

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 13 February 2024

DOCKET NUMBER: AR20230007565

APPLICANT REQUESTS:

- upgrade of his bad conduct discharge (BCD)
- a personal appearance hearing before the Board via video or telephone

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 limit 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 when the incident occurred, he had recently returned from war and suffered from post-traumatic stress disorder (PTSD). He believes he is not the same after returning from the war, so when his captain touched him, he had a flashback and snapped. The war taught him to always be on guard, but he realizes now that he could have handled the situation much better. He would like to get the benefits he feels he has earned.
3. The applicant enlisted in the Regular Army on 21 July 1988, for 4 years. The highest rank/grade he held was specialist/E-4.
4. Two DA Forms 4187 (Personnel Actions) show, effective 10 September 1991, his unit reported his duty status changed from assigned not joined to absent without leave (AWOL).
5. On 11 October 1991, his duty status change again from AWOL to present for duty as a result of his surrender to military authorities.

6. Special Court Martial Order (SPCMO) Number 9, issued by Headquarters, 101st Airborne Division (Air Assault) and Fort Campbell, Fort Campbell, KY, on 21 February 1992, shows:

a. He was found guilty of AWOL for between on or about 10 September 1991 and on or about 11 October 1991.

b. He was sentenced to reduction to private/E-1 and hard labor without confinement for 45 days. The sentence was adjudged on 31 December 1991.

c. The convening authority approved the sentence and ordered the sentence executed. The record of trial was forwarded for appellate review.

6. SPCMO Number 24, issued by Headquarters, 101st Airborne Division (Air Assault) and Fort Campbell, Fort Campbell, KY, on 10 June 1992, shows:

a. He was found guilty of the following charges:

- on or about 23 January 1992 and on or about 15 February 1992, failure to go at the time prescribed to his appointed place of duty
- twice on or about 17 February 1992, disrespecting a superior commissioned officer
- on or about 23 January 1992, willfully disobey a lawful order from a noncommissioned officer

b. He was sentenced to confinement for 45 days and separation from service with a bad conduct discharge (BCD). The sentence was adjudged on 7 May 1992.

c. The convening authority approved the sentence, and except for the part of the sentence extending to a BCD, ordered the sentenced executed. The record of trial was forwarded for appellate review. The U.S. Army Court of Military Review documentation affirming the approved findings of guilty and the sentence, is not available in the record.

7. A DA Form 4187 shows, effective 12 June 1992, his unit reported his duty status changed from confined by military authorities to present for duty upon his completion of sentence.

8. SPCMO Number 17, issued by Headquarters, U.S. Army Armor Center and Fort Knox, Fort Knox, KY, on 4 January 1993, shows the sentence was finally affirmed, the provisions of Article 71(c) had been complied with, and was ordered duly executed.

9. The applicant was discharged accordingly on 2 February 1993, under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel),

Chapter 3, as a result of court-martial, with a bad conduct characterization of service in the grade of E-1. He received Separation Code "JJD" and a reentry code of "4." His DD Form 214 (Certificate of Release or Discharge from Active Duty) contains the following entries:

a. He completed 4 years, 4 month, and 6 days of net active service with 2 years, 8 months, and 29 days of foreign service during the period covered.

b. Block 13 (Decorations, Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized) shows:

- Southwest Asia Service (SWA) Medal with 3 bronze service stars
- National Defense Service Medal
- Army Service Ribbon
- Overseas Service Ribbon
- Marksman Marksmanship Qualification Badge with Rifle Bar (M-16)
- Marksman Marksmanship Qualification Badge with Grenade Bar
- Kuwait Liberation Medal

c. Block 18 (Remarks) the entry "SERVICE IN SWA 4 JAN 1991 TO 20 MAY 1991."

d. Block 29 (Dates of Time Lost During this Period) shows the entries:

- 910910 – 911010
- 920507 – 920611

10. On 20 May 1997, the Army Discharge Review Board (ADRB) reviewed the applicant's request for an upgrade of his discharge. The ADRB found his discharge to be both proper and equitable under the circumstances and voted to deny his request.

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

13. MEDICAL REVIEW:

a. The applicant requests an upgrade of his BCD discharge 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 21 July 1988; 2) Special Court Martial Order (SPCMO) Number 9, issued by Headquarters, 101st Airborne Division (Air Assault) and Fort Campbell, Fort Campbell, KY, on 21 February 1992, shows he was guilty of AWOL from on or about 10 September 1991 to on or about 11 October 1991; 3) SPCMO Number 24, issued by Headquarters, 101st Airborne Division (Air Assault) and Fort Campbell, Fort Campbell, KY, on 10 June 1992, shows he was found guilty of failure to go to appointed place of duty on or about 23 January 1992 and on or about 15 February 1992, disrespect of a superior commissioned officer on 17 January 1992, and willfully disobeying a lawful order from an NCO on 23 January 1992. He was sentenced to 45 days confinement and separation from service with a BCD; 4) SPCMO Number 17, issued by Headquarters, U.S. Army Armor Center and Fort Knox, Fort Knox, KY, on 4 January 1993, shows the sentence was finally affirmed, the provisions of Article 71(c) had been complied with, and was ordered duly executed; 5) The applicant was discharged accordingly on 2 February 1993, under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 3, as a result of court-martial.

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 documents were provided for review. A review of JLV was void of any treatment history for the applicant. No civilian BH records were provided for review.

d. The applicant is requesting an upgrade of his BCD to Honorable and contends his misconduct was related to PTSD. A review of the records was void of any BH diagnosis or treatment history for the applicant during or after service and he provide no documentation supporting his assertion. In absence of documentation supporting his assertion of PTSD, there is insufficient evidence to find his misconduct was related to or mitigated by PTSD and therefore insufficient evidence to support an upgrade for reasons of medical mitigation.

e. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence that the applicant had an experience or condition during his time in service that would mitigate his misconduct. However, the applicant contends his misconduct was related to PTSD, and per liberal guidance, his contention is sufficient to warrant the Board's consideration.

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 his misconduct was related to 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? No. A review of the records was void of any BH diagnosis or treatment history for the applicant during or after service and he provide no documentation supporting his assertion. In absence of documentation supporting his assertion of PTSD, there is insufficient evidence to find his misconduct was related to or mitigated by PTSD and therefore insufficient evidence to support an upgrade for reasons of medical mitigation.

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 military record, the Board found that relief was not warranted. The applicant's contentions, the military record, a medical review, and regulatory guidance were carefully considered. The applicant's trial by a court-martial was warranted by the gravity of the offense. 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 bad conduct discharge pursuant to an approved sentence of a court-martial. The appellate review was completed, and the affirmed sentence was ordered duly executed. The Board found no error or injustice in his separation processing. The Board also reviewed and agreed with the medical reviewer's finding insufficient evidence that the applicant had an experience or condition during his time in service that would mitigate his misconduct. Additionally, the applicant provided no 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 for correction of the records of the individual concerned.



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, 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. AR 15-185 (ABCMR) states 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, 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.

d. A discharge under other than honorable conditions is an administrative separation from the Service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, homosexual conduct, security reasons, or in lieu of trial by court martial.

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 (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.

7. 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//