

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 August 2024

DOCKET NUMBER: AR20230014719

APPLICANT REQUESTS: an upgrade of her bad conduct discharge.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)

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, at the age of ten, she was assaulted by her uncle which she never understood and received help. From that time on, she tried seeking attention from men and women that she had experienced trauma (post-traumatic stress disorder (PTSD)). She joined the military to experience a better life for herself as she did not have the best family environment. While in the military, seeking attention, she would present herself as a man (Transgender). Further seeking attention, she took things that were not hers, mainly someone's debit card. She would take small things even though she did not need them. Recently, she has come to realize that the behavior was that of a Kleptomaniac. Kleptomania is a mental health disorder, "repeatedly being unable to resist urges to steal items that you generally don't really need." She could have purchased items that she took.
3. The applicant marked "Transgender" on her application but did not provide medical or other documents regarding gender reassignment. She also annotated PTSD was an issue/condition related to her request.
4. A review of the applicant's service records show:
 - a. She enlisted in the Regular Army on 27 February 1996.

b. On 24 September 1996, the applicant was convicted by a general court-martial of:

(1) Charge II, Article 121, Plea: Guilty. Finding: Guilty.

- Specification 1: Larceny of an automated teller machine card, of some value, on or about 2 June 1996. Plea: Guilty. Finding: Guilty.
- Specification 2: Larceny of U.S. currency, of a value of \$500.00, on or about 2 June 1996. Plea: Guilty. Finding: Guilty.
- Specification 3: Larceny of U.S. currency, of a value of \$500.00, on or about 3 June 1996. Plea: Guilty. finding: Guilty.

(2) Additional Charge. Article 121. Plea: Guilty. Finding: Guilty. Specification: Larceny of AAFES merchandise, of a value of about \$548.00, on or about 7 August 1996. Plea: Guilty. Finding: Guilty.

c. The court sentenced her to forfeiture of all pay and allowances, confinement for 180 months, reduction to E-1, and to be discharged from the service with a bad conduct discharge.

d. On 18 December 1996, the convening authority approved the adjudged sentence and except for the portion of the sentence extending to a bad conduct discharge, ordered the sentence executed.

e. On 6 June 1997, the U.S. Army Court of Criminal Appeals affirmed the findings of guilty and the sentence.

f. General Court-Martial Order Number 220, issued by Headquarters, U.S. Army Field Artillery Center, Fort Sill, OK on 11 September 1997, shows the appellate review had been completed, the sentence has been finally affirmed. Article 71(c) having been complied with, and the Bad-Conduct Discharge will be executed.

g. The applicant was discharged on 8 October 1997. Her DD Form 214 (Certificate of Release or Discharge from Active Duty) shows she was discharged as a result of court-martial conviction in accordance with Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 3, with a bad conduct discharge. She completed 1 year, 2 months, and 13 days of active service, and she had lost time from 24 September 1996 to 19 February 1997 and excess leave from 24 February 1997 to 8 October 1997.

5. By regulation (AR 635-200), 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.

6. In reaching its determination, the Board can consider the applicant's petition and her service record in accordance with the published equity, injustice, or clemency determination guidance.

7. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of her bad conduct discharge (BCD). She contends she experienced mental health conditions including PTSD and discrimination related to being transgender that mitigates her misconduct. 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 on 27 February 1996; 2) On 24 September 1996, the applicant was convicted by a general court-martial of multiple specifications of larceny; 3) The applicant was discharged on 8 October 1997, Chapter 3-as a result of court-martial conviction with a bad conduct discharge.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's available military service records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical records were provided.

c. The applicant asserts she experienced PTSD as the result of childhood trauma and also experienced kleptomania while on active service, which mitigate her misconduct. In addition, she indicated on her application that negative experiences related to being transgender were associated with her request for an upgrade. There is insufficient evidence the applicant reported or was diagnosed with a mental health condition including PTSD while on active service. There is also insufficient evidence the applicant reported or was identified as being transgender during her active service.

d. A review of JLV provided insufficient evidence the applicant has been diagnosed with a mental health condition including PTSD by the VA. She has received assistance for homelessness. There is also insufficient evidence the applicant has reported to the VA she identifies as a transgender or non-binary individual.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a condition or experience that mitigates her misconduct.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant asserts she experienced a mental health condition including PTSD while on active service that mitigates her misconduct. She also reported experiencing kleptomania while on active service, which mitigates her misconduct.

Lastly on her application, she indicated that she had negative experiences related to being transgender.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts she experienced a mental health condition including PTSD while on active service that mitigates her misconduct. She also reported experiencing kleptomania while on active service, which mitigates her misconduct. Lastly on her application, she indicated that she had negative experiences related to being transgender.

(3) Does the condition experience actually excuse or mitigate the misconduct? No, there is insufficient evidence beyond self-report the applicant experiencing a mental health condition including PTSD, while on active service. Also, there is insufficient evidence the applicant experienced discrimination associated with her gender identity. There is no nexus between her reported gender identity, mental health conditions including PTSD and her misconduct of multiple instances of larceny: 1) this type of misconduct is not a part of the natural history or sequelae of reported mental health condition including PTSD; 2) Her reported mental health conditions including PTSD do not affect one's ability to distinguish right from wrong and act in accordance with the right. While those who have been formally diagnosed with kleptomania do experience problems with theft, the applicant was not formally diagnosed with this condition, and the presence of misconduct is not sufficient evidence of a mental health condition. However, the applicant contends she was experiencing a mental health condition or an experience that mitigated her misconduct, and per Liberal Consideration her 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 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 larceny. The Board found no error or injustice in the separation proceedings. Based on a preponderance of the evidence, the Board concluded that the characterization of service the applicant received upon separation was appropriate. The Board noted the applicant's contention of childhood post-traumatic stress disorder; however, reviewed and concurred with the medical advisor's review finding insufficient evidence she was experiencing a mental health condition while on active service.

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 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. 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 635-200 (Personnel Separations – Enlisted Personnel) provides for the separation of enlisted personnel:

a. Paragraph 3-7a provides that 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. Paragraph 3-7b provides that 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. Paragraph 3-7c 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, security reasons, or for the good of service in selected circumstances.

d. Paragraph 3-11 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.

3. 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 Uniform Code of Military Justice, 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 Uniform Code of Military Justice 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.

4. 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 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.

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 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; TBI; sexual assault; sexual harassment. Boards were directed to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part to 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 that misconduct which led to the discharge.

6. 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. 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. 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.

7. 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//