

IN THE CASE OF: ██████████

BOARD DATE: 31 January 2024

DOCKET NUMBER: AR20230007035

APPLICANT REQUESTS: in effect, an upgrade of his bad conduct discharge (BCD).

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

DD Form 149 (Application for Correction of Military Record)

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, in effect, upon returning home from Desert Storm he was having marital and financial problems. He was not paid for over three months after returning. A friend wrote him a check and told him to sign it. He was not thinking clearly, or he would never have signed his friend's name on the check. He was stressed out and needed help. He was demoted to specialist/E-4 when he got stranded on leave. After that, it looked like his captain was after him. He gave up on everything. He was charged with forgery. His defense never tried to help him. The applicant notes post-traumatic stress disorder (PTSD) as a condition related to his request.
3. The applicant enlisted in the Regular Army on 2 July 1987 for a 3-year period. Upon completion of initial entry training, he was awarded military occupational specialty 13F (Fire Support Specialist). The highest rank he attained was sergeant/E-5.
4. He reenlisted on 15 June 1990 for a 4-year period and served in Southwest Asia from 2 September 1990 to 27 March 1991.
5. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice on 4 May 1992 for absenting himself from his unit without authority on or about 22 February 1992 until on or about 17 March 1992. His punishment consisted of reduction to specialist/E-4, forfeiture of \$585.00 per month for

two months, and 30 days of extra duty. The appeal of his punishment was denied on 3 June 1992.

6. Before a special court-martial on 14 December 1992, at Fort Benning, GA, the applicant was found guilty of one specification of larceny (property other than military), of a value of less than \$100.00, between on or about 1 March 1992 and 24 April 1992, and two specifications of forgery, on or about 19 April 1992 and on or about 24 April 1992. He was sentenced to a BCD, four months confinement, forfeiture of \$500.00 pay per month for four months, and reduction to private/E-1.

7. The sentence was approved on 1 April 1993 and the record of trial was forwarded to the U.S. Army Court of Review for appellate review.

8. On 27 July 1993, the U.S. Army Court of Review determined the findings of guilty and the sentence were correct in law and fact. The findings of guilty and the sentence were affirmed.

9. Special Court-Martial Order Number 13, Headquarters, U.S. Army Armor Center, Fort Knox, KY, dated 4 February 1994, shows the sentence was finally affirmed, the provisions of Article 71(c) had been complied with, and the sentence was ordered duly executed.

10. The applicant was discharged on 14 March 1994, under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 3, by reason of court-martial, in the rank of private/E-1. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms his service was characterized as bad conduct with separation code JJD and reentry code 4. He was credited with 6 years, 4 months, and 11 days of net active service with lost time from 14 December 1992 to 21 March 1993. He was awarded or authorized the following:

- Southwest Asia Service Medal with two bronze service stars
- Army Achievement Medal
- Army of Occupation Medal
- National Defense Service Medal
- Army Service Ribbon
- Overseas Service Ribbon
- Kuwait Liberation Medal

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. Regulatory guidance provides a Soldier will receive a BCD 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. The Army Review Boards Agency, Case Management Division, sent the applicant a letter on 11 August 2023, requesting the applicant provide medical documentation to support his contention of PTSD. To date, no additional documentation has been received.

14. MEDICAL REVIEW:

a. The applicant requests and upgrade of his BCD to honorable. He contends his misconduct was related to PTSD.

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 2 July 1987; 2) He served in Southwest Asia from 2 September 1990 to 27 March 1991; 3) The applicant accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice on 4 May 1992 for absenting himself from his unit without authority on or about 22 February 1992 until on or about 17 March 1992; 4) Before a special court-martial on 14 December 1992, at Fort Benning, GA, the applicant was found guilty of one specification of larceny (property other than military), of a value of less than \$100.00, between on or about 1 March 1992 and 24 April 1992, and two specifications of forgery, on or about 19 April 1992 and on or about 24 April 1992; 5) On 27 July 1993, the U.S. Army Court of Review determined the findings of guilty and the sentence were correct in law and fact. The findings of guilty and the sentence were affirmed; 6) The applicant was discharged on 14 March 1994, under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 3, by reason of court-martial, in the rank of private/E-1

c. The VA electronic medical record (JLV), and ROP were reviewed. The military electronic medical record, AHLTA, was not reviewed as it was not in use during the applicant's period of service. No military BH-related records were provided for review. A review of JLV shows the applicant 50 percent SC for PTSD with an effective dated of 27 Oct 2022. Initial PTSD DBQ, dated 8 May 2023 shows the applicant reported a history of traumatic experiences associated with his assignment in Berlin from 1987 to 1990 characterized by having shots fired over his head by East German Soldiers, while he pulled guard duty, having East German helicopter pilots point there crew-served weapons toward the U.S Barracks, and being shot at by local Turkish civilian due to an argument. He reported he began having nightmares, feeling depressed, isolated, and

experienced headaches. Post-service he reportedly sought treatment for depression in 1999 due to feeling unstable and was treated for 1-year. He also reported seeing a pastoral counselor from 1994 to 2000 for anger issues, physical aggression, suicidal ideation, and partner relational problems. The PTSD DBQ examiner deemed the applicant reported sufficient symptoms to meet diagnostic criteria for PTSD. With the exception of the Initial PTSD DBQ, JLV was void of any BH treatment history for the applicant and no civilian hardcopy records were provided for review.

d. The applicant is requesting an upgrade of his BCD to honorable and asserts his misconduct was related to PTSD. A review of the records shows the applicant 50 percent SC for PTSD and although the Initial PTSD DBQ was not available for review and records don't show a treatment history, this advisor accepts that the diagnosis was properly rendered by a license provider, given the VA's SC finding. As such, given the association between PTSD and avoidance, there is a nexus between the applicant's diagnosis of PTSD and misconduct characterized by AWOL. However, neither larceny nor forgery is naturally sequelae of PTSD and therefore those instances of misconduct are not mitigated by the applicant's SC diagnosis of PTSD, as the disorder did not impair the applicant ability to differentiate between right and wrong and adhere to the right.

e. Based on the available information, it is the opinion of the Agency BH Advisor that there is sufficient evidence that the applicant had an experience or condition during his time in service that would partially mitigate 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 is 50 percent SC for PTSD.

(2) Did the condition exist or experience occur during military service? Yes.

(3) Does the condition or experience actually excuse or mitigate the discharge? Partial. the Initial PTSD DBQ was not available for review and records don't show a treatment history, this advisor accepts that the diagnosis was properly rendered by a license provider, given the VA's SC finding. As such, given the association between PTSD and avoidance, there is a nexus between the applicant's diagnosis of PTSD and misconduct characterized by AWOL. However, neither larceny nor forgery is naturally sequelae of PTSD and therefore those instances of misconduct are not mitigated by the applicant's SC diagnosis of PTSD, as the disorder did not impair the applicant ability to differentiate between right and wrong and adhere to the right.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant's petition, available military records and medical review, the Board considered the advising official finding sufficient evidence that the applicant had an experience or condition during his time in service that would partially mitigate his misconduct. Further, the opine noted given the association between PTSD and avoidance, there is a nexus between the applicant's diagnosis of PTSD and misconduct characterized by AWOL.

2. The Board notwithstanding the advising official determined there is insufficient evidence of in-service mitigating factors to overcome the misconduct and the applicant provided no evidence of post-service achievements or letters of support to weigh a clemency determination. The Board noted, the applicant has two separate incidents of larceny while he was absent without leave. ABCMR 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. Based on the preponderance of evidence, the Board determined relief 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 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.

2/6/2024

X [REDACTED]

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CHAIRPERSON  
[REDACTED]

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 Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.
  
3. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.
  - a. Chapter 3 provided that an enlisted person would be given a bad conduct discharge 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.

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.

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 Discharge Review Boards (DRB) 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.

6. 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, BCM/NRs 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//