

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 21 May 2024

DOCKET NUMBER: AR20230011416

APPLICANT REQUESTS:

- upgrade of his bad conduct discharge (BCD) to under honorable conditions (general) or honorable
- a different, presumably more favorable, narrative reason for separation

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)
- Veterans Affairs Form 21-4138 (Statement in Support of Claim)

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 he joined the Army to follow his siblings and uncles. He joined to serve his country, escape poverty, and break generational curses in order to help provide for his family. He went absent without leave (AWOL) because he learned his father was sick and had a heart attack. He made a promise to his parents that he would always take care of them, and decided to go home to help support him parents. His family was very proud of him for joining the Army, and encouraged him to turn himself in. Every day, he regrets his decision to go AWOL. He is disappointed in himself for not completing his obligation. He has learned many things during his time in the military and the values he learned have assisted him throughout his life.

3. On his DD Form 293, the applicant notes post-traumatic stress disorder (PTSD) issues are related to his request.

4. The applicant enlisted in the Regular Army on 16 July 1980, for 3 years. Upon completion of training, he was awarded military occupational specialty 11B (Infantryman).
5. On 31 July 1982, the applicant was reported as AWOL, and on 30 August 1982, he was dropped from the rolls as a deserter.
6. Court-martial charges were preferred against the applicant on 2 September 1982, for violations of the Uniform Code of Military Justice. His DD Form 458 (Charge Sheet) shows he was charged with one specification of going AWOL.
7. On 7 October 1983, the applicant surrendered to military authorities.
8. Before a special court-martial on 18 November 1983, at Fort Carson, CO, the applicant was found guilty of one specification of going AWOL from on or about 31 July 1982 until on or about 7 October 1983.
9. The court sentenced the applicant to reduction to the grade of E-1, forfeiture of \$382.00 pay per month for two months, confinement at hard labor for two months, and discharge from the service with a BCD. The sentence was approved on 6 December 1983, and the record of trial was forwarded for appellate review. The applicant was placed on excess leave ending appellate review of his court-martial conviction.
10. The U.S. Army Court of Military Review affirmed the findings and sentence on 3 February 1984.
11. Special Court-Martial Order Number 53, issued by Headquarters, Fort Carson and 4th Infantry Division, Fort Carson, CO, on 16 May 1984, noted that the applicant's sentence had been affirmed and ordered the BCD to be duly executed.
12. The applicant was discharged on 25 May 1984, in the rank/grade of private/E-1. He was credited with 2 years and 7 months of net active service this period, with two periods of lost time from 31 July 1982 to 6 October 1983 and from 18 November 1983 to 21 December 1983, to as well as 520 days of excess leave (22 December 1983 to 25 May 1984). His DD Form 214 contains the following entries in:
 - Item 24 (Character of Service) – bad conduct discharge
 - item 25 (Separation Authority) – AR [Army Regulation] 635-200, Chapter 3 (Personnel Separations – Enlisted Personnel), Section IV
 - item 26 (Separation Code) – JJD
 - item 27 (Reentry Code) – 4
 - item 28 (Narrative Reason for Separation) – as a result of court-martial

13. Additionally his DD Form 214 shows he was awarded or authorized the:

- Army Service Ribbon
- Parachutist Badge
- Expert Badge (Hand Grenade)
- Sharpshooter Badge (Rifle M-16)

14. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, U.S. Code, 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.

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

16. 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. 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 16 July 1980; 2) Before a special court-martial on 18 November 1983, the applicant was found guilty of one specification of going AWOL from 31 July 1982 until 7 October 1983; 3) The applicant was discharged on 25 May 1984, Chapter 3-As a result of Court-Martial with a BCD.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's available military service records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical records were provided for review.

c. The applicant asserts he was experiencing PTSD while on active service, which mitigates his misconduct. There is insufficient evidence the applicant reported or was diagnosed with a mental health disorder including PTSD while on active service.

d. A review of JLV provided evidence the applicant has been engaged with the VA for assistance with homelessness since 2021. There is insufficient evidence the applicant has been formally diagnosed with a mental health condition by the VA, and there is no evidence the applicant has been identified as experiencing a service-

connected mental health condition and does not receive any service-connected disability. Lastly, there was insufficient evidence the applicant was exposed to combat or a potentially traumatic event, while on active service.

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 a condition or experience that mitigates his misconduct.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant asserts he experienced PTSD which mitigates his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced PTSD that mitigates his misconduct while on active service.

(3) Does the condition experience actually excuse or mitigate the misconduct? No, there is insufficient evidence beyond self-report the applicant was experiencing PTSD, while he was on active service. The applicant did go AWOL, which could be avoidant behavior and a natural sequelae to PTSD. However, the presence of misconduct is not sufficient evidence of the presence of a mental health condition. Yet, the applicant contends he was experiencing a mental health condition or an experience that mitigates his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

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 request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests.

a. The applicant was convicted by a court-martial that sentenced him to a bad conduct discharge. The applicant's trial by a court-martial was warranted by the gravity of the offenses charged (AWOL). His conviction and discharge were conducted in accordance with applicable laws and regulations and the discharge appropriately characterizes the misconduct for which he was convicted. He was given a bad conduct discharge pursuant to an approved sentence of a court-martial. The appellate review was completed, and the affirmed sentence was ordered duly executed. All requirements of law and regulation were met with respect to the conduct of the court-martial and the appellate review process, and the rights of the applicant were fully protected. The Board found no error or injustice in the separation processing.

b. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewing official. The Board concurred with the medical official's finding insufficient medical documentation of any behavioral health condition during military service that would mitigate his misconduct. Also, the applicant provided no evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination. 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.

c. The applicant's narrative reason for separation as based on the fact that he was convicted by a court-martial due to his offenses/violations. Absent his misconduct and/or offenses, there was no reason to arraign, prosecute, and sentence him. The underlying reason for his separation was his conviction by a court-martial. Therefore, based on a preponderance of evidence, the Board determined that the narrative reason for separation 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.

[REDACTED]

[REDACTED]

[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, 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. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the separation codes to be entered on the DD Form 214. At the time, this regulation prescribed the separation code "JJD" as the appropriate code to assign to Soldiers separated under the provisions of Army Regulation 635-200, as a result of court-martial.

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, Section IV provided that a member 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, U.S. Code, 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. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Navy Records (BCM/NR), on 3 September 2014, 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.

7. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating 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 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.

8. 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, 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//