

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 2 August 2024

DOCKET NUMBER: AR20230013617

APPLICANT REQUESTS: reconsideration of his previous request for an upgrade of his characterization of service from bad conduct to honorable.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States), 15 August 2023

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20160015890 on 19 March 2019.
2. The applicant states before his deployment to Iraq, his performance as a Soldier was outstanding and although Desert Storm was a short war it left some terminal damage to his mental state. There was not a day that he did not think he was going to die.
 - a. After his deployment, he would put on a facade in front of everyone, he was stressed and depressed, and lost not knowing where to go for help, or someone who he could talk to about his experience. He suffered thoughts of suicide and was hiding from his feelings of shame and humility. Many nights of not sleeping, dealing with the fear of what he now knows to be post-traumatic stress disorder (PTSD).
 - b. He loved the military and if he could go back in time, he would change and undo the past. He asks the Board to consider his application and upgrade his discharge to a level of honor which would merit him to receive partial, if not full, benefits for his service as a Soldier.
3. The applicant enlisted in the Regular Army on 25 August 1983, for a period of 3 years. He subsequently reenlisted on 19 June 1986, and on 27 June 1991 for 3-years.
4. He served in Saudi-Arabia from 24 December 1990 to 3 May 1991.

5. General Court Martial Order Number 33, issued by Headquarters, Fort Carson, Colorado, shows:

a. On 8 September 1994, he was arraigned, tried, and found guilty of the following:

- failure to repair
- absent without leave (AWOL)
- unauthorized absence
- two specifications of failure to obey lawful commands
- wrongful use of cocaine
- possession with intent to distribute
- larceny in excess of \$100.00
- two specifications of forgery

b. He was sentenced to reduction to private/E-1, confinement for 4 years, and to be discharged from the Army with a bad-conduct discharge. The sentence was adjudged on 21 July 1994.

c. The sentence was approved on 8 September 1994 and the record of trial was forwarded to the Judge Advocate General of the Army for appellate review.

6. The findings and sentence were affirmed; however, the appellate review is not available for review.

7. General Court-Martial Order Number 45, issued by the U.S. Disciplinary Barracks, U.S. Army Combined Arms Center, Fort Leavenworth, KS on 25 April 1996, noted the applicant's sentence had been affirmed, and ordered the bad conduct discharge to be duly executed.

8. The applicant was discharged on 31 May 1996, under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), paragraph 3-11, as a result of court-martial - other, in the grade of E-1. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms his characterization of service was bad conduct, with separation code JJD and reenlistment code RE-4. He was credited with 10 years, 8 months, and 12 days of active service. He had three periods of lost time. He was awarded or authorized the following decorations, medals, badges, citations, and campaigns:

- Good Conduct Medal
- National Defense Service Medal
- Army Achievement Medal (5th oak leaf cluster)
- Southwest Asia Service Medal with 3 Bronze Service Stars
- Noncommissioned Professional Development Ribbon (level 2)

- Army Service Ribbon
- Kuwait Liberation Medal
- Overseas Service Ribbon
- Army Superior Unit Award

9. On 19 March 2019, the ABCMR denied his request for discharge upgrade, stating the evidence presented did not demonstrate the existence of a probable error or injustice. The Board determined the overall merits of the case were insufficient as a basis for correction of the applicant's record.

10. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, U.S. Code (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.

11. The Board should consider the applicant's argument and/or evidence in accordance with the published equity, injustice, or clemency determination guidance.

12. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR for reconsideration of his previous request for an upgrade of his characterization of service from bad conduct to honorable. He contends he experienced Posttraumatic Stress Disorder (PTSD) that mitigates his misconduct. The applicant's previous consideration by the ABCMR is summarized in Docket Number AR20160015890 dated 19 March 2019. 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 (RA) on 25 August 1983 and re-enlisted twice, 2) he served in Saudia Arabia from 24 December 1990 to 03 May 1991, 3) a General Court Martial dated 08 September 1994 shows the applicant was found guilty of failure to repair, absent without leave (AWOL), unauthorized absence, two specifications of failure to obey lawful commands, wrongful use of cocaine, possession with intent to distribute, larceny in excess of \$100.00, and two specifications of forgery. The applicant was sentenced to confinement for four years. 4) the applicant was discharged on 31 May 1996 under the provisions of Army Regulation (AR) 635-200, paragraph 3-11, as a result of court-martial-other, 5) during his time in service he was awarded several medals, awards and ribbons, most notably to include the Good Conduct Medal, Army Achievement Medal (5th oak leaf cluster), Southwest Asia Service Medal with 3 Bronze Service Stars, and the Kuwait Liberation Medal.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. The electronic military medical record (AHLTA) was not reviewed as it was not in use during the applicant's time in service. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. The applicant's Report of Medical Examination for enlistment dated 03 February 1983 documented item number 42, psychiatric, as 'normal.' Per review of JLV, the applicant had several visits in 1996 while in confinement at Ft. Leavenworth for physical health reasons. No in-service BH-related records were available for review.

d. Review of the applicant's service record documented on DD Form 1966/6 shows the applicant received a Moral Waiver for retail theft and running a red light which resulted in his paying fines for those transgressions. He also had a number of charges that were dismissed to include grand theft burglary, assault, and conspiracy trespassing. Review of the applicant's available Enlisted Evaluation Reports from 1987 through 1993 largely demonstrate a Soldier who took initiative, was reliable, and worked well with little supervision. An evaluation dated 17 May 1990 documented that the applicant often required supervision to accomplish his assigned tasks, set a poor example for Soldiers by complaining about unit missions, did not ensure Soldiers were properly trained, failed to maintain accurate accountability, reprimanded for failure to maintain work area in an orderly fashion.

d. A review of JLV shows the applicant is not service-connected through the VA for any conditions. There are VA records in JLV from 21 February 2023 through 16 August 2023 showing the applicant attended psychoeducational groups with the HealthCare for Veterans Re-Entry (HVRC) program at the Moore Haven Correctional Institute to learn about the HVRC program.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient medical documentation available that the applicant had a condition or experience during his time in service that mitigated his misconduct. However, he contends his misconduct was related to PTSD, and, per liberal guidance, his assertion is sufficient to warrant the Board's consideration.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant contends his misconduct was related to PTSD.

(2) Did the condition exist or experience occur during military service? Yes, per the applicant's assertion.

(3) Does the condition experience actually excuse or mitigate the discharge? Partially. The applicant's records were void of any BH diagnosis or treatment history and he provided no medical documentation supporting his assertion of PTSD. However, he contends his misconduct was related to PTSD, and, per liberal guidance, his assertion is sufficient to warrant the Board's consideration. Despite a lack of medical evidence, a review of the applicant's military service record reflects an overall high-performing Soldier with no indication of in-service misconduct prior to his deployment to Saudi Arabia. As such, the Agency's BH/Medical Advisor can reasonably conclude that there was a change in the applicant's following his return from Saudia Arabia. Per Liberal Guidance, a change in behavior is considered as possible evidence of a mental health condition and would otherwise provide a basis of support for medical mitigation. Specific to the misconduct that resulted in the applicant's discharge, there is an association between avoidance, irritability, and self-medicating with substances with failure to repair, unauthorized absence, AWOL, failure to obey lawful commands, and wrongful use of cocaine. Therefore, there is a nexus between PTSD symptoms and some of the circumstances that led to his discharge. However, possession with the intent to distribute, larceny and forgery are not part of the natural history and sequelae associated with PTSD as PTSD does not interfere with one's ability to distinguish between right and wrong and act in accordance with the right. As such, BH medical mitigation is partially supported.

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 being absent without leave, failing to report to duty, disobeying a lawful command on two occasions. The Board found no error or injustice in the separation proceedings. The Board noted and concurred with the medical advisor's review finding insufficient evidence to support the applicant having a condition that existed at the time of service. 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 amendment of the ABCMR decision rendered in Docket Number AR20160015890 on 19 March 2019.

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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. 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 Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

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. Army Regulation 635-200, in effect at the time, provides for the orderly administrative separation of Soldiers in a variety of circumstances.

a. Chapter 3 provides guidance and information on the information as it relates to the character of service and the description of separation. Characterization at separation will be based upon the quality of the Soldier's service, including the reason for the separation and guidance, subject to the limitations under the various reasons for separation. Paragraph 3-7 addresses characterization of service as follows:

(1) Honorable discharge is appropriate when the quality of the Soldier's service 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. An honorable discharge may be furnished when disqualifying entries in the Soldier's military record are outweighed by subsequent honest and faithful service over a greater period during the current term of service. It is a pattern of behavior and not the isolated incident that should be considered the governing factor in determination of character of service.

(2) General discharge is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge. A characterization of under honorable conditions may be issued only when the reason for the member's separation specifically allows such characterization. It will not be issued to members

upon separation at expiration of their period of enlistment, military service obligation, or period for which called or ordered to Active Duty.

(3) Under other than honorable conditions discharge is an administrative separation from the Service. It may be issued for misconduct, fraudulent entry, homosexual conduct, security reasons, or for the good of service in the following circumstances when the reason for separation is based on a pattern of behavior that constitutes a significant departure from the conduct expected of Soldiers of the Army. In addition, 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 is another valid circumstance. Some examples provided by the regulation are disregard by a superior or customary superior-subordinate relationships. An under other than honorable conditions discharge will be directed by a commander exercising general court-martial authority.

b. Paragraph 3-11 states a member will be given a bad conduct discharge pursuant only to an approved sentence of a general court-martial or special 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.

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 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 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.

5. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and Service 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//