

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 7 June 2024

DOCKET NUMBER: AR20230013262

APPLICANT REQUESTS:

- an upgrade of his bad conduct discharge (BCD)
- restoration of his rank/grade
- medical benefits
- disability compensation
- and retroactive pay and allowances

APPLICANT'S SUPPORTING DOCUMENT 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 (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 proudly served his country for 13 years and 9 months and had no desire to be discharged. He believes all of the accusations and charges against him stemmed from an angry and vindictive wife and her lover. His wife wanted a divorce so she could marry her new lover, who happened to be the applicant's best friend. The applicant and his wife were both serving in the Army and would deploy separately, which made it easy for affairs to exist without his knowledge.

a. His wife threatened him to give her a divorce, or else. He really wanted to work things out, but the next thing he knew, he was under investigation. He admits to having an addiction to adult pornography, but the charge of child pornography was an outrageous accusation. He would download free pornography without monitoring it and sometimes a picture or video of child pornography entered mixed in with the picture he wanted. In the investigation, the computer forensics found over 6,000 images and video porn; less than 15 of them were child pornography. He and his wife had seen them, but they were so random and rare they quickly passed them by.

b. Upon his release from prison, he returned home and became a caregiver to his grandparents. After they passed away, he had to live with his parents because he was unable to find employment with a sustainable salary.

c. He is trying to have his name removed from the Registered Sex Offender list. He has made many amends in his life, he has rid himself of addictions, and tried to become a self-conscious citizen. He was always proud of his military service. He has paid in full for his debts, and just wants to stop being punished.

3. On 25 January 2000, the applicant enlisted in the Regular Army.

4. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) for the period ending 24 June 2003, shows he was honorably released from active duty upon completion of required active service and transferred to the U.S. Army Reserve. He held the rank/grade of specialist/E-4 at the time of his release. He was credited with completion of 3 years and 5 months of active service.

5. On 26 April 2004, the applicant reenlisted in the Regular Army in the grade of E-4, the highest rank he held while serving. He served in Haiti from 18 January 2010 to 21 March 2010.

6. General Court-Martial Order (GCMO) Number 9 rendered by U.S. Combined Arms Support Command Sustainment Center of Excellence and Fort Lee, Fort Lee, VA on 8 November 2011, shows the applicant was arraigned and tried before a GCM.

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

- knowingly and wrongfully possessing 18 video files of child pornography transported in interstate commerce, and stored on a desktop computer
- knowingly and wrongfully possessing 21 picture files of child pornography transported in interstate commerce, and stored on a desktop computer
- wrongfully soliciting a Soldier to obstruct justice by destroying the accused's desktop and laptop computer hard drives during an investigation of the accused
- wrongfully watching pornographic videos in the physical presence of two children under the age of 12 years

b. The applicant was sentenced to reduction to E-1, confinement for 34 months, and to be discharged with a BCD. The sentence was adjudged on 21 July 2011.

c. The sentence was approved and, except for the part of the sentence extending to a BCD, ordered to be executed. The automatic forfeiture of all pay and allowances was

deferred effective 27 July 2011 and was terminated and waived for 6 months, with direction that the money be paid to the applicant's wife for the benefit of his dependents.

7. The applicant was confined by military authorities from 21 July 2011 to 4 June 2013.

8. GCM Order Number 17, issued by Headquarters, U.S. Fires Center of Excellence and Fort Sill, Fort Sill, OK on 1 March 2013, shows the sentence, had been finally affirmed. Article 71(c) having been complied with; the BCD was ordered to be executed.

9. On 16 May 2013, the applicant rendered a statement wherein he declined his opportunity to have a separation medical examination.

10. The applicant was discharged on 13 September 2013, under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3, as a result of court-martial. He was assigned Separation code "JJD" and Reentry code "4." His service was characterized as "Bad Conduct." He was credited with completion of 7 years, 6 months, and 4 days of active service. He had lost time due to confinement from 21 July 2011 until 4 June 2013. He held the rank/grade of private/E-1. He completed his first full term of service and was credited with continuous honorable service from 26 April 2004 until 8 December 2005. He was awarded or authorized the:

- Army Good Conduct Medal (2nd Award)
- National Defense Service Medal
- Global War on Terrorism Service Medal
- Humanitarian Service Medal
- Noncommissioned Officer Professional Development Ribbon
- Army Service Ribbon
- Overseas Service Ribbon (2nd Award)
- Army Sea Duty Ribbon

11. The applicant's record is void of evidence showing he was promoted following his reduction to E-1, effective 24 August 2011.

12. 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.

13. 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.

14. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his bad conduct discharge (BCD). He contends he experienced mental health conditions that mitigate 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 enlisted in the Regular Army on 25 January 2000; 2) On 8 November 2011, the applicant was arraigned, tried before a GCM, and found guilty of possessing child pornography, soliciting another Soldier to destroy evidence, and watching pornographic videos in the presence of children; 3) The applicant was discharged on 13 September 2013, Chapter 3, as a result of Court-Martial. His service was characterized as "Bad Conduct."

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's available military service and medical records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical information was provided by the applicant

c. The applicant asserts he experienced mental health conditions, which mitigate his misconduct. There is evidence the applicant underwent a sanity board on 15 June 2011. The results of the evaluation were not available in the electronic medical record, but the results were provided to that applicant's legal team. On 17 June 2011, the applicant underwent neuropsychological testing. He was found to have mild cognitive impairment attributed to a history of closed head injury prior to his military service. However, he was determined solely on the basis of his cognitive performance to be suitable for retention in the military. There was no other evidence the applicant reported or was diagnosed with a mental health condition while on active service.

d. A review of JLV provided in insufficient evidence the applicant has been diagnosed with a mental health condition by the VA, and he does not receive any service-connected disability for a mental health condition.

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 mental health condition 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 mental health condition 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, while on active service. In addition, there is no nexus between his reported mental health condition and his misconduct in that: 1) these types of misconduct are not a part of the natural history or sequelae of his reported mental health conditions; 2) his reported mental health conditions 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. 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 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 possessing child pornography, soliciting a Soldier to obstruct justice, and watching pornographic videos in the presence of two children under the age of 12 years old. The Board found no error or injustice in the separation proceedings. 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.

3. Additionally, the applicant requested restoration of his rank/grade, medical benefits, disability compensation, and retroactive pay and allowances, which the Board

determined based on their denial of the discharge upgrade from a bad conduct characterization of service that the requests were without merit and voted to deny relief.

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 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 the Army Review Boards Agency (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 Uniform Code of Military Justice (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.
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. 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 post-traumatic stress disorder (PTSD) criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged UOTHC 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.

8. 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 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.

9. 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//