

IN THE CASE OF: ██████████

BOARD DATE: 20 March 2024

DOCKET NUMBER: AR20230008538

APPLICANT REQUESTS: an upgrade of his characterization of service.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
DD Form 149 (Application for Correction of Military Record), 28 May 2023

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 he was having post-traumatic stress disorder (PTSD) and mental issues at the time. He made a request to speak with a mental health professional; however, this was denied. He was making bad decisions due to his mental state. He is still experiencing mental issues, alcohol and drugs have been factors in and throughout his life and he has suffered from a stroke and is disabled.
3. The applicant enlisted in the Regular Army on 25 February 1986, for a 4-year period. He was awarded the military occupational specialty of 13B (Cannon Crewman) and the highest rank he attained was Private/E-2.
4. Before a special court-martial, adjudged on 15 June 1987, the applicant pled guilty and was found guilty of:
 - without authority, failed to report (three specifications) on or about 6 March 1987, 9 March 1987, and 10 March 1987
 - through design, missed movement on or about 11 March 1987
 - disobeyed a lawful command on or about 11 March 1987
 - disobeyed a lawful order (two specifications) on or about 10 March 1987 and 11 March 1987

5. The court sentenced him to a bad conduct discharge (BCD), forfeiture of \$438.00 pay per month for five months, confinement for five months, and reduction to the grade of E-1.
6. On 13 August 1987, only so much of the sentence was approved, as provides for BCD, confinement for 60 days, total forfeiture of \$438.00 pay per month for two months, and reduction to E-1.
7. A memorandum from the Command to the applicant, dated 31 August 1987, states the Command did not consider his presence on active duty pending appellate review to be productive or beneficial to the U.S. Army and directed the applicant to take involuntary excess leave.
8. On 23 November 1987, the U.S. Army Court of Military Review determined the findings of guilty and the sentence were correct in law and fact. The findings and sentence were affirmed.
9. The available record is void of the Special Court-Martial Order ordering the sentence to be duly executed.
10. The applicant was discharged on 6 April 1988, under the provisions of Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel), Chapter 3, by reason of court-martial, in the grade of 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 3B, 3C, and 3. He was credited with 1 year, 11 months, and 24 days of net active service with lost time from 15 June 1987 to 2 August 1987.
11. 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.
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 Board should consider the applicant's argument and/or evidence in accordance with the published equity, injustice, or clemency determination guidance.

14. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his characterization of service.

b. 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 RA on 25 February 1986.
- Before a special court-martial, adjudged on 15 June 1987, the applicant pled guilty and was found guilty of:
- without authority, failed to report (three specifications) on or about 6 March 1987, 9 March 1987, and 10 March 1987
- through design, missed movement on or about 11 March 1987
- disobeyed a lawful command on or about 11 March 1987
- disobeyed a lawful order (two specifications) on or about 10 March 1987 and 11 March 1987
- Applicant was discharged on 6 April 1988, under the provisions of Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel), Chapter 3, by reason of court-martial, in the grade of 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 3B, 3C, and 3.

c. Review of Available Records Including Medical:

The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 149, DD Form 214, ABCMR Record of Proceedings (ROP), and documents from his service record and separation. The VA electronic medical record and DoD health record were reviewed through Joint Longitudinal View (JLV). Lack of citation or discussion in this section should not be interpreted as lack of consideration. The applicant states he was having post-traumatic stress disorder (PTSD) and mental issues at the time. He made a request to speak with a mental health professional; however, this was denied. He was making bad decisions due to his mental state. He is still experiencing mental issues, alcohol and drugs have been factors in and throughout his life and he has suffered from a stroke and is disabled.

d. Due to the period of service, no active-duty electronic medical records were available for review and the applicant did not submit hardcopy medical documentation from his time in service. No VA electronic medical records were available for review and the applicant is not service connected. In addition, the applicant did not submit any

medical documentation post-military service substantiating his assertion of PTSD and other mental health condition.

e. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a behavioral health condition that mitigates 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 self-asserts a mitigating condition.

(2) Did the condition exist or experience occur during military service? Yes. The applicant asserts PTSD, however, he provides no documentation.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant provides no medical documentation substantiating any BH diagnosis. There is no evidence of any in-service BH diagnoses, and the VA has not service-connected the applicant for any BH condition. And while the applicant self-asserts PTSD, he did not provide any medical documentation substantiating the diagnoses and did not provide a rationale for his contention. However, per Liberal Consideration guidelines, the applicant's self-assertion of PTSD merits consideration by the Board.

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 the medical review, the Board concurred with the advising official finding insufficient evidence to support the applicant had a behavioral health condition that mitigates his misconduct. The opine noted, the applicant provided no medical documentation substantiating any BH diagnosis. There is no evidence of any in-service BH diagnoses.

2. The Board determined based on the opine review, there is insufficient evidence of mitigating factors to overcome the misconduct. 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. The Board noted the applicant's service record exhibits numerous instances of misconduct during his enlistment period for 1

year, 11 months, and 24 days of net active service with lost time from 15 June 1987 to 2 August 1987. 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. Therefore, relief was denied.

3. This board is not an investigative body. The Board determined despite the absence of the applicant's medical records, they agreed the burden of proof rest on the applicant, however, he did not provide any supporting documentation and his service record has insufficient evidence to support the applicant contentions for any BH conditions.

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.

3/25/2024

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CHAIRPERSON

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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. 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, USC, 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.

3. AR 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. Paragraph 3-7a provided that 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. Paragraph 3-7b provided that 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, 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.

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 Service 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//