

IN THE CASE OF: ██████████

BOARD DATE: 15 December 2023

DOCKET NUMBER: AR20230005794

APPLICANT REQUESTS: Upgrade of his bad conduct discharge (BCD) to honorable.

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

- DD Form 149 (Application for Correction of Military Record)
- Self-authored letter
- Applicant's Biography
- In-service records
- Character reference letters (two)
- Memorandum from Office of the Under Secretary of Defense; subject: Clarifying Guidance to Military Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCMR/NR) Consideration Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment

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:

a. He made the decision to join the U.S. Army out of Chicago, Illinois. He quickly rose from the rank of private first class to specialist within his second year of service. He self-referred and checked into a military mental health clinic for cocaine use. He was examined and diagnosed with cocaine dependency. It was noted then that his dependency would cause legal problems but yet he checked out and reported back to his unit broken, with no help or mentor to guide him. Feeling the pressures of marriage, lack of confidence, and failures of job accomplishments, he was guided to a profound decision to take some time to let off some steam by going out on liberty in town.

b. Unfortunately, the heavy partying and drinking, led him back to drugs. He returned back to the unit where he was informed that he was absent without leave (AWOL) and ordered to take a mandatory command-wide urinalysis. His sample came back positive for cocaine. His unit commander placed him on probation, confined him to the barracks, and extra duty. While on the probation, he asked to go to a drug rehabilitation program, and was told, "yes," he could go. The decision was reversed. Missing his family and full of anger, he left the barracks and went home to his family. He repeated his use of drugs. He was picked up four days later by base authorities and incarcerated. When it came time for the trial, his lawyer was conveniently out of town. Since he had never been incarcerated before and didn't like it, he chose to proceed with the trial and accepted his punishment.

c. Since his separation from the military, he has turned his life around. He became a Christian in 1991, and has been clean and sober ever since. He knows the choices he made as a young man were irresponsible and to put it bluntly extremely stupid and selfish, which not only hurt his family and career but his integrity. He strongly feels that the punishment outweighed the choices he made.

3. On his DD Form 149, the applicant notes that mental health, and sexual/harassment are related to his request.

4. The applicant enlisted in the Regular Army on 1 June 1988. Upon completion of training, he was awarded military occupational specialty 13F (Fire Support Specialist).

5. A Standard Form 513 (Consultation Sheet), dated 2 October 1989, shows he self-referred to a military clinic for cocaine usage. Attending physician recommended that the applicant should be enrolled in a rehabilitation program if available. If not, the applicant's command should consider discharge because he could get in legal trouble.

6. On 3 January 1990, the applicant was reported as AWOL and remained absent until he was apprehended and returned to military authorities on 4 January 1990.

7. On 7 February 1990, the applicant was reported as AWOL a second time, and remained absent until he was apprehended and returned to military authorities on 11 February 1990.

8. Before a special court-martial on 28 February 1990, at Fort Richardson, Alaska, the applicant was found guilty of two specifications of being AWOL; and two specifications of wrongfully using cocaine.

9. The court sentenced him to a BCD, confinement for two months, and forfeiture of \$200.00 pay per month for two months. The sentence was approved on 18 April 1990 and the record of trial was forwarded for appellate review.

10. Special Court-Martial Order Number 6, issued by Headquarters, 7th Infantry Division (Light) and Fort Ord, Fort Ord, CA, on 11 March 1991, noted that the applicant's sentence had been affirmed and ordered the BCD duly executed.
11. The applicant was discharged on 29 March 1991. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms he was discharged under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 3, Section IV, as a result of court-martial. His service was characterized as bad conduct. He was assigned Separation Code JJD and Reentry Code 3. He was credited with 2 years, 8 months, and 2 days of net active service this period with 55 days of time lost.
12. In the processing of this case, a search of the Criminal Investigation Division database was requested for a Report of Investigation and/or Military Police Report pertaining to the applicant. The search revealed no records pertaining to the applicant.
13. The applicant provides two character reference letters that collectively attest to his faith, positive changes in his personal life, and his dedication to completing tasks. These letters are provided in their entirety for the Board's review within the supporting documents.
14. 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.
15. In reaching its determination, the Board can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance.
16. MEDICAL REVIEW:
 - a. The applicant is applying to the ABCMR requesting upgrade of his bad conduct discharge (BCD) to honorable. He asserts he was experiencing mental health conditions and sexual assault/harassment, which contributed to his misconduct and mitigates his discharge.
 - 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 1 June 1988; 2) On 3 January 1990, the applicant was reported as AWOL and remained absent until he was apprehended and returned to military authorities on 4 January 1990. He again on 7 February 1990 was reported as AWOL. He remained absent until apprehended and returned to military authorities on 11 February 1990; 3) Before a special court-martial on 28 February 1990, the applicant was found guilty of two specifications of being AWOL and two specifications of wrongfully using cocaine; 4) On 29 March 1991, the applicant was discharged, Chapter 3-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 records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical documentation was provided for review.

d. The applicant noted mental health conditions and sexual assault/harassment as contributing and mitigating factors in the circumstances that resulted in his separation. In his narrative description of the circumstances surrounding his misconduct and separation, the applicant did not report experiencing military sexual trauma. Instead, he described experiencing barriers to care for substance abuse and a lack of legal support. There is evidence the applicant was self-referred to a military clinic for cocaine use. He was recommended for substance abuse care in October 1989. There is insufficient evidence the applicant attended this treatment or was ever diagnosed with another mental health condition. The applicant reported a history of substance abuse prior to his enlistment, which he reengaged in while assigned to Alaska. A review of JLV was void of medical documentation, and the applicant did not provide any additional civilian medical documentation.

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 mental health conditions and sexual assault/harassment during his military service.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he was experiencing mental health conditions and sexual assault/harassment during his military service that contributed to his misconduct.

(3) Does the condition or experience actually excuse or mitigate the discharge? No, there is insufficient evidence the applicant was experiencing mental health conditions

beyond substance abuse while on active service. The applicant did indicate that he was exposed to sexual assault/harassment on his application. However, he described experiencing barriers to behavioral health care and insufficient legal support, not sexual trauma. The applicant did go AWOL and use illegal substances. This type of avoidant behavior can be a sequela to some mental health conditions or sexual trauma, but this is not sufficient to establish a history of a mental health condition or sexual trauma during active service. However, the applicant contends he was experiencing a mental health condition and experience 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 within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published DoD guidance on consideration of discharge upgrade requests. The Board noted the offenses leading to the applicant's separation. After due consideration of the request the Board found that the character of service the applicant received upon separation was not in error or unjust and an upgrade of his bad conduct discharge to honorable is not warranted.

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 and an upgrade of his bad conduct discharge to honorable is not warranted.

2/28/2024

X █

CHAIRPERSON
█

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. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the 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.

3. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR.

a. Paragraph 2-9 states the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

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 3, section IV provided that a member 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, 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.

6. The Secretary of Defense directed the Service DRBs and Service BCM/NRs, on 3 September 2014, to carefully consider the revised post-traumatic stress disorder (PTSD) criteria, detailed medical considerations, and mitigating factors when taking action on applications from former service members administratively discharged under other than honorable conditions and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

7. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating 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 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.

8. 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, 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//