

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 23 August 2024

DOCKET NUMBER: AR20230013155

APPLICANT REQUESTS: an upgrade of his bad conduct discharge.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 93 (Record of Emergency Data), 23 May 2016
- Servicemembers' Group Life Insurance 8286, 23 May 2018
- Orders 281-1302, 8 October 2019
- Two DD Forms 214 (Certificate of Release or Discharge from Active Duty), 11 October 2019
- medical documentation, 9 November 2020

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 is requesting his discharge be upgraded due to an injury he received on active duty that requires surgery. During his time as a Soldier, he maintained his military bearing and was an active participant in company activities. His injury occurred in 2015.
3. The applicant enlisted in the Regular Army on 22 April 2014, for a period of 4 years. He was not awarded a military occupational specialty.
4. Before a General Court-Martial at Fort Gordon, Georgia, adjudged on 27 February 2018, the applicant was found guilty of the following offense(s) and specification(s):
  - a. On or about 30 August 2014, with intent to deceive, make false official statements to an investigator, to wit: he did not drink or see anyone else drinking, or words to that effect, and he did not have sex with anyone, or words to that effect.

b. He failed to obey a lawful order issued by Colonel S.A.E., on or about 30 August 2014 by wrongfully consuming alcoholic beverages as an Initial Entry Training Soldier.

c. On or about 30 August 2014, he wrongfully committed indecent conduct, to wit: committing a sexual act upon Specialist T.D.S., while in the presence of a third party, such conduct being to the prejudice of good order and discipline in the Armed Forces.

d. On or about 30 August 2014, unlawfully grab the hair of Specialist T.S., with his hands.

5. The court sentenced him to confinement for 4 months and discharge from the service with a bad conduct discharge (BCD). On 8 June 2018, the sentence was approved and except for the BCD, was ordered to be executed.

6. The available record is void of the applicant's appellate review and court-martial order ordering the BCD to be duly executed.

7. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged on 11 October 2019, under the provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3 (Character of Service/Description of Separation), by result of court-martial, other, in the grade of E-1. His service was characterized as bad conduct, with separation code JJD, and reentry code 4. He completed 5 years, 2 months, and 17 days of active service, with time lost from 27 February 2018 to 29 May 2018.

8. The applicant provides:

a. His record of emergency data, servicemembers group life insurance election and certificate, and transition orders.

b. His medical record, highlighted specifically is his groin (inguinal) pain right side with an onset date of 9 September 2015, insomnia with an onset date of 27 February 2017, and unilateral inguinal hernia, without obstructions or gangrene, not specified as recurrent with an onset date of 15 September 2017. Additional medical documentation showing he was seen at the emergency room for groin pain, inguinal hernia, left and was informed to contact his primary care provider for any new or remaining problems.

9. 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.

10. Regulatory guidance provides a Soldier will receive a BCD 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.

11. In reaching its determination, the Board can consider the applicant's petition, service record, and statements in light of the published guidance on equity, injustice, or clemency.

12. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (EMR – AHLTA and/or MHS Genesis), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting an upgrade of his 11 October 2019 bad conduct characterization of service. He states through counsel:

"I request my following discharge to be upgraded on behalf of an injury during Active-Duty status that requires surgical procedures. During the time as a soldier, I've maintained military bearing and an active participant in company activities. My injury occurred 2015 until now."

c. The Record of Proceedings outlines the applicant's military service and the circumstances of the case. The applicant's DD 214 shows he entered the Regular Army on 22 April 2014 and was discharged on 11 October 2019 under the separation authority provided by chapter 3 of AR 635-200, Active Duty Enlisted Administrative Separations (19 December 2016): Court-Martial.

d. General Court-Martial Order 6 dated 8 June 2018 show the applicant both pled guilty to and was found guilty of making a false official statement in a wrongful endeavor to impede an investigation, failure to obey a lawful order by wrongfully consuming alcoholic beverages as an Initial Entry Training Soldier, wrongfully committing indecent conduct by committing a sexual act upon SPC T.D.S. while in the presence of a third party, and assaulting a fellow Soldier by unlawfully grabbing her hair.

e. The EMR shows the applicant was intermittently evaluated and treated by behavioral health providers for stress and trust issues after which he was diagnosed with adjustment disorder, unspecified; and that he was referred to and treated by the Army Substance Abuse Program (ASPA) for "Cannabis Related Disorder."

f. He was also evaluated for a right inguinal hernia (RIH) after developing right sided inguinal discomfort in September 2015. Multiple studies (MRI, CT, and ultrasound) were negative for a hernia or other pathology though the MRI may have shown mild inflammation at the origin of a tendon: "Minimal intermediate signal near the attachment of the gluteus medius and minimus tendons felt likely to represent volume averaging with normal vessels, however, minimal tendinopathy is difficult to exclude. Otherwise, unremarkable MRI of the right hip."

g. Submitted documentation in the form of patient information on inguinal hernias suggest the applicant may have been diagnosed with such a hernia in 2020.

h. JLV shows he is not registered with the VA.

i. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? While the applicant was diagnosed with adjustment disorder during his service, this condition per se is not a mitigating behavioral health condition and is only a mitigating condition when in conjunction with a diagnosed mitigating behavioral health condition such as PTSD or major depressive disorder.

(2) Did the condition exist or experience occur during military service? Yes

(3) Does the condition or experience actually excuse or mitigate the discharge? No. Adjustment disorder is not a mitigating behavioral health condition per se, and even if it were, it does not affect one's ability to differentiate right from wrong and adhere to the right and therefore could not mitigate the multiple UCMJ violations which led to his bad conduct characterization of service.

### 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 request, supporting documents, evidence in the records, and published Department of Defense guidance for liberal consideration of

discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was separated for conviction by court-martial for making a false official statement, failure to obey a lawful order, indecent conduct by committing a sexual act while in the presence of a third party, and unlawfully grabbing the hair of another Soldier with his hands. The Board found no error or injustice in the separation proceedings. The Board noted the applicant's contention that he received an injury during active duty that requires a surgical procedure; however, reviewed and concurred with the medical advisor's review finding although the applicant was diagnosed with adjustment disorder in service, that condition is not mitigating toward differentiating between right and wrong. Based on a preponderance of the evidence, the Board concluded that the characterization of service the applicant received upon separation was appropriate.

2. The applicant was given a bad conduct discharge pursuant to an approved sentence of a general 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.

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. 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. Section 1556 of Title 10, USC, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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 ABCMR applicants (and/or their counsel) prior to adjudication.
4. AR 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:
  - 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.

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 Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder (PTSD); traumatic brain injury; sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. 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.

6. 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//