

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 23 July 2024

DOCKET NUMBER: AR20230012434

APPLICANT REQUESTS: an upgrade of his bad conduct discharge to under other than honorable conditions.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:  
DD Form 149 (Application for Correction of Military Record)

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 at the time he was going through problems with his now ex-wife and her boyfriend sexually assaulting and abusing his then 5-year-old daughter. He left to make sure her abuser was charged and removed from her life. Subsequently, he lost his friend to suicide and was introduced to cocaine from his peers in the barracks. He has since had a tough time after release from confinement in Fort Knox. He comes from four generations of combat veterans who have honorably and proudly served. The applicant annotates post-traumatic stress disorder as an issue/condition related to his request.
3. A review of the applicant's service record shows:
  - a. He enlisted in the Regular Army on 30 October 2000.
  - b. DD Form 553 (Deserter/Absentee Wanted by the Armed Forces) shows that the applicant absented himself from his unit on 20 February 2002 and remained absent until 23 March 2002.
  - c. DD Form 616 (Report of Return of Absentee) shows that the applicant was considered a deserter as of 20 February 2002. It then shows he was apprehended by military authorities at Fort Hood, TX and returned to military control on 22 August 2003.

d. On 26 February 2004, DA Form 4187 (Personnel Action) shows that the applicant's duty status changed from "present for duty" to "confined [by] military authorities."

e. General Court-Martial Order Number 29 issued by Headquarters, Fort Hood on 1 July 2004 shows that the applicant was charged with the following:

(1) On or about 20 February 2002, without authority and with intent to remain away therefrom permanently, absented himself from his unit: Headquarters and Headquarters Company, 2d Battalion, 5th Cavalry Regiment, 1st Brigade, 1st Cavalry Division, located at Fort Hood, Texas, and remained so absent in desertion until he was apprehended on or about 28 July 2003. Plea: Not guilty, but guilty to the lesser included offense of absent without leave, in violation of Article 86 of the UCMJ. Finding: Not guilty, but guilty of the lesser included offense of absence without leave in excess of 30 days.

(2) On or about 16 October 2003, without authority, absented himself from his unit, to wit: Headquarters and Headquarters Company, 2d Battalion, 5th Cavalry Regiment, 1st Brigade, 1st Cavalry Division, located at Fort Hood, Texas, and remained so absent until on or about 6 January 2004. Plea: Guilty. Finding: Guilty.

(3) At or near Fort Hood, Texas, on or between 1 January 2002 and 7 January 2002, wrongfully use a schedule II controlled substance, to wit: cocaine. Plea: Guilty. Finding: Guilty.

(4) He was sentenced to reduction to the grade of private/E-1, to forfeit all pay and allowances, to be confined for 18 months, and to be discharged with a bad-conduct discharge.

f. On 22 October 2004, DA Form 4187 shows that the applicant's duty status changed from "confined [by] military authorities" to "present for duty." He was released from confinement upon completion of his sentence.

g. On 7 November 2005, the United States Army Court of Criminal Appeals affirmed the findings of guilty and the sentence as approved by the convening authority correct in law and fact.

h. General Court-Martial Order Number 98 issued by Headquarters, United States Army Armor Center and Fort Knox on 2 June 2006 shows that the findings and sentence were affirmed on 7 November 2005, confinement had been served, and the bad-conduct discharge will be executed.

i. He was discharged on 17 November 2006 under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3. He completed 3 years, 8 months, and 23 days of active service. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows in:

- block 24 (Character of Service): Bad Conduct
- block 25 (Separation Authority): AR 635-200, Chapter 3
- block 26 (Separation Code): JJD
- block 28 (Narrative Reason for Separation): Court-Martial, Other
- block 29 (Dates of Time Lost During this Period): 20020220 – 20030727; 20031016 – 20040105; 20040226 - 20041021

4. By regulation, AR 635-200, in effect at the time, states a Soldier will be given 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.

5. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to his bad conduct discharge to under other than honorable conditions. He contends he experienced PTSD that mitigates his misconduct.

b. 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 enlisted into the Regular Army on 30 October 2000.
- The applicant was AWOL from February to March 2002 and then considered a deserter until he was apprehended on 22 August 2003. He was sentenced by a general court-martial for being AWOL in 2002 and October 2003 and for wrongful use of a schedule II controlled substance, cocaine.
- The applicant was discharged on 17 November 2006 and was credited with 3 years, 8 months, and 23 days of active service.

c. Review of Available Records: The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts PTSD is related to his misconduct, and he discussed going AWOL because of his daughter being abused and using cocaine after losing a friend to suicide. There were no medical or mental health records included in the application. There was insufficient evidence that the applicant was diagnosed with PTSD or another psychiatric condition while on active service.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed the applicant initiated mental health treatment at the VA in November 2023 following his release from prison. He endorsed symptoms of anxiety, depression, and noted a childhood trauma history. He was diagnosed with Major Depressive Disorder, Anxiety Disorder, Alcohol Use Disorder, and Acute Stress Reaction. He was seen for two follow up visits before the VA identified him as ineligible for services. Documentation reflected psychosocial problems, including financial problems, unemployment, and recent release from prison, as primary stressors, as well as adjustment to new routine following incarceration.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support that 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 discharge? Yes. The applicant asserts he had PTSD at the time of the misconduct. Mental health records from the VA in 2023-2024 show that the applicant was diagnosed with Major Depressive Disorder, Anxiety Disorder, Alcohol Use Disorder, and Acute Stress Reaction, but there are no medical or mental health records provided from his time in service. Additionally, the applicant is not service-connected for any of these conditions.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition while on active service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is insufficient evidence, beyond self-report, that the applicant was experiencing a mental health condition, including PTSD, while on active service. Avoidant behavior, such as going AWOL and substance use, can be a natural sequela to mental health conditions associated with exposure to traumatic and stressful events. Yet, the presence of misconduct is not sufficient evidence of a mitigating mental health condition during active service. However, the applicant contends he was experiencing 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. The applicant's trial by a court-martial was warranted by the gravity of the offenses charged (AWOL and cocaine use). 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 his separation processing. 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 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 available evidence, the Board determined that the character of service the applicant received upon separation were 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, 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. 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 ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.
3. Army Regulation 635-5 (Separation Documents) states:
  - a. The DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of release from active duty, retirement, or discharge. The information entered thereon reflects the conditions as they existed at the time of separation.
  - b. For block 24 (Character of Service) the correct entry is vital as it affects a soldiers' eligibility for post-service benefits. Characterization or description of service is determined by directives authorizing separation. The entry must be one of the following: honorable, under honorable conditions (general), under other than honorable conditions, bad conduct, dishonorable, or uncharacterized.
4. Army Regulation (AR) 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.
  - a. Chapter 3-11 provides a Soldier will be given 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.
  - b. 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.
  - c. A general discharge is a separation from the Army under honorable conditions. When authorized, it is used for a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

d. A discharge under other than honorable conditions is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct or for the good of the service.

5. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records 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. This guidance does not mandate relief but provides standards and principles to guide Boards in application of their equitable relief authority.

a. 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//