

IN THE CASE OF: ██████████

BOARD DATE: 11 April 2024

DOCKET NUMBER: AR20230009743

APPLICANT REQUESTS: Upgrade of his bad conduct discharge (BCD).

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate or 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 (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 when the incident happened back in 2002, he was suffering from post-traumatic stress disorder (PTSD) after just returning from a deployment to Bosnia where they had a firefight with some smugglers across the river where they were patrolling. There were several other issues such as anxiety and bullying from one of the noncommissioned officers. His record was perfect prior to the deployment as is evident by his promotions, wonderful counseling statements, and two reenlistments. Since his discharge, he received years of help and has become a well-adjusted member of his community. He often dedicates his spare time and money to supporting local charities. He also managed to earn a master's degree in information technology after his PTSD issues were resolved. His offense was uncharacteristic of him, so he does not think he deserves to be punished his entire life for a single mistake. He indicates on his application that PTSD and other mental health conditions are related to his request.

3. On 14 February 1997, the applicant enlisted in the Regular Army. He reenlisted on 2 March 1999 in the rank/grade of private first class/E-3. He reenlisted on 1 October 2002 in the rank/grade of sergeant (SGT)/E-5 for a period of 2 years. SGT was the highest rank he held while serving.

4. General Court-Martial Order (GCMO) Number 30 issued by Headquarters, 7th Infantry Division and Fort Carson, Fort Carson, CO, on 21 August 2003, shows the applicant was arraigned at a GCM empowered to adjudge a BCD.

a. The applicant pled guilty and was found guilty of one specification of committing an assault upon [REDACTED] by striking him on the head with a means or force likely to produce death or grievous bodily harm, to wit: a fist.

b. His sentence consisted of reduction to the rank/grade of private (PV1)/E-1, confinement for 26 months, and a BCD. The sentence was adjudged on 30 May 2003.

c. Only so much of the sentence as provided for the BCD, reduction to PV1, and confinement for 12 months was approved, and except for the BCD, ordered to be executed.

5. The applicant was confined by military authorities on 30 May 2003.

6. On 23 December 2003, the U.S. Army Court of Criminal Appeals affirmed the findings and sentence.

7. The applicant was released from confinement on 30 May 27 February 2004.

8. GCMO Number 109, issued by Headquarters, U.S. Army Armor Center and Fort Knox, Fort Knox, KY, noted the portion of the sentence pertaining to confinement had been served and the BCD was ordered to be duly executed.

9. Orders and his DD Form 214 show the applicant was discharged on 16 July 2004 under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 3, Section IV, as a result of court-martial. His service was characterized as "Bad Conduct." He was credited with completion of 6 years and 8 months of net active service. He had lost time due to confinement from 30 May 2003 until 26 February 2004. He completed his first full term of service and was credited with continuous honorable service from 14 February 1997 to 30 September 2002.

10. 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.

11. 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.

12. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition.

13. MEDICAL REVIEW:

a. The applicant requests an upgrade of his BCD discharge to Honorable. 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 in the Regular Army on 14 February 1997 and reenlisted on 2 March 1999; 2) General Court-Martial Order (GCMO) Number 30 issued by Headquarters, 7th Infantry Division and Fort Carson, Fort Carson, CO, on 21 August 2003, shows the applicant was arraigned at a GCM empowered to adjudge a BCD and found guilty of committing assault by striking an individual on the head with a means of force to produce death or serious injury; 3) His sentence consisted of reduction to the rank/grade of private (PV1)/E-1, confinement for 26 months, and a BCD; 4) GCMO Number 109, issued by Headquarters, U.S. Army Armor Center and Fort Knox, Fort Knox, KY, noted the portion of the sentence pertaining to confinement had been served and the BCD was ordered to be duly executed; 5) Orders and his DD Form 214 show the applicant was discharged on 16 July 2004 under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 3, Section IV, as a result of court-martial.

c. The VA electronic medical record (JLV), ROP, and casefiles were reviewed. The electronic military medical record (AHLTA) was not reviewed as it was not use during the applicant's time in service. No military behavioral health (BH)-related records were provided for review. A review of JVL was void of any treatment history for the applicant and he does not have a SC disability. No civilian BH-related records were provided for review.

d. The applicant is requesting an upgrade of his BCD discharge to Honorable 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 not medical documentation supporting his assertion of PTSD. In absence of documentation supporting a diagnosis of PTSD, there is insufficient evidence to support the applicant's misconduct was related to or mitigated by PTSD and insufficient evidence to support a change in discharge characterization, based on medical mitigation.

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 not medical documentation supporting his assertion of PTSD. In absence of documentation supporting a diagnosis of PTSD, there is insufficient evidence to support the applicant's misconduct was related to or mitigated by PTSD and insufficient evidence to support a change in discharge characterization, based on medical mitigation.

BOARD DISCUSSION:

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 to include deployment, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the applicant's PTSD claim and the review and conclusions of the Army Review Boards Agency BH Advisor. The applicant provided no corroborating 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 his misconduct not being mitigated by PTSD. 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

X

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, 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 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 (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) 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.

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.

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//