

IN THE CASE OF: ██████████

BOARD DATE: 18 April 2024

DOCKET NUMBER: AR20230010504

APPLICANT REQUESTS: his bad conduct discharge (BCD) be upgraded. Additionally, he requests a personal appearance before the Board.

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

- DD Form 293 (Application for the Review of Discharge)
- DD Form 214 (Certificate of release or Discharge from active Duty)
- Character Letters (14)
- Medical Documents

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 he made a mistake as a young 19-year-old Soldier. Actions that led to his discharge happened within a combat environment that was a result of stress. Prior to the incident he was a highly motivated individual serving and excelling within a Special Operations Unit where he received an Airborne badge. Ever since his discharge it has been very hard to find work and to live a normal life, but regardless, he started his own business and has dedicated his service to the local fire department participating in and volunteering with the ██████████ water rescue team as a diver and a swift water specialist. He had a lapse in judgement in the heat of the moment. He would like to change his charge so he can move on with his life. He wants to serve within law enforcement but cannot with his discharge.

3. The applicant enlisted in the Regular Army on 16 June 2004 for 3 years. His military occupational specialty was 11B (Infantryman).

4. The applicant served in Iraq for an undetermined period of service.

5. Before a special court-martial adjudged on 13 December 2005, the applicant was found guilty of:

- unlawful assault on Mr. [REDACTED] by striking him about the head and face with an open hand and closed fist and by kicking him in the stump of his amputated leg on or about 7 September 2005
- unlawful assault on Mr. [REDACTED] by striking him about the head and face with an open hand and closed fist on or about 7 September 2005
- unlawful assault Mr. [REDACTED] by striking him about the head and face with an open hand, on the back with a wooden stick, and by kicking him in the back and pushing him over and standing on his head while he was on the ground on or about 7 September 2005
- being derelict in the performance of his duties on or about 7 September 2005 by failing to protect three certain detainees from being maltreated

6. The sentence was approved on 9 August 2006. The court sentenced him to be reduced to private/E-1; to be confined for three months, and to be discharged from the service with a bad conduct discharge. The sentence was approved and except for the part of the sentence extending to a BCD would be executed.

7. The record of trial was forwarded for appellate review.

8. The U.S. Army Court of Criminal Appeals, Notice of Court Martial Order Correction, dated 16 April 2007 shows the court martial was corrected to show the applicant, between on or about 1 September 2005 and 7 September 2005, on divers occasions, unlawfully assaulted Mr. [REDACTED] by striking him about the head and face with an open hand and closed fist and by kicking him in the stump of his amputated leg on or about 1 September 2005. The words "between on or about 1 September 2005" and the words "on divers occasions" were deleted.

9. Special Court-Martial Order Number 136, dated 21 September 2007, Headquarters, U.S. Army Field Artillery Center, Fort Sill, OK, shows the sentence had been finally affirmed and ordered the BCD to be duly executed.

10. The applicant was discharged on 19 February 2008. His DD Form 214 shows he was discharged under the provisions of Army Regulation (AR) 635-200 (Active-Duty Administrative Separations), Chapter 3, as a result of court-martial (other). His service was characterized as bad conduct. He completed 3 years, 8 months, and 4 days of net active service.

11. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

12. The applicant provides:

a. Character letters, dated in 2005, one that did not condone what he did but the acts were out of character for this young Soldier. The other letters attest to the applicant showing a strong willingness to develop as a Soldier and as a leader who distinguished himself as a hard worker from the start. He was a motivated Soldier and his daily duties and all other tasks that were assigned were completed to standard, without incident, in a timely manner. He is a Ranger who showed great integrity by owning up to his mistake. He made a bad decision. He participated in numerous training events. His actions on actual combat missions were also significant indicators of his promising future. This was an isolated incident driven by bad personal choices. He matured a lot in the past year and had overcome some truly trying times in his personal life in the past. He personified all the ranger qualities. He was clearly the most motivated and most enthusiastic person out there (during the ranger instruction program). He was a reliable and loyal friend and teammate with a strong work ethic. He always put forward 110 percent. He is a good man and Soldier who stood out by being a hard worker. He was a motivational team player who worked well with others and showed leadership skills. He was going to make the Army a career. He made many friends due to his honesty and hard-working attitude.

b. Medical documents that show a diagnosis of post-traumatic stress disorder (PTSD).

13. In reaching its determination, the Board can consider the applicant's petition and service record in accordance with the published equity, injustice, or clemency determination guidance.

14. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his bad conduct discharge (BCD). He contends he experienced 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 16 June 2004; 2) The applicant served in Iraq for an undetermined period of service; 3) Before a special court-martial adjudged on 13 December 2005, the applicant was found guilty of various assault on a civilian while serving in Iraq on 07 September 2005. He was also found guilty of being derelict in his duties to protect three certain detainees from being maltreated; 4) The applicant was discharged on 19 February 2008, Chapter 3, as a result of court-martial (other) with Separation Code JJD and Reentry Code 4. His service was characterized as bad conduct.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service records. The VA's Joint Legacy Viewer (JLV) and additional medical documentation provided by the applicant were also examined.

d. The applicant asserts he was experiencing PTSD and stress as a result of being deployed while on active service, which mitigates his misconduct. There is insufficient evidence the applicant ever reported or was diagnosed with a mental health condition, including PTSD while on active service. A review of JLV provided insufficient evidence the applicant has been diagnosed with and or treated for service-connected any mental health condition including PTSD by the VA. He also does not receive any service-connected disability. The applicant did provide an evaluation completed by a Licensed Professional Clinical Counselor (LPCC) on 17 May 2022. The result of the evaluation was the applicant fit criteria for PTSD as the results of his childhood and combat experiences.

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 that mitigates his misconduct. He also provided an evaluation completed by a LPCC in 2022 that stated the applicant met criteria for PTSD as a result of his experiences in childhood and combat.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced PTSD while on active service. He also provided an evaluation completed by a LPCC in 2022 that stated the applicant met criteria for PTSD as a result of his experiences in childhood and combat.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is sufficient evidence beyond self-report the applicant was experiencing PTSD, while on active service. However, there is no nexus between PTSD and the applicant's misconduct in that: 1) these types of misconduct are not a part of the natural history or sequelae of the applicant's PTSD; 2) the applicant's 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. 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, supporting documents, 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 ARBA Medical Advisor. Beyond his own statement, the applicant provided no evidence of post-service achievements, and the Board found the character letters he provided insufficient 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.

9/3/2024

X [REDACTED]

CHAIRPERSON
[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, 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. 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.

4. 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 provided that an enlisted person 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.

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 Service 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. 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.

7. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and BCM/NRs on 25 July 2018, 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 court-martial forum.

However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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, 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.

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//