

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 October 2023

DOCKET NUMBER: AR20230002730

APPLICANT REQUESTS: upgrade of his dishonorable discharge.

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)
- Department of Veterans Affairs (VA) Letters (three)
- Medical Documents

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 he suffered from post-traumatic stress disorder (PTSD) after seeing his dorm roommate kill himself in front of him and he requests relief due to PTSD. He was a squared away Soldier until then. He was not thinking clearly; his judgement was not clear. Now that he is doing treatment, he now understands that he was suffering from PTSD, that was the direct cause of his poor decision making. He asks the Board to consider his relief. Through therapy at the VA, he just learned that he may be able to request this relief because he was suffering from PTSD at the time of his dishonorable act.
3. The applicant enlisted in the Regular Army on 8 December 1983 for four years. His military occupational specialty was 63B (Light Wheel Vehicle Mechanic).
4. The applicant reenlisted on 8 June 1987 for three years.
5. The applicant served in Germany from 30 May 1984 through 3 May 1989.
6. Before a general court-martial on or about 3 May 1989 the applicant was found guilty of:

- stealing \$800.00 U.S. currency the property of another, on or about 16 September 1988
- stealing \$600.00 U.S. currency the property of another, on or about 17 September 1988
- stealing \$175.00 U.S. currency the property of another on or about 30 September 1988
- stealing \$200.00 U.S. currency the property of another on or about 6 October 1988
- stealing \$260.00 U.S. currency the property of another on or about 7 October 1988
- conspiring with Sergeant AM\_\_ to commit an offense under the Uniform Code of Military Justice (UCMJ): larceny of \$1,400.00, the property of another on or about 16 September 1988
- conspiring to commit with Sergeant SA\_\_ an offense under the UCMJ: larceny of \$635.00, the property of another on or about 16 September 1988

7. The court sentenced the applicant to be discharged from the service with a bad conduct discharge (BCD), to be confined for 3 years, and to forfeit all pay and allowances. The sentence was adjudged on 3 May 1989. The sentence was approved and, except for the BCD, would be executed. The record of trial was forwarded for appellate review.

8. The U.S. Army Court of Military Appeals affirmed the findings and sentence on 30 November 1990.

9. The U.S. Army Court of Military Appeals reviewed the applicants petition for grant of review of the U.S. Army Court of Military Review. On 18 February 1992, the court denied his petition.

10. The applicant's DA Form 31 (Request and Authority for Leave) shows the applicant was released from confinement and placed on Adjudged Parole on 27 August 1991. The parole status was terminated on 2 May 1992. Excess leave status was effective on 3 May 1992 for an indefinite time pending completion of appellate review.

11. General Court-Martial Order Number 124, issued by the U.S. Disciplinary Barracks, U.S. Army Combined Arms Center and Fort Leavenworth, KS, on 13 August 1992, shows the sentence had been finally affirmed and ordered the BCD duly executed.

12. The applicant was discharged on 28 August 1992. His DD Form 214 shows he was discharged under the provisions of Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Personnel), Paragraph 3-10, as a result of court-martial. He was assigned Separation Code JJD with Reentry Code 4. His service was characterized as bad conduct. He completed 5 years, 8 months, and 22 days of net active service. He

had lost time from 4 May 1989 to 7 June 1990. After normal expiration term of service 8 June 1990 to 2 May 1992. His awards include the: Army Good Conduct Medal, Noncommissioned Officer Professional Development Ribbon (level 1), and the Overseas Ribbon.

13. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, 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.

14. The applicant provides:

a. A copy of his DD Form 214 discussed above and a VA letter, dated 18 November 2022, shows service connection for PTSD, and various ailments as secondary to PTSD was denied.

b. A VA letter, dated 22 November 2022, reiterated the above and a decision on entitlement to compensation for asthma, foot pain, and tension headaches was deferred.

c. A VA letter, dated 26 November 2022, shows the applicant is a veteran and had honorable Army service from 8 December 1983 to 7 June 1987 and a character of service as unknown from 8 June 1987 to 28 August 1992.

d. Medical documents show his problems to include PTSD and schizoaffective disorder, depressive type, and medications.

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

16. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requests an upgrade of his bad conduct discharge. He asserts he was experiencing PTSD during his active service, which contributed to 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: 1) The applicant enlisted in the Regular Army on 8 December 1983; 2) Before a general court-martial on 3 May 1989, the applicant was found guilty of multiple counts of stealing money and conspiracy to steal property; 3) The applicant was discharged on 28 August

1992, Chapter 3-10, as a result of court-martial. His service was characterized as bad conduct.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) and VA documentation provided by the applicant were also examined.

d. The applicant noted PTSD as a contributing and mitigating factor in the circumstances that resulted in his misconduct. There is insufficient evidence the applicant reported mental health symptoms while on active service. A review of JLV provided evidence the applicant been diagnosed with service-connected PTSD, but he does not receive service-connected disability for this disorder. The applicant was not exposed to combat, but he reported witnessing a potentially traumatic event while on active service.

e. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence to support the applicant had condition or experience that mitigated his misconduct.

#### Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes, the applicant contends he was experiencing PTSD that contributed to his misconduct, and he has been diagnosed with service-connected PTSD.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he was experiencing PTSD that contributed to his misconduct, and he has been diagnosed with service-connected PTSD.

(3) Does the condition or experience actually excuse or mitigate the discharge? No, there is sufficient evidence the applicant was experiencing PTSD while on active service related to a non-combat related experience. However, there is no nexus between PTSD and the applicant's misconduct of theft given that: 1) this type of misconduct is not part of the natural history or sequelae of PTSD; 2) PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing a mental health condition 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 and the evidence found within the military record, the Board found relief was not warranted. The Board carefully considered applicant's contentions, military record and regulatory guidance. The Board

carefully considered supporting documents, evidence in the records and published DoD guidance for consideration of discharge upgrade requests. The Board noted the applicant's length and nature of the misconduct and the reason for separation. Based on the totality of the misconduct and, in the absence of evidence attesting to post-service achievements or letters of reference to weigh in support of a clemency determination, the Board found the character of service the applicant received upon separation was not in error or unjust.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
█	█	█	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined 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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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 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. 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. AR 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

a. An honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

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

c. Chapter 3 provided that an enlisted person would be given a BCD 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.

4. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, 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.

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 Service Discharge Review Boards (DRB) and Service 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 PTSD; 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.

6. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and Service BCM/NRs on 25 July 2018 [Wilkie Memorandum], 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 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 grounds.

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//