

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 30 July 2024

DOCKET NUMBER: AR20230012552

APPLICANT REQUESTS:

- reconsideration of his previous request for an upgrade of his under other than honorable conditions discharge to honorable
- a personal appearance before the Board

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

Self-Authored Statement.

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous considerations of the applicant's cases by the Army Board for Correction of Military Records (ABCMR) in Dockets Number:

- AR20120021472 on 23 July 2013
- AR20140012153 on 17 March 2015
- AR20210011062 on 8 October 2021.

2. The applicant provides as new argument, the convictions within the confines of his plea deal, do not reflect the entirety of his character and service. Furthermore, they do not consider his significant mental and physical health conditions suffered before 8 May 2004. Specifically, he was grappling with untreated post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI). His PTSD and TBI were incurred during his combat service in Afghanistan and training exercises. One notable incident involved a military vehicle accident that caused severe neck, head, and brain injuries. He did not know then what he knows now that his decisions were influenced by untreated PTSD and TBI. The information was unrepresented by his attorney during the court-martial and the oversight poses a serious legal concern regarding the fairness and thoroughness of the proceedings which warrant a review. The reconsideration request implores the Board to address the matter with compassion, understanding, and a comprehensive evaluation it rightfully demands. His current discharge impedes his ability to be seen by the Department of Veterans Affairs (VA) for his PTSD and TBI. He

respectfully submits the discharge classification be upgraded. The applicant also refers to case law, his full statement is available for review by the Board.

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

a. He was appointed as a Reserve commissioned officer on 24 July 1998 and executed an oath of office on the same day. He entered active duty on 22 August 1998.

b. His foreign service includes a 6-month tour to Afghanistan, returning on 11 November 2003.

c. On 6 June 2005, he was convicted by a general court-martial for:

- one specification of failure to obey a lawful order by wrongfully remaining outside the military installation or place of lodging between curfew hours
- two specifications of indecent acts with Specialist (SPC) H\_\_\_,
- one specification of fraternizing with SPC H\_\_\_ and Private First Class B\_\_\_, enlisted Soldiers

The court sentenced him to confinement for 9 months and to be dismissed from the service.

d. On 15 September 2005, the convening authority approved the sentence and except for the part of the sentence extending to the dismissal from service, ordered it executed. The record of trial was forwarded to the Judge Advocate General of the Army for appellate review.

e. On 20 February 2007, the U.S. Army Court of Criminal Appeals (ACCA) affirmed the findings and the sentence. The conviction became final on 29 June 2007 when ACCA denied the applicant's petition for a grant of review.

f. On 29 August 2007, the Assistant Secretary of the Army for Manpower and Reserve Affairs, pursuant to Article 71(b) the sentence was affirmed, approved, and the sentence of dismissal ordered executed.

g. On 12 September 2007, he was discharged from active duty in accordance with Army Regulation 600-8-24 (Officer Transfers and Discharges) with an under other than honorable conditions characterization of service, Separation Code JJD. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 8 years, 7 months, and 11 days of active service with 163 days of lost time. It also shows he was awarded or authorized:

- Meritorious Service Medal

- Army Commendation Medal (2nd Award)
- Army Achievement Medal
- National Defense Service Medal
- Armed Forces Expeditionary Medal
- Global War on Terrorism Service Medal
- Korean Defense Service Medal
- Army Service Ribbon
- Overseas Service Ribbon
- NATO Medal
- Ranger Tab
- Parachutist Badge
- Air Assault Badge

5. The ABCMR rendered decisions in the below listed cases:

a. In Docket Number AR20120021472 dated 23 July 2013, the Board denied the applicant's request for relief. The Board found good post-service conduct alone is normally not a basis for upgrading a discharge. His record of service, while serving as a captain included one general court-martial conviction for serious offenses (failing to obey a general order, committing indecent acts with a female SPC, and fraternization). As a result, his record of service was not satisfactory, and he did not meet the standards of acceptable conduct and performance of duty for Army personnel. Therefore, the applicant's record of service is insufficiently meritorious to warrant an honorable or a general discharge.

b. In Docket Number AR20140012153 dated 17 March 2015, the Board again denied the applicant's request for relief. The Board noted the applicant indicated his character of service should be upgraded to honorable and he should be granted a personal appearance hearing because he had Miranda rights that were never extended even after he was taken into custody. His record contained a DA Form 3881 (Rights Warning Procedure/Waiver Certificate), dated 26 June 2004, which he signed and initialed indicating he had been read/or read his Article 31 rights and understood them. As such, his contention lacked merit.

c. In Docket Number AR20210011062 dated 8 October 2021, the applicant's request for an upgrade was denied. The Board determined the evidence presented did not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of his case were insufficient as a basis to amend the decision of the ABCMR set forth in Docket Number AR20120021472 and AR20140012153, on 23 July 2013 and 17 March 2015, respectively.

6. By regulation (AR 15-185), an applicant is not entitled to a hearing before the ABCMR. Hearings may be authorized by a panel of the ABCMR or by the Director of the ABCMR.

7. By regulation (AR 600-8-24), no formal discharge certificate will be issued when the officer is dismissed as a result of sentence of court-martial.

8. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, U.S. Code, section 1552, the authority under which this Board acts, the Army Board for Correction of Military Records 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.

9. Article 74 of the UCMJ allows the Secretary and, when designated by him, any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer to remit or suspend any part or amount of the unexecuted part of any sentence, including all uncollected forfeitures other than a sentence prescribed by the President. It also allows the Secretary concerned to, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.

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

11. MEDICAL REVIEW:

MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his discharge. He contends he experienced a traumatic brain injury (TBI) and 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 was appointed as a Reserve commissioned officer on 24 July 1998 and executed an oath of office on the same day. He entered active duty on 22 August 1998; 2) The applicant served in 6-month tour to Afghanistan, returning on 11 November 2003; 3) On 6 June 2005, he was convicted by a general court-martial for: A) one specification of failure to obey a lawful order by wrongfully remaining outside the military installation; B) two specifications of indecent acts with a lower enlisted Soldier; C) one specification of fraternizing with two lower enlisted Soldiers; 4) The applicant was discharged on 12 September 2007 in accordance with Army Regulation 600-8-24

(Officer Transfers and Discharges) with an under other than honorable conditions characterization of service.

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.

c. The applicant asserts he experienced a TBI and PTSD, which mitigate his misconduct. There is insufficient evidence the applicant reported or was diagnosed with a TBI or a mental health condition including PTSD while on active service.

d. A review of JLV provided insufficient evidence the applicant has been diagnosed with a TBI or a mental health condition including PTSD by the VA. No additional mental health documentation was provided for review.

e. 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.

f. 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 TBI and 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 a TBI and 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 TBI or PTSD, while on active service. In addition, there is no nexus between his reported TBI or PTSD his misconduct: 1) these types of misconduct are not a part of the natural history or sequelae of a TBI or PTSD; 2) His reported TBI and PTSD do 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:**

1. The Board determined 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.
  
2. 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 (failure to obey a lawful order, indecent acts with specialist, and fraternizing with junior enlisted Soldiers). 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 dismissed 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 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:

| <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 to amend the decision of the ABCMR set forth in Dockets Number

- AR20120021472 on 23 July 2013
- AR20140012153 on 17 March 2015
- AR20210011062 on 8 October 2021.

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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. 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.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent

evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that 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.

2. Army Regulation 600-8-24 (Officer Transfers and Discharges) prescribes the officer transfers from active duty to the Reserve component and discharge functions for all officers on active duty for 30 days or more.

a. Paragraph 1-22(a) states 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, or the final revocation of a security clearance for reasons that do not involve acts of misconduct, for an officer.

b. Paragraph 1-22(b) states 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.

c. Paragraph 1-22(c) states a discharge Under Other Than Honorable Conditions is an administrative separation from the service under conditions other than honorable. A discharge certificate will not be issued. Officers will normally receive an "Under Other Than Honorable Conditions" when they resign for the good of the service, are dropped from the rolls of the Army, are involuntarily separated due to misconduct, moral or professional dereliction, or for the final revocation of a security clearance as a result of an act or acts of misconduct, including misconduct for which punishment was imposed; or are discharged following conviction by civilian authorities.

d. Paragraph 1-22e states no formal discharge certificate will be issued when the officer is dismissed as a result of sentence of court-martial.

3. Title 10, U.S. Code, section 1552, provides that the Secretary of a Military Department may correct any military record of the Secretary's Department when the Secretary considers it necessary to correct an error or remove an injustice. With respect to records of 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 correction of a record to reflect actions taken by reviewing authorities under the UCMJ or action on the sentence of a court-martial for purposes of clemency. Such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that Military Department.



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 Boards for Correction of Military/Naval Records (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 based on 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//