

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 May 2024

DOCKET NUMBER: AR20230011455

APPLICANT REQUESTS: in effect, his bad conduct characterization of service be upgraded and a video/telephone appearance before the Board.

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

- DD Form 293, Application for the Review of Discharge
- Applicant's statement
- DD 2702-1, Department of Defense Report of Result of Trial, Corrected Copy
- Service Medical Records
- DD Form 214, Certificate of Release or Discharge from Active Duty
- Character Reference
- Department of Veterans Affairs (VA) Claim Decision
- VA Summary of Benefits

FACTS:

1. The applicant did not file within the three-year time frame provided in Title 10, United States 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 indicates his request is related to post-traumatic stress disorder (PTSD). He states, in effect, during his court-martial proceedings he sought mental health treatment for his PTSD. His service includes award of the Army Good Conduct Medal, and participation in Operation Iraqi Freedom and Operation Enduring Freedom. He currently has a period of honorable service; however, he is not eligible for VA health benefits because of his Bad Conduct Discharge (BCD).
3. The applicant enlisted in the Regular Army on 10 January 2007. He completed his initial training and was awarded military occupational specialty 92G, food service specialist.

4. His Enlisted Record Brief shows he completed foreign service in Iraq from 9 March 2008 to 16 March 2009; and Afghanistan from 19 July 2010 to 1 July 2011.
5. The complete facts and circumstances of his discharge are not available for review. However, the record contains Orders 035-085, 4 February 2014, published by Headquarters, U.S. Army Garrison Fort Sill, U.S. Army Installation Management Command, Fort Sill, Ok. These orders show the applicant was assigned to the Personnel Control Facility on 12 February 2014 as the result of his General Court-Martial (GCM) conviction on 14 January 2014. His punishment was reduction to private/E-1 and discharge from the military with a BCD.
6. GCM Order Number 228, 5 August 2015, published by Headquarters, U.S. Army Fires Center of Excellence and Fort Sill, Fort Sill, OK directed the applicant's BCD be executed.
7. The applicant was discharged on 11 September 2015. His DD Form 214 shows he was discharged under the provisions of Army Regulation 635-200, Personnel Separations-Active Duty Enlisted Administrative Separations, Chapter 3, as a result of court-martial. His service was characterized as bad conduct, and he completed 8 years, 8 months, and 2 days of net active service for the period.
8. Block 18, Remarks, of his DD Form 214 further shows the applicant had continuous honorable active service from 10 January 2007 through 13 January 2014.
9. The applicant provides:
  - a. DD Form 2707-1 (Corrected Copy), 14 January 2014, which shows the applicant was charged with one specification of engaging in a sexual act with a female Soldier that was substantially incapacitated of which he was found not guilty; and one specification of wrongfully committing indecent conduct by taking photos of a female Soldier's breast to include the areola and nipple, and buttocks without her permission of which he was found guilty. His punishment was reduction to private/E-1 and a BCD.
  - b. Medical records for the period 2013 to 2014 which show the applicant was treated for PTSD symptoms and that his pending court-martial and divorce were stressors.
  - c. A character reference from his aunt who indicated that the applicant was an honest, thoughtful person, who loved his children and family.
  - d. His VA claim decision for service-connected compensation, 25 April 2022. This document shows the VA granted compensation for his ankle lateral collateral ligament

sprain. It further shows that his request to service connect his PTSD had been previously denied and that decision continued. His claim for traumatic brain injury was also denied.

e. His VA summary of benefits, 8 December 2022, which shows the applicant had honorable service from 10 January 2007 to 30 May 2010. He had a combined service-connected evaluation of 10 percent.

10. 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.

11. The Board should consider the applicant's overall record in accordance with the published equity, injustice, or clemency determination guidance.

12. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his bad conduct characterization (BCD) of service. 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 10 January 2007; 2) The applicant was deployed to Iraq 9 March 2008-16 March 2009 and Afghanistan from 19 July 2010 -1 July 2011; 3) The complete facts and circumstances of his discharge are not available for review. However, the record contains orders, dated 4 February 2014, that show the applicant was assigned to the Personnel Control Facility on 12 February 2014 as the result of his General Court-Martial (GCM) conviction on 14 January 2014. His punishment was reduction to private/E-1 and discharge from the military with a BCD; 4) The applicant provided a charge sheet, dated 14 January 2014, which shows the applicant was charged with one specification of engaging in a sexual act with a female Soldier that was substantially incapacitated of which he was found not guilty; and one specification of wrongfully committing indecent conduct by taking photos of a female without her permission of which he was found guilty. His punishment was reduction to private/E-1 and a BCD; 5) The applicant was discharged on 11 September 2015, Chapter 3, as a result of court-martial. His service was characterized as bad conduct.

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

c. The applicant asserts he was experiencing PTSD while on active service, which mitigates his misconduct. The applicant initially engaged in behavioral health service on 12 December 2013. He was reporting symptoms of PTSD and stress related to being under investigation. He attended a few short 20–30-minute sessions, and he was initially diagnosed with PTSD related to his deployment experiences. However, there was concern by other behavioral health providers, if the applicant met full criteria for PTSD, but he was provided psychiatric medication for his reported experience of nightmares. The applicant was discharged prior to completing a full evaluation for PTSD.

d. A review of JLV provided evidence the applicant has not been diagnosed with service-connected PTSD. This was confirmed by the VA documentation provided by the applicant.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to support the applicant has been diagnosed and treated for PTSD symptoms while on active service. However, there is insufficient evidence surrounding the events which resulted in the applicant's discharge to provide an appropriate opinion on possible mitigation as the result of mental health condition or experience at this time. However, the evidence of his misconduct the applicant provided is not mitigated by PTSD.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? N/A. There is sufficient evidence to support the applicant had been diagnosed with PTSD symptoms while on active service. However, there is insufficient evidence surrounding the events which resulted in the applicant's discharge to provide an appropriate opinion on possible mitigation as the result of mental health condition or experience at this time. In addition, the applicant did provide some evidence that he was found guilty of indecent conduct by taking photos of a female, who did not consent. There is no nexus between this misconduct and PTSD.

(2) Did the condition exist or experience occur during military service? N/A.

(3) Does the condition experience actually excuse or mitigate the discharge? N/A.

#### 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, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant’s petition, available military records and medical review, the Board concurred with the advising official finding insufficient evidence surrounding the events which resulted in the applicant’s discharge to provide an appropriate opine on possible mitigation as the result of mental health condition or experience at this time. The opine did note there is sufficient evidence to support the applicant had been diagnosed with PTSD symptoms while on active service.

2. Consideration was given to the applicant’s character letter of support attesting to his character and integrity. 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. However, the Board determined there is insufficient evidence of in-service mitigating factors to overcome the misconduct. The Board determined there is no nexus between the applicant’s misconduct and PTSD. 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, relief was denied.

3. The applicant’s request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

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.

[REDACTED]

[REDACTED] [REDACTED]

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[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, United States 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 (AR) 635-200, Personnel Separations-Active Duty Enlisted Administrative Separations, sets forth the basic authority for the separation of enlisted personnel.

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.

3. 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.

4. The Under Secretary of Defense for Personnel and Readiness issued guidance to Service Discharge Review Boards and Service Boards for Correction of Military/Naval Records on 25 July 2018, regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records 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.

5. 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.

6. AR 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 will decide cases on the evidence of record. It is not an investigative body. Applicants have the burden of proof.

//NOTHING FOLLOWS//