

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 1 October 2024

DOCKET NUMBER: AR20230009312

APPLICANT REQUESTS: Upgrade of his Bad Conduct Discharge (BCD) and to appear in person before the Board.

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- Self-authored statement
- Counsel Brief
- DD Form 214 (Certificate or Release or Discharge from Active Duty)
- Arkansas State Police Criminal History Report
- Department of Veterans Affairs (VA) Rating Decision
- Character reference statement

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 appeared before a General Court-Martial (GCM) after getting involved in a personal and sexual relationship with a subordinate while stationed at the Old Guard in Fort Meyer, Virginia in 2015. He was a 22-year-old sergeant (SGT)/E-5 and she was a 20-year-old private first class (PFC)/E-3. He began the relationship after things started getting very stressful at work and he had been command referred to Anger Management and shortly thereafter began receiving behavioral health treatment.

a. Working in a small shop it is hard to conceal what you are going through due to working in such close quarters. The female Soldier befriended him during that time of vulnerability and what started as a friendship quickly developed into something more. He continued going to behavioral health and working with his medical team and really began opening up about events that took place while he was deployed to Afghanistan

from 2013 to 2014. At this time, he started taking medications that really affected his mood.

b. Eventually, the Soldier become pregnant, and he revealed the news to his command immediately. The relationship between himself and the Soldier began to strain due to the news and he became very detached. They would argue a lot through text messages and out of anger, they both threatened one another and called each other names. He began to crash mentally and called the suicide hotline because he bought a gun and was thinking of killing himself. The suicide hotline notified the Woodbridge, VA police and his command. He was instructed to go to the Hospital, which led to him being admitted to the inpatient mental health ward.

c. During the 8-day period that he was in Hospital, his command opened an investigation. The Soldier who he impregnated was also involved in the investigation. The text messages that had been sent were recovered and he was arrested. The charges were: Communicating a threat, Unlawful discharge of a firearm, sexual assault, and fraternization. The charges on the surface seemed egregious and with the sexual assault being involved he had to go to appear before a GCM. The unlawful discharge of a firearm came from a video that was recovered during the investigation of him shooting a gun in the air during a New Year's celebration. The sexual assault charges were dropped by prosecution due to the relationship being fully consensual. The Soldier had his child, who is now 3 years old.

3. On behalf of the applicant, counsel states his discharge warrants an upgrade based upon the guidance provided in the Hagel Memo, Kurta Memo, and Carson Memo which state the Board is required to provide a "liberal review" since the Veteran is service connected for post-traumatic stress disorder (PTSD) and was showing signs during his enlistment which led to his BCD. This clearly shows service connection would also excuse the discharge and warrant an upgrade. Also, relief is warranted based upon guidance under the Kurta Memo that expands favorable provisions in the Hagel Memo and answers the following questions:

a. Did the veteran have a condition or experience that may excuse or mitigate the discharge? Answer: Yes, since the Veteran is service connected for PTSD

b. Did that condition exist/experience occur during military service? Answer: Yes, the Veteran was noted in service to be under mental distress and even was admitted to the hospital in service after having to call the suicide crisis hotline.

c. Does that condition or experience actually excuse or mitigate the discharge? Answer: Yes, DOD failed to render a medical exam prior to discharge, which means the discharge is in error.

d. Does that condition or experience outweigh the discharge? Answer: Yes, the Veteran is service connected for PTSD by the VA, which warrants a good characterization of discharge.

4. On 27 June 2011, the applicant enlisted into the Regular Army for a period of 4 years and 21 weeks in the rank/pay grade of private first class/E-3. Upon completion of initial entry training, he was assigned to a unit in Korea. He was subsequently reassigned to a unit at Fort Campbell, KY.

4. He served in Afghanistan from 2 May 2013 until 5 December 2013. He was promoted to sergeant (SGT)/E-5 on 1 February 2014 and that was the highest rank he held while serving. On 21 October 2014, he reenlisted for a period of 4 years.

6. The applicant's service record is void of the complete facts and circumstances surrounding his trial by General Court-Martial, to include the DD Form 458 (Charge Sheet) depicting the offenses he committed in violation of the Uniform Code of Military Justice.

7. The applicant's duty status was changed from Present for Duty (PDY) to Confined by Military Authorities (CMA) on 14 March 2016 when he was placed in pre-trial confinement.

8. A DD Form 2718 (Prisoner Release Order), dated 26 August 2016, shows the applicant completed his sentence of confinement at the Naval Consolidated Brig located in Chesapeake, VA. The applicant's duty status was changed from CMA to PDY on 26 August 2016 following 165 days of pre-trial confinement.

9. Orders show the applicant was assigned to the Personnel Control Facility located at Fort Sill, OK effective 29 August 2016 in accordance with a DD Form 2707 (Result of Trial) signed by a Regimental Judge Advocate.

10. GCM Order Number 236 issued by Headquarters, U.S. Fires Center of Excellence and Fort Sill, Fort Sill, OK on 12 December 2017, shows the applicant was arraigned at a GCM empowered to adjudge a BCD. The sentence of reduction to private (PV1)/E-1, forfeiture of all pay and allowances, confinement for 165 days, and a BCD, adjudged on 26 August 2016, as promulgated by Corrected Copy GCM Order Number 14, issued by Headquarters, U.S. Army Military District of Washington, Fort Lesley J. McNair, District of Columbia 20319-5031, dated 16 December 2016, as corrected by U.S. Army Court of Criminal Appeals Notice of Court-Martial Order Correction, dated 18 May 2017, had been finally affirmed. That portion of the sentence extending to confinement had been served. Article 71(c) having been complied with; the BCD was ordered to be executed.

10. Orders and his DD Form 214 show the applicant was discharged on 15 December 2017 under the provisions of Army Regulation 635-200 (Active Duty Enlisted Separation), Chapter 3, as a result of court-martial. He was assigned Separation code "JJD" and Reentry code "4." His service was characterized as "Bad Conduct." He was credited with completion of 6 years and 7 days of net active service. He had lost time due to confinement from 14 March 2016 until 25 August 2016. He completed his first full term of service and was credited with continuous honorable service from 27 June 2011 to 20 October 2014. He was awarded or authorized the:

- Afghanistan Campaign Medal with Campaign Star
- Army Commendation Medal (3rd Award)
- Army Achievement Medal (3rd Award)
- Meritorious Unit Commendation
- Army Good Conduct Medal
- National Defense Service Medal
- Global War on Terrorism Service Medal
- Korea Defense Service Medal
- Noncommissioned Officer Professional Development Ribbon (2nd Award)
- Army Service Ribbon
- Overseas service Ribbon
- North Atlantic Treaty Organization Medal
- Combat Action Badge
- Driver and Mechanic Badge with Driver-Wheeled Vehicle(s) Clasp

11. The applicant provides the following documents which are available in their entirety for the Board's consideration.

- An Arkansas State Police Criminal History Report, dated 28 February 2020, which shows no criminal history in the state of Arkansas was found pertaining to the applicant
- A VA Rating Decision, dated 5 December 2019, that shows in part, he was awarded a 50 percent disability rating for PTSD
- A character reference letter rendered by his best friend who made favorable comments about how his character has improved with time and effort

12. 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.

13. Army Regulation 635-200 provides that a Soldier would be given a BCD pursuant only to an approved sentence of a general or special court-martial and that the appellate review must be completed, and the affirmed sentence ordered duly executed.

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. Applicants do not have a right to a hearing before the ABCMR.

15. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting an upgrade of his Bad Conduct Discharge (BCD). He contends PTSD mitigates his discharge.

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:

- The applicant enlisted into the Regular Army on 27 June 2011.
- Applicant's service record is void of the complete facts and circumstances surrounding his trial by General Court-Martial, to include the DD Form 458 (Charge Sheet) depicting the offenses he committed in violation of the Uniform Code of Military Justice.
- A DD Form 2718 (Prisoner Release Order), dated 26 August 2016, shows the applicant completed his sentence of confinement at the Naval Consolidated Brig located in Chesapeake, VA. The applicant's duty status was changed from CMA to PDY on 26 August 2016 following 165 days of pre-trial confinement.
- His DD Form 214 shows the applicant was discharged on 15 December 2017 under the provisions of Army Regulation 635-200 (Active Duty Enlisted Separation), Chapter 3, as a result of court-martial. He was assigned Separation code "JJD" and Reentry code "4." His service was characterized as "Bad Conduct." He was credited with completion of 6 years and 7 days of net active service. He had lost time due to confinement from 14 March 2016 until 25 August 2016. He completed his first full term of service and was credited with continuous honorable service from 27 June 2011 to 20 October 2014.

c. Review of Available Records: The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts on his application he was suffering from PTSD when he engaged in the misconduct that led to his discharge. Although the record is void of the specific facts and circumstances that led to his court martial conviction, the applicant reports the following charges: "communicating a threat, unlawful discharge of a firearm, sexual assault, and fraternization". The electronic active-duty medical record indicates, beginning in February 2015 the applicant was treated with medication for Attention-Deficit Hyperactivity Disorder and later for Generalized Anxiety Disorder. He was

referred for individual therapy and started in December 2015, with his sessions focused on psychosocial stressors. The applicant was psychiatrically hospitalized from 5 March to 14 March 2016, due to suicidal ideation with intent and plan due to occupational, familial, and relationship stress. The record states, "patient has pending legal charges and has limited insight into recognizing any potential behaviors that led to these charges". The applicant was diagnosed with Adjustment Disorder with Depressed mood and Rule-out of Antisocial Personality Disorder. Contrary to the applicant's contention that he did not receive a pre-discharge physical, the applicant was both medically and psychiatrically examined during this hospitalization prior to his confinement. While in confinement the applicant, once again participated in an in-depth Initial Patient Evaluation on 22 March 2016. The evaluation states, the applicant "was transferred to the NW Annex Brig for multiple alleged charges: fraternization, firing a firearm from a moving vehicle with intent to harm someone, sexual battery, assault, malingering, and communicating a threat through text messages." No medical issues were identified, and the applicant was diagnosed with Adjustment Disorder with mixed anxiety and depressed mood. The applicant was provided with individual therapy focused on his psychosocial stressors until his discharge.

d. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is 100% service connected for PTSD. He has participated inconsistently in medication management via the VA.

e. Two Disability Benefits Questionnaires appear in the applicant's record. One on 9 January 2019 diagnosed the applicant with Bipolar Disorder and indicated he did not meet diagnostic criteria for PTSD. Another on 9 August 2019, indicates the applicant was diagnosed with PTSD and his diagnosis of Bipolar Disorder was discontinued.

f. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to support the applicant had a behavioral health condition during military service. However, his BH condition does not mitigate his misconduct.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts a mitigating condition, PTSD.

(2) Did the condition exist or experience occur during military service? Yes. The VA electronic medical record indicates the applicant is 100% service connected for PTSD.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. This advisor is unable to opine regarding medical mitigation without the specific facts and circumstances that led to his discharge. However, the medical record and the applicant indicate, he was court martialled due to "fraternization, firing a firearm from a moving vehicle with intent to harm someone, sexual battery, assault, malingering, and

communicating a threat through text messages.” PTSD does not mitigate this misconduct.

h. As there is no nexus between PTSD and his misconduct of “communicating a threat, unlawful discharge of a firearm, sexual assault, and fraternization” since 1) these types of misconduct are not part of the natural history or sequelae of his mental health conditions; 2) his mental health condition does not affect one’s ability to distinguish right from wrong and act in accordance with the right.

#### 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 Board carefully considered the applicant’s request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests.

a. The evidence shows the applicant was convicted by a court-martial that sentenced him to a bad conduct discharge. The applicant’s trial by a court-martial was warranted by the gravity of the offenses charged (communicating a threat, unlawful discharge of a firearm, sexual assault, and fraternization). The applicant’s 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. 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. The Board found no error or injustice in his separation processing.

b. The Board also considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewing official. The Board concurred with the medical official’s finding sufficient evidence to support that the applicant had a mental health condition while on active service; however, this condition does not mitigate his misconduct. Also, the applicant provided a letter of reference in support of a clemency determination; however, the Board determined his submission does not outweigh the serious misconduct. Based on a preponderance of available evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

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.

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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, 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, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.
3. Title 10, USC, Section 1552(b), provides, with respect to courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under the Uniform Code of Military Justice (UCMJ), action to correct any military record of the Secretary's Department may extend only to actions taken by reviewing authorities under the UCMJ or action on the sentence of a court-martial for purposes of clemency. The Secretary of the Army shall make such corrections by acting through boards of civilians within the executive part of the Army.
4. Title 10, USC, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Court-martial convictions stand as adjudged or modified by appeal through the judicial process, 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. 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. prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation provides that 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. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing. 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.
6. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. An honorable discharge was separation with honor. Issuance of an honorable discharge certificate was appropriate when the quality of the Soldier's service generally met the standards of acceptable conduct and performance of duty or was otherwise so meritorious that any other characterization would clearly be inappropriate. Where there were infractions of discipline, commanders were to consider the extent thereof, as well as the seriousness of the offense. Separation authorities could furnish an honorable discharge when subsequent honest and faithful service over a greater period outweighed disqualifying entries in the Soldier's military record. It was the pattern of behavior, and not the isolated instance, which commanders should consider as the governing factor.

b. A general discharge was a separation from the Army under honorable conditions. When authorized, separation authorities could issue a general discharge to Soldiers whose military record was satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. A discharge under other than honorable conditions (UOTHC) 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 in the following circumstances.

(1) An under-other-than-honorable-conditions discharge will be directed only by a commander exercising general court-martial authority, a general officer in command who has a judge advocate or legal advisor available to his/her command, higher authority, or the commander exercising special court-martial convening authority over the Soldier who submitted a request for discharge in lieu of court-martial (see chapter 10) when delegated authority to approve such requests.

(2) When the reason for separation is based upon one or more acts or omissions that constitutes a significant departure from the conduct expected of Soldiers of the Army. Examples of factors that may be considered include the following:

- Use of force or violence to produce bodily injury or death
- Abuse of a position of trust
- Disregard by a superior of customary superior-subordinate relationships
- Acts or omissions that endanger the security of the United States or the health and welfare of other Soldiers of the Army
- Deliberate acts or omissions that seriously endanger the health and safety of other persons

d. A bad conduct discharge will be given to a Soldier pursuant only to an approved sentence of a general or special court-martial. The appellate review had to have been

completed and the affirmed sentence then ordered duly executed. Questions concerning the finality of appellate review should be referred to the servicing staff judge advocate.

e. A dishonorable discharge will be given to a Soldier pursuant only to an approved sentence of a general court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed. Questions concerning the finality of appellate review should be referred to the servicing staff judge advocate.

7. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service BCM/NRs to carefully consider the revised post-traumatic stress disorder (PTSD) criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged UOTHC 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.

8. 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; Traumatic Brain Injury; sexual assault; or sexual harassment. Boards are 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 misconduct that led to the discharge.

9. 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//