

IN THE CASE OF: ██████████

BOARD DATE: 6 March 2024

DOCKET NUMBER: AR20230008997

APPLICANT REQUESTS: Upgrade of his bad conduct discharge (BCD) to under honorable conditions (general) or honorable. Additionally, he requests an appearance before the Board.

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

- DD Form 149 (Application for Correction of Military Record)
- Civilian education and certification documents (25 pages)

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 not given the opportunity to seek rehab. His lawyer never brought the rehab up, he did not know it was an option. Once he got home, he got married and had two kids.
3. On his DD Form 149, the applicant notes post-traumatic stress disorder (PTSD) is related to his request.
4. The applicant enlisted in the Regular Army on 5 March 2003, for 3 years. Upon completion of training, he was awarded military occupational specialty 77F (Petroleum Supply Specialist).
5. On 30 December 2003, the applicant was reported as absent without leave (AWOL) and remained absent until he returned to military authorities on 12 February 2004.
6. Before a special court-martial on 25 March 2004, at Fort Stewart, Georgia, the applicant was found guilty of one specification of going AWOL; three specifications of wrongfully using marijuana and one specification of wrongfully using cocaine.

7. The court sentenced the applicant to reduction to the grade of E-1, confinement for seven months, and to be separated from service with a BCD. The sentence was approved on 1 October 2004; however, the execution of that part of the sentence adjudging confinement in excess of four months was suspended for four months at which time, unless the suspension was sooner vacated, the suspended part of the sentence would be remitted without further action. The record of trial was forwarded for appellate review.

8. The U.S. Army Court Criminal Appeals affirmed the findings and sentence on 30 November 2004.

9. Special Court-Martial Order Number 59, issued by Headquarters, U.S. Army Armor Center and Fort Knox, Fort Knox, KY on 25 March 2005, noted that the applicant's sentence had been affirmed and ordered the BCD to be duly executed.

10. The applicant was discharged on 10 June 2005. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms he was discharged under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3, Section IV, by reason of court-martial. His service was characterized as bad conduct. He was assigned Separation Code JJD and Reentry Code 4. He was credited with 1 year, 11 months, and 1 day of net active service this period with 125 days of lost time.

11. On 22 August 2023, the ABCMR staff requested that the applicant provide medical documents to support his mental health issue. He was advised that he could contact the doctor that diagnosed him or his Veterans Affairs regional office for assistance. He did not respond.

12. The applicant provides documents that detail his post-service educational and professional accomplishments. These documents are provided in their entirety for the Board's review within the supporting documents.

13. 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.

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

15. MEDICAL REVIEW:

a. The applicant requests and upgrade of his BCD to under honorable conditions, general. 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 5 March 2003; 2) On 30 December 2003, the applicant was reported as absent without leave (AWOL) and remained absent until he returned to military authorities on 12 February 2004; 3) Before a special court-martial on 25 March 2004, at Fort Stewart, Georgia, the applicant was found guilty of one specification of going AWOL, three specifications of wrongfully using marijuana, and one specification of wrongfully using cocaine. The court sentenced the applicant to reduction to the grade of E-1, confinement for seven months, and to be separated from service with a BCD; 4) The U.S. Army Court Criminal Appeals affirmed the findings and sentence on 30 November 2004; 5) The applicant was discharged on 10 June 2005. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms he was discharged under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3, Section IV, by reason of court-martial.

c. The military electronic medical record (AHLTA), VA electronic medical record (JLV), ROP, and casefiles were reviewed. A review of AHLTA was void of any BH treatment history for the applicant. A review of JLV was void of any BH treatment history for the applicant and he does not have a service-connected disability. No hardcopy military or civilian BH related records were provided for review.

d. The applicant requests upgrade of his BCD to under honorable conditions, general, 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 provided no documentation supporting his assertion of PTSD. In absence of documentation supporting his assertion, there is insufficient evidence to establish that his misconduct was related to or mitigated by PTSD and insufficient evidence to support an upgrade of his discharge characterization.

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 mitigated his misconduct. However, he contends his misconduct was related to PTSD, and per liberal guidance his assertion 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 contends 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 provided no documentation supporting his assertion of PTSD. In absence of documentation supporting his assertion, there is insufficient evidence to establish that his misconduct was related to or mitigated by PTSD and insufficient evidence to support an upgrade of his discharge characterization.

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 that the applicant had an experience or condition during his time in service that mitigated his misconduct. The Board found insufficient evidence of in-service mitigating factors to overcome the misconduct of AWOL and multiple drug use. The Board noted the applicant's service record exhibits numerous instances of misconduct during his enlistment period for 1 year 11 months and 1 day of net service for this period.

2. Furthermore, the Board found the applicant's record is absent any behavioral health diagnosis or treatment history for the applicant during or after service and he provided no documentation supporting his assertion of PTSD. 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 applicant provided no post service achievements or character letters of support attesting to his honorable conduct for the Board to weigh as a clemency determination. Based on the preponderance of evidence, the Board denied relief.

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, 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.

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.

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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, 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, U.S. Code, 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 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR.

a. Paragraph 2-9 states the ABCMR begins its consideration of each case with the presumption of administrative regularity. 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.

4. Army Regulation 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, Section IV provided that a member 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.

5. 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.

6. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR), on 3 September 2014, to carefully consider the revised PTSD criteria, detailed medical considerations, and mitigating factors when taking action on applications from former service members administratively discharged under other than honorable conditions and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

7. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating 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 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.

8. 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, 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//