

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 2 January 2024

DOCKET NUMBER: AR20230007029

APPLICANT REQUESTS:

- reconsideration of his previous request to upgrade his bad conduct discharge to under honorable conditions (general)
- in effect, a DD Form 214 (Certificate of Release of Discharge from Active Duty) which shows he served honorably from 1997 to 2003
- an in-person appearance before the Board via video/telephone

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) Rating Decision, 21 September 2011

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 Dockets Number:

- AR20140009187 on 19 February 2015
- AR20180002309 on 19 April 2019

2. The applicant provides a new argument which was not previously considered by the Board. The applicant states, in effect, he requests to change his character of service and upgrade it to general, under honorable conditions because of his post-traumatic stress disorder (PTSD) diagnosis, which affected his thinking. He feels his PTSD had a lot to do with his thinking ability and caused him to act irrational and make dumb decisions, for which he is deeply sorry. He would also like his DD Form 214 to reflect his honorable service from 1997 to 2003 (reenlisted honorably). He currently serves in the Columbus Community Center and help others that are in need.

3. The applicant provides a copy of his VA rating decision, dated 21 September 2011, which shows he was assigned a 70 percent evaluation for PTSD based on occupational

and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood.

4. The applicant's request for issuance of a new DD Form 214 for his honorable period of service from 1997 to 2003 is governed by Army Regulation 635-8, currently in effect, and by Army Regulation 635-5, then in effect. Beginning in October 1979, a new DD Form 214 was no longer issued at the end of honorable service for which the purpose of discharge was immediate reenlistment.

a. Honorable service completed for earlier periods was then noted in block 18 (Remarks) of the DD Form 214 issued at the time of separation, and when the characterization of the last and most recent period of service was not fully honorable. This issue will not be discussed further in this record of proceedings

b. The periods of honorable service were to be denoted as immediate reenlistment periods after the first entry in block 18 and will be discussed in administrative corrections below.

5. The applicant's records contain sufficient evidence to support administrative corrections in reference to his immediate reenlistments and are not shown on his DD Form 214 for the period ending on 25 January 2010 but will be listed in administrative notes.

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

a. Having completed prior honorable service in the U.S. Marine Corps from 20 October 1992 to 19 October 1996, he enlisted in the Regular Army on 1 April 1997 for a period of 3 years.

b. He reenlisted on 26 April 1999 for a period of 3 years.

c. On 20 July 2000, he accepted company grade nonjudicial punishment (NJP) under provisions of Article 15, Uniform Code of Military Justice (UCMJ), for without authority, failing to go at the time prescribed to his appointed place of duty on 15 June 2000 and on 16 June 2000. His punishment consisted of 7 days of extra duty. He did not appeal this punishment.

d. He reenlisted on 15 October 2001, for a period of 2 years in the grade/pay grade staff sergeant/E-6.

e. A DD Form 2329 (Record of Trial by Summary Court-Martial) shows he was arraigned and tried by summary court-martial on 20 December 2002 and charged with and found guilty of:

- being disrespectful in language and deportment on 18 November 2002
- willfully disobeying the order of a noncommissioned officer (NCO) on 18 November 2002

f. The court sentenced him to reduction to sergeant (SGT)/E-5, forfeiture of \$1406.00, and restriction for 2 months. The sentence was approved except that reduction was suspended for 6 months. If no misconduct punishable under the UCMJ was committed during that period, reduction would be vacated.

g. The applicant reenlisted on 15 November 2003 for an indefinite period.

h. His enlisted record brief shows he served in Kuwait from 4 August 2004 to 21 August 2004 and in Iraq from 22 August 2004 to 28 July 2005.

i. General Court-Martial Order Number 37, issued on 10 July 2008 by Headquarters, United States Army Infantry Center and Fort Benning, Fort Benning, shows the applicant was found guilty on 15 January 2008 of:

(1) Charge I, one specification of attempting to steal U.S. currency of a value of over \$500.00, the property of the U.S. Government, between on or about 1 August 2005 and 1 December 2005;

(2) Charge II, one specification of conspiring with R_ L_, on or about 1 August 2005 and 1 December 2005, to commit an offense under the UCMJ, to wit: larceny of U.S. currency of value of over \$500.00, the property of the U.S. Government, and in order to effect the object of the conspiracy the accused and R_ L_ received a receipt for cleaning clothes for over \$4,000.00, and notified the claims office at Fort Carson, CO that the bill was submitted for cleaning clothes had been paid, when in fact it had not, after providing the receipt to the Fort Carson claims office asking for reimbursement;

(3) Charge III, specification one: on or about 1 August 2005 and 1 December 2005, making an official statement with intent to deceive, to wit: "that he paid for having his clothes cleaned," or words to that effect, in an attempt to file a claim, which statement was totally false and was then known by the accused to be so false

(4) Charge IV, specification one: on divers occasions on or about 22 November 2006, willfully disobeying a lawful order from a superior NCO to "at-ease, stop talking, and do not say anything until asked," or words to that effect;

(5) Charge IV, specification two: on or about 7 February 2007, willfully disobeying a lawful order from a superior NCO to "sit in the bleachers until after formation," or words to that effect;

(6) Charge IV, specification four: on or about 4 October 2006, willfully disobeying a lawful order from a superior NCO, to not play basketball, or words to that effect;

j. The court sentenced the applicant to reduction to the rank/grade of private (PVT)/E-1, to be confined for one year, and to be discharged from the service with a bad conduct discharge.

k. On 28 May 2009, the U.S. Army Court of Criminal Appeals, after consideration of the entire record, including the consideration of the issues personally specified by the appellant, held the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, the findings of guilty and the sentence were affirmed.

l. On 4 November 2009, on consideration of the petition for grant of review of the decision of the U.S. Army Court of Criminal Appeals, the U.S. Court of Appeals for the Armed Forces ordered the said petition be denied.

m. General Court-Martial Order Number 186, issued by Headquarters, United States Army Armor Center and Fort Knox, Fort Knox, KY on 21 November 2009, shows the sentence had been affirmed. The provisions of Article 71(c) had been complied with and the bad conduct discharge would be executed.

n. The applicant was discharged on 25 January 2010. His DD Form 214 shows he was discharged under the provisions of Army (AR) 635-200 (Personnel Separations - Enlisted Personnel), chapter 3, by reason of court-martial, in the rank/grade of private (PV1)/E-1, and his service was characterized as bad conduct. He completed 11 years, 11 months, and 21 days of active service during this period. This form also shows in:

- Item 13 (Decorations, Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized):
 - Army Commendation Medal
 - Army Achievement Medal
 - Navy Unit Commendation
 - Army Good Conduct Medal (3rd Award)
 - Marine Corps Good Conduct Medal
 - National Defense Service Medal
 - Global War on Terrorism Service Medal
 - Korean Defense Service Medal
 - Armed Forces Service Medal
 - Noncommissioned Officer Professional Development Ribbon
 - Army Service Ribbon

- Item 18 (Remarks): Continuous honorable service 19930417 – 20050801, Service in Iraq from 20040822 – 20050728, Service in Kuwait from 20040804 – 20040821, and Member has completed first full term of service
- Item 29 (Dates of Time Lost During This Period): 20080115 - 20081102

8. The applicant's service record does not contain a copy of a medical examination conducted during the time of his discharge.

9. The applicant previously applied to the ABCMR to request his bad conduct discharge be changed to a medical discharge. On 19 February 2015 and in ABCMR Docket Number AR20140009187, the Board determined that the evidence presented did not demonstrate the existence of a probable error or injustice. Therefore, the Board determined that the overall merits of the case were insufficient as a basis for correction of the records of the applicant.

10. The applicant requested an upgrade of his bad conduct discharge. On 19 April 2019 and in ABCMR Docket Number AR20180002309, the Board considered his application and the evidence of record along with an Army Review Boards Agency medical advisor/psychologist advisory opinion. The Board determined that the evidence presented did not demonstrate the existence of a probable error or injustice and that the overall merits of the case were insufficient as a basis for correction of his records.

11. 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.

12. 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.

13. 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.

14. MEDICAL REVIEW:

a. Background: The applicant is requesting to change his character of service, upgrading to *general under honorable conditions* due to his PTSD diagnosis impacting his thinking. He additionally requested a correction on his DD 214, noting that he served honorably in the Army from 1997-2003. This reportedly transpired prior to his

reenlistment in 2003 that culminated in two court martials. 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 Marine Corps on 20 Oct 1992 and was honorably discharged.

- On 19 Oct 1996. He reenlisted in the U. S. Army on 17 Apr 1997 and received a Bad Conduct discharge on 25 Jan 2010.
- On or about 16 Jun 2000, he received an Article 15 for failure to attend morning formation.
- On 20 Dec 2002, applicant received sentencing for a court martial as the result of disrespectful language and disobeying an NCO order.
- On 10 Jul 2008, applicant was found guilty in a General Court Martial of an attempt to steal \$500.00, conspiracy to commit larceny, making false statements and disobedience/disrespect of an NCO. The punishment included rank reduction to PV1, confinement for one year and a BCD discharge.
- The applicant's service record includes his DD Form 214 (Report of Separation from Active Duty), which shows that he was rendered a Bad Conduct discharge 25 Jan 2010.

b. The Army Review Boards Agency (ARBA) Medical Advisor reviewed this case. Documentation reviewed included 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). This applicant asserted that PTSD should have been a mitigating factor in his discharge. Included in his service record and supporting documents is a VA document assigning him with a 70% service-connected *evaluation* for PTSD. No other medical or behavioral health records were provided.

c. Per the applicant's VA EHR, he is 70% service connected for a combined disability rating of 70% for several medical conditions, but none indicated as behavioral health conditions. There is noted evidence in JLV that the applicant was diagnosed and treated for potentially mitigating conditions (depression and anxiety) while on active duty. As early as 13 Oct 2006, a social worker identified his claim of increased anger, mood swings and marital problems since his return from a deployment to Iraq. A psychologist questioned the validity of his PTSD reported symptoms (05 Nov 2009) of nightmares and heightened anxiety, diagnosing him with Anxiety Disorder NOS. Following his Army discharge, he initiated services again (05 Jun 2015) following an altercation with his spouse. He was diagnosed with PTSD by the social worker and continued to receive some group and individual therapy since then. A diagnosis of PTSD was indicated on the problem list 08 Jun 2019. In summary, there is considerable evidence (JLV) applicant carries a PTSD diagnosis associated with his period of active duty.

d. After reviewing the application and all supporting documents, it is the opinion of this Agency Medical Advisor that there is sufficient evidence of a partially mitigating condition (PTSD) in relationship with the specific misconduct of disobeying orders and exhibiting disrespect toward an NCO that contributed to his discharge. Adequate documentation was provided in JLV to support the contention that the applicant had experienced PTSD during his time of service. Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge. Yes, he experienced PTSD symptoms while still on active duty and later validated as a diagnosis while engaged in post-military services with VA.

(2) Did the condition exist or experience occur during military service? Yes, there is considerable evidence he initially encountered PTSD related symptoms while on active duty as a result of his deployment to Iraq.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes, it partially mitigates for his misconduct, specific to disobeying orders and disrespectful demeanor toward an NCO. However, it does not mitigate for attempted theft, conspiracy to commit larceny and making false statements since a PTSD condition is not associated with such illegal actions.

BOARD DISCUSSION:

1. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

2. After reviewing the application, all supporting documents, and the evidence found within the applicant's military records, 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 for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, the applicant's record of service, the frequency and nature of the applicant's misconduct and the reason for separation.

a. The applicant's trial by a general court-martial was warranted by the gravity of the offenses charged (attempting to steal U.S. currency, conspiring to commit larceny of U.S. currency, making a false official statement with intent to deceive, and willfully disobeying orders). His conviction and discharge were conducted in accordance with applicable laws and regulations and the discharge appropriately characterizes the misconduct for which he was convicted. He was given a dishonorable discharge pursuant to an approved sentence of a general court-martial. The appellate review was

completed, and the affirmed sentence was ordered duly executed. All requirements of law and regulation were met with respect to the conduct of the court-martial and the appellate review process, and the rights of the applicant were fully protected.

b. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the advising official. The Board concurred with the medical advisory opinion finding the applicant's condition or experience partially mitigates for his misconduct, specifically disobeying orders and disrespect toward an NCO. However, it does not mitigate for attempted theft, conspiracy to commit larceny and making false statements since a PTSD condition is not associated with such illegal actions. Additionally, the applicant provided insufficient evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination. Based on a preponderance of evidence, the Board determined that 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 to amend the decision of the ABCMR set forth in Dockets Number AR20140009187 on 19 February 2015 and AR20180002309 on 19 April 2019.

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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. 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.

2. 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.

3. Army Regulation 635-5 (Separation Documents), in effect on 1 July 1981, prescribed the separation documents which were prepared for individuals upon retirement, discharge, or release from active military service or control of the Army. It established standardized policy for preparing and distributing DD Form 214.

a. paragraph 1-4b(5) stated a DD Form 214 will not be prepared for enlisted members discharged for immediate reenlistment in the RA.

b. Table 2-1. DD Form 214 Preparation Instructions. In block 18 (Remarks). Use the remarks section for entries required by HQDA for which a separate item is not available on the form and completing entries that were too long for their blocks. Enter a list of enlistment periods for which a DD form 214 was not issued under the provisions of paragraph 1-4b(5). Example: immediate reenlistments this period: 761210-791001; 791002-821010.

4. Army Regulation 635-5, Interim Change, in effect on 2 October 1989, implemented by DODI 1336.1, provided updated instructions for completing the DD Form 214. In block 18 it stated, this must be the first entry in block 18. Enter list of reenlistment periods for which a DD Form 214 was not issued, if applicable, e.g., "Immediate reenlistments this period: 761218-791001; 791002-821001." However, for soldiers who have previously reenlisted without being issued a DD Form 214 and who are being separated with any characterization of service except "Honorable," the following statement will appear as the first entry in block 18, "Continuous Honorable Active Service From (first day of service for which a DD Form was not issued, e.g., 761218) Until (date before commencement of current enlistment, e.g., 821001); then enter the specific periods of reenlistments as prescribed above.

5. Army Regulation 635-8 (Separations Processing and Documents), currently in effect, provides for the preparation and distribution of the DD Form 214. It states for item 18 (Remarks) to Soldiers who have previously reenlisted without being issued a DD Form 214 and are separated with any characterization of service except "Honorable", enter "Continuous Honorable Active Service from" (first day of service for which DD Form 214 was not issued) Until (date before commencement of current enlistment).

(a) For enlisted Soldiers with more than one enlistment period during the time covered by this DD Form 214, enter "IMMEDIATE REENLISTMENTS THIS PERIOD" and specify inclusive dates for each period of reenlistment.

(b) For Soldiers who have previously reenlisted without being issued a DD Form 214 and are separated with any characterization of service except "Honorable," enter "Continuous Honorable Active Service From" (first day of service for which DD Form 214 was not issued) Until (date before commencement of current enlistment). Then, enter the specific periods of reenlistment as prescribed above.

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 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.

6. 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.

7. 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.

8. 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. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. 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.

//NOTHING FOLLOWS//