

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 5 June 2024

DOCKET NUMBER: AR20230011873

APPLICANT REQUESTS: reconsideration of his previous request for an upgrade of his bad conduct discharge to honorable.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 293 (Application for the Review of Discharge)

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20120000379 on 28 June 2012.

2. The applicant provides the following new evidence not previously considered by the Board:

- new argument - he was suffering with mental and medical issues while serving during Desert Shield/Desert Storm
- he needed a mental evaluation during his service time
- he notes "other mental health issues" as a related issue/condition to his request

3. A review of the applicant's service record shows:

a. He enlisted in the Regular Army on 30 August 1989.

b. His DA Form 2-1 (Enlisted Qualification Record – Part II) shows:

- item 5 (Overseas Service): Saudi Arabia 31 October 1990 to 8 June 1991
- item 18 (Appointments and Reductions):
 - Private (PV2)/E-2: 1 March 1990
 - PVT/E-1: 24 May 1990
 - PVT2/E-2: 1 August 1990

- Private first class (PFC)/E-3: 14 December 1990
- Specialist (SPC)/E-4: 1 April 1992
- PVT/E-1: 18 November 1992

c. General Court-Martial Order Number 7, issued by Headquarters, U.S. Army Signal Center, Fort Gordon, Georgia, dated 18 November 1992, shows:

(1) He was found guilty of one (1) specification of wrongfully having possession of ammunition and a Thompson .45 caliber pistol, one (1) specification of wrongfully discharging a Thompson .45 caliber pistol, and one (1) specification of driving while drunk.

(2) The court sentenced him to reduction to the rank/grade of private (PVT)/E-1, confinement at hard labor for 6 months, and to be discharged from the service with a bad conduct discharge. The sentence was adjudged on 2 November 1992.

(3) On 18 November 1992, the convening authority approved the sentence and except for the part of the sentence extending to a bad conduct discharge ordered it duly executed. The record of trial was forwarded for appellate review.

d. General Court-Martial Order Number 121, issued by Headquarters, U.S. Army Armor Center, Fort Knox, KY on 22 September 1993, shows the sentence to a bad conduct discharge, confinement for 6 months, and reduction to PVT/E-1, dated 18 November 1992 has been finally affirmed. Article 71(c) having been complied with, the bad conduct discharge will be executed. That portion of the sentence pertaining to confinement has been served.

e. On 29 October 1993, the applicant was discharged pursuant to his court-martial sentence under the provisions with a bad conduct discharge under the provisions of AR 635-20. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he is assigned Separation Code JJD and Reentry Code 4. He completed 3 years, 10 months, and 29 days of active service. It also shows he was awarded or authorized:

- Southwest Asia Service Medal (three bronze service stars)
- National Defense Service Medal
- Army Service Ribbon
- Sharpshooter Marksmanship Qualification Badge with Rifle Bar (M-16)
- Driver and Mechanic Badge-W
- Kuwait Liberation Medal

4. The applicant petitioned the ABCMR for an upgrade to his service characterization. The ABCMR considered his request on 21 June 2012, determined the evidence

presented did not demonstrate the existence of a probable error or injustice and that he was properly discharged and denied his request for relief.

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. Regulatory guidance provides a Soldier will receive a bad conduct discharge 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.

7. In reaching its determination, the Board can consider the applicants petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

8. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting an upgrade of his bad conduct discharge. The applicant contends he needed a mental health evaluation while in-service due to Other Mental Health Issues. 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 previously petitioned the ABCMR for relief. On 21 June 2012, the board determined the evidence presented did not demonstrate the existence of probable error or injustice and denied his request for relief as referenced in Docket Number AR20120000379.
- The applicant enlisted in the Regular Army on 30 August 1989.
- During his time in service he was awarded the following: Southwest Asia Service Medal (three bronze service stars), National Defense Service Medal, Army Service Ribbon, Sharpshooter Marksmanship Qualification Badge with Rifle Bar, Driver and Mechanic Badge-W, and Kuwait Liberation Medal.
- He served in Saudi Arabia from 31 October 1990 to 08 June 1991.
- By means of General Court-Martial Order Number 7, the applicant was found guilty of one specification of wrongfully having possession of ammunition and a Thompson .45 caliber pistol, one specification of wrongfully discharging a Thompson .45 caliber pistol, and one specification of driving while drunk.

- The applicant was discharged on 29 October 1993. Per his DD 214, his discharge was in accordance with AR 635-120, Chapter 10 with the narrative reason being court martial and a characterization of bad conduct.

b. Review of Available Records Including Medical: All supporting documents reviewed. Lack of citation or discussion in this section should not be interpreted as lack of consideration. The VA electronic medical record (JLV), ROP and casefiles were reviewed. The electronic military medical record (AHLTA) was not reviewed as it was not in use during the applicant's time in service. No BH-related military or civilian records were provided for review. A review of JLV was void of any treatment history for the applicant and he does not have a service-connected (SC) disability.

c. The applicant requests reconsideration of a request to upgrade his bad conduct discharge. He contends he needed a mental health evaluation while in-service due to Other Mental Health Issues. A review of records was void of any BH diagnosis or treatment history for the applicant during or after service and he provided no medical documentation supporting his assertion of Other Mental Health Issues. In absence of documentation supporting his assertion there is insufficient evidence to establish his misconduct was related to or mitigated by Other Mental Health Issues and insufficient evidence to support an upgrade based on BH medical mitigation.

d. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence that the applicant had a condition or experience during his time in service that mitigated his misconduct. However, he contends he needed a mental health evaluation while in-service due to Other Mental Health Issues, and per liberal guidance his assertion is sufficient to warrant the Board's consideration.

f. Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes, the applicant contends his misconduct was related Other Mental Health Issues.

(2) Did the condition exist or experience occur during military service? Yes, per the applicant's assertion.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of the records was void of any BH diagnosis or treatment history for the applicant during or after service and he provided no medical documentation supporting his assertion of Other Mental Health Issues. In absence of documentation supporting his assertion there is insufficient evidence to establish his misconduct was related to or

mitigated by Other Mental Health Issues and insufficient evidence to support and upgrade based on BH medical mitigation.

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 applicant's trial by a court-martial was warranted by the gravity of the offenses charged (one specification each of wrongfully having possession of ammunition and a Thompson .45 caliber pistol, wrongfully discharging a Thompson .45 caliber pistol, and driving while drunk). 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. 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.

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 to amend the decision of the ABCMR set forth in Docket Number AR20120000379 on 28 June 2012.



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. 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.

3. Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, prescribes the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a (Honorable Discharge) states an honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier'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. Paragraph 3-7b (General Discharge) states 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.

4. 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 post-traumatic stress disorder (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.

5. 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, 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, on 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.

6. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Service Boards for Correction of Military/Naval Records (BCM/NR) 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, 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.

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.

7. Section 1556 of Title 10, United States Code, 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//