

IN THE CASE OF: [REDACTED]

BOARD DATE: 11 April 2024

DOCKET NUMBER: AR20230009662

APPLICANT REQUESTS: an upgrade of his bad conduct discharge (BCD) to honorable and a personal appearance before the Board.

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

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States), with self-authored statement, 24 May 2023
- Letter, Disabled American Veterans (DAV), 24 May 2023

FACTS:

1. The applicant did not file within the 3-year time frame 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, in effect, prior to his drug abuse and sexual abuse he was a Soldier without reproach, on time for duty, and willing to follow others. The drug use and sexual abuse caused him to not return to duty.

a. When he was promoted to sergeant (SGT)/E-5, he went to a promotion party and enjoyed it. He started going to clubs with his roommates and Soldiers in his platoon. One night at a party, he was introduced to crack cocaine and got "caught up". He was sexually abused and contracted a sexually transmitted disease (STD). He became docile, his self-esteem dropped, and he was ashamed and in fear to return to post.

b. When he formally returned to post, he was court martialled, sentenced to a bad conduct discharge, and discharged. He turned his life around, went back to school, became a licensed nurse for more than 25 years, yet he has been haunted with thoughts of his past until now.

3. In the processing of this case, an Army Review Boards Agency (ARBA) staff member requested the applicant's official military personnel file (OMPF) from the

National Archives and Records Administration (NARA). According to the response received from NARA, his record is currently signed out and is unavailable for review at this time. Despite the lack of his OMPF, the applicant provided a properly constituted DD Form 214 (Certificate of Release or Discharge from Active Duty) for the Board to conduct a fair and impartial review of the applicant's petition.

4. The applicant enlisted in the Regular Army on 11 December 1986. After completing his initial entry training, he was awarded military occupational specialty 94B (Food Service Specialist).

5. His DD Form 214 shows he was discharged on 10 February 1989, under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 3, as a result of court-martial, in the rank of E-1. His service was characterized as BCD. He was credited with 1 year, 8 months, and 18 days of net active service this period, with 5 years, 11 months, and 7 days of prior active service. He had 203 days of time lost this period from 11 January 1988 to 14 February 1988, 15 February 1988 to 14 March 1988, 26 April 1988 to 1 August 1988, and 2 August 1988 to 10 February 1989. He was authorized or awarded the following:

- Army Good Conduct Medal (2nd award)
- Army Service Ribbon
- Overseas Service Ribbon
- Noncommissioned Officer Professional Development Ribbon

6. 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.

7. In reaching its determination, the Board can consider the applicant's petition, service record, and statements in light of the published guidance on equity, injustice, or clemency. 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.

8. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his bad conduct discharge (BCD) to honorable.

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 11 December 1986.
- The available record is void of a separation packet containing the specific facts and circumstances surrounding the applicant's discharge processing.
- Army Review Boards Agency (ARBA) staff member requested the applicant's official military personnel file (OMPF) from the National Archives and Records Administration (NARA). According to the response received from NARA, his record is currently signed out and is unavailable for review at this time.
- His DD Form 214 shows he was discharged on 10 February 1989, under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 3, as a result of court-martial, in the rank of E-1. His service was characterized as BCD, with separation code JJD and reentry code RE-4.
- The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 293, his ABCMR Record of Proceedings (ROP), self-authored statement, and documents from his service record and separation packet. 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.

c. The applicant states, prior to his drug abuse and sexual abuse he was a Soldier without reproach, on time for duty, and willing to follow others. The drug use and sexual abuse caused him to not return to duty. When he was promoted to sergeant (SGT)/E-5, he went to a promotion party and enjoyed it. He started going to clubs with his roommates and Soldiers in his platoon. One night at a party, he was introduced to crack cocaine and got "caught up". He was sexually abused and contracted a sexually transmitted disease (STD). He became docile, his self-esteem dropped, he was ashamed and in fear to return to post. When he formally returned to post, he was court martialed, sentenced to a bad conduct discharge, and discharged. He turned his life around, went back to school, became a licensed nurse for more than 25 years, yet he has been haunted with thoughts of his past until now.

d. Due to the period of service, no active-duty electronic medical records were available for review and the applicant did not submit any hardcopy medical documentation from his time in service. The VA electronic medical records available for review indicates the applicant is not service connected and his most recent behavioral health encounter on 20 March 2024 diagnosed with Problems related to housing and economic circumstances and Cocaine Dependence. The applicant has received support via the VA due to homelessness and the record shows five hospital admissions due to complications of substance abuse. A discharge summary dated 8 October 2019 indicates substance induced mood disorder and homelessness. The applicant reported,

during his hospital admission, a chronic history of substance use with the most recent addiction to crack cocaine. He reported spending up to \$1,000 per month on crack. He also reported an addiction to sex and spending large amounts of money on prostitutes. In addition, he reported loss of employment due to frequent accusations of sexual harassment and inappropriate sexual behavior towards his coworkers. The most recent hospital admission, with a discharge date of 7 September 2023, diagnosed him with Cocaine Dependence with Cocaine-Induced Mood Disorder.

e. Based on the information available, the Agency Behavioral Health Advisor is unable to opine regarding medical mitigation without the specific facts and circumstances that led to his discharge. In addition, there is no evidence in the available records of the applicant experiencing MST and he provides no details about the alleged sex abuse. However, per liberal consideration guidelines, the applicant's self-assertion of MST alone merits consideration by the Board.

#### 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 a mitigating condition.

(2) Did the condition exist or experience occur during military service? Yes. The applicant self-asserts sexual abuse but does not provide details of what occurred.

(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 evidences an extensive history of substance abuse, with his mood issues related to substance induced mood disorder. In addition, there is indication of post-military loss of employment due to frequent accusations of sexual harassment and inappropriate sexual behavior. Regardless of diagnosis, the specific facts and circumstances that led to his discharge are unknown and, if the applicant engaged in sexual harassment and inappropriate sexual behavior, that misconduct is unlikely to be mitigated by a BH condition.

#### BOARD DISCUSSION:

1. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.
2. The Board carefully considered the applicant's request, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration

of discharge upgrade requests. The Board considered the applicant's statement, his record of service, and the reason for his separation. The Board considered the applicant's sexual abuse claim and the review and conclusions of the Army Review Boards Agency Behavioral Health Advisor. The applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding it being unlikely that his misconduct was mitigated by any behavioral health conditions. Based on a preponderance of the evidence, the Board determined 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.

8/27/2024

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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, 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. Section 1556 of Title 10, USC, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the 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. The regulation provides 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.
  - b. Additionally, the ABCMR begins its consideration of each case with the presumption of administrative regularity. The ABCMR is not an investigative body and decides cases based on the evidence presented in the military records provided and the independent evidence submitted with the application.
4. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.
  - a. 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.
  - b. 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.

c. 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.

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. 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.

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//