

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 17 September 2024

DOCKET NUMBER: AR20240000655

APPLICANT REQUESTS: his bad conduct discharge (BCD) be upgraded. Additionally, he requests an appearance before the Board via video/telephone.

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Statement
- Enlisted Record Brief (ERB)
- Certificate
- Service Medical Document
- Department of Veterans Affairs (DVA) Statement in Support of Claim Letter (DT\_\_)
- DVA Letter

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 due to the recent change in policies regarding post-traumatic stress disorder (PTSD), a case can be made in his situation that his discharge was mischaracterized. He was raised in foster care. He was taken away from his mother a bipolar, mentally ill, drug addict. Because of a traumatic brain injury (TBI) suffered at the hands of his emotionally unstable mother his life has been a roller coaster of homes and strangers throughout his life. The correction should be made due to the Secretary of Defense Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming PTSD. The applicant lists PTSD and TBI as related to his request.

a. In his letter, he states his foster family was half decent. The applicant became a substance abuser and got into trouble with law enforcement; however, he completed college and had no friends or family guidance. He joined the Army. The rigors of his

training, long work hours coupled with extensive isolation and exposure to war like conditions and field exercise resulted in the resurfacing of his alcohol and drug addiction issues.

b. As a result of his undiagnosed PTSD, he spiraled out of control and withdrew from his unit and his obligations to the Army. He failed to report to duty after Christmas leave and never returned, while he holed up in is off-base housing doing drugs and alcohol. While he believes his punishment was fair and proper, he believes that his discharge was unjust, and he was not provided any counseling or evaluation for his PTSD.

c. Post service, the applicant volunteers. His combat military occupational specialty (MOS) triggered his PTSD which was left undiagnosed and has still yet to be fully addressed.

3. The applicant provides a DVA Statement in Support of Claim letter from the applicant's spouse, DT\_\_, which states prior to joining the Army the applicant was full of love and happiness and loved to laugh and have a good time. His training sessions sent him into a deeper depression. His social drinking began to turn into abuse of alcohol and marijuana. He became distant and had no desire to go out and do anything with the family. Eventually he began to miss duty, which led to his absence and ultimately, his being confined. He became paranoid of other people and loud noises. She is aware the applicant comes from a family with a history of mental illness.

4. The applicant enlisted in the Regular Army on 23 February 2011. His MOS was 13B (Cannon Crewmember).

5. The applicant was reported as absent without leave (AWOL) on 9 January 2012 and dropped from the rolls as a deserter on 9 February 2012.

6. The applicant surrendered to military authorities on 10 April 2013, returned to military control and was present for duty on 10 April 2013.

7. On 18 October 2013, the applicant was convicted by a general court martial that convened at Lewis-McChord of the following charges:

- Charge I: one specification of wrongful use of marijuana between on or about 10 March 2013 and on or about 10 April 2013
- Charge II: one specification of being AWOL from on or about 9 January 2012 until on or about 10 April 2013

8. The court sentenced him to reduction to private/E-1, confinement for 100 days, and to be discharged from the service with a bad conduct discharge. The convening authority disapproved any confinement in excess of six months

9. The applicant was confined by military authorities on 18 October 2013 as a result of court martial. The applicant was present for duty. He completed his sentence to confinement, date signed 8 January 2014.

10. General Court-Martial Order Number 208, dated 10 July 2015, issued by Headquarters, U.S. Army Fires Center of Excellence, Fort Sill, OK, shows the sentence having been complied with, the bad conduct discharge was ordered to be duly executed.

10. The applicant was discharged on 13 August 2015. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of Army Regulation (AR) 635-200 (Active-Duty Administrative Separations), Chapter 3, as a result of court-martial, other with Separation Code JJD and Reentry Code 4. His service was characterized as bad conduct. He completed 3 years and 3 days of net active service this period. He lost time from 9 January 2012 to 9 April 2013, and from 18 October 2013 to 4 January 2014. He was awarded or authorized the National Defense Service Medal, Global War on Terrorism Service Medal, and the Army Service Ribbon.

11. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

12. The applicant provides:

a. ERB discussed above and a service certificate for honor graduate dated 14 June 2011.

b. DVA letter, dated 30 June 2017, shows the applicant's available records indicate his discharge from the service was under other than honorable conditions. As a result, he is not eligible for enrollment or for VA health care.

c. A medical document shows psychiatric diagnosis or condition deferred on Axis I.

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

14. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his bad conduct discharge (BCD). He contends he experienced a Traumatic Brain Injury (TBI) and 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 23 February 2011; 2) A general court-martial adjudged on 18 October 2013 found the applicant guilty of wrongful use of marijuana and being AWOL from 9 January 2012-10 April 2013; 3) The applicant was discharged on 13 August 2015, Chapter 3, as a result of court-martial, other. His service was characterized as bad conduct.

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

c. The applicant asserts he experienced a TBI and PTSD while on active service, which mitigates his misconduct. He contends he experienced trauma and TBI prior to his enlistment, which impacted his mental health and behavior during his active service. There is evidence the applicant reported to ASAP on 30 November 2011 as a self-referred appointment. He described experiencing depressive symptoms for several months, and he was drinking more heavily in response. He was seen again on 13 December 2011, and he reported a low level of clinical distress, but he did report difficulty adjusting to the military. There is insufficient evidence the applicant was diagnosed with a mental health or substance abuse disorder while on active service.

d. A review of JLV provided evidence the applicant attempted to engage with the VA starting in 2019, but he has not been diagnosed with a mental health condition. However, he has received assistance for homelessness.

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 a TBI and PTSD which mitigates his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced a TBI and PTSD while on active service, which mitigates his misconduct.

(3) Does the condition experience actually excuse or mitigate the misconduct? No, there is insufficient evidence beyond self-report the applicant was diagnosed with a TBI or PTSD, while he was on active service. There is some evidence the applicant was reporting some depressive symptoms and increased alcohol use while on active service, but there is insufficient evidence that he met full criteria for a mental health condition including PTSD or had evidence of a TBI. The applicant did go AWOL and used illegal drugs, which could be avoidant behavior and a natural sequelae to a TBI and PTSD. However, the presence of misconduct and some report of depressive symptoms is not sufficient evidence of the presence of PTSD or TBI. Yet, the applicant contends he was experiencing a mental health condition and TBI that mitigates his misconduct, and per Liberal Consideration his contention alone is sufficient for the board's consideration.

#### BOARD DISCUSSION:

1. The Board determined 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.
2. 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 offense charged (wrongful possession of drugs and AWOL). 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. 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 finding insufficient evidence to support the applicant had a behavioral health condition/diagnosis during his time in military service. 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 evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

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 (USC), 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.

3. Army Regulation 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.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. 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. Army Regulation 635-200 (Active-Duty Administrative Separations) sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

a. 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. 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 BCD 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.

5. 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.

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 Service

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 (TBI); 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 to those conditions or experiences.

7. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and BCM/NRs on 25 July 2018, 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 court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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, Boards 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//