

IN THE CASE OF: ██████████

BOARD DATE: 27 March 2024

DOCKET NUMBER: AR20230010390

APPLICANT REQUESTS:

- an upgrade of his bad conduct discharge
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Statement
- Department of Veterans Affairs (VA) Rating Letter
- VA Medical Records (113 pages)
- DD Form 214 (Certificate of Release or Discharge from Active Duty), for the period ending 11 February 2011
- Three Character Letters
- Enlisted Record Brief
- Training Certificates and Diplomas (26 pages)
- Baptism Certificate
- Foster Home Provider Certificate
- Achievements and Awards (19 pages)
- Promotion Actions (5 pages)
- Three DA Forms 1059 (Service School Academic Evaluation Report)
- Two DA Forms 2166-8 (Noncommissioned Officer (NCO) Evaluation Report)
- Two Honorable Discharge Certificates

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 his court-martial resulted in a bad conduct discharge; however, he does not believe that his post-traumatic stress disorder (PTSD) and traumatic brain

injury (TBI) were taken into consideration. His behavior and actions were greatly impacted by his service-connected PTSD and TBI. He was recently informed of liberal consideration and asks that the Board consider an upgrade of his discharge. His self-authored statement further notes:

a. His childhood dreams became a reality when he joined the military at 19 years of age and graduated basic training following the horrific terrorists' attacks. He deployed to Iraq from 19 March 2003 through 14 February 2004 and effectively led his squad into 21 mortar firing positions throughout Iraq an over 200 dismounted and mounted patrols. He believes he began suffering from undiagnosed PTSD following his return from Iraq. He was subsequently assigned to a mortar platoon in Italy and served in numerous positions to include squad leader, fire direction control check, fire direction control chief, and section sergeant. He achieved the rank of staff sergeant (SSG) and was assigned as the Unit Prevention Leader following his completion of the Army Substance Abuse Program, although he was trying to cope himself by drinking alcohol.

b. He deployed to Afghanistan from 23 February 2005 to 19 February 2006 and led his squad on more than 200 full spectrum combat operations without incident or injury to his Soldiers. He was attached to Special Forces throughout a myriad of missions along the Pakistan border with one fire mission resulting several enemies killed in action (KIA). They always maintained situation awareness due to daily small arms fire, rocket attacks, drive by shootings, and improvised explosive devices (IED). He returned to Italy following his deployment to Afghanistan and his PTSD remained undiagnosed and untreated. He continued to drink alcohol to cope with his PTSD and eventually began making additional poor choices which ultimately led to the end of his military career. He was charged with breaking and entering, and assault of a Soldier that went absent without leave (AWOL) in his platoon which led to a bad conduct discharge. He was sentenced to 2 years in prison.

c. He had time to reflect while incarcerated and make changes. He spent a significant amount of time taking courses online from the Federal Emergency Management Agency (FEMA) and assigned by the counselor in the prison. He also received PTSD counseling while incarcerated and was released in 18 months for good behavior. His marriage unraveled during his time in prison which ultimately ended in divorce upon his return. He was diagnosed with PTSD on 12 February 2011 and sought religious counseling. He no longer drinks alcohol and is committed to a sober life.

3. The applicant provides:

a. A VA rating letter, dated 21 May 2020, which shows the applicant received a 50% service connected rating for PTSD and 10% rating for tinnitus, for a total of 60%. The rating decision also noted TBI was not a service-connected disability.

b. His VA medical records (113 pages) for treatment received from approximately 13 September 2001 through 6 June 2023.

c. Three-character letters, which describe the applicant as an exceptional leader, a person of impeccable moral character, honest, respectful, displays a deep-rooted faith, a devoted family man, industrious, diligent, composed, and hard working:

- Mr. ██████ First Sergeant (1SG), U.S. Army, Retired – 27 June 2023
- Mr. ██████ Plant Supervisor at Ash Grove – 9 December 2016
- Senator ██████ former classmate and friend

d. His training certificates and diplomas (26 pages) show he completed the following:

- 13 September 2001 – 11C Mortar, Special Weapons Training
- 5 October 2001 – Individual Infantry Training Diploma
- 5 September 2002 – Air Assault School
- 10 October 2003 – Combat Lifesaver Course
- 12 May 2004 – Primary Leadership Development Course (PLDC)
- 10 September 2004 – Airborne Course (awarded Parachutist Badge)
- 23 September 2004 – Operator Qualification Record
- 11 & 13 February 2006 – Redeployment/Reintegration Training
- 7 June 2006 – Substance Abuse Program, Unit Prevention Leader
- 4 October 2006 – Infantry Mortar Leader Course
- 4 October 2006 – Basic NCO Course (BNCOC)
- 4 January 2007 – Stress Management Program
- 9 January 2008 – Victim Impact Program
- 28 January 2008 – Goal Setting Group
- 29 July 2008 – 3 November 2008 – FEMA Courses (x9)

e. A Baptism Certificate, which shows the applicant was baptized on 11 September 2016.

f. A certificate from Social Services shows on 13 December 2016 the applicant was designated as a foster home provider to minors in need of care.

g. Several certificates of achievements and awards (19 pages), as listed below:

- Certificate of Achievement – Physical Fitness Excellence
- 7 September 2001 – Certificate of Achievement, Expert on Mortar Gunnery
- 16 January 2002 – Certificate of Achievement, Field Training Exercise
- 18 June 2005 – Certificate of Appreciation, Support in Afghanistan

- 24 November 2003 – Combat Infantryman Badge (CIB)
- 4 August 2004 – Army Good Conduct Medal
- 18 February 2003 – Army Achievement Medal (AAM), Field Training
- 18 November 2003 – Army Commendation Medal (ARCOM), Iraq
- 11 August 2004 – ARCOM, Duty Performance
- 19 December 2005 – ARCOM, Afghanistan

h. A number of promotion actions (Five Pages) show:

- 12 December 2001 – advancement to private (PV2)/E-2
- 1 May 2002 – advancement to private first class (PFC)/E-3
- 1 January 2003 – advancement to specialist (SPC)/E-4
- 1 June 2003 – Orders 148-071, dated 28 May 2003, promoted to sergeant (SGT)/E-5
- 1 January 2005 – Orders 353-06, dated 29 December 2005, promoted to SSG/E-6

i. Three DA Forms 1059 confirm completion of the following courses:

- 12 May 2004 – PLDC, achieved course standards
- 30 June 2006 – BNCOC, Phase I, achieved course standards
- 11 October 2006 – BNCOC, Phase 11, exceeded course standards

j. Two DA Forms 2166-8 (NCO Evaluation Report) show the applicant was rated among the best and senior rated 1/1 in overall performance and potential in his role as a squad leader.

- June 2004 thru October 2004 – Change of Rater
- November 2004 thru October 2005 - Annual

k. Two Honorable Discharge Certificates which align with the applicant's periods of reenlistment on 16 December 2003 and 13 February 2006.

4. A review of the applicant's service record shows:

a. He enlisted in the Regular Army on 12 June 2001.

b. He served in:

- 19 March 2003 to 14 February 2004 – Iraq
- 14 October 2004 to 22 February 2005 – Italy
- 23 February 2005 to 19 February 2006 - Afghanistan

c. On 23 May 2007, he was convicted by a general court-martial of one specification of house breaking and aggravated assault and battery, one specification of dereliction of duties by willfully failing to provide for the safety of PV2 [REDACTED] one specification of false official statement to 1SG [REDACTED] one specification of assault consummated by battery upon PV2 [REDACTED] one specification of unlawfully entering a barracks room with intent to commit a criminal offense to wit: assault, and one specification of wrongfully soliciting three Soldiers to commit the offense of house breaking and assault. His sentence included reduction to private/E-1, confinement for 2 years, and a bad conduct discharge.

d. A DD Form 2707 (Confinement Order) shows on 24 May 2007, the applicant was confined as part of the sentence adjudged in a General Court-Martial.

e. On 14 April 2008, the convening authority approved the sentence and except for the bad conduct discharge, ordered it executed. The record of trial was forwarded to the Judge Advocate General of the Army for appellate review.

f. General Court-Martial Order Number 10, dated 8 July 2010, after Article 71(c) was complied with and the sentence was affirmed, ordered the bad conduct discharge executed.

g. On 11 February 2011, he was discharged from active duty with a bad conduct characterization of service as a result of a general court martial conviction in accordance with Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), chapter 3. His DD Form 214 shows he completed 8 years, 2 months, and 4 days of active service with 546 days of lost time and 816 days of excess leave. He was assigned separation code JJD and the narrative reason for separation listed as "Court-Martial, Other," with reentry code 4. It also shows he was awarded or authorized:

- Army Commendation Medal (3rd Award)
- Army Achievement Medal
- Meritorious Unit Commendation
- Good Conduct Medal
- National Defense Service Medal
- Afghanistan Campaign Medal with two campaign stars
- Global War on Terrorism Expeditionary Medal
- Global War on Terrorism Service Medal
- Noncommissioned Officer Professional Development Ribbon (2nd Award)
- Army Service Ribbon
- Overseas Service Ribbon (3rd Award)
- Combat Infantryman Badge
- Parachutist Badge
- Air Assault Badge

5. A review of the applicant's record confirms his foreign service and deployments are not recorded on his DD Form 214. The entries will be added to his DD Form 214 as administrative corrections and will not be considered by the Board.
6. By regulation (AR 635-200), a member will be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed.
7. By regulation (AR 15-185), an applicant is not entitled to a hearing before the ABCMR. Hearings may be authorized by a panel of the ABCMR or by the Director of the ABCMR.
8. In reaching its determination, the Board can consider the applicant's petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.
9. MEDICAL REVIEW:
  - a. The applicant is applying to the ABCMR requesting an upgrade of his bad conduct discharge. He contends he experienced a traumatic brain injury (TBI) and PTSD that mitigates his misconduct.
  - 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 12 June 2001; 2) The applicant deployed to Iraq from 2003-2004 and then to Afghanistan from 2005-2006; 3) On 23 May 2007, he was convicted by a general court-martial of one specification of house breaking and aggravated assault and battery, one specification of dereliction of duties by willfully failing to provide for the safety of a PV2, one specification of false official statement to a1SG, one specification of assault consummated by battery upon a PV2, one specification of unlawfully entering a barracks room with intent to commit a criminal offense to wit: assault, and one specification of wrongfully soliciting three Soldiers to commit the offense of house breaking and assault. His sentence included reduction to private/E-1, confinement for 2 years, and a bad conduct discharge; 4) On 11 February 2011, he was discharged from active duty with a bad conduct characterization of service as a result of a general court martial conviction.
  - c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined.
  - d. The applicant asserts she was experiencing PTSD and TBI while on active service, which mitigates his misconduct. There is evidence the applicant was seen by behavioral health in 2006 after returning from his second deployment for assistance with

back pain. He was seen for a few sessions focused on learning relaxation techniques. He denied any behavioral health concerns. He was seen again by behavioral health services on 31 January 2007. He was reporting stress related to his legal problems and sleep problems. He was diagnosed with phase of life problems. He continued in regular individual therapy till his incarceration and eventual discharge. A review of JLV provided evidence the applicant has been diagnosed with and treated for service-connected PTSD and TBI.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had condition or experience that mitigates his misconduct.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant asserts he experienced PTSD and a TBI that mitigates his misconduct. There was sufficient evidence he was diagnosed with service-connected PTSD by the VA.

(2) Did the condition exist or experience occur during military service? Yes, there was sufficient evidence he was diagnosed with service-connected PTSD by the VA.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is sufficient evidence the applicant was experiencing PTSD while on active service. There is, however, no nexus between PTSD and the applicant's misconduct which resulted in his court martial in that: 1) these types of misconduct are not part of the natural history or sequelae of PTSD; 2) PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing a mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

#### 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. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding insufficient evidence to support the applicant had condition or experience that mitigates his misconduct. The opine noted there is no nexus between the applicant's diagnosis of

PTSD and his misconduct resulting his in court martial. The Board found no evidence supporting the applicant could not distinguish between right and wrong.

2. The Board noted the applicant’s post service achievements as a foster care provider, character letters of support attesting to his integrity and deep-rooted faith. The Board gave careful consideration to the applicant’s 8 years of service, his multiple deployments, prior periods of honorable service and his awards and decorations. However, the Board determined there is insufficient evidence of in-service mitigating factors to overcome the misconduct of breaking and entry as well as assault consummated by battery upon a lower enlisted Soldier to weigh a clemency determination.

3. The Board determined because the applicant was a non-commissioned officer at the time, he had adequate training and experience necessary to avoid conducting misconduct and was entrusted to set the example for subordinate Soldiers to emulate, and therefore, the discharge characterization was proper and fitting for the misconduct. 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. 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. Therefore, the Board denied relief.

4. Prior to closing the case, the Board did note the analyst of record administrative notes below, and recommended the correction is completed to more accurately depict the military service of the applicant.

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:

Except for the correction addressed in Administrative Note(s) below, the Board found 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.

4/8/2024

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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.

ADMINISTRATIVE NOTE:

A review of the applicant’s service records shows his foreign service and deployments were omitted from his DD Form 214, for the period ending 11 February 2011. As a result, correct his DD Form 214 to show:

- Block 12f (Foreign Service): 0003 07 06 (3 years, 7 months, and 6 days)
- Block 18 (Remarks):
  - “Service in Iraq from 19 March 2003 to 14 February 2004”
  - “Service in Afghanistan from 23 February 2005 to 19 February 2006”

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. 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.

The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. 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.

3. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a (Honorable discharge) states an honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of the 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 (General discharge) states a general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Paragraph 3-7c (Under Other Than Honorable Conditions) states a discharge under other than honorable conditions is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, homosexuality, security reasons, or for the good of the service.

d. Paragraph 3-11 (DD Form 259A (Bad Conduct Discharge Certificate) states a member will be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed.

4. Title 10, U.S. Code, section 1552, provides that the Secretary of a Military Department may correct any military record of the Secretary's Department when the Secretary considers it necessary to correct an error or remove an injustice. With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under the UCMJ, action to correct any military record of the Secretary's Department may extend only to correction of a record to reflect

actions taken by reviewing authorities under the UCMJ or action on the sentence of a court-martial for purposes of clemency. Such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that Military Department.

5. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (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 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. 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, 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 Discharge Review Boards and Boards for Correction of Military/Naval Records (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 based on 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.

8. Section 1556 of Title 10, United States Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (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.

//NOTHING FOLLOWS//