

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 30 July 2024

DOCKET NUMBER: AR20230011894

APPLICANT REQUESTS: through a member of Congress:

- upgrade of his bad conduct discharge (BCD) (which was already upgraded to a general discharge)
- to have his Separation Program Designator (SPD) Code changed to an unspecified, presumably more favorable code

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- Self-authored statements (2)
- Letters of support/recommendation (5)
- Photographs (4)

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. The applicant states he believes his diagnosed conditions of post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), and other mental health conditions were not considered along with his meritorious service in combat when determining the characterization of his service. This is a matter of inequity because he had an excellent service record prior to the events that resulted in his trial by court-martial. The applicant provides two self-authored statements which are available in their entirety for the Board's consideration.

a. He provides a synopsis of his military career to include descriptions of some traumatic events he experienced while deployed to Kuwait; one of which resulted in him receiving shrapnel in his lower right ankle and arm. He witnessed a lot of bloodshed, destruction, and the deaths of fellow Soldiers. Upon returning from deployment, he and

several other Soldiers used alcohol as a way to cope with the mental problems they had from combat.

b. The applicant's best friend died during an airborne operation. Although he enjoyed parachuting from planes, this made him nervous about jumping. On his next airborne operation, he had a bad parachute landing fall and tear his anterior cruciate ligament and partially tear his meniscus. He did not complain about his injuries and continued to Soldier on.

c. To make matters worse, he discovered his wife was having an affair with a noncommissioned officer (NCO) in her unit, Sergeant (SGT) W\_\_. When he confronted SGT W about the affair there was an exchange of words and punches were thrown. As a result, the applicant was arrested and incarcerated. While in jail, he was given an opportunity to make a telephone call and learned from his friend that while his wife was in the field his son was being taken care of by SGT W. This made the applicant furious, so he escaped from jail and ran home. He was met by SGT W's wife, who allowed him to see his son and make sure he was okay. The applicant was taken back to jail and underwent court-martial proceedings for the next several months and ultimately resulted in him receiving a BCD.

d. Since his discharge, several of the applicant's battle buddies have committed suicide. He turned to alcohol to cope with his nightmares, headaches, and to get rid of some of the pain he feels. He has been in and out of mental hospitals due to something triggering his PTSD. He has six children that rely on him for support. He is trying to get his life together because they deserve a better father. He is leaving alcohol alone and seeking help with a group called Vets4Veterans. Since getting involved with this group he has become a productive member of his community and his life is changing for the better. Receiving a discharge upgrade would make him eligible for Veterans' benefits and change his life dramatically.

3. On 11 June 2007, the applicant enlisted in the Regular Army for a period of 3 years and 25 weeks. He served in Iraq from 5 December 2008 to 20 November 2009.

4. The applicant's service record is void of the complete facts and circumstances surrounding his trial by Court-Martial, to include the DD Form 458 (Charge Sheet) detailing the offenses he committed in violation of the Uniform Code of Military Justice (UCMJ).

5. The applicant's duty status was changed from Present for Duty (PDY) to Confined by Military Authorities (CMA) effective 6 December 2011, when he was placed in pre-trial confinement. His rank/grade was private (PV1)/E-1 at the time.

6. Special Court-Martial Order Number 14, issued by Seventh U.S. Army Joint Multinational Training Command on 14 September 2012 shows the applicant was arraigned and tried before a Special Court-Martial.

a. He pled guilty and was found guilty of following offenses in violation of the UCMJ:

- unlawfully striking a person in the head with a closed fist
- wrongfully breaking restriction
- being drunk and disorderly
- without authority, absenting himself from his unit on 4 December 2011 and remaining so absent until he was apprehended on 6 December 2011
- two specifications of without authority, failing to go at the time prescribed to his appointed place of duty
- escaping from confinement

b. He was sentenced to be confined for 3 months and to be discharged with a BCD. The sentence was adjudged on 24 February 2012.

c. The sentence was approved and except for that portion of the sentence pertaining to the BCD, ordered to be executed. The applicant was credited with 82 days of confinement against the sentence to confinement.

7. The applicant's duty status was changed from CMA to PDY on 26 March 2012 when he was released from confinement. He was placed on excess involuntary leave while his court-martial proceedings went through the appeal process.

8. His duty status was changed from Excess Involuntary Leave to PDY on 17 March 2013. It was noted that he was performing duties commensurate with his grade and years of service.

9. Orders and the applicant's DD Form 214 show the applicant was discharged in the rank/grade of PV1/E-1 on 7 June 2013 under the provisions of Army Regulation 635-200 (Active Duty Enlisted Separations), Chapter 3, as a result of court-martial. He was assigned SPD code "JJD" and Reentry code "4." His service was characterized as "Bad Conduct." He was credited with completion of 5 years, 9 months, and 14 days of net active service. He had lost time due to confinement from 5 February 2011 until 17 April 2011. He was awarded or authorized the:

- Army Commendation Medal
- Army Good Conduct Medal

- National Defense Service Medal
- Global War on Terrorism Service Medal
- Iraq Campaign Medal with Campaign Star
- Army Service Ribbon
- Overseas service Ribbon
- Combat Action Badge
- Parachutist Badge

10. The applicant petitioned the Army Discharge Review Board (ADRB) for relief. On 30 April 2022, the applicant was informed the ADRB had reviewed his case and voted to grant relief in the form of updating the characterization of his service from "Bad Conduct" to "Under Honorable Conditions (General)."

a. The ADRB voted to change the applicant's characterization of service to General, Under Honorable Conditions, because the applicant had PTSD which mitigated the misconduct of multiple failures to report, breaking of restriction, disobeying an order, being drunk and disorderly and absent without leave. Thus, the prior characterization was no longer appropriate.

b. Despite the seriousness and amount of unmitigated misconduct the ADRB granted clemency based on the severity of applicant's PTSD and the necessity of a General Characterization to be eligible for PTSD treatment and assistance from the Department of Veterans Affairs.

11. On 5 July 2022, the applicant was provided an amended DD Form 214 showing his service characterization as "Under Honorable Conditions (General)."

12. The applicant provides the following documents which are available in their entirety for the Board's consideration.

- letter rendered by G.R. shows the applicant began psychotherapy on 13 January 2022, to address post war/combat PTSD and TBI
- list of observations rendered by G.R. shows the progress the applicant has made since beginning therapy
- two letters rendered by a Clinical Social Worker, wherein he contends the applicant suffered from mental health conditions and should be afforded a discharge upgrade so he can receive medical benefits for appropriate care
- letter rendered by J.P. provides a synopsis of the applicant's progress during his participation in the Armed Services Auto and Vets4Veterans Training program since April 2022

13. 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.

14. Army Regulation 635-200 provides that a Soldier would be given a BCD pursuant only to an approved sentence of a general or special court-martial and that the appellate review must be completed, and the affirmed sentence ordered duly executed.

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. Applicants do not have a right to a hearing before the ABCMR.

16. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his discharge under other than honorable conditions (UOTHC). He contends he experienced mental health conditions including 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 re-enlisted in the Regular Army on 4 February 2004 after serving in the U.S. Army Reserve (USAR); 2) The applicant served in Iraq from 4 December 2005-4 December 2006; 3) Court martial charges were preferred against the applicant on 14 March 2007, for violating general order by possessing sexually explicit images and for the possession child pornography; 4) The applicant was discharged on 19 September 2007, Chapter 10, in lieu of trial by court-martial with Separation Code KFS and Reentry Code 4. His service was characterized as UOTHC.

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. The applicant asserts he experienced mental health conditions including PTSD, which mitigate his misconduct. There is insufficient evidence the applicant reported or was diagnosed with a mental health condition including PTSD while on active service. A review of JLV provided insufficient evidence the applicant has been diagnosed with a mental health condition including PTSD by the VA. He has received assistance for homelessness.

c. 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. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant asserts he experienced a mental health condition including PTSD while on active service that mitigates his misconduct.

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

(3) Does the condition experience actually excuse or mitigate the misconduct? No, there is insufficient evidence beyond self-report the applicant experiencing a mental health condition including PTSD, while on active service. In addition, there is no nexus between his reported mental health conditions including PTSD and his misconduct of possession of child pornography: 1) this type of misconduct is not a part of the natural history or sequelae of reported mental health condition including PTSD; 2) His reported mental health conditions including PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing a mental health condition or an experience that mitigated 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. Discharge upgrade: Deny. The applicant's trial by a court-martial was warranted by the gravity of the offenses charged (unlawfully striking a person in the head with a closed fist, wrongfully breaking restriction, being drunk and disorderly, without authority, absenting himself from his unit on 4 December 2011 and remaining so absent until he was apprehended on 6 December 2011, failing to go at the time prescribed to his appointed place of duty, and escaping from confinement).

(1) The applicant's 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 his separation processing. The ADRB reviewed the applicant's case and upgraded his characterization of service to general, under honorable conditions.

(2) The Board also 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 determination finding insufficient evidence to support the applicant had a condition or experience that mitigates his discharge. Also, the applicant provided evidence of post-service achievements or letters of reference in support of a clemency determination; but the Board found these letters did not outweigh the serious misconduct that led to his court-martial conviction and discharge. Therefore, based on a preponderance of available evidence, the Board determined that the character of service the applicant received upon separation were not in error or unjust.

b. Separation Code: Deny. The Board note that enlisted soldiers convicted by a court-martial and sentenced to a bad conduct discharge are assigned Separation Code JJD. The fact that his characterization of service was upgraded to general did not change the court-martial conviction and reason for his discharge. Therefore, the Board determined the Separation Code listed on his DD Form 214 is 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.

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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 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. 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. Title 10, USC, Section 1552(b), provides, with respect to courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under the UCMJ, action to correct any military record of the Secretary's Department may extend only to actions taken by reviewing authorities under the UCMJ or action on the sentence of a court-martial for purposes of clemency. The Secretary of the Army shall make such corrections by acting through boards of civilians within the executive part of the Army.

4. Title 10, USC, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Court-martial convictions stand as adjudged or modified by appeal through the judicial process, 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.

5. 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. 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. The ABCMR may, in its discretion, hold a hearing. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

6. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. An honorable discharge was separation with honor. Issuance of an honorable discharge certificate was appropriate when the quality of the Soldier's service generally met the standards of acceptable conduct and performance of duty or was otherwise so meritorious that any other characterization would clearly be inappropriate. Where there were infractions of discipline, commanders were to consider the extent thereof, as well as the seriousness of the offense. Separation authorities could furnish an honorable discharge when subsequent honest and faithful service over a greater period outweighed disqualifying entries in the Soldier's military record. It was the pattern of behavior, and not the isolated instance, which commanders should consider as the governing factor.

b. A general discharge was a separation from the Army under honorable conditions. When authorized, separation authorities could issue a general discharge to Soldiers whose military record was satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. A discharge under other than honorable conditions (UOTHC) is an administrative separation from the Service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, homosexual conduct, security reasons, or in lieu of trial by court martial in the following circumstances.

(1) An under-other-than-honorable-conditions discharge will be directed only by a commander exercising general court-martial authority, a general officer in command who has a judge advocate or legal advisor available to his/her command, higher authority, or the commander exercising special court-martial convening authority over the Soldier who submitted a request for discharge in lieu of court-martial (see chapter 10) when delegated authority to approve such requests.

(2) When the reason for separation is based upon one or more acts or omissions that constitutes a significant departure from the conduct expected of Soldiers of the Army. Examples of factors that may be considered include the following:

- Use of force or violence to produce bodily injury or death
- Abuse of a position of trust
- Disregard by a superior of customary superior-subordinate relationships
- Acts or omissions that endanger the security of the United States or the health and welfare of other Soldiers of the Army
- Deliberate acts or omissions that seriously endanger the health and safety of other persons

d. A bad conduct discharge will be given to a Soldier pursuant only to an approved sentence of a general or special court-martial. The appellate review had to have been completed and the affirmed sentence then ordered duly executed. Questions concerning the finality of appellate review should be referred to the servicing staff judge advocate.

e. A dishonorable discharge will be given to a Soldier pursuant only to an approved sentence of a general 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.

7. Army Regulation 635-5-1 (SPD Codes) implements the specific authorities and reasons for separating Soldiers from active duty. It also prescribes when to enter SPD codes on the DD Form 214.

a. Paragraph 2-1 provides that SPD codes are three-character alphabetic combinations that identify reasons for, and types of, separation from active duty. The primary purpose of SPD codes is to provide statistical accounting of reasons for separation. They are intended exclusively for the internal use of Department of Defense and the Military Services to assist in the collection and analysis of separation data. This analysis may, in turn, influence changes in separation policy. SPD codes are not intended to stigmatize an individual in any manner.

b. Table 2-3 provides the SPDs and narrative reasons for separation that are applicable to enlisted personnel. It shows, in part, SPD JJD is the appropriate code to assign to an enlisted Soldier who is involuntarily separated under the provisions of Army Regulation 635-200, Chapter 3, as a result of trial by court-martial. Additionally, the SPD/RE Code Cross Reference Table established RE code "4" as the proper reentry code to assign to Soldiers separated under this authority and for this reason.

8. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) 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.

9. 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.

10. 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, 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.

//NOTHING FOLLOWS//