

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 June 2024

DOCKET NUMBER: AR20230013420

APPLICANT REQUESTS: Upgrade of his bad conduct discharge (BCD) to under honorable conditions (general). Additionally, he requests a personal appearance before the Board.

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

- DD Form 149 (Application for Correction of Military Record)
- Veterans Affairs (VA) Form 21-4138 (Statement in Support of Claim)
- In-service personnel records
- Character reference letters
- Medical documents

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 he joined the Army in 1986 and honorably served through the Persian Gulf War. During his time as a drill sergeant, he was newly married. Looking back at it now, he sees that he had unresolved mental health issues from being sexually abused as a child. He made a mistake and allowed the attention of women to persuade him into cheating. At that time, he did not take his wife nor his vows seriously. His wife was not the one to turn him in. The woman he had cheated with got mad because she was not the only one he cheated with. Out of anger she turned him in. He was tried and sentenced. He feels like his punishment was a lot. He lost his career. He felt he could still be an honorable person and from that moment, he tried to make it up to his wife that he had wronged. He got employment after being released and retired from that company after 20 years. His wife passed in 2016. In 2020, he moved back [REDACTED] to be closer to his mother and help take care of her.

3. On his DD Form 149, the applicant notes other mental health issues are related to his request.

4. The applicant enlisted in the Regular Army on 23 September 1986. Upon completion of training, he was awarded military occupational specialty 88M (Motor Transport Operator). He reenlisted on 6 July 1989.
5. The applicant served in Southwest Asia from 21 October 1990 until 13 April 1991.
6. He reenlisted on 6 March 1992, 16 December 1994, and 11 September 1998. He attained the rank/grade of staff sergeant/E-6 on 1 October 1998.
7. Before a general court-martial on 22 February 2000, at Fort Bliss, TX, the applicant was found guilty of six specifications of violating a lawful general regulation; four specifications of wrongfully committing adultery with a private/E-1; one specification of wrongfully endeavoring to influence the statement of Private [REDACTED] and one specification of making a false statement.
8. The court sentenced the applicant to reduction to E-1, confinement for 36 months, and discharge from the service with a BCD. However, only so much of the sentence as provides for reduction to E-1, 30 months confinement, and a BCD was approved and, except for the part of the sentence extending to a BCD, would be executed. The sentence was approved on 18 May 2000 and the record of trial was forwarded for appellate review.
9. On 22 May 2001, the U.S. Army Court of Criminal Appeals ordered correction to General Court-Martial Order Number 23, to reflect the true proceedings at the trial. Correction was made to Specification 6 of Charge I, a finding of Not Guilty and Specification 7 of Charge II, a finding of Not Guilty.
10. General Court-Martial Order Number 13, issued by U.S. Disciplinary Barracks, U.S. Army Combined Arms Center and Fort Leavenworth, Fort Leavenworth, KS, on 18 January 2002, noted that the applicant's sentence had been affirmed and ordered the BCD to be duly executed.
11. The applicant was discharged on 16 August 2002. He was credited with 13 years, 4 months, and 17 days of net active service this period with 907 days of lost time. His DD Form 214 (Certificate of Release or Discharge from Active Duty) contains the following entries in:
 - Item 24 (Character of Service) – bad conduct
 - item 25 (Separation Authority) – AR [Army Regulation] 635-200 (Personnel Separations – Enlisted Personnel), Chapter 3, Section IV
 - item 26 (Separation Code) – JJD
 - item 27 (Reentry Code) – 4
 - item 28 (Narrative Reason for Separation) – court-martial

12. Additionally his DD Form 214 shows he was awarded or authorized the:

- Meritorious Service Medal
- Army Commendation Medal (5th Award)
- Army Achievement Medal (7th Award)
- Joint Meritorious Unit Award
- Meritorious Unit Commendation
- Army Good Conduct Medal (4th Award)
- National Defense Service Medal
- Southwest Asia Service Medal with 3 bronze service stars
- Humanitarian Service Medal (2nd Award)
- Noncommissioned Officer's Professional Development Ribbon with Numeral 2
- Army Service Ribbon
- Overseas Service Ribbon (2nd Award)
- Kuwait Liberation Medal (Kuwait)
- Kuwait Liberation Medal (Saudi Arabia)
- Expert Marksmanship Qualification Badge with Rifle Bar
- Air Assault Badge
- Driver and Mechanic Badge with Driver – Wheeled Bar
- Drill Sergeant Identification Badge
- Bronze German Army Marksmanship Badge

13. On 25 January 2024, the ABCMR staff requested that the applicant provide medical documents to support his other mental health issues. He was advised that he could contact the doctor that diagnosed him or his VA regional office for assistance. The applicant responded with various medical documents that show he has been diagnosed and received treatment for psoriasis.

14. The applicant provides ten character reference letters that collectively attest to the applicant's military achievements, leadership, and service to others. These letters are provided in their entirety for the Board's review within the supporting documents.

15. 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 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.

16. 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.

17. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to his characterization of service from bad conduct discharge (BCD) to under honorable conditions (general). He contends he experienced an undiagnosed mental health condition 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 23 September 1986, and he reenlisted on 6 July 1989 and again on 6 March 1992, 16 December 1994, and 11 September 1998.
- Before a general court-martial on 22 February 2000, the applicant was found guilty of six specifications of violating a lawful general regulation; four specifications of wrongfully committing adultery with a private/E-1; one specification of wrongfully endeavoring to influence the statement; and one specification of making a false statement. Two of the charges were corrected by the U.S. Army Court of Criminal Appeals.
- The applicant was discharged on 16 August 2002, and he was credited with 13 years, 4 months, and 17 days of net active service.

c. Review of Available Records: The Army Review Boards Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts he had unresolved mental health issues from being sexually abused as a child, which led to his misconduct of adultery with an E-1. No mental health records were provided. There was insufficient evidence that the applicant was diagnosed with any psychiatric condition while on active service.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed no history of mental health related treatment or diagnoses.

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 an undiagnosed mental health condition at the time of the misconduct. No mental health records were provided or available through JLV.

(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 while on 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:

1. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.

2. The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service to include deployment, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the applicant's mental health claim and the review and conclusions of the ARBA Behavioral Health Advisor. The Board found the letters of support provided by the applicant insufficient to support clemency. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding his misconduct not being mitigated by a mental health condition. Based on a preponderance of the evidence, the Board determined the character of service the applicant received upon separation was 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.

12/19/2024

X

CHAIRPERSON

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. Section 1556 of Title 10, U.S. Code, 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 Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

3. Army Regulation 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, Section IV provided that a member 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.

4. 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 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.

5. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Navy Records (BCM/NR), on 3 September 2014, 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.

6. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters

relating to mental health conditions, including 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 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.

7. 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, 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//