

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 October 2024

DOCKET NUMBER: AR20240001402

APPLICANT REQUESTS:

- an upgrade of his bad conduct discharge to under honorable conditions (General) or honorable
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- official college transcript

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 it has been over 14 years since his discharge and he has been struggling to adapt back to society. He was diagnosed with post-traumatic stress disorder (PTSD), bipolar, and schizophrenia during his time in the Army. He was seen by a doctor and treated for mental health issues during his incarceration at Fort Knox, KY. He suffered because of his inappropriate relationship with his superior officer, and he was penalized. The applicant had pay issues and decided to discuss this matter with his chain of command. He waited by his first sergeant's office; however, the first sergeant was not in the office. Shortly thereafter, he saw the first sergeant in a truck with another sergeant. The first sergeant saw the applicant looking at him. The first sergeant eventually returned to the office, but was acting weird. The applicant asked to meet with someone regarding his pay issues; but was told his paperwork was lost. He was in college when he joined the Army with high hopes for his future. He feels he can possibly correct his wrongs if he had access to the necessary medication and benefits.
3. The applicant enlisted in the Army National Guard on 19 January 2007.

4. A DD Form 220 (Active Duty Report) shows he entered active duty on 3 June 2007 for completion of basic combat training.
5. He entered active duty on 8 January 2008, for the purpose of completing advanced individual training. However, his service record shows he was not awarded a military occupational specialty.
6. On 29 February 2008, the applicant was reported as absent without leave (AWOL) and remained absent until he returned to military authorities on 1 April 2008.
7. On 5 April 2008, the applicant was reported AWOL a second time, and remained absent until he returned to military authorities on 10 June 2008.
8. On 8 July 2008, the applicant was reported AWOL a third time, and remained absent until he returned to military authorities on 22 July 2008.
9. Before a general court-martial on 12 September 2008, at Fort Lee, VA, the applicant was found guilty of three specifications of going AWOL on between February 2008, and July 2008; one specification of striking a noncommissioned officer, on or about 5 July 2008; and one specification of resisting arrest on an undetermined date.
10. The court sentenced the applicant to reduction to E-1, five months confinement, and to be discharged from the service with a BCD. The sentence was approved on 26 September 2008, and the record of trial was forwarded for appellate review.
11. The U.S. Army Court of Criminal Appeals affirmed the findings and sentence on 15 April 2010.
12. General Court-Martial Order Number 13, issued by Headquarters, U.S. Army Accessions Command and Fort Knox, Fort Knox, KY, on 23 July 2010, noted the applicant's sentence had been affirmed and ordered the BCD to be duly executed.
13. The applicant was discharged on 11 February 2011. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3, by reason of court-martial. His service was characterized as bad conduct. He was assigned Separation Code JJD and Reentry Code 4. He was credited with 2 years, 7 months, and 2 days of active service with 184 days of lost time.
14. The applicant provides his official transcript, which shows he was attending college prior to his enlistment in the Army.

15. On 27 June 2024, the ABCMR staff requested that the applicant provide medical documents to support his other mental health issues. He was advised that he could contact the doctor that diagnosed him or his Veterans Affairs regional office for assistance. He did not respond.

16. 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.

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

18. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his bad conduct discharge (BCD) to under honorable conditions (general) or honorable, based on disability. The applicant selected PTSD and OMH on his application as related to his request.

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 in the Army National Guard on 19 January 2007.
- DD Form 220 (Active Duty Report) shows he entered active duty on 3 June 2007 for completion of basic combat training.
- He entered active duty on 8 January 2008, for the purpose of completing advanced individual training. However, his service record shows he was not awarded a military occupational specialty.
- On 29 February 2008, the applicant was reported as absent without leave (AWOL) and remained absent until he returned to military authorities on 1 April 2008.
- On 5 April 2008, the applicant was reported AWOL a second time and remained absent until he returned to military authorities on 10 June 2008.
- On 8 July 2008, the applicant was reported AWOL a third time and remained absent until he returned to military authorities on 22 July 2008.
- Before a general court-martial on 12 September 2008, at Fort Lee, VA, the applicant was found guilty of three specifications of going AWOL on between February 2008, and July 2008; one specification of striking a noncommissioned

officer, on or about 5 July 2008; and one specification of resisting arrest on an undetermined date.

- Applicant was discharged on 11 February 2011. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3, by reason of court-martial. His service was characterized as bad conduct. He was assigned Separation Code JJD and Reentry Code 4.

c. Review of Available Records: The Army Review Board Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant states, "it has been over 14 years since his discharge, and he has been struggling to adapt back to society. He was diagnosed with post-traumatic stress disorder (PTSD), bipolar, and schizophrenia during his time in the Army. He was seen by a doctor and treated for mental health issues during his incarceration at Fort Knox, KY. He suffered because of his inappropriate relationship with his superior officer, and he was penalized. The applicant had pay issues and decided to discuss this matter with his chain of command. He waited by his first sergeant's office; however, the first sergeant was not in the office. Shortly thereafter, he saw the first sergeant in a truck with another sergeant. The first sergeant saw the applicant looking at him. The first sergeant eventually returned to the office but was acting weird. The applicant asked to meet with someone regarding his pay issues; but was told his paperwork was lost. He was in college when he joined the Army with high hopes for his future. He feels he can possibly correct his wrongs if he had access to the necessary medication and benefits."

d. Contrary to the applicant's assertion of being diagnosed with PTSD, Bipolar Disorder and Schizophrenia, the active-duty electronic medical record available for review shows on 5 November 2008 the applicant underwent a mental health evaluation while in confinement. The note for the evaluation indicates the applicant had not participated in prior behavioral health services and there were no records to review. However, the applicant was diagnosed with Anxiety Disorder and Insomnia due to stress apparently related to his incarceration.

e. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is not service connected. No VA electronic medical records were available for review, and he did not submit any medical documentation post-military service substantiating his assertion of PTSD and OMH. On 27 June 2024, an ARBA staff member from the Case Management Division requested the applicant provide medical documentation supporting his contention of OMH and PTSD; no response was provided.

f. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a behavioral health condition during military service that mitigates his discharge. In

addition, there is no evidence the applicant failed the medical retention standards of AR 40-501, chapter 3, Standards of Medical Fitness, prior to his separation. Based on the documentation available for review, there is no indication that an omission or error occurred that would warrant a referral to the IDES process. In summary, his separation process appears proper, equitable and free of error, and insufficient new evidence has been provided to determine otherwise.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant selected PTSD and OMH on his application.

(2) Did the condition exist or experience occur during military service? Yes. The applicant had no prior behavioral health treatment history but was diagnosed with Anxiety Disorder and Insomnia related to his incarceration.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant was diagnosed with Anxiety Disorder, NOS, and Insomnia related to his incarceration. The one-time encounter in the record indicates he had no prior history of behavioral health services, and his symptoms appeared related to the consequences of his misconduct. Overall, the applicant is not service-connected and there are no VA electronic records indicating he has been treated for PTSD or any other mental health condition. In addition, there is no evidence of any post-service behavioral health treatment substantiating his assertion. However, regardless of diagnosis, his more serious offense of striking a noncommissioned officer and resisting arrest would not be mitigated by his asserted condition.

h. Per Liberal Consideration, the applicant's selection of PTSD and OMH on his application is sufficient to warrant consideration by the Board.

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 general court-martial for being absent without leave (AWOL) from 29 February 2008 to 1 April 2008, 5 April 2008 to 10 June 2008, and from 8 July 2008 to 22 July 2008. Additionally, the

applicant was convicted by general court-martial of striking a noncommissioned officer in the body with his open hands, and resisting arrest. 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.

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.

3. 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:

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.

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. Title 10, U.S. Code, Section 1556, 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 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR.
 - a. Paragraph 2-9 states the ABCMR begins its consideration of each case with the presumption of administrative regularity. 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 Enlisted 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, Section IV provided that a member 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, 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.

6. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Navy Records (BCM/NR), on 3 September 2014, 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.

7. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating 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 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.

8. 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, 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//