

IN THE CASE OF: ██████████

BOARD DATE: 26 January 2024

DOCKET NUMBER: AR20230005635

APPLICANT REQUESTS: an upgrade of his bad conduct discharge (BCD) to an honorable 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) for the period ending 8 February 1983

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 was told his BCD would be upgraded after 10 years for benefit purposes. The applicant notes post-traumatic stress disorder (PTSD) as a condition related to his request. He also notes his request is related to the "Somalia Conflict."

3. The applicant enlisted in the Regular Army on 17 June 1980 for a 3-year period. Upon completion of initial entry training, he was awarded military occupational specialty 16P (Air Defense Artillery Short Range Missile Crewman). The highest rank he attained was private first class/E-3.

4. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice on five occasions for the following violations:

a. On 19 January 1981, for failure to go at the time prescribed to his appointed place of duty and for willfully disobeying a lawful order from his superior noncommissioned officer (NCO), on or about 10 January 1981. His punishment consisted of 14 days of extra duty and 14 days of restriction.

b. On 13 March 1981, for willfully disobeying a lawful order from his superior NCO to return to his place of duty and for violating a lawful general order by running and playing football in violation of a lawfully issued medical profile, on or about 7 March 1981. His punishment consisted of reduction to private/E-1, forfeiture of \$116.00 pay for one month, seven days of extra duty, and seven days of restriction.

c. On 31 July 1981, for willfully disobeying a lawful order from his superior NCO by refusing to come to the position of attention and for being disrespectful towards his superior NCO, on or about 27 July 1981, and for failure to go at the time prescribed to his appointed place of duty, on or about 29 July 1981. His punishment consisted of reduction to private/E-2 (suspended for 60 days), forfeiture of \$130.00 pay for one month, 14 days of extra duty, and 14 days of restriction. The suspension was vacated on 3 August 1981, and the unexecuted portion of the punishment was ordered duly executed.

d. On 24 August 1981, for two occasions of failure to go at the time prescribed to his appointed place of duty and for two occasions of disobeying a lawful order from his superior NCO, on or about 17 August and 18 August 1981, and for being disrespectful in language to his superior NCO, on or about 17 August 1981. His punishment consisted of reduction to private/E-1, forfeiture of \$116.00 pay for one month, 14 days of extra duty, and 14 days of restriction.

e. On 10 September 1981, for failure to go at the time prescribed to his appointed place of duty, on or about 31 August 1981. His punishment consisted of 14 days of extra duty and 14 days of restriction. The applicant's appeal of his punishment was denied.

5. The applicant's commander requested a Bar to Reenlistment Certificate pertaining to the applicant. The certificate was approved on 6 October 1981.

6. Before a general court-martial on 6 January 1982, at Frankfurt, Germany, the applicant pled guilty to and was found guilty of committing the following offenses:

- 27 specifications of unlawfully making, drawing, or uttering a check, draft, or order without sufficient funds at the Army and Air Force Exchange and Kreis Sparkasse Banking Facility, between on or about 4 July 1981 and 6 September 1981
- 27 specifications of stealing, dollar amounts ranging from \$10.00 to \$625.00, the property of the Army and Air Force Exchange and Kreis Sparkasse Banking Facility, between on or about 4 July 1981 and 6 September 1981
- one specification of being absent without leave (AWOL) from his unit, on or about 5 October 1981 to on or about 20 October 1981

- one specification of unlawfully making, drawing, or uttering a check, draft, or order without sufficient funds at Volksbank, on or about 4 September 1981
- one specification of stealing \$650.00, the property of Volksbank, on or about 4 September 1981

7. His sentence included confinement at hard labor for 18 months, forfeiture of all pay and allowances, and separation from service with a BCD. On 19 May 1982, the sentence was approved, but the execution of the portion adjudging confinement at hard labor in excess of one year and one day was suspended for one year and one day, at which time, unless the suspended portion was sooner vacated, the suspended portion would be remitted without action. The record of trial was forwarded to the U.S. Army Court of Military Review for appellate review.

8. General Court-Martial Order Number 309, issued by Headquarters, U.S. Army Combined Arms Center, Fort Leavenworth, KS, dated 19 July 1982, noted the unexecuted portion of his sentence to confinement was remitted, effective 28 July 1982.

9. On 25 August 1982, the U.S. Army Court of Military Review approved the findings of guilty and found the sentence correct in law and fact. The findings and sentence were affirmed.

10. General Court-Martial Order Number 81, issued by Headquarters, U.S. Army Combined Arms Center, Fort Leavenworth, KS, dated 2 February 1983, noted that the applicant's sentence as modified had finally been affirmed and ordered the remaining portion of his sentence duly executed.

11. The applicant was discharged under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), paragraph 11-2, as a result of court-martial, other, on 8 February 1983. His DD Form 214 confirms his service was characterized as bad conduct, with separation code JJD and reenlistment code RE-4. He was credited with 1 year, 9 months, and 29 days of net active service, with lost time from 5 October 1981 to 19 October 1981 and 20 October 1981 to 27 July 1982.

12. A DA Form 2-1 (Personnel Qualification Record – Part II), Item 5 (Oversea Service) shows he served in Germany from 16 October 1980 to 4 October 1981, a period of 11 months and 19 days.

13. The Army Review Boards Agency (ARBA), Case Management Division, sent the applicant an email on 7 July 2023 requesting documentation in support of his contention of PTSD. To date, no additional documentation has been received.

14. 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.

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

16. MEDICAL REVIEW:

a. Background: The applicant is requesting that his Bad Conduct discharge be upgraded due to experiencing PTSD during his time in service.

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.

- Applicant enlisted in the Regular Army on 17 Jan 1980. During his time in service, he was deployed to Germany from 16 Oct 1980 - 04 Oct 1981. His military occupational specialty was "Air Defense Artillery Short Range Missile Crewman."
- Applicant received five NJP Article 15's for failure to report (FTR)/disobeying order (19 Jan 1981), disobeying order/violating profile order (13 Mar 1981), disobeying order/disrespecting NCO (31 Jul 1981) and FTR (29 Jul 1981), two FTR's and two disobeying orders (17-18 Aug 1981), and FTR (31 Aug 1981).
- A General Court Martial found him guilty for 27 specifications uttering checks (04 Jul-06 Sep 1981), 27 specifications stealing money ranging between \$10.00-\$625.00, one specification going AWOL (05-20 Oct 1981), and two additional specifications for uttering a check and stealing \$650.00 from Volksbank (04 Sep 1981).
- The applicant's separation packet is unavailable for review. However, the applicant's service record includes his DD Form 214 (Report of Separation from Active Duty), which shows the applicant received a Bad Conduct discharge on 08 Feb 1983.

c. 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 documents from his service record. The VA electronic medical record and DOD health record were reviewed through Joint Longitudinal View (JLV).

d. This applicant asserted that PTSD was a mitigating factor in his discharge. His

service record and supporting documents did not contain any documents indicating behavioral health assessment or treatment during his time in service. Based on this documentation in its entirety, there is no evidence the applicant was diagnosed or treated for mitigating conditions that occurred during his time in service.

e. Per the applicant's VA EHR, he is not service connected for any medical or behavioral health concerns. There is not any available data in JLV.

f. In summary, although he is not service connected for any behavioral health conditions (likely due to the character of his discharge), there is the applicant's own assertion of PTSD. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a behavioral health condition/diagnosis that mitigates his misconduct. However, per Liberal Consideration the applicant's assertion of PTSD warrants consideration by the board.

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 asserts a mitigating condition.

(2). Did the condition exist or experience occur during military service? Yes. The applicant selected PTSD on his application.

(3). Does the condition or experience actually excuse or mitigate the discharge? No. There is insufficient evidence of a mitigating BH condition while in military service. There is no evidence of an in-service BH diagnoses, and there is no medical documentation indicating the VA has service-connected the applicant for any BH condition. And while the applicant self-asserted PTSD, the applicant did not submit any medical documentation substantiating his claim.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence within the military record, the Board found relief was not warranted. The Board carefully considered the applicant's request and published DoD guidance on consideration of discharge upgrade requests. The Board noted multiple offenses leading to the applicant's separation. He was brought before a general court-martial, pled guilty to and found guilty of committing the offenses. The Board noted the applicant's reference to a diagnosis of PTSD. However, documentation available for review is void supporting medical documentation and none was provided any for consideration. After due consideration of the request and in the absence of mitigating factors such as post-service accomplishments or letters of reference to weigh in favor of the request, the Board found 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.

2/26/2024

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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, 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. Section 1556 of Title 10, USC, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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 ABCMR applicants (and/or their counsel) prior to adjudication.

3. Army Regulation 600-8-2 (Military Awards) Table 2-4 (Armed Forces Expeditionary Medal – Designated U.S. Military Operations) shows Operations Restore Hope and United Shield in Somalia from 5 December 1992 to 31 March 1995. Appendix B, Table B-1, shows the campaign medal period in Somalia from 5 December 1992 to 31 March 1995.

4. 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.

5. 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.

6. 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 Discharge Review Boards and 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. Standards for review should rightly consider the unique nature of

these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences.

7. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards 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, 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//