

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 August 2024

DOCKET NUMBER: AR20230013723

APPLICANT REQUESTS: an upgrade of his characterization of service from bad conduct, and award of any awards or medals he earned.

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

- DD Form 149 (Application for Correction of Military Record), 8 August 2023
- self-authored statement
- Medical Documentation, Progress Notes, 6 April 2020, 12 May 2020, 21 December 2022, and 20 January 2023

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 suffers from attention deficit disorder and anxiety, which went undiagnosed for most of his life. He additionally suffered from substance abuse during his time in service and there was no opportunity for treatment.

a. Since his separation, he attended college and graduated with a bachelor's degree in business administration with concentrations in sports management and marketing. He was on the football team, cheer squad, in student government, students in free enterprise, and served as treasurer and in the sports management club as the president.

b. He has been a contributing member of society, where he held steady employment for over 15 years, he volunteered for youth sports in his community, and started his own business.

c. He has been diagnosed with anxiety and attention deficit/hyperactivity disorder, and now takes medication for his symptoms. He believes his undiagnosed disorders are what contributed to his discharge. He also was addicted to illegal substances following a

deployment from 2001 to 2002. Treatment was never offered to him, which led to his downward spiral while in the military; however, he has been drug free for over 20 years.

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

4. The applicant enlisted in the Regular Army on 22 September 1999, for a 4-year period. He was awarded the military occupational specialty of 11B (Infantryman) and the highest rank he attained was private/E-2.

5. Court-martial charges were preferred against the applicant for violations of the Uniform Code of Military Justice; however, the relevant DD Form 458 (Charge Sheet) is not available for review.

6. Special Court Martial Order Number 21, issued by Headquarters, 1st Armored Division, on 16 November 2002 shows:

a. He was found guilty of the following charges:

- Charge I: one specification of absenting himself without authority on or about 17 June 2001 and remaining absent until on or about 28 September 2001
- Charge II, two specifications of disobeying a lawful command on or about 18 January 2002 and on or about 20 January 2002
- Charge III, one specification of assaulting another Soldier on or about 31 December 2001
- Charge IV, one specification of wrongfully using psylocybin mushrooms on or about 8 April 2001 and one specification of wrongfully possessing about 1.3 grams of psylocybin mushrooms on or about 8 April 2001
- Charge V, one specification of unlawfully pushing another Soldier on or about 31 December 2001
- Charge VI, one specification of wrongfully communicating a threat to another Soldier

b. He was sentenced to confinement for 110 days and discharge from the service with a bad conduct discharge (BCD), which was adjudged on 16 April 2002.

c. The sentence was approved, and the record of trial was forwarded to the U.S. Court of Criminal Appeals for appellate review.

7. The appellate review is not available for review in the applicant's official military personnel file.

8. Special Court-Martial Order Number 117, issued by Headquarters, U.S. Army Armor Center and Fort Knox, on 3 June 2004, shows the sentence was finally affirmed, the provisions of Article 71(c) had been complied with, and the sentence was ordered duly executed.

9. The applicant was discharged on 16 July 2004, under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3, by reason of court-martial, in the grade of E-1. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms his service was characterized as bad conduct with separation code JJD and reentry code 4. He was credited with 4 years, 7 months, and 25 days of net active service. He had lost time from 16 April 2002 to 14 June 2002. He also had excess leave of 758 days from 20 June 2002 to 16 July 2004.

10. The applicant additionally provides medical documentation with progress notes from his provider, which shows he was diagnosed with anxiety and the medications he receives for his diagnosis of his anxiety disorder.

11. 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.

12. 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.

13. 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.

14. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to his bad conduct discharge (BCD) characterization of service. 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 on 22 September 1999.

- The applicant was found guilty on 16 November 2022 by a Special Court Martial of the following: AWOL from 17 June 2001 to 28 September 2001; disobeying a lawful command; assaulting another soldier; wrongfully possessing and using psilocybin mushrooms; unlawfully pushing another soldier; and wrongfully communicating a threat to another soldier.
- The applicant was discharged on 16 July 2004 and was credited with 4 years, 7 months, and 25 days of net 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 using addictive illegal substances post-deployment for most of 2001 and 2002, and that treatment options were not offered to him. He stated he has been diagnosed with Anxiety since 2010 and has used medication for treatment. He also indicated he has been diagnosed and treated for ADHD over the past year, and he believes these diagnoses are contributing factors to some of his actions during his enlistment. The application included a medical note by a primary care physician dated 6 April 2020, which showed a diagnosis of Anxiety and prescription for an antidepressant (commonly used for anxiety) and an anxiolytic. There was a follow up progress note dated 12 May 2020, which indicated the applicant's anxiety was improving. A third note dated 21 December 2022 showed that the applicant reported a history of AHD diagnosis in college and was having more difficulty with concentration. His primary care provider initiated a trial of a stimulant medication, and he was seen again on 20 January 2023, which noted improvement with the medication. There was insufficient evidence that the applicant was diagnosed with a 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. He provided records from 2020 to 2023 from his primary care provider indicating diagnosis and treatment for Anxiety and ADHD.

(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, and he attributed his addiction to illegal substances to post-deployment. However, the service records did not indicate a history of deployment, and the applicant did not report a specific traumatic event.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There were no medical or mental health records from the applicant's time in service, but he did provide evidence of diagnosis and treatment of Anxiety in 2020 through 2023. Avoidance strategies, such as substance use and going AWOL, can be a natural sequelae to mental health conditions associated with exposure to traumatic or stressful events. However, there is insufficient evidence to demonstrate a nexus between his substance use and trauma exposure.

g. 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. 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 applicant's trial by a court-martial was warranted by the gravity of the offenses charged (absenting himself without authority, disobeying a lawful command, assaulting another Soldier, wrongfully using psilocybin mushrooms, unlawfully pushing another Soldier, and wrongfully communicating a threat to another Soldier).

a. 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. He was given a bad conduct discharge pursuant to an approved sentence of a 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. The Board found no error or injustice in his separation processing.

b. 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.

2. Prior to closing the case, the Board did note the analyst of record administrative notes below, and recommended the correction is completed to more accurately depict the military service of the applicant.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

Except for the correction addressed in Administrative Note(s) below, 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.

ADMINISTRATIVE NOTE(S): a review of the applicant's record shows his DD Form 214 is missing important entries. Amend the applicant's DD Form 214 to add:

- Item 11 (Primary Specialty) – 11B10, Infantryman, 2 years, 3 months
- Item 13 (Decorations, Medals, Badges, Citations and Campaign Ribbons awarded or authorized) – Army Service Ribbon

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, 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.

3. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Chapter 3 provided that an enlisted person would be given a bad conduct discharge 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.

b. 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.

c. 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.

4. 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.

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//