

IN THE CASE OF: ██████████

BOARD DATE: 14 December 2023

DOCKET NUMBER: AR20230002926

APPLICANT REQUESTS: reconsideration of his previous requests for an upgrade of his characterization of service from bad conduct to under honorable conditions (general) and a personal appearance via video or telephone.

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

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20090019415 on 27 May 2010.
2. The applicant provides a new argument not previously considered by the Board.
3. The applicant states he was given false information that led to his separation. He was on change of quarters (CQ) duty when the Criminal Investigation Division (CID) informed him that if he did not confess to a crime, he would serve 30-50 years at Fort Leavenworth if found guilty. Additionally, his application to the Board notes his request is related to post-traumatic stress disorder (PTSD).
4. The applicant enlisted in the regular Army on 18 June 1981.
5. A DA Form 4187 (Personnel Action) dated 10 December 1982 shows the applicant's duty status changed from present for duty to confined by military authorities.
6. General Court-Martial Order Number 1, dated 18 February 1983, shows:
 - a. The applicant was convicted of the below two specifications of Charge I, Violation of the Uniform Code of Military Justice (UCMJ) Article 78 (Accessory after the Fact):
 - (1) Specification 1: In that the applicant, knowing that on or about 16 August 1982, Private First Class ██████ had committed an offense punishable by the UCMJ, to

wit: larceny of stereo components of a value of about \$275.00 dollars, did, on or about 16 August 1982, in order to prevent the apprehension of the said Private First Class ■■■, assist the said Private First Class ■■■, by helping to move the stolen property from Room #209, Building 12004 to another area of the building.

(2) Specification 3: In that the applicant knowing that on or about 16 August 1982, Private First Class ■■■ had committed an offense punishable by the UCMJ, to wit: housebreaking of Room #202, Building 12004, did, on or about 16 August 1982, in order to prevent the apprehension of the said Private First Class ■■■, assist the said Private First Class ■■■, by helping to move the stolen property from Room #209, Building 12004 to another area of the building.

b. His sentence, which was adjudged on 10 December 1982, included a reduction to the rank/grade of private (PVT)/E-1, forfeiture of \$200.00 pay per month for 9 months, confinement at hard labor for 9 months, and to be discharged from the service with a bad conduct discharge (BCD).

d. The sentence was approved on 18 February 1983 and, except for the part of the sentence extending to dishonorable discharge, was to be executed. The record of trial was forwarded to the U.S. Army Court of Military Review for appellate review.

7. Two DA Forms 4187 dated 19 May 1983 show the applicant's duty status changed from:

- confined by military authorities to present for duty
- present for duty to excess leave

8. On 16 August 1983, the U.S. Court of Military Review affirmed the findings of guilty and the sentence. The U.S. Court of Military Review received the applicant's request for a review on 24 October 1983 and it was denied on 24 January 1984.

9. General Court-Martial Order Number 59, issued by United States Correctional Activity, Fort Riley, KS on 7 February 1984, confirmed the applicant's conviction and the sentence had been affirmed and directed, Article 71(c), having been complied with, the sentence to be duly executed.

10. On 21 February 1984, the applicant was discharged pursuant to his court-martial sentence under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 3, Section IV. His DD Form 214 shows -

- he was discharged in the rank/grade of private/E-1 with a date of rank of 19 May 1983
- his service was characterized as bad conduct

- he was credited with completing 2 years, 2 months, and 24 days of net active service
- he had 150 days of lost time from 20 December 1982 to 18 May 1983 and 279 days of excess leave from 19 May 1983 to 21 February 1984

11. The applicant petitioned the ABCMR for an upgrade to his service characterization. The ABCMR considered but ultimately denied his request on 27 May 2010 after determining the evidence presented did not demonstrate the existence of a probable error or injustice and that he was properly discharged.

12. 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.

13. Regulatory guidance provides a Soldier will receive a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed.

14. The applicant provided argument or evidence that the Board should consider in accordance with the published equity, injustice, or clemency determination guidance

15. MEDICAL REVIEW:

a. Background: The applicant is requesting reconsideration of his previous requests for an upgrade of his characterization of service from bad conduct to under honorable conditions (general). The applicant asserts that PTSD is related to his request for upgrade.

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

- He enlisted in the Regular Army on 18 June 1981.
- General Court-Martial Order Number 1, dated 18 February 1983, shows the applicant was convicted of two specifications of Charge I, Violation of the Uniform Code of Military Justice (UCMJ) Article 78 (Accessory after the Fact):
Specification 1 - In that the applicant, knowing on or about 16 August 1982, Private First Class ██████ had committed an offense punishable by the UCMJ, to wit: larceny of stereo components of a value of about \$275.00 dollars, did, on or about 16 August 1982, in order to prevent the apprehension of the said Private First Class ██████, assist the said Private First Class ██████, by helping to move the

stolen property from Room #209, Building 12004 to another area of the building. And Specification 3 - In that the applicant knowing that on or about 16 August 1982, Private First Class [REDACTED] had committed an offense punishable by the UCMJ, to wit: housebreaking of Room #202, Building 12004, did, on or about 16 August 1982, in order to prevent the apprehension of the said Private First Class [REDACTED], assist the said Private First Class [REDACTED], by helping to move the stolen property from Room #209, Building 12004 to another area of the building. He was found not guilty of all other charges (see records).

- His sentence, which was adjudged on 10 December 1982, included a reduction to the rank/grade of private (PVT)/E-1, forfeiture of \$200.00 pay per month for 9-months, confinement at hard labor for 9-months, and to be discharged from the service with a bad conduct discharged (BCD).
- After review, General Court-Martial Order Number 59, issued by United States Correctional Activity, Fort Riley, KS on 7 February 1984, confirmed the applicant's conviction and the sentence had been affirmed and directed, Article 71(c), having been complied with, the sentence will be duly executed.
- On 21 February 1984, the applicant was discharged with a bad conduct characterization of service.
- ABCMR denied his request for upgrade on 27 May 2010.

c. Review of Available Records Including Medical:

The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 149, his ABCMR Record of Proceedings (ROP), his DD Form 214, as well as his service and separation records. The VA electronic medical record and DoD health record were reviewed through Joint Longitudinal View (JLV). Lack of citation or discussion in this section should not be interpreted as lack of consideration.

d. The applicant asserts PTSD is related to his request for upgrade. He also contends that he was given false information or lied to by CID and told to confess or spend 30-50 years in Leavenworth. The applicant's time in service predates use of electronic health records (EHR) by the Army, hence no EHRs are available for review. His service record and supporting documents did not contain his service treatment records (STR). The applicant denied a request for a separation physical. No other records were provided to substantiate his claim. There is no evidence of any mental health conditions nor concerns during his time in service.

e. Per the applicant's VA EHR, he is not service connected. He has not been engaged in any mental health care through the VA and he holds no mental health diagnoses with the VA. However, given the characterization of his discharge, he would

not typically be eligible for most VA benefits. Through review of JLV, this applicant did have "Community Health Summaries and Documents" available, though there was no record of a mental health diagnosis, nor mental health encounters. No other medical records were provided. There is no evidence the applicant has experienced any mental health concerns since his discharge.

f. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a potentially mitigating condition during his time in service. Regardless, there is no nexus between his misconduct and PTSD.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes, applicant asserts PTSD is related to his request for upgrade.

(2) Did the condition exist or experience occur during military service? Unclear. The applicant did not specify if his asserted diagnosis was a concern during his time in service, or after.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant asserts PTSD is related to his request for discharge however he did not specify how it was related to his request, or when he may have experienced it. There is insufficient evidence the applicant was diagnosed with a mitigating mental health condition during his time in service, nor since his discharge. In addition, PTSD would not mitigate the charges he was found guilty of (accessory after the fact [Article 78]. Accessory after the fact to larceny is not part of the natural history or sequelae of PTSD. Hence, mitigation is not supported.

BOARD DISCUSSION:

The Board carefully considered the applicant's request, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the applicant's PTSD claim and the review and conclusions of the ARBA BH Advisor. The applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding his misconduct not being

mitigated by PTSD. Based on a preponderance of the evidence, the Board determined the character of service the applicant received upon separation was not in error or unjust.

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 for correction of the records of the individual concerned.

2/15/2024

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CHAIRPERSON

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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, 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 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Chapter 3 provided that an enlisted person 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.

b. 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.

c. 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.

3. 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.

4. 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/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, BCM/NRs 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.

5. Section 1556 of Title 10, United States Code, 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

6. Army Regulation 15-185 (ABCMR), paragraph 2-11, states applicant's 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//