k. The DA Form 4430-R (Department of the Army Report of Results of Trial) shows during a summary court-martial held at Fort Polk, LA on 24 April 2007, the applicant was found guilty of three specifications of Article 112a (wrongful use, possession, etc, of controlled substances), UCMJ. The sentence, adjudged on 24 April 2007, included 14 days confinement, reduction to the rank/grade of private (PV1)/E-1, and forfeiture of \$867.00 per month for one month.

l. On 24 April 2007, his duty status was changed from PDY to Confinement.

m. On 24 April 2007, the applicant acknowledged receipt of his commander's separation notification and after being advised by his consulting counsel of the basis for the contemplated action to separate him for commission of a serious offense, under the provisions of AR 635-200, chapter 14, and its effects, of the rights available to him; and the effect of any action he took in waiving his rights.

(1) He waived his right to have his case considered by an administrative separation board.

(2) He waived his right for a personal appearance before administrative separation board.

(3) He elected not to submit statements on his own behalf.

(4) He understood that he may expect to encounter substantial prejudice in civilian life if a general discharge under honorable conditions was issued to him.

(5) He further understood that, if he received a discharge certificate/character of service which was less than honorable, he may make application to the Army Discharge

Review Board (ADRB) or the ABCMR for upgrading; however, an act of consideration by either board did not imply that his discharge will be upgraded.

(6) He understood that he would be ineligible to apply for enlistment in the United States Army for a period of two years after discharge.

n. On 30 April 2007, the applicant's company level commander recommended he be separated under the provisions of AR 635-200, chapter 14-12c, with a under other than honorable discharge. His commander noted: The applicant wrongfully used and possessed marijuana on numerous occasions between on or about 3 August 2004 and on or about 29 January 2007. He also went absent without leave from 15 December 2004 until 11 July 2005.

o. On 1 May 2007 and 4 May 2007, the applicant's immediate and intermediate commanders recommended approval of the applicant's separation under the provisions of AR 635-200, chapter 14, section III, paragraph 14-12c, for commission of a serious offense, with an other than honorable discharge.

p. On 5 May 2007, his duty status was changed from Confinement to PDY.

q. On 16 May 2007, the separation authority approved the request for discharge, under the provisions of AR 635-200, chapter 14, paragraph 14-12c, for commission of serious offense, with an other than honorable discharge.

r. The applicant was discharged on 17 May 2007. His DD Form 214 (Certificate of Release of Discharge from Active Duty) shows he was discharged under the provisions of AR 635-200, paragraph 14-12c(2), by reason of misconduct (drug abuse), in the rank/grade of PV1/E-1, and his service was characterized as under other than honorable conditions. He completed 6 years, 1 month, and 17 days of net active service with lost time from 15 December 2005 to 11 July 2005 and from 24 April 2007 to 5 May 2007. He was assigned the separation code of JKK and the RE code of 4. Item 13 (Decorations, Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized) shows he was awarded or authorized the following:

- Army Good Conduct Medal
- National Defense Service Medal
- Global War on Terrorism Service Medal
- Iraq Campaign Medal
- Army Service Ribbon
- Overseas Service Ribbon

4. There is no indication the applicant applied to the Army Discharge Review Board for review of his discharge processing within that board's 15-year statute of limitations.

5. Regulatory guidance states when an individual is discharged under the provisions of Chapter 14, AR 635-200 for misconduct, an under other than honorable conditions characterization of service is normally appropriate.

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

7. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) 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 07 September 2000, 2) on 4 October 2004, the applicant received an Article 15 for use of marijuana between on or about 3 August 2004 and on or about 2 September 2004, 3) on 8 August 2005, the applicant received an Article 15 for, on or about 15 December 2004, without authority, absenting himself from his unit and did remain so absent until 11 July 2005, and for, on or about 11 July 2005 and on or about 2 August 2005, and wrongfully and willfully impersonate a noncommissioned officer of the Army by publicly wearing a uniform and insignia rank of a sergeant (E-5), 4) on 11 January 2007, the applicant underwent a mental status evaluation (MSE) for the purposes of separation and was psychiatrically cleared for any administrative action deemed appropriate by his command, 5) DA Form 458 (Charge Sheet) dated 28 February 2007 shows the applicant was charged with three specifications (wrongful use, possession, etc., of controlled substances), 6) On 1 March 2007, after having examined the charges preferred against him and after consulting with his defense counsel, the applicant offered to plead guilty to the charge of violation of use and or possession of marijuana, and its specifications and to accept an other than honorable discharge in the action initiated to separate him pursuant of AR 635-200, chapter 14, paragraph 12 and to waive his right to demand a separation board, 7) on 19 April 2007, the applicant's company level commander notified the applicant he was initiating action to separate him under the provisions of AR 635-200, chapter 14, paragraph 14-12c, for commission of a serious offense, abuse of illegal drugs, with an other than honorable discharge, 8) The DA Form 4430-R (Department of the Army Report of Results of Trial) shows during a summary court-martial held on 24 April 2007, the applicant was found guilty of three specifications of Article 112a (wrongful use, possession, etc., of controlled substances), 9) on 30 April 2007, the applicant's company level commander recommended he be separated under the provisions of AR 635-200, chapter 14-12c, with a under other than honorable discharge. The reasons for the proposed action were noted as the applicant wrongfully used and possessed

marijuana on numerous occasions between on or about 3 August 2004 and on or about 29 January 2007. He also went absent without leave from 15 December 2004 until 11 July 2005, 10) The applicant was discharged on 17 May 2007 under the provisions of AR 635-200, paragraph 14-12c(2), by reason of misconduct (drug abuse), with a separation code of JKK and the RE code of 4.

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. The applicant's in-service medical records available via JLV and submitted as part of his application were reviewed. A BH note dated 11 August 2005 shows the applicant was screened for a Chapter 14 evaluation and was diagnosed with Cannabis Abuse and was released without limitations. An in-service MSE conducted on 11 January 2007 for the purposes of Chapter 14-12c separation shows all domains of the MSE were within normal limits (WNL). He was diagnosed with Cannabis Abuse. The provider noted that the applicant was psychiatrically cleared for any administrative action deemed appropriate by command. He was seen by nutrition care on 22 January 2007 with the reason for the appointment noted as ADAPT (Alcohol and Drug Abuse Prevention Training).

d. A review of JLV shows the applicant is not service-connected through the VA for any conditions and has not been diagnosed with any BH conditions through the VA. A Social Work case management note dated 07 March 2024 shows he reported as he experienced severe depression and was struggling with PTSD. It was documented that due to the applicant's UOTHC discharge he was ineligible for VA clinical services.

e. Review of the applicant's DD Form 214 shows he was deployed in support of Operation Iraqi Freedom from 23 April 2003 through 14 July 2004 with duty in Iraq.

f. Based on the available information, it is the opinion of the Agency Medical Advisor that there is insufficient evidence that the applicant had a condition or experience during his time in service that mitigated his misconduct. However, he contends that his misconduct was related to PTSD, and, per liberal guidance, his assertion is sufficient to warrant the Board's consideration.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends his misconduct was related to PTSD.

(2) Did the condition exist or experience occur during military service? Yes, per the applicant's assertion.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of records shows the applicant was diagnosed with Cannabis Abuse in-service, which does not constitute a mitigating BH condition. Review of his in-service records was void of any mitigating BH diagnosis or treatment history for the applicant during or after service and he provided no medical documentation supporting his assertion of PTSD. In absence of documentation supporting his assertion there is insufficient evidence to establish his misconduct was related to or mitigated by PTSD and insufficient evidence to support an upgrade based on BH mitigation. However, he contends that his misconduct was related to PTSD, and, per liberal guidance, his assertion is sufficient to warrant the Board's consideration.

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. Upon review of the applicant's petition, available military records and the medical review, the Board concurred with the advising opinion of the Agency Medical Advisor that there is insufficient evidence that the applicant had a condition or experience during his time in service that mitigated his misconduct. The Board determined there is insufficient evidence of in-service mitigating factors to overcome pattern of serious misconduct, including multiple instances of wrongful use and possession of marijuana, impersonation of a noncommissioned officer, and an extended period of unauthorized absence.

2. The Board acknowledged the applicant's deployment and the awards he received, including the Army Good Conduct Medal and Iraq Campaign Medal, it determined that the severity and recurrence of his misconduct outweighed any mitigating factors. Furthermore, the applicant provided no post service accomplishments or character letters of support for the Board to weigh a clemency determination. The Board found no evidence of error or injustice in the discharge process and agreed that the characterization of service was appropriate based on the circumstances. Therefore, the applicant has not demonstrated by a preponderance of evidence that relief is warranted, and relief is denied for a discharge upgrade.

3. Consideration was given to the Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends his misconduct was related to PTSD.

(2) Did the condition exist or experience occur during military service? Yes, per the applicant's assertion.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of records shows the applicant was diagnosed with Cannabis Abuse in-service, which does not constitute a mitigating BH condition. Review of his in-service records was void of any mitigating BH diagnosis or treatment history for the applicant during or after service and he provided no medical documentation supporting his assertion of PTSD. In absence of documentation supporting his assertion there is insufficient evidence to establish his misconduct was related to or mitigated by PTSD and insufficient evidence to support an upgrade based on BH mitigation. However, he contends that his misconduct was related to PTSD, and, per liberal guidance, his assertion is sufficient to warrant the Board's consideration.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	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.

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

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. Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, set forth the basic authority for the separation of enlisted personnel.
 - a. Chapter 14 established policy and procedures for separating members for misconduct. Specific categories include minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, or absences without leave. 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 considered appropriate. However, the separation authority may direct a general discharge if such is merited by the Soldier's overall record.
 - b. An honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier'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.

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

d. 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 or for the good of the service.

3. AR 635-5-1 (Separation Program Designator (SPD) Codes), in effect at the time, provided that enlisted Soldiers separated under the provisions of AR 635-200, paragraph 14-12c for misconduct would receive a separation code of "JKK."

4. AR 601-210 (Active and Reserve Components Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment and processing into the Regular Army, U.S. Army Reserve, and Army National Guard. Table 3-1 provides a list of RE codes.

- RE code "1" applies to Soldiers completing their term of active service, who are considered qualified for enlistment if all other criteria are met.
- RE code "2" is no longer in use but applied to Soldiers separated for the convenience of the government, when reenlistment is not contemplated, who are fully qualified for enlistment/reenlistment.
- RE code "3" applies to Soldiers who are not considered fully qualified for reentry or continuous service at time of separation, whose disqualification is waivable; they are ineligible unless a waiver is granted.
- RE code "4" applies to Soldiers separated from last period of service with a non-waivable disqualification.

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 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; TBI; sexual assault; sexual harassment. Boards were directed 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 that misconduct which led to the discharge.

6. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records 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. This guidance does not mandate relief but provides standards and principles to guide Boards in application of their equitable relief authority.

a. 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.

7. 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 ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. 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.

//NOTHING FOLLOWS//