

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 23 April 2024

DOCKET NUMBER: AR20230009429

APPLICANT REQUESTS: Upgrade of his bad conduct discharge (BCD) to under honorable conditions (general) or honorable.

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

- DD Form 293 (Application for the Review of Discharge)
- Self-authored letter
- Character reference letters (4)
- Medical documents
- DD Form 214 (Certificate of Release or Discharge from Active Duty)

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:

a. He has regretted his actions from back then for a long time. That's the reason it's taken him this long to make this request. He was deployed in 2007. He came home on leave in October to see his family. While he was home, he was in a life threatening car accident. At the hospital, he told them to send a message through Red Cross. He doesn't know if that actually ended up happening at the time. His unit did not believe that he was injured and demanded his return. He was unable to do so because he fractured his neck and sustained a large laceration up the back of his right triceps area.

b. He should have returned to the Rear Detachment. At the time, he wanted to be with his family, and he decided to spend his recovery time at home. That was the wrong decision even though it made sense to him at the time. He felt that his unit had basically abandoned him and called him a liar. He has always regretted not going back to Iraq with his fellow Soldiers.

c. Since he's been separated from the Army, he has discovered that he suffers from Bipolar Disorder and that he has symptoms of Post-Traumatic Stress Disorder (PTSD). It has made life difficult, but he's been managing. It's been harder because he doesn't have consistent insurance so that he can stay on top of his mental health and treatment. He has also been diagnosed with tinnitus as a result of using the faulty 3M earplugs. He thanks the Board for their time and consideration.

3. The applicant enlisted in the Regular Army on 8 February 2006, for 3 years. Upon completion of training, he was awarded military occupational specialty 13B (Cannon Crewmember).

4. The applicant began service in Kuwait on 14 May 2007.

5. On 13 November 2007, the applicant was reported as absent without leave (AWOL) and remained in desertion status until he returned to military authorities on 21 May 2008.

6. Court-martial charges were preferred against the applicant on 18 June 2008, for violations of the Uniform Code of Military Justice. His DD Form 458 (Charge Sheet) shows he was charged with one specification of going AWOL, with the intent to avoid hazardous duty.

7. Before a general court-martial on 12 September 2008, at Fort Stewart, GA, the applicant was found guilty of one specification of on or about 13 November 2007, with intent to avoid hazardous duty, namely: Operation Iraqi Freedom V, quit his unit, to wit: Alpha Battery, 1st Battalion, 9th Field Artillery, located at Balad, Iraq, and did remain so absent in desertion until on or about 21 May 2008. Plea: Guilty. Finding: Guilty.

8. The court sentenced the applicant to confinement for nine months, and to be discharged from the service with a BCD. The sentence was approved on 2 February 2009, and the record of trial was forwarded for appellate review.

9. The U.S. Army Court Criminal Appeals affirmed the findings and sentence on 16 March 2009.

10. General Court-Martial Order Number 122, issued by Headquarters, U.S. Army Armor Center, Fort Knox, KY on 23 July 2009, noted that the applicant's sentence had been affirmed and ordered the BCD to be duly executed.

11. The applicant was discharged on 16 October 2009. His DD Form 214 confirms he was discharged under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3, 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 2 years, 6 months, and 20 days of net active service this period with 413 days of lost time.

12. The applicant provides the following (provided in entirety for the Board):

a. Character reference letters (4) that collectively attest to the applicant's leadership, his good nature and core values. Several letters speak to impact the car accident had on his health and well-being.

b. Medical documents that's shows he has received treatment for various illnesses and injuries including mental health, tinnitus and trauma due to a car accident.

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 upgrade of his BCD to Under Honorable Conditions, General. He selected on his DD Form 293 that his request is related to PTSD and Other Mental Health Issues

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 in the Regular Army on 8 February 2006; 2) He began service in Kuwait on 14 May 2007; 3) On 13 November 2007, the applicant was reported as absent without leave (AWOL) and remained in desertion status until he returned to military authorities on 21 May 2008; 4) Before a general court-martial on 12 September 2008, at Fort Stewart, Georgia, the applicant was found guilty of one specification of quitting his unit with the intent to avoid hazardous duty, by going AWOL; 5) The court sentenced the applicant to confinement for nine months, and to be discharged from the service with a BCD. The U.S. Army Court Criminal Appeals affirmed the findings and sentence on 16 March 2009; 6) The applicant was discharged on 16 October 2009. His DD Form 214 confirms he was discharged under the provisions of Army Regulation

635-200 (Active Duty Enlisted Administrative Separations), Chapter 3, by reason of court-martial.

c. The electronic military medical record (AHLTA), VA electronic medical record (JLV), ROP, and casefiles were reviewed. A review of AHLTA shows the applicant's only BH-related encounter, during service, occurred on 22 August 2008 whereby he underwent an MSE prior to court-martial proceedings. The provider noted the applicant endorsed having gone AWOL after experiencing a MVA while on leave from Kuwait, whereby he lost control of his car, and it flipped several times. Other were reportedly able to right side the vehicle, allowing him to get out. He was reportedly transported to the hospital and received stitches to his arm and ear and instructed to wear a neck brace for "a couple of months". The provider found the applicant was mentally responsible for his conduct, able to distinguish between right and wrong and adhere to the right, had the mental capacity to understand and participate in administrative proceedings, and psychiatrically cleared for any administrative actions deemed appropriate by command. He was found to NOT have a psychiatric diagnosis. Included in the applicant's casefile is an excerpt from a medical record that shows the applicant was referred to psychiatry for confirmation and treatment of Bipolar Disorder. Records are void of evidence that a Bipolar Disorder was rendered but supports diagnoses of ADHD and Unspecified Mood Disorder were rendered on 22 June 2022. However, there is no documentation showing the applicant's diagnosis of ADHD or Unspecified Mood Disorder were related to military service. Also included in the casefiles are records from Baptist Health attesting to the applicant's treatment secondary to an MVA. Records show the applicant was hospitalized from 26 October 2007 to 27 October 2007. No BH conditions were noted. See ARBA Medical (physician) for physical/medical opine. A review of JLV was void of any BH treatment encounters for the applicant and he does not have a SC disability. No additional military or civilian BH records were provided for review.

d. The applicant requests upgrade of his BCD to Under Honorable Conditions, General, and noted his request was related to PTSD and Other Mental Health Issues. A review of the records was void of any BH diagnosis or treatment history during service. Post-service records show the applicant with diagnosis of ADHD and Unspecified Mood Disorder, however, there is no documentation associating the conditions with military service. Although the applicant experienced a potentially traumatizing experience, records are void of reports of trauma-related symptoms proximal to the event, and records are void of any condition that impacted the applicant's ability to differentiate between right and wrong and adhere to the right. The applicant, in his self-statement, acknowledged that he made an informed decision to remain at home with his family, and did so until May 2008. The available evidence does not support that the applicant's misconduct was mitigated by PTSD or Other Mental Health Issues.

e. Based on the available information, it is the opinion of the Agency BH Advisor that there evidence that the applicant had an experience during his time in service, however, the experience did not 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 contends his misconduct was related to PTSD and Other Mental Health Issues.

(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 during service. Post-service records show the applicant with diagnosis of ADHD and Unspecified Mood Disorder, however, there is no documentation associating the conditions with military service. Although the applicant experienced a potentially traumatizing experience, records are void of reports of trauma-related symptoms proximal to the event, and records are void of any condition that impacted the applicant's ability to differentiate between right and wrong and adhere to the right. The applicant, in his self-statement, acknowledged that he made an informed decision to remain at home with his family, and did so until May 2008. The available evidence does not support that the applicant's misconduct was mitigated by PTSD or Other Mental Health Issues.

BOARD DISCUSSION:

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. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation.

a. The applicant's trial by a court-martial was warranted by the gravity of the offenses charged (quit his unit and remained absent in desertion from 13 November 2007 to 21 May 2008). 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 special 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 the separation processing.

b. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewer. The Board concurred with the medical reviewer's finding evidence that the applicant had an experience during his time in service, however, this experience did not mitigate his misconduct. Also, the applicant provided letters of reference in support of clemency, but his letters were not sufficient to overcome the misconduct that led to his discharge. 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.

[REDACTED]

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[REDACTED]

[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, 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 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.

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. 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.

6. 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.

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. 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. 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//