

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 29 September 2023

DOCKET NUMBER: AR20230003347

APPLICANT REQUESTS: 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 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- Medical Treatment Records (69 pages)
- Court-Martial Statement, undated
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 11 January 2013
- Letter from Client Care Continuum, 23 November 2022

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, in effect, he was diagnosed with severe post-traumatic stress disorder (PTSD) from his service in Iraq. When he came home from Iraq, he was handling his PTSD by using drugs and it led to his severe decline from being a good Soldier to making bad choices. He states he would like an upgrade to at least a general discharge so he can get treatment from Department of Veterans Affairs (VA) for his PTSD and apply for benefits.
3. The applicant provides the following supporting documentation:
 - a. His medical records (69 pages) for treatment of PTSD, substance abuse, mood disorder, depression, history of a severe concussion, contusion of right hand, and family and social issues.

b. A witness statement from Staff Sergeant (SSG) M given during the applicant's court-martial, which states he was the applicant's squad leader for a year and a half, and they deployed to Iraq together. SSG M stated that their mission while deployed was to transport vehicles, houses, or whatever they needed transported. The applicant was his driver and they conducted driving missions outside the wire. His squad leader stated that on missions the applicant was one of the top guys. He did everything without having to be asked and he was a go getter. He knew what needed to be done and got it done. SSG M stated that on at least one occasion they were attacked with an improvised explosive device (IED), and the applicant got out of the vehicle to pull security. SSG M stated that without a doubt he would serve with the applicant again.

c. A letter from Client Care Continuum, dated 23 November 2022, which states the applicant is in treatment for severe PTSD and substance abuse, secondary to his PTSD incurred by his military service. The licensed professional counselor stated that in her clinical observations, the applicant's actions were directly influenced by severe PTSD. PTSD directly limits the applicant's ability to work and maintain gainful employment.

4. A review of the applicant's service record shows:

a. He enlisted in the Regular Army on 9 May 2007.

b. DA Form 4187 (Personnel Action) shows the applicant's duty status changed on the following dates:

- Present for Duty (PDY) to Confined by Military Authorities (CMA) – 21 November 2010
- CMA to PDY – 15 March 2011

c. General Court-Martial Order Number 3, issued by Headquarters, I Corps (Rear) (Provisional), Joint Base Lewis-McChord, Washington on 1 August 2011, shows the applicant was found guilty on 15 March 2011 of:

- Charge I, one specification of without authority, absenting himself from his unit, on or about 19 October 2010 to on or about 21 November 2010
- Charge III, specification one: on diverse occasions between on or about 25 March 2010 and 21 April 2010, wrongfully possess some amount of methamphetamines, a controlled substance
- Charge III, specification two: wrongfully distribute some amount of methamphetamines, a controlled substance on or about 25 March 2010
- Charge III, specification four: between on or about 27 February 2010 and on or about 27 March 2010, wrongfully use methamphetamines, a controlled substance

- Charge III, specification five: between on or about 28 March 2010 and on or about 30 July 2010, wrongfully use methamphetamines, a controlled substance
- Charge III, specification six: between on or about 30 June 2010 and on or about 30 July 2010, wrongfully use methamphetamines, a controlled substance
- Charge III, specification seven: between on or about 16 August 2010 and on or about 16 September 2010, wrongfully use methamphetamines, a controlled substance
- Charge IV, one specification of on or about 26 August 2010, stealing an item of sum value of less than \$500.00, the property of AAFES
- Charge V, one specification of between on or about 1 March 2010 and 25 March 2010, conspire with SB to commit an offense under the Uniform Code of Military Justice, to wit: distribution of methamphetamines, and in order to affect the object of the conspiracy the applicant had a verbal agreement with SB and provided \$100.00 for the purchase of methamphetamine.

d. The court sentenced the applicant to confinement for 5 months, to perform hard labor without confinement for a period of 90 days, and to be discharged from the service with a bad conduct discharge.

e. The sentence was approved on 1 August 2011. Only so much of the sentence as provided for 5 months confinement and a bad conduct discharge was approved and, except for the part of the sentence extended to a bad conduct discharge, would be executed. The accused was credited with 128 days confinement credit against the sentence to confinement.

f. Orders Number 216-139, dated 4 August 2011, assigned the applicant to the Personnel Control Facility, Personnel and Support Battalion, Fort Sill, OK. The orders stated the applicant would be assigned to the unit and placed on excess leave pending the appellate process.

g. On 30 August 2011, the applicant was placed on excess leave without pay and allowances.

h. General Court-Martial Order Number 189, issued by the U.S. Army Fires Center of Excellence and Fort Sill, Fort Sill, OK on 21 November 2012, shows only so much of the sentence as provided for confinement for 5 months and a bad-conduct discharge was affirmed. The applicant was credited with 128 days confinement credit against the sentence to confinement. The provisions of Article 71(c) had been complied with; the bad conduct discharge would be duly executed.

i. The applicant was discharged on 11 January 2013. His DD Form 214 shows he was discharged under the provisions of Army (AR) 635-200 (Personnel Separations - Enlisted Personnel), by reason of court-martial, in the rank/grade of private (PV1)/E-1, and his service was characterized as bad conduct. He completed 5 years, 3 months, and 7 days of net active service during the covered period and had lost time from 19 October 2010 to 20 November 2010 and from 21 November 2010 to 14 March 2011. He served in Iraq from 12 September 2008 to 14 September 2009. He was awarded or authorized the following:

- National Defense Service Medal
- Global War on Terrorism Service Medal
- Iraq Campaign Medal with campaign star
- Army Service Ribbon
- overseas service ribbon

5. By regulation AR 635-200, a Soldier will be given 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.

6. 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.

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

8. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requests an upgrade of his characterization of service from bad conduct to under honorable conditions (general). 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 into the Regular Army on 9 May 2007; 2) He served in Iraq from 12 September 2008 to 14 September 2009; 3) General Court-Martial Orders shows the applicant was found guilty on 15 March 2011 of: A) being AWOL 19 October-21 November 2010; B) possessing methamphetamines; C) wrongfully distributing methamphetamines; D) wrongfully using methamphetamines; E) stealing from AAFES;

and F) conspiring with another Soldier to sell methamphetamines and providing money to complete the act; 4) The applicant was discharged on 11 January 2013, by reason of court-martial, in the rank/grade of private (PV1)/E-1, and 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 medical records. The Armed Forces Health Longitudinal Technology Application (AHLTA), VA's Joint Legacy Viewer (JLV), and civilian hardcopy behavioral health records were also examined.

d. The applicant noted PTSD as a contributing and mitigating factor in the circumstances that resulted in his separation. The applicant was initially seen by behavioral health while on active service on 08 March 2010. He was escorted to the Emergency Department the night previously because of reported suicidal ideation. He described experiencing increased depression related to a recent PCS and being away from his wife, who could not accompany him due to financial difficulties. He also reported nightmares related to his deployment. He agreed to individual therapy, and he was diagnosed with an adjustment disorder with depressed mood. On his follow up session on 29 March 2010, the applicant's command notified behavioral health the applicant was found with illegal drug paraphernalia and likely would have other charges brought against him. The applicant reported using illegal drugs to manage his symptoms of depression and anxiety. He was seen the same day for a psychiatric medication management, and he reported a history of methamphetamine use when he was 18 years old for 2 years prior to joining the Army. The applicant was prescribed anti-depressant medication, and he also enrolled in substance abuse treatment at the Army Substance Abuse Program.

e. The applicant attended medication management and a few individual therapy appointments along with ASAP. On 22 April 2010, he was again seen at the Emergency Room after using methamphetamine consistently for two days. He was recommended for inpatient substance abuse treatment, and he was admitted to a civilian program. After his discharge from the inpatient program, he was admitted into a military Intensive Outpatient Therapy program for substance abuse in June 2010, and he was diagnosed with amphetamine dependence. However, by August 2010, the applicant's commander was notified that the applicant was not attending the prescribed treatment program. This pattern continued till the applicant was reported AWOL in OCT. He was seen again in behavioral health on 22 December 2010 after returning from being AWOL and being in pretrial confinement. He declined any treatment other than medication management till his discharge, and he was diagnosed with adjustment disorder with anxiety.

f. A review of JLV was void of medical documentation, and the applicant does not receive any service-connected disability. The applicant provided hard copy medical

documents that he was admitted into Cedar Hills Hospital in Portland, OR on 28 April 2010-14 June 2010. He was diagnosed with methamphetamine abuse and dependence with a history of head injury and martial issues. There was also a letter from a licensed counselor at Client Care Continuum at Arley, AL provided by the applicant. In the letter, the applicant was reported to be receiving treatment at the facility and was evaluated to meet criteria for PTSD.

g. Based on the available information, it is the opinion of the Agency BH Advisor that there is sufficient evidence to support the applicant had condition or experience that partially 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. There was evidence the applicant was diagnosed with an adjustment disorder while on active service and PTSD after his discharge.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he was experiencing PTSD that contributed to his misconduct. There was evidence the applicant was diagnosed with an adjustment disorder while on active service.

(3) Does the condition or experience actually excuse or mitigate the discharge? Partially, there is sufficient evidence the applicant was experiencing symptoms of depression and anxiety while on active service. The applicant had a history of significant methamphetamine abuse prior to his military service. After returning from his deployment and experiencing marital problems, he began to reengage in significant illegal drug use likely to self-medicate to avoid his negative emotions. Avoidant behavior such as drug use and going AWOL are natural sequelae to negative mental health symptoms. While the applicant was on active service, he was seen by multiple different behavioral health providers in different locations, and he was not diagnosed with PTSD. After his discharge, he was reported to meet criteria for PTSD by a civilian licensed counselor, but the method of evaluation was not provided. In addition, there is no nexus between PTSD, depression, and anxiety and the applicant's misconduct of stealing, selling illegal drugs, and conspiring with another Soldier to sell illegal drugs given that: 1) these types of misconduct are not part of the natural history or sequelae of PTSD, depression, and anxiety; 2) PTSD, depression, and anxiety do 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, 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 whether there was sufficient evidence of mitigating circumstances to weigh in favor of clemency determination. The Board agreed that although the applicant references a post-service diagnosis of PTSD, there is no nexus between PTSD and anxiety and the misconduct which led to his discharge. Based on the lack of documentation showing in-service mitigating factors to overcome the misconduct or evidence of post-service achievements or letters of reference to weigh in support of a clemency determination, 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 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.



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 (Personnel Separations – Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel.

a. Chapter 3 states a Soldier will be given a bad conduct discharge pursuant only to an approved sentence of a general or a special court-martial. The appellate review must be completed, and the affirmed sentence 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, U.S. Code, 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 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.

5. 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.

6. 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//