

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 July 2023

DOCKET NUMBER: AR20220008026

APPLICANT REQUESTS: Reconsideration of his previous request for correction of his DD Form 214 (Certificate of Release or Discharge from Active Duty), for the period ending 27 March 2009, to show a more favorable reentry eligibility (RE) code, and:

- correction of his separation code JJD to a presumably more favorable code
- correction of his military records to show completion of military occupational specialty (MOS) course 25C (Army Radio Operator)
- a personal appearance before the Board

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

- Online Application with signature page
- Legal Brief, Tully Rinckey PLLC, dated 30 September 2022 (seven pages)
- Enclosure 1, Power of Attorney (POA), Tully Rinckey PLLC, dated 23 June 2022
- Enclosure 2, DD Form 214, for the period ending 27 March 2009
- Enclosure 3, self-authored statement
- Enclosure 4, Docket Number AR20190013487, Army Board for Correction of Military Records (ABCMR), dated 23 February 2021
- Enclosure 5, Professional Accomplishments
 - Resume, undated
 - Bargaining Unit Performance Appraisal and Recognition Election, dated 31 January 2022
 - Certificates of Completion/Training, dated 14 March 2013 through 9 June 2022 (66)
 - Graduate Advising Transcript, print date 5 May 2022
- Enclosure 6, Blog article, "Too Nice: Avoiding the Traps of Exploitation and Manipulation," dated 12 September 2018

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the ABCMR in Docket Number AR20180000009 on 11 April 2019.

2. As a new argument, counsel states, in effect, the applicant's involvement in a criminal conspiracy was marginal and due to others exploiting him based upon his diagnosis of Autism. Since his discharge, he has proven his condition no longer places him in a position where he is prone to exploitation. He has developed personally, academically, and professionally to the point where he can perform high-level tasks for the U.S. Government. He should be allowed the opportunity to redeem his career and serve his country again.

3. The applicant states, in effect:

a. He comes from a long line of family members who have served in the military. He knew he wanted to be like those who came before him and join the military. He has been married since 2015. His wife helped him in his return to college, both undergraduate and post-graduate, and he earned a master's degree in Cybersecurity from Penn State. He works for the Internal Revenue Service as an Information Technology (IT) Program Manager.

b. He had his first exposure to the "real Army" during his initial entry training when he saw a sergeant violently rape a private. In 2006, he got caught up in the scheme that led to his discharge. He was intimidated by the other Soldiers and was ultimately convinced to participate. He was extremely impressionable and unbeknownst to him, on the autism spectrum. He wanted to tell the truth, but he feared retaliation. The special agent who questioned him promised him leniency if he told the truth. He gave her a confession which she retyped omitting anything favorable to him. Her behavior and attitude frightened him. He was bullied and coerced.

c. He believes there was a conflict of interest in his case. The appointed prosecutor was an officer he previously sought out as a spiritual leader. Someone he confided in and may have confessed certain aspects of his guilt to as well. He was too intimidated to bring this up at the time.

d. He pled guilty. He felt his lawyer abandoned his case. His second lawyer insinuated the prosecution had an ironclad case. His military defense rejected a lesser sentence without consulting him. He still feared retaliation but realized the correct thing to do was to help in any other criminal investigation he could. Had he done that earlier, he may have avoided the lengthy, damaging trial.

e. Since his court-martial, he sometimes has a hard time adjusting. He was accepted to medical school, but an inability to use his military education benefit caused him to withdraw. He is not able to pass the rigid screening process for certain Federal, State, and law enforcement agencies due to his inability to be issued a clearance. He wants a chance to serve again and lead the next generation of Soldiers. In his time as a

federal employee, he has shown his outstanding character and proof positive that the situation in the Army was an aberration.

4. Prior to his enlistment, the applicant underwent a medical examination on 20 November 2004. The corresponding DD Form 2808 (Report of Medical Examination) does not include any indication the applicant reported being treated for or diagnosed with a mental health condition.

5. The applicant enlisted in the Regular Army on 12 April 2006 for a 4-year period. The highest rank he attained was private first class/E-3.

6. A DD Form 458 (Charge Sheet) shows court-martial charges were preferred against him on 2 July 2007 for the following violations:

- attempting to steal money, of a value of more than \$500.00, from Allstate Insurance Company, on or about 29 December 2006
- conspiring to commit larceny of money, of a value more than \$500.00, from Allstate Insurance Company, between on or about 1 December 2006 and on or about 29 December 2006
- making an official statement to a Criminal Investigation Division special agent with the intent to deceive, on or about 29 December 2006

7. An additional DD Form 458 shows court martial charges were preferred against him on 3 October 2007 for four specifications of failure to be at his prescribed place of duty on or about 20 August 2007 and on or about 21 August 2007.

8. A U.S. Army Second Judicial Circuit, Offer to Plead Guilty, dated 23 October 2007, shows the applicant examined the charges and specifications against him. After consulting and being fully advised by his defense counsel he offered to plead guilty at a special court-martial empowered to adjudge a bad conduct discharge.

9. Special Court Martial Order Number 4, issued by Headquarters, U.S. Army Signal Center, Fort Gordon, GA adjudged on 6 November 2007, shows:

a. He pled guilty to and was found guilty of the following charges and specifications:

- attempting to steal money of a value of more than \$500.00, the property of Allstate Insurance Company, on or about 29 December 2006
- conspiring to commit larceny of money of a value of more than \$500.00, the property of Allstate Insurance Company, between on or about 1 December 2006 and 16 January 2007
- making a false official statement with the intent to deceive on or about 29 December 2006

- four specifications of failing to be at his prescribed place of duty on or about 20 August 2007 (two occasions) and on or about 21 August 2007 (two occasions)
- b. He was sentenced to confinement for 9 months and a bad conduct discharge.
- c. The sentence was approved on 7 March 2008, and the record of trial was forwarded for appellate review.
10. A memorandum, issued by a clinical Psychologist, subject: Mental Health Recommendations in the case of [Applicant], dated 14 March 2008, shows:
- a. During his confinement, the applicant was evaluated and receiving psychological and psychiatric treatment from the mental health department at the Naval Hospital Jacksonville.
- b. His was diagnosed with adjustment disorder with depressed mood and anxiety disorder (not otherwise specified (NOS)) and personality disorder NOS.
- c. The mental health treatment at Naval Hospital Jacksonville was not sufficient to manage the applicant's mental health and behavioral issues. Due to the applicant's suicide attempt, it was recommended that he be transferred to a facility with on-site medical and health capabilities.
- d. Due to the applicant's personality disorder and mental health conditions, it was further recommended he was not suitable for retention in the Army and separation should occur expeditiously following the conclusion of his sentence.
11. Special Court Martial Order Number 197, issued by Headquarters, U.S. Army Armor Center, Fort Knox, KY on 17 October 2008, confirmed the applicant's court-martial sentence was affirmed and the sentence to a bad conduct discharge was ordered duly executed.
12. Accordingly, the applicant was discharged on 27 March 2009, under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3, by reason of court-martial. His service was characterized as bad conduct. He was credited with 2 years and 3 months of net active service this period with lost time from 6 November 2007 to 21 July 2008. His DD Form 214 further shows:
- Block 26 (Separation Code) – JJD
 - Block 27 (Reentry Code) – 4
 - Block 28 (Narrative Reason for Separation) – Court-martial, Other

13. The applicant's Enlisted Record Brief shows his primary military occupational specialty (PMOS) as 25C.

14. The Army Discharge Review Board (ADRB) reviewed the applicant's request for a discharge upgrade on 12 March 2010. After careful consideration, the Board determined the applicant was properly and equitably discharged. His request was denied. The ADRB reconsidered the applicant's request for a discharge upgrade and change in narrative reason for discharge on 16 May 2011 and voted to grant partial relief in the form of upgrade of his characterization of service to under honorable conditions (general). The Board denied his request for a change in the narrative reason for discharge, noting it was not authorized under Federal statute.

15. The applicant was issued a new DD Form 214 on 27 July 2011 showing his character of service as under honorable conditions (general). There were no additional changes to the DD Form 214.

16. The applicant petitioned the ABCMR for an upgrade of his RE code. The Board reviewed his request on 11 April 2019 and determined there was insufficient evidence to warrant relief. His request for relief was denied.

17. The applicant provides the following:

a. A Power of Attorney, dated 23 June 2022, shows the applicant designated the law firm of [REDACTED] to serve as his attorneys in all matters relating to and/or arising out of his service in the Army.

b. An undated resume shows the applicant's continuous 14 year work experience in the IT/Cybersecurity fields since leaving the Army to include Federal positions with the Department of Commerce, Department of the Army, and his current position as an IT Program Manager with the Department of Treasury. The resume also shows his education and job related training.

c. A performance appraisal for his current position as an IT Manager dated 31 January 2022 shows the applicant received an "Exceeds Fully Successful" rating for the period. His rater noted the applicant communicated with his team members, stayed focused on tasks, displayed respect to everyone, and conducted himself in a professional manner.

d. 66 certificates of completion/training dated between 14 March 2013 and 9 June 2022 highlight areas of professional development and training.

e. A graduate advising transcript includes the award of his Bachelor of Science in Integrated Social Sciences on 15 August 2020 and his Cybersecurity Analytics and Operations graduate school record.

f. A blog article, titled, Too Nice: Avoiding the Traps of Exploitation and Manipulation, discusses the multiple scenarios where those with autism are taken advantage of by others.

18. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, U.S. Code (USC), Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Rather, it is only empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

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

20. MEDICAL REVIEW:

a. Background: The applicant is requesting reconsideration of his previous request for correction of his DD Form to show a more favorable reentry eligibility (RE) code and correction of his separation code JJD to a presumably more favorable code. The applicant contends that he was exploited based upon his diagnosis of Autism.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Below is a brief summary of information pertinent to this advisory:

- The applicant enlisted in the Regular Army 12 April 2006.
- Special Court Martial Order Number 4, issued 6 November 2007, shows he pled guilty to and was found guilty of the following charges and specifications:
- attempting to steal money of a value of more than \$500.00, the property of Allstate Insurance Company, on or about 29 December 2006
- conspiring to commit larceny of money of a value of more than \$500.00, the property of Allstate Insurance Company, between on or about 1 December 2006 and 16 January 2007
- making a false official statement with the intent to deceive on or about 29 December 2006
- four specifications of failing to be at his prescribed place of duty on or about 20 August 2007 (two occasions) and on or about 21 August 2007 (two occasions)
- He was sentenced to 9 months of confinement and a bad conduct discharge.

- The applicant was discharged on 27 March 2009, under the provisions of Army Regulation 635-200, Chapter 3, by reason of court-martial. His service was characterized as bad conduct.
- The ADRB reviewed the applicant's request for a discharge upgrade on 12 March 2010. His request was denied. The ADRB reconsidered the applicant's request for a discharge upgrade and change in narrative reason for discharge on 16 May 2011 and voted to grant partial relief in the form of upgrade of his characterization of service to under honorable conditions (general). The applicant petitioned the ABCMR for an upgrade of his RE code. The Board reviewed his request on 11 April 2019 and determined there was insufficient evidence to warrant relief.

c. The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 149, ABCMR Record of Proceedings (ROP), DD Form 214, legal brief, self-authored statement, professional accomplishments, a blog article, as well as documents from his service record and separation. The VA electronic medical record and DoD health record were reviewed through Joint Longitudinal View (JLV) and AHLTA. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

d. As a new argument, the applicant's counsel states that his involvement in a criminal conspiracy was marginal and due to others exploiting him based upon his diagnosis of Autism. In his application he also states he'd previously received retribution/reprisal for reporting the rape of another service member and was therefore scared to report the person that stole his car. There were numerous other soldiers involved in the theft and sale of his stolen car (parts), with the applicant reporting none of them were court martialled.

e. In the applicant's previous board file submission a psychological evaluation, though it is not available for review by this advisor. The previous medical advisory noted that the report indicates he was diagnosed with ADHD and Conduct Disorder with an IQ in the Superior to Very Superior range. The psychologist also diagnosed him with Asperger's Syndrome (today, this would likely be a diagnosis of autism spectrum disorder [ASD]). His electronic health record (EHR) from his time in service indicates that the applicant did engage with mental health care while in the Army, though did not start until after he was brought up on charges of larceny and giving false report (first walk-in encounter was April of 2007). On 2 July 2007 he was diagnosed with major depression, single episode, and the depression was noted as secondary to legal problems. Per a hospital discharge note dated 4 September 2007, the applicant was admitted to inpatient 22-28 August 2007 and was diagnosed with adjustment disorder with mixed disturbance of emotions and Conduct, ADHD (by history), alcohol dependence in partial remission and was noted as having significant stress secondary

to court-martial and issues with his 1SG. The applicant noted to a provider that he had previously engaged in the Army Substance Abuse Program (ASAP) for his drinking, though quit the program before completing. An encounter from 19 September 2007 noted the applicant was admitted to the inpatient ward again 5-10 September 2007, after stating he wanted to run his first sergeant over with his truck, then considered suicide for having those thoughts. A third record from 31 October 2007, noted the applicant had a 3rd hospital admission 17-19 October 2007, and an additional diagnosis of personality disorder, not otherwise specified was added to his chart. During this encounter he reported that he was diagnosed with high functioning Asperger's and Autism in high school (neuropsychological evaluation present in his previous board file). The applicant was also provided psychiatric care while he was incarcerated. He was transferred from one institution to another due to needing higher level of psychiatric care after a suicide attempt. He held numerous diagnoses, during his time in service and incarceration, to include adjustment disorder (with disturbance of emotions, with anxiety, with mixed emotional features), anxiety disorder NOS, depression, episodic mood disorder, insomnia due to stress, bipolar disorder NOS, personality disorder NOS, and antisocial personality disorder. In a mental health recommendation memorandum dated 14 March 2008, it was noted that due to the applicant's personality disorder and mental health conditions, it was recommended he was not suitable for retention in the Army and separation should occur expeditiously following the conclusion of his sentence.

f. Per the applicant's EHR, he engaged with health care at the VA once in 2009, and then not again until 2022, with minimal engagement likely due to his discharge status. He is now actively engaged in behavioral health care. Since being discharged from the Army, he has been diagnosed with PTSD, chronic and reports a history of MST (three incidents while in the service). He is 80% service connected, 70% for PTSD. Through review of Joint Legacy Viewing, this applicant did have "Community Health Summaries and Documents" available. Per these records, a history of ADHD, combine type, depressive disorder, PTSD, anxiety and insomnia were stated in his problems list.

g. It is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to indicate the applicant was diagnosed with ADS and that he holds other mental health diagnoses, which were all likely a factor in his previous mitigation and discharge upgrade. However, this does not warrant a change to his reentry code but may warrant a change to his separation code. Per Liberal Consideration guidance, his contention is sufficient to warrant the Board's consideration.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes. He contends he had Asperger. He has also since been diagnosed and service connected for PTSD secondary to MST.

(2) Did the condition exist, or experience occur during military service? Yes. The applicant does assert a mitigating condition and experiences were during his time in service.

(3) Does the condition or experience actually excuse or mitigate the discharge? Partial. The applicant did experience mental health concerns during his time in service, though it appears they began after he was in legal trouble from his misconduct. Also, he has been service connected for PTSD, which would partially mitigate his charges; however, this has already been considered and he was upgraded from bad conduct discharge to general discharge. In addition, the applicant is alleging reprisal as well as being exploited based on his reported condition of Asperger's/ASD and is requesting his re-entry and separation code be changed to a more favorable code. If policy allows for a change to his separation code, this would be supported given his assertion (and service connection) of PTSD secondary to MST. Of note, ASD diagnosis may contribute to him being more easily socially influenced and could have also led to avoidance (hence the failure to reports). Hence this mitigation only goes so far as to have his separation code be consistent with previous decisions that supported his discharge upgrade. As stated in the medical opinion of his previous board, "while his ASD diagnosis may impair his social interactions there is no nexus between his diagnosis and conspiracy, larceny, nor making a false statement. His diagnosis does not impair his ability to know right from wrong and adhere to the right."

h. In regard to the reentry code change, the applicant stated he would like to serve again in the future. This advisor would not recommend changing his reentry code to one that would allow reentry. He has been diagnosed with numerous personality disorders and bipolar disorders, which means he does not meet enlistment or retention standards. In addition, the applicant would need his depression, anxiety, PTSD, adjustment disorder, insomnia and ADHD all to receive a medical waiver. And he's had numerous suicide attempts while previously on active duty (at least three attempts noted in 22 August 2007 encounter and at least one additional while incarcerated). His reentry code of 4 appears accurate and a change is not supported.

BOARD DISCUSSION:

1. The applicant's request for a personal appearance 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 before the Board is not necessary to serve the interest of equity and justice in this case.

2. 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 contentions, the military record, and regulatory guidance. The Board considered his behavioral health diagnosis and the misconduct

which resulted in his discharge. The Board found no nexus between his diagnosis and his ability to know right from wrong. Therefore, the Board concluded that the burden of proof had not been met and a change to his reentry code is not warranted. Based on the preponderance of evidence available for review, the Board determined the evidence presented insufficient to warrant a recommendation for relief.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
█	█	█	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 to amend the decision of the ABCMR set forth in Docket Number AR20180000009 on 11 April 2019.

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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. 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 Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

2. Army Regulation 15-185 (ABCMR), paragraph 2-11 states applicants do not have the right to a hearing before the ABCMR. The Director of the ABCMR may grant a formal hearing whenever justice requires.

3. Army Regulation 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

4. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the separation codes to be entered on the DD Form 214. At the time, this regulation prescribed the separation code "JJD" as the appropriate code to assign to Soldiers separated under the provisions of Army Regulation 635-200, as a result of court-martial. Additionally, the SPD/RE Eligibility Code Cross Reference Table established RE code "4" as the proper reentry code to assign to Soldiers separated under this authority and for this reason.

5. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel. Chapter 3, section IV provides that a member would be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial, after completion of appellate review, and after such affirmed sentence has been ordered duly executed.

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 (BCM/NR) 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//