

IN THE CASE OF: [REDACTED]

BOARD DATE: 13 August 2024

DOCKET NUMBER: AR20230014834

APPLICANT REQUESTS: reconsideration of his previous request for an upgrade of his dishonorable discharge to honorable. Additionally, he requests a personal appearance before the Board.

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

- letter, Request for Reconsideration, dated 12 October 2023
- Standard Form (SF) 600 (Health Record – Chronological Record of Medical Care), dated 5 July 1989
- memorandum, Department of Veterans Affairs (VA), dated 9 March 2023

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous considerations of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Dockets Number AR20210014808 on 5 May 2022 and AR20230000166 on 21 July 2023.

2. As a new argument, the applicant states the Board erred and came to a flawed decision in deciding not to upgrade his discharge.

a. The Board did not obtain documents to support his request which were in their possession, and they had access to. There was an incident in Alaska, which he participated in, that caused his post-traumatic stress disorder (PTSD).

b. The Board did not cite any medical literature or evidence that contradicts what a person with PTSD does or whether any of its Board members are in the medical field of psychology or psychiatry. The New England Journal of Medicine and the Mental Society of doctors have repeatedly written and stated that there is no “one way” that all individuals with PTSD behave. This alone is a reversible error that should be grounds for an upgrade.

c. He enclosed a medical document, dated 5 July 1989, wherein the psychologist diagnosed him with issues. He was only in the office for less than five minutes and was

misdiagnosed. This is a common occurrence, and this Board has previously overturned, reversed, or upgraded servicemembers' discharges.

3. The applicant enlisted in the Regular Army on 17 November 1983. Upon completion of initial entry training, he was awarded military occupational specialty 76Y (Unit Supply Specialist). He reenlisted on 14 November 1986 and 14 July 1988. The highest rank he attained was specialist/E-4.

4. An SF 600, dated 5 July 1989, shows the applicant was referred to mental health services by his first sergeant. The evaluating provider noted a diagnosis of "occupational problems" and returned the applicant to duty.

5. Before a general court-martial on 22 May 1990, at Fort Wainwright, AK, the applicant was found guilty of rape, sodomy with force and without consent, burglary, and wrongfully communicating a threat, on 16 February 1990. The court sentenced him to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for eight years, and discharge from the service with a dishonorable discharge. The sentence was approved on 27 September 1990, and the record of trial was forwarded for appellate review.

6. The U.S. Army Court of Military Review affirmed the findings of guilty and the sentence on 20 December 1991.

7. The U.S. Court of Military Appeals denied the applicant's petition for review of the decision of the U.S. Army Court of Military Review on 17 August 1992.

8. General Court-Martial Order Number 164, issued by the U.S. Disciplinary Barracks, U.S. Army Combined Arms Command, Fort Leavenworth, KS on 4 March 1993, noted the applicant's sentence had been affirmed and ordered the dishonorable discharge duly executed.

9. The applicant was discharged on 23 April 1993, under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), by reason of court-martial, other. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms his dishonorable character of service, with separation code JJD and reentry code RE-4. He was credited with 7 years and 6 months of net active service, with lost time from 17 February 1990 to 22 February 1990, 22 May 1990 to 13 July 1991, and lost time after normal expiration term of service from 14 July 1991 to 23 April 1993. He was awarded or authorized the:

- Army Good Conduct Medal (2nd award)
- Noncommissioned Officers Professional Development Ribbon
- Army Service Ribbon

- Overseas Service Ribbon
- Driver/Mechanic Badge

10. The ABCMR reviewed the applicant's request for an upgrade of his dishonorable discharge, on 5 May 2022. After careful consideration, the Board determined that based upon the seriousness and criminal nature of the offenses leading to the applicant's separation and the evidence showing all appellate rights were afforded, there was insufficient evidence of an error or injustice warranting a change to his characterization of service. The Board denied his request.

11. The applicant requested reconsideration of his request for an upgrade, along with a new request for restoration of his rank, time in service, and all lost pay. The Board reviewed his request on 21 July 2023.

a. In the processing of the case, an advisory opinion was provided by the Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor. The BH Advisor opined that the applicant's misconduct was not natural sequelae of PTSD. The applicant's service record was void of a BH diagnosis or treatment during service. There was evidence that the applicant had a condition or experience during his time in service. Post-service records show he has a 100 percent (%) service-connected disability rating for PTSD. However, the condition did not mitigate his misconduct.

b. The Board carefully considered the applicant's request, evidence of record, and the published Department of Defense liberal consideration guidance. There was no supporting evidence the applicant witnessed or was involved in a plane crash. Nor was there a nexus between the characteristics of PTSD and the applicant's misconduct. The Board determined the character of service received was not in error or unjust and denied the applicant's request for relief.

12. The applicant provides a memorandum from the VA, dated 9 March 2023, wherein it shows the applicant claimed he participated in the clean-up of a plane crash at Fort Wainwright, AK. The applicant was assigned a VA rating for PTSD, granting "reasonable doubt" for participation in the clean-up.

13. 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.

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

15. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting reconsideration of his previous request for an upgrade of his dishonorable discharge to honorable. He contends he experienced PTSD that mitigates his 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 17 November 1983; 2) Before a general court-martial on 22 May 1990, the applicant was found guilty of rape, sodomy with force and without consent, burglary, and wrongfully communicating a threat; 3) The applicant was discharged on 23 April 1993, by reason of court-martial with a dishonorable character of service; 4) The ABCMR reviewed and denied the applicant's request for an upgrade of his dishonorable discharge on 5 May 2022 and 21 July 2023.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's available military service and medical records. The VA's Joint Legacy Viewer (JLV), military medical documentation provided by the applicant, and VA documentation provided by the applicant were also examined.

c. The applicant asserts he experienced PTSD, which mitigate his misconduct. There is insufficient evidence the applicant reported or was diagnosed with a mental health condition including PTSD while on active service. He did provide a handwritten SF 600, dated 05 July 1989, which demonstrated the applicant was referred to mental health services by his first sergeant. The evaluating provider provided the diagnosis of occupational problems and returned the applicant to duty.

d. A review of JLV provided sufficient evidence the applicant has been diagnosed with service-connected PTSD by the VA as a result of being exposed to a potentially traumatic military accident. He is currently 100% SC for PTSD, and he is engaged in behavioral health treatment for the condition.

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 his misconduct.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant asserts he experienced PTSD while on active service

that mitigates his misconduct. In addition, he has been diagnosed with service-connected PTSD by the VA.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced PTSD while on active service that mitigates his misconduct. In addition, he has been diagnosed with service-connected PTSD by the VA.

(3) Does the condition experience actually excuse or mitigate the misconduct? No, there is sufficient evidence beyond self-report the applicant experiencing PTSD, while on active service. However, there is no nexus between his diagnosis of service-connected PTSD and his misconduct of rape, sodomy with force and without consent, burglary, and wrongfully communicating a threat: 1) these types of misconduct are not a part of the natural history or sequelae of PTSD; 2) PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing a mental health condition or an experience that mitigates 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 record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a condition or experience that mitigates his misconduct.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant asserts he experienced PTSD while on active service that mitigates his misconduct. In addition, he has been diagnosed with service-connected PTSD by the VA.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced PTSD while on active service that mitigates his

misconduct. In addition, he has been diagnosed with service-connected PTSD by the VA.

(3) Does the condition experience actually excuse or mitigate the misconduct? No, there is sufficient evidence beyond self-report the applicant experiencing PTSD, while on active service. However, there is no nexus between his diagnosis of service-connected PTSD and his misconduct of rape, sodomy with force and without consent, burglary, and wrongfully communicating a threat: 1) these types of misconduct are not a part of the natural history or sequelae of PTSD; 2) PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing a mental health condition or an experience that mitigates his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

2. The Board determined that reconsideration of the applicant's discharge upgrade is not warranted. The applicant was convicted by court-martial for serious misconduct, that included rape, sodomy with force and without consent, burglary, and wrongfully communicating a threat. These offenses reflect a grave and sustained disregard for military standards and values. The applicant asserts that he suffered from Post-Traumatic Stress Disorder (PTSD), which should be considered a mitigating factor. However, the Board determined there is insufficient documentation confirming that the applicant reported or was diagnosed with PTSD or any mental health condition while on active duty. The only relevant record is a handwritten SF 600 dated 5 July 1989, which confirms referral to mental health services by the applicant's first sergeant. The evaluating provider at that time diagnosed "occupational problems" and returned the applicant to duty, with no indication of a behavioral health disorder.

3. The Board acknowledged, while there is some evidence beyond self-report that the applicant may have experienced PTSD during his time in service, the Board found no nexus between any behavioral health diagnosis and the nature of the misconduct. The opine noted the offenses committed are not characteristic manifestations or recognized sequelae of PTSD. The Board agreed that PTSD does not impair one's ability to distinguish right from wrong or act in accordance with recognized moral and legal standards. Furthermore, the applicant provided no post-service achievements or character references for the Board to consider in evaluating a request for clemency. Without mitigating medical evidence or compelling post-service conduct, the Board concluded that the seriousness and nature of the misconduct preclude an upgrade to the applicant's discharge. Therefore, the request for reconsideration is denied.

4. The applicant’s request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board found 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 AR20210014808 on 5 May 2022 and AR20230000166 on 21 July 2023.

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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.

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. 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 regulation provides that the ABCMR may, in its discretion, hold a hearing. 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.

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

a. Paragraph 3-7a provided 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 provided 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. 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.

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 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. 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.

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//