

IN THE CASE OF: [REDACTED]

BOARD DATE: 15 August 2024

DOCKET NUMBER: AR20230014254

APPLICANT REQUESTS:

- an upgrade of his bad conduct discharge
- a video/telephonic appearance before the Board

APPLICANT'S SUPPORTING DOCUMENT(S) 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, 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 prior to his time in the Regular Army, he served honorably in the U.S. Army Reserve (USAR) from 18 December 2001 to 14 September 2004. He additionally states that he has held a stable job, been a contributing member of society, and put two of his children through college with a third on the way. He is seeking clemency for his special court-martial conviction. In his application, he also selected post-traumatic stress disorder (PTSD) and other mental health issues are related to his request.
3. A review of the applicant's service record shows:
 - a. He enlisted in the USAR on 23 August 1999 for a term of 8 years.
 - b. On 11 May 2000, he was ordered to initial active duty for training (IADT).
 - c. He was released from IADT on 15 September 2000, with uncharacterized service. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 4 months and 5 days of active service.
 - d. He enlisted in the Regular Army on 18 December 2001.

e. Special Court-Martial Orders Number 11, issued by Headquarters, V Corps, on 9 July 2004, states that the applicant was arraigned on one charge with 22 specifications of violating Article 121 (Larceny) of the Uniform Code of Military Justice (UCMJ). He pleaded not guilty to the charge and its specifications, but guilty to the lesser-included offense of wrongful appropriation. The 22 specifications of wrongful appropriation were between on or about 6 May 2003 and between on or about 29 August 2003, in amounts less than \$600.00, the property of Armed Forces Bank, Targa, and the Army Air Force Exchange Service (AAFES). He was found guilty of the charge and its specifications and was sentenced to confinement for 6 months and to be discharged with a bad conduct discharge.

f. On 21 March 2005, the United States Army Court of Criminal Appeals considered the applicant's entire record and held the findings of guilty and the sentence as approved by the convening authority correct in law and fact.

g. He was discharged from active duty on 10 February 2006, with a bad conduct character of service. His DD Form 214 shows he completed 3 years, 8 months and 23 days of active service.

4. On 19 March 2024, Case Management Division (CMD) sent a request to the applicant to provide the supporting evidence listed in Section 4 (Evidence, records, and Additional Remarks) of his DD Form 149 dated 25 September 2023. The applicant's case was placed on hold for 21 days from the date of the letter to allow him the opportunity to respond. He failed to provide any documentation in support of his request.

5. On 18 March 2020, the Army Discharge Review Board denied the applicant's request to upgrade his characterization of service from bad conduct to under honorable conditions (general), upon finding the separation was both proper and equitable.

6. By regulation, AR 635-200, in effect at the time, states a Soldier 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.

7. 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, including 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 U.S. Army Reserves on 23 August 1999 and was ordered to IADT on 11 May 2000. He enlisted into the Regular Army on 18 December 2001.
- The applicant was found guilty on 9 July 2004 by Special Court-Martial of 22 specifications of wrongful appropriation (a lesser charge of larceny), which occurred between on or about 6 May 2003 and between on or about 29 August 2003, and in amounts less than \$600.00. He was confined from 16 March 2004 until 16 August 2004.
- The applicant was discharged on 10 February 2006 and completed 3 years, 8 months and 23 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 indicated undiagnosed mental health condition and PTSD as factors related to his misconduct. There were no medical or mental health records included in the application. 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 the applicant made a call to the Veterans Crisis Line on 27 September 2023 seeking mental health services and indicated that "ignoring his mental health problems has gotten him into some trouble." He was seen for an initial evaluation on 6 December 2023, and he reported symptoms of depression, anxiety, mood swings, intrusive memories, heightened startle response, and sleep difficulty. He reported trauma exposure while working as a military police officer (witnessing death of an infant) and in combat in Iraq (reported seven months in 2002). He was diagnosed with PTSD associated with childhood trauma as well as military-related trauma, and he was prescribed an antidepressant medication and referred to the PTSD program. Documentation from the initial evaluation for the PTSD program dated 28 February 2024 showed that the applicant indicated childhood history of trauma as the most distressing experiences, and his score on a PTSD screener was subthreshold and mild in severity for PTSD. Documentation also discussed continued legal problems with larceny charges in 2022, and marital problems associated with his impulsive sexual behaviors. He reported a history of individual and marital counseling, life coaching, and medication management. Cognitive processing therapy, an evidence-based PTSD treatment, was indicated, but the applicant missed his first appointment and then was determined to be ineligible for VA care.

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, including PTSD, at the time of the misconduct. There were no in-service medical or mental health records provided, and the only mental health records obtained were through JLV, which showed a diagnosis of PTSD in 2023 associated primarily with childhood trauma.

(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. Additionally, there is no nexus between his asserted mental health condition, including PTSD, and his misconduct related to larceny or wrongful appropriation: 1) these types of misconduct are not part of the natural history or sequelae of a mental health condition; 2) his asserted mental health condition does not affect one's ability to distinguish right from wrong and act in accordance with the right.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined it could reach a fair and equitable outcome without a personal appearance by the applicant.

The Board also determined relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the multiple criminal offenses leading to the applicant's separation and the lack of mitigation found in the medical review, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant's characterization of service.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

1. 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.
2. Prior to closing the case, the Board did note the administrative note below from the analyst of record and recommended that change be completed to more accurately reflect the military service of the applicant.

2/5/2025

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.

ADMINISTRATIVE NOTE: A review of the applicant's records shows an erroneous entry in item 24 (Character of Service) of his DD Form 214 for the period ending 15 September 2000. As a result, correct this DD Form 214 to show his character of service as honorable.

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. Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations) sets forth the basic authority for the separation of enlisted personnel.

a. Chapter 3 states a Soldier will be given a bad conduct discharge pursuant only to an approved sentence of a general or a special court-martial. The appellate review must be completed, and the affirmed sentence 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.

d. 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, homosexual conduct, security reasons, or in lieu of trial by court martial in the following circumstances:

(1) When the reason for separation is based upon a pattern of behavior that constitutes a significant departure from the conduct expected of soldiers of the Army.

(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:

- (a) Use of force or violence to produce serious bodily injury or death.
- (b) Abuse of a position of trust.
- (c) Disregard by a superior of customary superior-subordinate relationships.
- (d) Acts or omissions that endanger the security of the United States or the health and welfare of other soldiers of the Army.

(e) Deliberate acts or omissions that seriously endanger the health and safety of other persons.

3. AR 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

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. 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.

6. 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.

7. 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.

//NOTHING FOLLOWS//