

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 3 November 2023

DOCKET NUMBER: AR20230003058

APPLICANT REQUESTS: reconsideration of his previous requests for an upgrade of his characterization of service from bad conduct to under honorable conditions (general).

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

- DD Form 149 (Application for Correction of Military Record)
- 14-page personal statement
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- three (3) character reference letters

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 Numbers AR20130009121 on 30 January 2014 and AR20160012274 on 7 December 2018.

2. The applicant provides the following new evidence not previously considered by the Board:

- new argument - he was suffering with post-traumatic stress disorder (PTSD) without having an evaluation or treatment
- he provides a self-authored statement and 3 character references

3. The applicant provides a 14 -page personal statement, wherein he states he joined the Pennsylvania Army National Guard (PAARNG) to escape gang violence. He received an honorable discharge from PAARNG and enlisted in the regular Army. He graduated at the top of his class and was stationed in the Republic of Korea.

a. He was made aware of the legal prostitution in Korea. He was on the duty truck in the village one day, when another Soldier on the truck banged to get the driver to stop.

One Soldier jumped out and grabbed a schoolgirl in uniform and put her in the back of the truck. The men on the truck began raping the schoolgirl, he protested, and they held him down and continued to rape the schoolgirl.

b. He did not take part in raping the schoolgirl, but he was threatened not to say anything. He was afraid for his life and did not say anything, he wanted to get out of the unit because he did not trust any of them. He was continually being threatened. One day he came off the mountain, went to his room and drank some wine. He started feeling strange and realized he had been drugged. The guys came in his room acting as if they were going to attack him. He finally went to sleep and was more scared than ever. He was afraid that he might be killed or kill someone, so he began sleeping in the village at night. He was at the bar drinking and was extremely intoxicated from one drink, he jumped in a cab and went back to base and passed out.

c. On another occasion he was in the village Qui Jon Bu City at the bar and the next minute he woke up in the room with two of the Soldiers who raped the schoolgirl who he did not trust. He felt as though he had been drugged. He reached out to his friends from Philadelphia who was stationed at other bases, they came to the village as a show of force. His drinking and drug use got out of control, and he was not being himself. He wanted to go back stateside and was denied midterm leave. Whenever he was not working, he was drunk.

d. The President of South Korea got assassinated and they were ordered to mobilize their missile base. They heard about massacres, and they were put on the roof for guard duty. They soon received an all clear and things went back to normal. The guys he came in country with left and then he finally left Korea.

e. He arrived at Fort Bliss, Texas and was assigned to supply duty. He was responsible for assigning the female barracks supplies. He was unable to get rest with girls coming to his room all times of nights for supplies, wanting to change their rooms, arguing, and fighting. He decided to move off base and only stayed on base when he had duty.

f. He liked his job, but he still wanted to attend ranger school. He caught a cab off post to a check cashing place and when he got back in the cab the driver put a gun in his face and robbed him. When his next payday came, he purchased a gun. He would often have dreams and flashbacks of what happened to him in Korea and the rape situation. He could not report anything to prove this was happening except the one time he lost his vision. He was downtown at a bar in El Paso drinking until it closed. He went in the back and saw a black man raping a white girl, he stopped the man and the girl got away. A week later his friend came and picked him up and in the car was the black man he stopped from raping the white girl.

g. They were in the car drinking outside the barracks. As they started to get back in the car the guy grabbed him from behind and they started fighting. He had the guy on the ground, and someone pulled him up and the guy started towards him with a bottle. He pulled his gun from his waistband and shot him. They took the guy to a hospital off post, and he was arrested at the hospital. He was asked to sign a paper saying that he would not testify.

h. When they got to court, they guy lied and stated he knew the applicant, that he owed the applicant money and stated that was why the applicant shot him. The applicant found out during the trial that this guy was also a Soldier. He was not allowed to tell his side of the story. The girl the guy tried to rape was the daughter of an officer who lived on base. He had no one to testify for him and was sentenced to 4-years at Fort Leavenworth. He was never offered any professional help for what he went through. The military did not help him with what he was going through.

i. He received a Bad Conduct Discharge (BCD) and felt that his life was over, alcohol and drugs became his escape. He never used alcohol or drugs before entering military. He was dealing with PTSD and never knew it. He still has breakdowns and knew he needed help but did not trust doctors or psychiatrists. He was informed that he was illegally tried and convicted.

4. The applicant completed 3 years, 9 months, and 25 days of prior inactive service prior to his enlistment in the Regular Army on 21 February 1979.

5. The applicant accepted non-judicial punishment (NJP), under the provisions of Article 15 of the uniform code of military justice (UCMJ) on the following dates for the following misconduct –

a. On 16 January 1980, for wrongful possession of marijuana, on or about 14 December 1979. His punishment included reduction to the rank/grade of private/E-1 (suspended after 30 days).

b. On 27 May 1980, for wrongfully having in his possession a residue of marijuana, on or about 5 May 1980. His punishment included reduction to the rank/grade of private/E-1.

c. On 4 August 1980, for stealing a Hitachi Television/Cassette Recorder, of a value of about \$250.00, the property of private C\_ M\_, on or about 29 June 1980.

6. General Court-Martial Order Number 8, dated 7 April 1981, shows

a. On 16 January 1981, the applicant was arraigned, tried, and convicted of the following offenses:

(1) Charge I (Violation of the UCMJ, Article 92 (Failure to obey an order or regulation), Specification: in that the applicant did, at a military installation, on 16 December 1980, violate a lawful general order, by having in his possession a pistol.

(2) Charge II (Violation of the UCMJ, Article 128 (Assault), Specification: in that the applicant did, at a military installation, on 16 December 1980, commit assault upon another Soldier with a means likely to produce grievous bodily harm by shooting him in the left side of the neck with a pistol. [Note: Charge reads as modified.]

b. His sentence included forfeiture of all pay and allowances, confinement at hard labor for four years, and separation from service with a bad conduct discharge. His sentences was adjudged on 23 February 1981. The convening authority approved only so much of the sentence as provided for a bad conduct discharge, confinement at hard labor for 15 months, and forfeiture of pay and allowances. The record of trial was forwarded to the U.S. Army Court of Military Review for appellate review.

7. On 30 October 1981, the U.S. Army Court of Military Review reviewed the applicant's case. The Court of Military Review found irregularities in the processing of the court-martial as it related to the use of two instances of nonjudicial punishment and the difference in the stated maximum punishment. However, as the convening authority had approved a sentence less than the maximum and the applicant pled guilty to the charges, the court found that the errors caused no harm and affirmed the charges as modified, the findings, and the sentence.

8. General Court-Martial Order Number 109, dated 31 December 1981, issued by Headquarters, Combined Arms Center and Fort Leavenworth, Fort Leavenworth, KS on 31 December 1981, notes the unexecuted portion of his sentence to confinement was remitted, effective 5 January 1982.

9. General Court-Martial Order Number 264, issued by United States Disciplinary Barracks, US Army Combined Arms Center and Fort Leavenworth, KS on 16 April 1982, notes the finding and sentence had been affirmed and the provisions of Article 71(c), the bad conduct discharge was ordered to be executed.

10. On 14 May 1982, the applicant was discharged pursuant to his court-martial sentence under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Paragraph 11-2. His DD Form 214 shows -

- he was discharged in the rank/grade of private/E-1 with a date of rank of 27 May 1980
- his service was characterized as bad conduct
- he was credited with completing 2 years, 2 months, and 5 days of net active service, with 1 year, 1 month, and 12 days of foreign service

- he had 384 days of lost time from 16 December 1980 to 4 January 1982 and 130 days of excess leave from 5 January 1982 to 14 May 1982
- he was awarded or authorized one marksman marksmanship rifle M-16 qualification badges
- he received a separation code of "JJD" and a reentry code of "4."

11. The applicant petitioned the ABCMR for an upgrade to his service characterization on two previous occasions. The ABCMR considered his request on 30 January 2014 and 7 December 2018, determined the evidence presented did not demonstrate the existence of a probable error or injustice, he was properly discharged, and denied his request for relief.

12. The applicant provides:

a. A character reference letter from the Department of Veterans Affairs psychotherapist dated 11 October 2022. The psychotherapist states he has worked with the applicant since April 2016. He has shown commitment to personal growth, his deeply held values, and his character. He was subject to immense number of traumas during his service. His behavior appears consistent with undiagnosed and untreated PTSD, which was not taken into consideration in the discharge process. He has done a great amount of work to understand the traumas in his history and their effect on him, and to begin to heal from them.

b. Character reference letters from his wife and his uncle attest to him being a hard worker, who is reliable, trustworthy, and a dependable husband, father, and nephew. He is respected by his church members and friend and has a passion for helping others. He deserves a new beginning.

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 Board should consider the applicant's argument and/or evidence in accordance with the published equity, injustice, or clemency determination guidance

15. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting reconsideration of his previous requests for an upgrade of his characterization of service from bad conduct to under

honorable conditions (general). He contends he was experiencing PTSD that mitigated 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 21 February 1979; 2) The applicant accepted non-judicial punishments (NJP) between 16 January-4 August 1980 for possessing the residue of marijuana, possessing marijuana, and stealing an item from another Soldier; 3) On 16 January 1981, the applicant was arraigned, tried, and convicted for possessing a pistol on a military installation and shooting another Soldier in the neck; 4) The applicant was discharged on 14 May 1982, Chapter 11-2, with a character of service as bad conduct; 5) The applicant petitioned the ABCMR for an upgrade to his service characterization. On 30 January 2014 and 7 December 2018, the applicant's requests were reviewed and denied.

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

d. On his application, the applicant noted PTSD is related to his request, as a contributing and mitigating factor in the circumstances that resulted in his separation. There is insufficient evidence the applicant reported any mental health symptoms while on active service. A review of JLV provided evidence the applicant has been assisted for homelessness after his release from prison for sexual assault. He has also been diagnosed and treated for PTSD related to childhood trauma and his later report of observing the sexual assault of a minor in Korea. The applicant receives no service-connected disability.

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

(2) Did the condition exist or experience occur during military service? Yes, the applicant reports experiencing PTSD while on active service.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is evidence the applicant has been diagnosed with PTSD by the VA, but it has not been identified as a service-connected mental health condition. In addition, there is no nexus between the applicant's post-discharge diagnosis of PTSD the possession of a

pistol on post and shooting another Soldier in the neck given that: 1) these types of misconduct are 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 PTSD that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board’s consideration.

**BOARD DISCUSSION:**

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records and published DoD guidance for liberal consideration and clemency in determining discharge upgrade requests. The Board considered the severity of the misconduct and relative applicability of documentation for consideration as mitigating circumstances for the misconduct. The Board noted the applicant’s reference to a post-service diagnosis of PTSD. However, as there is no causal relationship between PTSD, anxiety and the misconduct which led to his discharge, after due consideration, the Board determined that 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 to amend the decision of the ABCMR set forth in Docket Number AR20160012274 on 7 December 2018.

[REDACTED]

[REDACTED]

[REDACTED]

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. Army Regulation 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 11 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. The service of Soldiers sentenced to a BCD was to be characterized as UOTHC.

2. 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.

3. 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, 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.

4. 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.

//NOTHING FOLLOWS//