

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 August 2024

DOCKET NUMBER: AR20230013573

APPLICANT REQUESTS:

- reconsideration of his prior request for an upgrade of his bad conduct discharge
- as a new request, his retirement be restored

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) Letter, 10 November 2022
- VA Rating Decision, 8 November 2022

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:

- AR20070010655 on 29 January 2008
- AR20220006014 on 8 September 2022.

2. The applicant states he was under a lot of stress trying to keep his family together. He was a Green Beret, did not have enough money to take care of them, and he was deployed to Afghanistan for a period where he remained under stressful conditions. He was involved in an improvised explosive device (IED) blast where he witnessed a Soldier in his unit get blown up. It was horrific and he never received counseling for the event, the unit kept moving as if it never happened. To date he continues to have nightmares of body parts everywhere. He sought counseling later where he was diagnosed with post-traumatic stress disorder (PTSD).

3. The applicant provides a VA letter dated 10 November 2022 which notified the applicant of the results of his VA Rating Decision (8 November 2022). He was granted, among other ratings, 50% service connection for PTSD effective 8 February 2022.

4. A review of the applicant's service record shows: He enlisted in the Regular Army on 8 November 1983. He served through multiple reenlistments in a variety of stateside or overseas assignments, and he attained the rank of sergeant first class/E-7.

5. His DA Form 2-1 (Personnel Qualification Record – Part II) shows his foreign service includes:

- Korea – 13 August 1986 to 7 August 1987
- Italy – 3 September 1990 to 20 August 1991
- Saudi Arabia – 28 April 1991 to 19 July 1991
- Germany – 27 August 1996 to 27 August 1998
- Hungary – 6 March 1997 to 20 May 1997 (temporary change of station)

6. On 21 May 2002, he was convicted by a general court-martial of:

- Charge I, one specification of falsifying official documents with the intent to deceive
- Charge II, one specification of larceny of U.S. currency of a value greater than \$100, U.S. Government property between on or about February 1997 and August 1998
- Charge III, one specification of larceny of U.S. currency of a value greater than \$100, U.S. Government property between on or about September 1998 and November 2001

The court sentenced him to reduction to the grade of private/E-1, confinement for 1 year, and a bad conduct discharge.

7. On 23 July 2002, the convening authority approved so much of the sentence as provides for reduction to the grade of E-1; confinement for 6 months; and except for the bad conduct discharge, ordered it executed. The record of trial was forwarded to the Judge Advocate General of the Army for appellate review.

8. General Court-Martial Order Number 235, dated 27 August 2003, after Article 71(c) was complied with and the sentence was affirmed, ordered the bad conduct discharge executed.

9. On 2 January 2004, he was discharged from active duty with a bad conduct discharge. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of chapter 3 of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations). He completed 19 years, 9 months, and 3 days of active service with 142 days of lost time. He was assigned separation code JJD and the narrative reason for separation listed as "Court-Martial, Other," with reentry code 4. It also shows he was awarded or authorized:

- Meritorious Service Medal
- Army Commendation Medal (2nd Award)
- Army Achievement Medal (2nd Award)
- Army Good Conduct Medal (5th Award)
- Joint Meritorious Unit Award
- National Defense Service Medal
- Southwest Asia Service Medal with one bronze service star
- Armed Forces Service Medal
- Military Outstanding Volunteer Service Medal
- Noncommissioned Officers Professional Development Ribbon (Advanced Level)
- Army Service Ribbon
- Overseas Service Ribbon (3rd Award)
- North Atlantic Treaty Organization (NATO) Medal
- Expert Marksmanship Qualification Badge with Rifle Bar (M-16)
- Air Assault Badge
- Driver and Mechanic Badge with Wheeled Vehicle Clasp
- Driver and Mechanic Badge with Mechanic Clasp

10. . His DD Form 214 listed his continuous honorable service and immediate reenlistments.

11. On 29 January 2008, the ABCMR rendered a decision in Docket Number AR20070010655. The Board the applicant was divorced in 1992. At that time he was no longer entitled to receipt of full basic allowance for housing (BAH) with dependents. He may not have realized what he was or was not entitled to at that time; however, in 1998 he clearly knew he was not entitled to the BAH at the married rate and yet still submitted information to the finance office that indicated he was married. He compounded his offense through his continued submission of false statements through two duty station transfers when he continued to report his status as married. Defrauding the government of over \$30,000.00 is not a minor or insignificant act. Further, this was not a single occurrence but a recurring one that lasted for between 3 and 9 years. Aside from his own assertion, there is no available evidence that the applicant actually used the wrongfully received BAH for his children's welfare. There is no available evidence that he has, in fact, repaid the monies to the Government. The Board denied his request.

12. On 8 September 2022, the ABCMR rendered a decision in Docket Number AR20220006014. The Board found based upon the criminal nature of the misconduct and the large dollar amount involved, as well as a lack of any post-board character evidence submitted by the applicant showing he has grown from the time of the misconduct, the Board concluded there was insufficient evidence of an error or injustice

warranting any clemency. As a result, the Board recommended denying the applicant's requested relief.

13. By regulation (AR 635-200), a member 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.

14. 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.

15. 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.

16. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting reconsideration of an upgrade to his characterization of service from bad conduct discharge (BCD) to under honorable conditions (general). He is also requesting that his retirement be restored. He contends he experienced an undiagnosed 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 8 November 1983.
- The applicant was convicted by a general court-martial of one specification of falsifying official documents with the intent to deceive, one specification of larceny of U.S. currency of a value greater than \$100, U.S. Government property between on or about February 1997 and August 1998, and one specification of larceny of U.S. currency of a value greater than \$100, U.S. Government property between on or about September 1998 and November 2001. Essentially, the applicant repeatedly indicated he was married and collected BAH after being divorced in 1992.
- The applicant was discharged on 2 January 2004 and completed 19 years, 9 months, and 3 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 he was under financial stress in caring for his family and that he deployed to Afghanistan where he was involved in an IED explosion and witnessed a soldier being blown up. He still has nightmares about the event and stated he has been diagnosed with PTSD. The application included a VA Decision Letter dated 10 November 2022 indicating that the applicant is 50% service connected for PTSD and has a combined rating of 80%. Documentation also shows duty in imminent danger pay areas of Saudi Arabia and Hungary. 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 no history of mental health related treatment or diagnoses.

e. A review of the Initial Posttraumatic Stress Disorder (PTSD) Disability Benefits Questionnaire (DBQ) dated 30 August 2022 showed that the applicant endorsed the requisite number of symptom criteria for a diagnosis of PTSD, and he reported an event involving a blast that happened to him and killed a fellow soldier. The documentation indicated he had no prior mental health treatment or diagnoses. He also indicated symptoms of anxiety, low mood, and difficulty in establishing and maintaining relationships.

f. 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.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts he had undiagnosed PTSD at the time of the misconduct. There were no mental health records from his time in service, but he provided a VA Decision letter and a DBQ was reviewed, which showed a diagnosis of PTSD with service connection of 50%.

(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. A review of military medical and mental health records revealed no documentation of any mental health condition(s) while on active service. The applicant was diagnosed with PTSD by the VA in 2022, but there is no evidence of any mental health treatment. Additionally, there is no nexus between his diagnosis of PTSD and his misconduct related to falsifying documents and larceny: 1) these types of misconduct are not part of the natural history or sequelae of a mental health condition, including PTSD; 2) his

asserted mental health condition does not affect one's ability to distinguish right from wrong and act in accordance with the right.

h. However, the applicant contends he was experiencing PTSD 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.

a. Discharge Upgrade: Deny. The evidence shows the applicant was found guilty and was convicted by court martial for violating the UCMJ for larceny and falsifying official documents. The court sentenced him to reduction to the grade of E-1, confinement for 1 year, and separation from service with a bad conduct discharge. the finding of guilty and the sentence were affirmed, and the sentence of a bad conduct discharge was ordered duly executed. The applicant's conviction and discharge were conducted in accordance with applicable laws and regulations and the discharge appropriately characterizes the misconduct for which he was convicted. The appellate review was completed, and the affirmed sentence was ordered duly executed. The Board found no error or injustice in his separation processing. 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 that the applicant had a condition or experience that mitigates his misconduct. 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.

b. Retirement: Deny. The applicant completed 19 years, 9 months, and 3 days of active service with 142 days of lost time. He did not qualify for length of service retirement. His own misconduct led to his court-martial conviction and subsequent discharge. The Board also found no error or injustice regarding this issue.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
█	█	█	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. Regarding the issue being reconsidered (discharge upgrade), 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 AR20070010655 on 29 January 2008 and in Docket Number AR20220006014 on 8 September 2022.

2. Regarding the new issue (retirement), 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. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a (Honorable discharge) states an honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of the acceptable conduct and performance of duty for Army personnel, or is otherwise so meritorious that any other characterization would be clearly inappropriate.

b. Paragraph 3-7b (General discharge) states a general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Paragraph 3-7c (Under Other Than Honorable Conditions) states 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, fraudulent entry, homosexuality, security reasons, or for the good of the service.

d. Paragraph 3-11 (DD Form 259A (Bad Conduct Discharge Certificate) states a member 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.

2. 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.

3. 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.



4. 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.

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 (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.

6. 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//