

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 June 2024

DOCKET NUMBER: AR20230011352

APPLICANT REQUESTS: an upgrade to her bad conduct discharge (BCD) in order to receive Veteran benefits due to post-traumatic stress disorder (PTSD).

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

- DD Form 149 (Application for Correction of Military Record)
- Medical Records
- Department of Veterans Affairs (VA) decision document, dated 29 June 2023

FACTS:

1. The applicant states she is requesting a discharge upgrade, so she can receive VA benefits due to PTSD.

2. The applicant's service record reflects the following information:

a. DD Form 4 (Enlistment/Reenlistment Document) shows she enlisted in the Regular Army on 7 February 2006, followed by multiple reenlistments.

b. On 25 September 2019, The Statement of Trial Results shows the applicant, who was a sergeant at that time, was tried by a GCM for stealing basic housing allowance (BAH), a violation of Article 121 (Larceny) of a value of more than \$500, the property of the United States Government. There was no plea agreement in the case. The case was adjudicated on the same date. She was tried for the following issues:

- Charge I: Violation of the UCMJ, Article 121 - Specification: Larceny from on or about 21 May 2014 to on or about 14 March 2017: Plea of not guilty, Finding of not guilty
- Charge II: Violation of the UCMJ, Article 121 - Specification: Larceny from on or about 15 March 2017 to on or about 29 October 2018: Plea of not guilty, Finding of guilty by exceptions and substitutions

- She was found guilty of Charge II only and received a BCD, 30 days confinement, and reduction to the grade of E1

c. DA Form 4187 (Personnel Action) dated 25 September 2019, reflects a change in the applicant's duty status from present for duty (PDY) to confined by military authorities.

d. On 10 October 2019, the applicant was counseled by the Staff Judge Advocate (SJA) and waived her right to submit matters under the provisions of R. C. M., but requested a deferment of her reduction in grade and in her automatic forfeitures. The SJA accordingly recommended that the sentence be approved and, except for the portion of the sentence extending to a BCD, ordered it executed.

e. DA Form 4187 dated 10 October 2019, reflects a change of the applicant's duty status from confined by military authorities to PDY.

f. On 25 November 2019, in a Judgment of the Court document, the applicant's request for deferment of reduction in grade and automatic forfeitures was disapproved. The sentence was approved and, except for the portion of the sentence extending to a BCD, ordered to be executed.

g. A memorandum, subject: Certification of Completion of Appellate Review, dated 26 August 2019, shows the findings of guilty and the sentence adjudged on 25 September 2019 and as entered by the judgment, dated 25 November 2019, were affirmed. Pursuant to Article 57(c)(1), Uniform Code of Military Justice (UCMJ), the appellate review was complete, and the BCD may be executed.

h. Her DD Form 214 (Certificate of Release or Discharge from Active Duty) shows she was discharged on 10 September 2021 pursuant to Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3, with a BCD. She completed 15 years, 6 months, and 10 days of net active service this period. This document also shows in:

- Item 4a (Grade, Rate or Rank): Private
- Item 4b (Pay Grade ): E1
- item 18 (Remarks): Served in Iraq 26 November 2006 to 14 February 2008 and 5 February 2010 to 3 June 2010; Served in Afghanistan 23 March 2012 to 17 September 2012
- Item 26 (Separation Code): "JJD"
- Item 27 (Reentry Code): RE -4
- item 28 (Narrative Reason for Separation): Court-Martial, Other

- item 29 (Dates of Time Lost During This Period): 25 September 2019 to 18 October 2019

### 3. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to her bad conduct discharge (BCD). She contends she experienced an undiagnosed PTSD that mitigates her 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:

- The applicant enlisted into the Regular Army on 7 February 2006 and had multiple reenlistments.
- The applicant was found guilty of larceny for stealing basic housing allowance by a general court-martial on 25 September 2019. The facts and circumstances leading to the conviction were not contained in the records.
- The applicant was discharged on 10 September 2021 and completed 15 years, 6 months, and 10 days of net active service.

c. Review of Available Records: The Army Review Boards Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts she had PTSD and needs VA benefits. The applicant included several pages of VA records showing mental and physical health treatment over the past year, and a VA disability determination letter dated 29 June 2023 showing 50% service connection for PTSD (combined rating of 70%). In this documentation, there was insufficient evidence that the applicant was diagnosed with PTSD or another psychiatric condition while on active service.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed that the applicant initiated mental health treatment in March 2008 following a deployment. The documentation discusses engagement in care while deployed as well, and that she was taking an antidepressant medication. She was diagnosed with Adjustment Disorder, given a medication, and referred for individual therapy to address symptoms of PTSD. She was seen for several sessions of therapy and medication management and primary stressors discussed in session were related to work and family difficulties. Therapy was successfully terminated in July 2008. She reengaged in treatment in July 2009 following a PCS and attended several group and individual therapy sessions. The applicant engaged in mental health treatment intermittently between 2011 and her discharge in 2021. She endorsed subthreshold symptoms of PTSD, and her primary diagnosis was depression. Documentation discussed marital difficulties, postpartum depression, and work stress. She had several trials of medication targeting mood and sleep, and she was on an antidepressant medication at discharge. The applicant has continued mental

health treatment through the VA, and her most recent visit was on 16 April 2024. She was diagnosed with Generalized Anxiety Disorder and history of PTSD.

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

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts she had a diagnosed mental health condition, including PTSD, at the time of the misconduct. Records from her time on active service show that she was treated for Adjustment Disorder related to her deployment as well as marital problems. She was also diagnosed with depression.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts and there is documentation showing that she was experiencing a mental health condition while on active service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. Without knowledge of the facts and circumstances leading to the misconduct and the conviction, no decision regarding mitigation under liberal consideration can be made.

g. The applicant asserts mitigation due to PTSD at the time of her discharge, and there is documentation of mental health treatment while on active service. She has been awarded VA service connection for PTSD, and VA treatment records show a PTSD diagnosis and treatment for depression. However, without a full understanding of the circumstances leading to her conviction of larceny, no decision regarding mitigation under liberal consideration can be made. Moreover, even if she did have PTSD at the time of her misconduct, it would not mitigate said misconduct given that PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right. However, her assertion of PTSD is sufficient to merit consideration by the board.

#### BOARD DISCUSSION:

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, her record of service to include deployment, the frequency and nature of her misconduct, and the reason for her separation. The Board considered the applicant's PTSD claim and the review and conclusions of the ARBA 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 PTSD not affecting her ability to distinguish right from wrong. The Board also noted the serious nature of the misconduct for which she was convicted (stealing Basic Housing Allowance for more than 18 months) as a basis for denying relief. 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:

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.

11/4/2024

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. Army Regulation 15-185 (Army Board for Correction of Military Records) 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. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

2. Army Regulation AR 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, provided the authority for separation of enlisted personnel upon expiration term of service, prior to ETS, and the criteria governing the issuance of honorable, general, and undesirable discharge certificates.

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. A characterization of under honorable conditions may be issued only when the reason for separation specifically allows such characterization. It will not be issued to Soldiers solely upon separation at expiration of their period of enlistment, MSO, or period for which called or ordered to active duty.

c. 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, security reasons, or in lieu of trial by court-martial.

d. Chapter 3 provides that a Soldier will be given a BCD 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. Questions concerning the finality of appellate review should be referred to the servicing staff judge advocate.

3. Army Regulation 635-8 (Separation Processing and Documents). The DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of REFRAD, retirement, or discharge. The DD Form 214 is not intended to have any legal effect on termination of a Soldier's service.

4. Army Regulation 601-210 (Active and Reserve Components Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment and processing into the Regular Army, U.S. Army Reserve, and Army National Guard. Table 3-1 provides a list of RE codes:

- RE-1 Applies to persons immediately eligible for reenlistment at time of separation
- RE-2 Applies to persons not eligible for immediate reenlistment
- RE-3 Applies to persons who may be eligible with waiver-check reason for separation
- RE-4 Applies to persons who are definitely not eligible for reenlistment

5. Army Regulation 635-5-1 (Separation Program Designator Codes) states that the Separation Program Designator (SPD) codes are three-character alphabetic combinations which identify reasons for, and types of, separation from active duty. SPD code "JJD" is the appropriate code to assign to enlisted Soldiers who are administratively discharged under the provisions of Army Regulation 635-200, Chapter 3, based on Court Martial.

6. Army Regulation 635-40 (Army Physical Disability Evaluation System), establishes the Army Physical Disability Evaluation System according to the provisions of chapter 61 of Title 10 United States Code and DOD Directive 1332.18. It sets forth policies, responsibilities, and procedures that apply in determining whether a member is unfit because of physical disability to perform the duties of his office, grade, rank, or rating. If a member is found unfit because of physical disability, it provides for disposition of the member according, to applicable laws and policies.

a. Paragraph 4-1 provided the case of a member charged with an offense, or is under investigation for an offense which could result in dismissal or punitive discharge, may not be referred for disability processing unless:

- (1) The investigation ends without charges.
- (2) The-officer exercising proper court-martial jurisdiction dismisses the charge.
- (3) The officer exercising proper court-martial jurisdiction refers the charge for trial to a court-martial that cannot adjudge such a sentence.

b. Paragraph 4-2 provided, a member may not be referred for disability processing if he is under sentence of dismissal or punitive discharge. If the sentence is suspended, the member's case may then be referred for disability processing. A copy of the order suspending the sentence must be included in the member's records. If action to vacate the suspension, is started after the case is forwarded for disability .processing, notify the PEB serving the area promptly. Stop disability processing. Do not resume processing unless the PEB is certain that the suspension will not be vacated.

7. 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 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. The acting Under Secretary of Defense for Personnel and Readiness provided clarifying guidance on 25 August 2017, which expanded the 2014 Secretary of Defense memorandum, that directed the BCM/NRs and DRBs to give liberal consideration to veterans looking to upgrade their less-than-honorable discharges by expanding review of discharges involving diagnosed, undiagnosed, or misdiagnosed mental health conditions, including PTSD; traumatic brain injury; or who reported sexual assault or sexual harassment.

9. 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. 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. 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.

10. 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 Uniform Code of Military Justice, 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 Uniform Code of Military Justice 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.

11. By law, Title 10, U.S. Code, section 1552, court-martial convictions stand as adjudged or modified by appeal through the judicial process. This Board 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. The ABCMR does not have authority to set aside a conviction by a court-martial.

12. Title 10, U.S. Code, section 1556 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//