

IN THE CASE OF: ██████████

BOARD DATE: 18 January 2024

DOCKET NUMBER: AR20230006402

APPLICANT REQUESTS: his bad conduct discharge (BCD) be upgraded.

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

- DD Form 149 (Application for Correction of Military Record)
- Certificates (two)

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 is requesting an upgrade to have his Department of Veterans Affairs (VA) benefits restored. He is struggling with post-traumatic stress disorder (PTSD) as a result of his tour of duty in Southwest Asia. He would like this correction because it has been over 30 years since his separation, and he has never attempted to have his benefits restored. However, he did put his life on the line to service his Country and did not have any issues until his service in the Gulf War. He did not know the process, nor did he ever think it was possible to have his VA benefits restored. PTSD and other mental health issues are related to his request.
3. The applicant enlisted in the Regular Army on 11 May 1989 for five years. His military occupational specialty was 67T (Helicopter Repairer).
4. He served in Saudi Arabia from 14 October 1990 through 17 April 1991.
5. The applicant accepted nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ) in July 1991 for wrongfully using cocaine during the period 8 June to 19 June 1991. His punishment consisted of reduction to private/E-1, forfeiture of \$376.00 a month for one month, and extra duty.

6. Orders 340-564, dated 6 December 1991, issued by Headquarters, U.S. Army Infantry Center, Fort Benning, GA show the applicant was assigned to the U.S. Army Personnel Control Facility.
7. Before a general court-martial at Fort Benning, GA, the applicant was found guilty of:
 - wrongfully and unlawfully making a false statement on 22 July 1991 and 25 July 1991
 - larceny of property, values of over \$100.00, 21 July 1991 and 27 July 1991
 - wrongful use of cocaine, between 29 May 1991 and 5 June 1991
 - forgery of personal checks, 8 August 1991, 28 July 1991, 29 July 1991 (twice), and 16 August 1991
 - forgery of savings account withdrawal requests, 30 July 1991, 31 July 1991, 1 August 1991, and 2 August 1991
8. The court sentenced the applicant to a BCD, confinement for 30 months, and forfeiture of all pay and allowances. The sentence was adjudged on 26 November 1991. The sentence was approved on 13 March 1992 and, except for the BCD, would be executed.
9. The applicant was recommended for parole in June 1992. He was on military parole 16 November 1992 to 25 May 1994.
10. The U.S. Army Court of Military Review affirmed the findings and sentence on 4 February 1993.
11. General Court-Martial Order Number 392, dated 30 November 1993, issued by the U.S. Disciplinary Barracks, U.S. Army Combined Arms Center, Fort Leavenworth, KS, shows the sentence had been finally affirmed and ordered the BCD duly executed.
12. The applicant was discharged on 21 January 1994. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Personnel), Paragraph 3-11, as a result of court-martial. His service was characterized as bad conduct. He completed 2 years, 5 months, and 5 days of net active service. He lost time from 16 October 1991 to 21 January 1994.
13. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.
14. The applicant provides certificates of completion for anger management and master mind study.

15. In reaching its determination, the Board can consider the applicant's petition and her service record in accordance with the published equity, injustice, or clemency determination guidance.

16. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his bad conduct discharge. He contends he experienced mental health conditions including 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 11 May 1989; 2) The applicant served in Saudi Arabia from 14 October 1990-17 April 1991; 3) On 13 March 1992, before a general court-martial, the applicant was found guilty of: A) wrongfully and unlawfully making a false statement on two occasions; B) larceny of property, values of over \$100.00; C) wrongful use of cocaine; D) forgery of personal checks on six occasions; and E) forgery of savings account withdrawal requests on four occasions; 4) The applicant was discharged on 21 January 1994, Chapter 3-11, as a result of court-martial. His service was characterized as bad conduct.

c. The Army Review Board Agency (ARBA) Behavioral Health (BH) 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.

d. On his application, the applicant contends mental health conditions including PTSD were contributing and mitigating factors in the circumstances that resulted in his separation. There is insufficient evidence the applicant reported or was diagnosed with any mental health condition while on active service. A review of JLV was void of mental health documentation, and the applicant receives no service-connected disability. The applicant did not provide any additional medical documentation from a licensed behavioral health provider.

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 mental health conditions, including PTSD that contributed to his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he was experiencing mental health conditions including PTSD that contributed to his misconduct, while on active service.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is insufficient evidence beyond self-report the applicant has ever reported or been diagnosed with a mental health condition, including PTSD. The applicant may have also been utilizing cocaine to self-medicate and avoid his negative emotions. However, there is no nexus between his reported mental health conditions including PTSD and his misconduct of making a false statements, larceny, forgery of personal checks, forgery of savings account withdrawal requests: 1) these types of misconduct are not part of the natural history or sequelae of his reported mental health conditions; 2) His reported mental health conditions 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 mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

The Board carefully considered the applicant's request, supporting documents, 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 to include deployment, 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 limited evidence of post-service achievements and no 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:

Mbr 1 Mbr 2 Mbr 3

:	:	:	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.

4/15/2024

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, 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. Title 10, USC, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

3. AR 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 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.

4. 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.

5. 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 Service Discharge Review Boards (DRB) and Service 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. Boards are 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.

6. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and Service BCM/NRs on 25 July 2018 [Wilkie Memorandum], 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 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 grounds.

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//