

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 10 May 2024

DOCKET NUMBER: AR20230011453

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions dismissal to under honorable conditions (General).

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Counsel's Statement

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. Counsel provides a statement that is available in its entirety for the Board's consideration. The documents to which counsel refers as Tabs A-E were not included with the application. Through counsel, the applicant states:

a. There are two material errors that were substantially prejudicial to the applicant's rights:

(1) Equity. Under the 2014, Secretary of Defense revised post-traumatic stress disorder (PTSD) guidelines, an upgraded discharge is appropriate. The applicant had documented combat-related PTSD in his military record at the time of discharge with no prior history of misconduct.

(2) Mitigating Factors. The applicant had a thoracotomy in 2009 and Fentanyl, hydrocodone, and Lyrica were prescribed. The medications resulted in behavioral changes that were contemporaneous with the conduct leading to the court-martial. He was also using a continuous positive airway pressure (CPAP) machine for sleep apnea, was going through divorce, and was performing well in an extremely high operational tempo.

b. The applicant was dismissed from the service following a General Court-Martial (GCM) tried by a military judge alone. (TAB A – DD Form 214 (Certificate of Release or Discharge from Active Duty)). The offenses included one specification of violating Articles 107 and 127 of the Uniform Code of Military Justice (UCMJ). The relevant sentence for this application included, among other things, a dismissal.

c. Attached with this application is documentation related to the applicant's Combat Action Badge (CAB) (TAB B). Also included are medical documents substantiating the PTSD resulting from the events underlying the CAB (TAB C).

d. In June 2006, the applicant was a member of Operations Security mobile training and survey team at Camp Victory, Iraq. He volunteered to serve as an Operational Security Officer with the 1 Marine Expeditionary Force. He was involved in two indirect fire attacks that qualified him for award of a CAB. At the time of the attacks, CAB guidelines required the Soldier to return fire to qualify for the CAB. Those guidelines were later changed.

(1) The first instance of indirect fire was on 20 June 2006. The concussion from the explosion caused ringing in his ear and partial hearing loss. The second instance was on 22 June 2006. The guidelines were changed on 11 December 2006 under Army Regulation 600-8-22 (Military Awards), paragraph 8-8, to remove the requirement that a Soldier return fire to qualify for the CAB.

(2) The approval for the CAB is included in TAB B. At TAB D is the DA Form 67-9 (Officer Evaluation Report (OER)) for the period from 12 August 2006 through 11 August 2007. The award of the CAB is noted in the OER. He was rated Best Qualified.

e. In October 2012, the applicant was diagnosed with both PTSD and traumatic brain injury (TBI) (TAB B). Medical records from the Department of Veterans Affairs (VA) Audie L Murphy Memorial Hospital document a history of: Depression; PTSD; Memory loss; Sleep apnea; Thoracotomy in 2009; Prescriptions including Fentanyl, hydrocodone, and Lyrica; and personal stressors including a divorce and his father's stroke.

f. Not documented in the medical records, but clear from evaluation reports is a high operational tempo in Baghdad in 2006.

g. Counsel cites guidance pertaining to equity in discharge reviews that is provided in Department of Defense Instruction 1332.28 and the 3 September 2014 memorandum from the Secretary of Defense to the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) to carefully consider revised PTSD criteria, detailed medical considerations, and mitigating factors when

taking action on applications from service members administratively discharged under other than honorable conditions and who have been diagnosed with PTSD by a competent medical health professional in order to determine if it would be appropriate to upgrade the characterization of an applicant's service.

h. There is no question that the PTSD diagnosis existed at the time of the applicant's separation. He had a lengthy history of honorable service with no misconduct, received numerous awards, and was selected to serve in several high-level positions. Misconduct only occurred after incurring PTSD coupled with: TBI; divorce; medical emergency involving his father; prescription medications known to cause behavioral changes; thoracotomy and spinal cord stimulator for pain; and sleep issues requiring CPAP.

i. The applicant has had no post-service misconduct and serves on his local water board and as an assistant Scout Master.

3. The applicant was appointed as a second lieutenant/O-1 in the Texas Army National Guard (TXARNG) on 28 May 1986. He was honorably discharged from the TXARNG on 1 July 1987 and transferred to U.S. Army Reserve (USAR) Control Group (Individual Ready Reserve). He subsequently served in various jobs as he ascended through the officer ranks as a member of the USAR Control Group (Individually Mobilized Augmentee (IMA)).

4. A DD Form 214 shows the applicant was ordered to active duty in support of Operation Joint Endeavor/Guard on 24 February 1997. He served in Germany from 2 March 1997 to 4 November 1997 and in the Imminent Danger Pay (IDP) area of Hungary from 4 November to 14 November 1997. On 17 November 1997, he was released from active duty (REFRAD) upon completion of required active service and returned to USAR Control Group (IMA). His service for this period was characterized as honorable.

5. A DD Form 214 shows the applicant was ordered to temporary active duty in support of Operation Noble Eagle/Enduring Freedom on 2 June 2003. This document is void of an entry showing a period he served in an IDP area during this period of service, but it shows he was awarded or authorized the Global War on Terrorism Expeditionary Medal, Iraq Campaign Medal, and CAB. On 30 September 2007, he was REFRAD upon completion of required active service and transferred to Director, Operational Test and Evaluation, Washington, DC. His service for this period was characterized as honorable.

6. The applicant's OER rendered for the period from 12 August 2006 through 11 August 2007 shows both his rater and senior rater made favorable comments about his performance and potential. His rater also stated after the applicant returned from Iraq he was awarded the Navy and Marine Corps Achievement Medal and the CAB.

7. He was promoted to the rank/grade of lieutenant colonel (LTC)/O-5 on 21 December 2007.

8. A DA Form 2627 (Record of Proceedings under Article 15, UCMJ) shows on 21 October 2008, General Officer nonjudicial punishment (NJP) under the provisions of Article 15, of the UCMJ was initiated against the applicant for, on divers occasions, for the purpose of obtaining approval and payment, of claims against the U.S. in the amount of about \$8,250.00, between on or about 5 July 2005 and on or about 4 November 2005, make and use certain writings and papers, to wit: false Washington Mutual Bank rental receipts and bank checks, which said writings and papers were false and fraudulent in that the rental receipts were not created by Washington Mutual Bank and the checks were not written for the purpose of paying rent on any premises where he lived, and were then known to be false and fraudulent. The proposed punishment was a General Officer Memorandum of Reprimand (GOMOR). The applicant provided a 61-page response. On 10 November 2008, a GOMOR was imposed for the aforementioned charges.

9. The applicant's OER rendered for the period from 27 March 2008 through 15 December 2008 shows he was relieved for cause. He received unfavorable ratings from his rater in the areas of integrity and decision-making. His rater indicated his performance was unsatisfactory and recommended that he not be promoted. His senior rater rated him below center of mass and recommended that he not be promoted or retained.

10. A DA Form 2173 (Statement of Medical Examination and Duty Status), dated 31 March 2010, shows the applicant was diagnosed with a right lung Pulmonary Nodule in September 2005 while assigned to Fort Sam Houston, TX. This was determined to have been incurred or aggravated while serving on active duty "In Line of Duty."

11. A DA Form 2173, dated 15 April 2010, shows the applicant was diagnosed with Lumbago and Myofascial Pain Syndrome in November 2009 while assigned to Fort Sam Houston, TX. This was determined to have been incurred or aggravated while serving on active duty "In Line of Duty."

12. Orders show the applicant was retained on active duty from 30 May 2010 for a period of 130 days ending on 6 October 2010 for the purpose of participating in the Reserve Component Medical Retention Program for completion of medical care and treatment with duty at Victoria, TX.

13. A DA Form 199 (Physical Evaluation Board (PEB) Proceedings) shows a PEB convened on 26 March 2012 to evaluate the applicant's medical condition.

a. His status post pulmonary upper lobe resection in 2009 was determined to be unfitting due to preventing him from wearing IBA [Interceptor Multi-Threat Body Armor] or LBE [Load Bearing Equipment] which was incompatible with the demands of his Military Police Officer Area of Concentration (AOC). He was awarded a disability rating of 50 percent (%) for this condition that was incurred or aggravated as a proximate result of performing his duty while entitled to basic pay.

b. His diagnosis of Lumbar Degenerative Disease was determined to be unfitting due to his inability to carry and fire weapons or do prolonged riding in tactical vehicles which was incompatible with the demands of his AOC.

c. The PEB found the applicant's medical and physical impairment prevented him for reasonable performance of duties required by his grade and military specialty and recommended a combined disability rating of 70% and permanent disability retirement.

14. The applicant petitioned the ABCMR for removal of the DA Form 2627 and all documents related to or associated with the NJP, GOMOR, and the OER for the period from 27 March through 15 December 2008 from his records, and reinstatement of his Top Secret/Compartmented Information security clearance. On 21 June 2012, the applicant was informed the ABCMR considered his application under procedures established by the Secretary of the Army and denied his request.

15. Orders A-09-216932 issued by U.S. Army Human Resources Command, Fort Knox, KY on 20 September 2012 show the applicant was ordered to active duty for a period of 179 days from 22 September 2012 and ending on 19 March 2013 for the purpose of UCMJ processing. He was relieved of his Reserve Component assignment on 21 September 2012, retained on active duty in his current rank/grade of LTC/O-5 and included in the active Army strength. The duration was subsequently amended to 239 days ending on 18 May 2013.

16. A DA Form 2707-1 (Department of Defense Report of Result of Trial) shows the applicant was tried under the provisions of a GCM by a judge alone on 8 May 2013.

a. He was convicted of the following offenses:

Charge I: Violation of Article 127, UCMJ. Plea: Not Guilty. Finding: Guilty.

Specification 1: Did, on or about 8 March 2010, at or near Fort Sam Houston, TX, with intent unlawfully to obtain an advantage, to wit: a memorandum supporting the applicant in an appeal to the Army Review Boards Agency (ARBA), communicate to LTC BF, a threat that he would make allegations of wrongdoing against the said LTC BF if LTC BF did not sign the memorandum. Plea: Not Guilty. Finding: Guilty.

Specification 2: Did, on or about 13 October 2010, at or near Fort Sam Houston, TX, with intent unlawfully to obtain an advantage, to wit: a memorandum supporting the applicant in an appeal to the ARBA, communicate to Colonel (COL) VDC a threat that he would pursue allegations against COL MHJ if COL VDC did not sign the memorandum. Plea: Not Guilty. Finding: Guilty.

Specification 3: Did, on or about 19 November 2010, at or near Fort Sam Houston, TX, with intent unlawfully to obtain an advantage, to wit: a memorandum supporting the applicant in an appeal to the ARBA, communicate to LTC BF a threat that he would make allegations of perjury against LTC BF if LTC BF did not sign the memorandum. Plea: Not Guilty. Finding: Guilty.

Specification 4: Did, on or about 30 September 2011, at or near Fort Sam Houston, TX, with intent unlawfully to obtain an advantage, to wit: a memorandum supporting the applicant in an appeal to the ARBA, communicate to COL VDC a threat that he would formally allege that said COL VDC was negligent in his supervisory duties for not investigating certain persons under his command if COL VDC did not sign the memorandum. Plea: Not Guilty. Finding: Guilty.

Charge II: Violation of Article 107, UCMJ. Plea: Not Guilty. Finding: Guilty. The Specification: Did, on or about 30 September 2007, at or near Fort Sam Houston, TX, with intent to deceive, sign an official record, to wit: a DD Form 214, which record was false in that it states that [the Applicant] received a CAB, and was then known by the applicant to be so false. Plea: Not Guilty. Finding: Guilty.

b. His sentence included a reprimand; forfeiture of \$4,000.00 pay per month for 4 months; confinement for 45 days; and a dismissal from the service. The sentence was adjudged on 8 May 2013.

17. The applicant's duty status was changed from Present for Duty (PDY) to Confined by Military Authorities (CMA) on 8 May 2013. He was confined at the Midwest Joint Regional Correctional Facility, Fort Leavenworth, KS.

18. On 13 June 2013, the applicant was released from confinement and his duty status was changed from CMA to PDY.

19. On 20 May 2013, the applicant declined the opportunity to undergo a separation medical examination.

20. GCM Order Number 5, issued by Headquarters, Department of the Army, Washington, DC on 4 February 2016 shows:

a. The sentence was approved and except for that part of the sentence extending to dismissal from the service, was ordered to be executed. The applicant was reprimanded as follows: "Pursuant to the sentence of the court, you are hereby reprimanded for your misconduct, which is grossly contrary to the high standards of military discipline expected of a senior officer in the U.S. Army. Your flagrant violation of the UCMJ seriously tarnished the reputation of all Officers and Soldiers serving in the U.S. Army and has degraded morale and discipline within your unit. You failed to set the type of example an officer with your years of experience should display, and you gravely breached your duties as a senior officer. You have brought disgrace upon yourself, this command, the officer corps and the U.S. Army."

b. On 30 July 2015, the U.S. Army Court of Criminal Appeals affirmed the findings of guilty and the sentence as approved by the convening authority. The conviction became final on 20 November 2015, when the U.S. Court of Appeals for the Armed Forces denied the applicant's petition for a grant of review.

c. The Assistant Secretary of the Army (Manpower and Reserve Affairs) approved the sentence and ordered the applicant's dismissal to be executed.

21. Orders and the applicant's DD Form 214 show the applicant was dismissed on 19 January 2016, under the provisions of Army Regulation 600-8-24 (Officer Transfers and Discharges), paragraph 5-17, due to Court-Martial (Other) with SPD code "JJD" with an under other than honorable conditions characterization of service. He was credited with completion of 8 years, 2 months, and 14 days of active service; with 15 years, 11 months, and 24 days of total prior active service; and 5 years, 4 months, and 28 days of total prior inactive service. He had time lost due to confinement from 8 May 2013 to 12 June 2013. His DD Form 214 shows, in part, he was awarded or authorized the CAB.

22. 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.

23. In reaching its determination, the Board can consider the applicant's petition, service record, and statements in light of the published guidance on equity, injustice, or clemency.

## 24. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, the Army Aeromedical Resource Office (AERO), and/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. Through counsel, the applicant is applying to the ABCMR requesting an upgrade of his 19 January 2016 under other than honorable discharge. He asserts that his PTSD mitigates his misconduct under liberal consideration policies.

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 for the period of Service under consideration shows the former USAR Military Police Officer entered the active-duty 30 September 2007 and received an under other than honorable conditions discharge on 19 January 2016 under the provisions provided in paragraph 5-17 of AR 600-8-24, Officer Transfers and Discharges: Rules for processing dismissal of an officer due to general courts-martial proceedings.

d. The Department of the Army Report of Result of Trial (DA Form 2707-1) dated 5 May 2013 show the applicant was found guilty at court martial of the following:

Article 107 — False official statements: 1 Specification

Article 127 — Extortion: 4 Specifications

e. JLV shows the applicant was awarded several VA service-connected disability ratings, including a 70% rating for PTSD. He does not have a service-connected disability rating for or diagnosis of traumatic brain injury or related sequelae.

## Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? YES: PTSD

(2) Did the condition exist or experience occur during military service? YES: His PTSD is connected to his Army service



(3) Does the condition or experience actually excuse or mitigate the discharge? NO. PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right and so does not mitigate the conviction for making a false official statement or the convictions for extortion.

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. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was separated by a General Court-Martial for four specifications of communicating a threat toward individuals in the course of submitting an appeal to the Army Review Boards Agency and one specification of signing an official record indicating award of the Combat Infantryman Badge, a record the applicant knew to be false. The Board found no error or injustice in the separation proceedings and designated characterization of service assigned by during separation. Based on the egregiousness of the applicant's misconduct, the Board concluded that the characterization of service the applicant received upon separation was appropriate.

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.

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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 three 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 three-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 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.
4. Army Regulation 600-8-24 prescribes policies and procedures governing transfer and discharge of Army officer personnel.
  - a. Paragraph 5-17 states an officer convicted and sentenced to dismissal as a result of general court-martial proceedings will be processed pending appellate review. A Reserve Component officer may be released from active duty pending completion of the appellate review or placed on excess leave in lieu of release from active duty.
  - b. Paragraph 1-22a provides that an officer will normally receive an honorable characterization of service when the quality of the officer's service has met the standards of acceptable conduct and performance of duty.
  - c. Paragraph 1-22b provides that an officer will normally receive an under honorable conditions characterization of service when the officer's military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.
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 3 September 2014, the Secretary of Defense directed the Service DRBs and Service 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.

7. 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; TBI; 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.

8. The Under Secretary of Defense for Personnel and Readiness issued guidance to Service DRBs and Service 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//