

IN THE CASE OF: [REDACTED]

BOARD DATE: 21 October 2024

DOCKET NUMBER: AR20240002324

APPLICANT REQUESTS:

- upgrade of his dishonorable discharge to an honorable discharge
- his narrative reason for separation be amended to reflect "Secretarial Authority"

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Counsel Brief and 13 Exhibits (190 pages)

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. On behalf of the applicant, counsel provides a brief and 13 exhibits, all of which are available in their entirety for the Board's consideration. Counsel states, in part, the applicant entered the Army as a healthy young man eager to serve; he reenlisted three times during his military career, with his most recent reenlistment extending indefinitely into the future. The applicant quickly proved to be a promising Soldier, earning "success" or "excellence" on every performance evaluation metric from January 2002 through May 2013. The applicant was continually recommended for promotion, earning the rank/grade of sergeant first class (SFC)/E-7 in 2008. The applicant deployed to Bosnia, Kosovo, and twice to Iraq.

a. The applicant was injured during a field training exercise in Hohenfels, Germany in 2001. This injury worsened during his deployment to Iraq but did not interfere with his duty performance. After his return home, several medical examinations determined that the applicant had facet arthropathy, resulting in him being assigned a permanent level-3 (P3) profile; his commander recommended that he be retained and reclassified to a different military occupational specialty (MOS).

b. The applicant's injuries and his subsequent post-traumatic stress disorder (PTSD) diagnosis led to several recommendations for him to be considered by a Medical Evaluation Board (MEB). Court-martial charges were imposed upon the applicant and his MEB process was placed on hold pending completion of the court-martial action. In February and April of 2014, the applicant participated in a deer hunt and a turkey hunt. Each event was intended for wounded warriors/Purple Heart recipients; the applicant was awarded a Purple Heart in 2008 and met this requirement at the time of the hunts.

c. Unbeknownst to the applicant at the time, and despite the general officer signing off on his 2013 court-martial for larceny, the applicant's MEB process had yet to be reinitiated. The applicant discovered this fact in July 2014. The applicant's court-martial resulted in his reduction in rank/grade to specialist (SPC)/E-4 and a \$1,600.00 forfeiture of pay. While waiting to restart his MEB, the applicant learned of additional charges against him. His second court-martial arose from a complaint that "he had not been punished enough," which the applicant believes his ex-wife engineered. The second court-martial alleged that he had "obtained services under false pretenses" by attending those hunting events intended for Purple Heart recipients. His court-martial concluded in January 2015, the same month his Purple Heart was revoked. Despite persistent pleas and appeals, the applicant was sentenced to reduction from SPC/E-4 to private (PV1)/E-1, 120 days confinement, forfeiture of all benefits, and a dishonorable discharge.

d. The Secretary of the Army may correct military records when it is "necessary to correct an error or remove an injustice." Army Regulation 15-185 (ABCMR) provides that for relief to be granted, an applicant must demonstrate the existence of an error or injustice that can be remedied effectively by correcting an applicant's military record. Here, the applicant seeks to correct the discretionary error in canceling his MEB and proceeding with court-martial separation. The applicant also seeks to remove the injustice this error has imposed on his post-military life. This request falls squarely within the jurisdiction of this Honorable Board.

e. Due to the severe implications a dishonorable discharge can have in civilian life and the errors made in determining such a discharge was appropriate, the applicant respectfully requests that the 3-year statute of limitations for applying to the Board be waived in the interest of justice.

f. It is respectfully submitted that the U.S. Army made a material error in discretion when it discharged the applicant before completing an MEB. The applicant was in the process of obtaining a medical retirement due to a back injury that he incurred during training in Germany, which was exacerbated during his deployment in Iraq; the applicant was also diagnosed with PTSD upon his return from Iraq.

g. His MEB was delayed while a court-martial was conducted. This initial court-martial required four U.S. Army Criminal Investigation Division (CID) investigations before probable cause of misconduct could be established. After this court-martial concluded and the applicant had served his punishments, his MEB was not reinitiated, and subsequent charges were brought against him. These subsequent charges stemmed from a complaint that the applicant wasn't "punished enough" and allege the applicant "obtained services under false pretenses" by participating in hunting events designated for Purple Heart recipients. However, the applicant received a Purple Heart 6 years prior, in July 2008; this award was not revoked/rescinded until after his courts martial concluded in January 2015.

h. Although the court determined the applicant was improperly awarded the Purple Heart, the applicant had a good-faith belief that he earned the Purple Heart and was justified to attend the hunting events; if his award was improper, then he could have been notified of such impropriety when the secretary of the Army was reviewing and approving his award, or anytime during the 6 years prior to the hunting events he attended. If the applicant had known he was not permitted to attend these hunts, he simply would not have attended them and the basis for his second court-martial would have been vitiated.

i. Furthermore, if the applicant had been given the opportunity to complete his MEB and serve the remaining 2 months and 20 days of his service obligation rather than discharge and confinement, the applicant likely would have received a medical retirement without issue. He would still be justly punished by retiring as a SPC/E-4 rather than an SFC/E-7 and having his Purple Heart revoked. Instead, the Army erroneously determined it necessary to strip him of all promotions and benefits, then confine him for a period longer than what would have been necessary to meet the 20-year requirement for retirement (120 days of confinement, compared to 80 days to reach retirement). This is clearly a discretionary error that needs correction by this Honorable Board.

j. It is respectfully submitted that the discretionary error of the U.S. Army has resulted in ongoing injustice to the applicant. The applicant was an exemplary Soldier, earning several awards and scoring "success" or "excellence" on every performance evaluation metric before CID's investigations in November 2013. Despite the short-term drop in his evaluations, the applicant recovered the following year, maxing out his academic evaluation in December 2014. He served his country through four deployments, eagerly reenlisted at the end of each service obligation, and was determined to be "a great asset to the Army" by his first sergeant and an MOS/Medical Retention Board (MMRB).

k. The applicant deserves to reflect on his service with pride, share his stories without guilt or shame, and enjoy his retirement in peace. Unfortunately, the punitive

effects of his discharge continue to restrict him from doing just that. After separation and while appealing his court martial ruling, the applicant began searching for other jobs. Having been stripped of all benefits and having his reputation stained, the applicant found himself starting his career over. He applied to over 100 positions, looking for a job in purchasing so that he could use his bachelor's degree in business administration; however, he was unable to secure employment due to his physical infirmities (hearing loss, back pain, depression, and PTSD) and his dishonorable characterization of service.

l. Office of the Under Secretary of Defense Memorandum for Secretaries of the Military Departments, Subject: Clarifying Guidance to Military Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment, dated 25 August 2017 (referred to as the Kurta Memo) clarified and expanded guidance on whether a veteran's mental health condition(s) might mitigate the circumstances that led to the veteran's discharge; this memo serves to address the "invisible wounds" suffered by veterans. The memo states the following: "Invisible wounds, however, are some of the most difficult cases they (the BCM/NRs and the DRBs) review, and there are frequently limited records for the boards to consider (often through no fault of the Veteran). In resolving appeals for relief, standards of review should rightly consider the unique nature of these cases and afford the reasonable opportunity for relief even if...the mental health condition was not diagnosed until years later." To this end, the Kurta Memo established the following four (4) questions that are to be considered in discharge relief:

(1) Did the veteran have a condition or experience that may excuse or mitigate the discharge?

(2) Did the condition exist/experience occur during the military service?

(3) Does that condition or experience excuse or mitigate the discharge?

(4) Does that condition or experience outweigh the discharge? See Id. In the instant case, the Applicant was diagnosed with PTSD and was prescribed medication(s) to mitigate his symptoms.

m. The applicant's mental health should have been considered under the Kurta Memo's guidance that "liberal consideration will be given 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." If the applicant's PTSD had been evaluated during an MEB, then the applicant's discharge would have been excused in lieu of retirement or medical separation. Additionally, the hardship he faces after separation would have

been significantly mitigated by his access to Department of Veterans Affairs (VA) treatment and ongoing support from his peers. The applicant's condition(s) outweigh his being stripped of all promotions and benefits and having nothing to show for his 19-year career besides a stained reputation.

n. The applicant provides through counsel:

(1) Exhibit 1 - DD Form 214 (Certificate of Release or Discharge from Active Duty), Enlisted Record Brief, and documentation for awards and decorations.

(2) Exhibit 2 - Permanent Order 026-14 issued by U.S. Army Human Resources Command (USAHRC), Fort Knox, KY on 7 July 2008, show the applicant was awarded the Purple Heart for wounds received as a result of hostile actions on 6 April 2004. Permanent Order 026-14 issued by USAHRC, Fort Knox, KY on 26 January 2015, show the order awarding the applicant the Purple Heart were revoked.

(3) Exhibit 3 - Documents for the applicant's three immediate reenlistments in 2001, 2004, and 2007, respectively.

(4) Exhibit 4 - 13 DA Forms 2166-8 (Noncommissioned Officer Evaluation Report (NCOER)) which show the applicant's rating officials rendered favorable comments and ratings for his performance and potential for the period from January 2002 through May 2013 and very unfavorable comments and ratings for the period from June 2013 through November 2013. DA Forms 1059 (Service School Academic Evaluation Report) show he successfully completed the requirements for five service schools.

(5) Exhibit 5 - Summary of MMRB, dated 1 November 2005, which shows the applicant was injured during a field exercise in Hohenfels, Germany, in 2001 when he suffered a fall off a 5-ton truck and landed on metal tent poles which were lying on the ground. He received physical therapy treatments with no improvement. He deployed to Iraq with his unit and during his deployment, his back worsened but never interfered with his duty performance. Several medical examinations determined that the applicant had facet arthropathy in his lower back and resulted in a P3 profile being assigned. His first sergeant felt the applicant would be a great asset to the Army in another MOS. The MMRB members all agreed that he should be reclassified to a different MOS. The applicant was willing to remain in the Army in another MOS.

(6) Exhibit 6 - A Psychology Follow-Up Note, dated 2 May 2013, shows the applicant reported being anxious about his current situation at work and the unknown status of his military career. He also reported having ongoing legal problems with his ex-wife as well as under addressed combat-related PTSD symptoms from his past

deployments. He also reported being diagnosed with sleep apnea and utilizing a continuous positive airway pressure (CPAP) machine for approximately 2 years.

(7) Exhibit 7 - DA Forms 3349 (Physical Profile) and documents from his military medical treatment record which show, in part, he was assigned permanent profiles limiting his functional activity as a result of experiencing: back pain, PTSD, bilateral hearing loss, sleep apnea, arm pain, and shoulder/wrist/elbow pain.

(8) Exhibit 8 - A U.S. Court of Appeals for the Armed Forces (USCAAF) Supplement to Petition for Grant of Review in the case of the U.S. versus [the applicant] shows the applicant's counsel submitted an appeal following his court-martial conviction to determine whether the evidence was legally sufficient to support the findings of guilty for Specifications 2 and 3 of Charge III from his trial that was conducted on 20 November 2014, and 15, 20-21 January 2015. On 13 December 2016, on consideration of the entire record, the U.S. Army Court of Criminal Appeals (USACCA) held the findings of guilty and sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence were affirmed. The applicant's counsel respectfully requested the USCAAF review the findings of the USACCA.

(9) Exhibit 9 - Notes from a follow-up medical consultation the applicant had on 8 July 2014. It was noted the consultation was Operation Iraqi Freedom/Operation Enduring Freedom related. The applicant reported severe depressive and anxiety symptoms. He stated that the General signed off on his court-martial, but his MEB had not been re-instated. His administrative separation flag had been revoked and new flag for "adverse action" had been implemented due to a Congressional Inquiry stating that the "Army didn't punish me enough of my crimes." The applicant stated that he believed his ex-wife filed the inquiry against him. He stated that he felt like a "walking duck waiting to be shot down." He felt that there was a "conspiracy" against him, although he had no idea why he was being targeted. He stated that it was difficult to trust anyone in uniform at that point, and that every day he went to work with "dread, not knowing what's waiting for me." He stated that his main goal was to leave the Army "peacefully." Doctor [REDACTED] had re-submitted an MEB packet based on the patient's diagnosis of PTSD and Major Depressive Disorder (MDD).

(10) Exhibit 10 - On 28 May 2015, the applicant underwent a mental health follow-up for PTSD at the Mental Health Clinic at Joint Base San Antonio Military Treatment Facility, TX. It was noted the applicant was previously being treated by Behavioral Health at Fort Sam Houston, TX for PTSD and MDD and was in an MEB until he encountered serious legal trouble in 2013. His legal issues began back in 2005 when he received a company grade nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for forgery. He then underwent four CID investigations from 2009-2013; three of which turned up nothing.

But, in November 2013, he was court-martialed for larceny. As part of his punishment, he was reduced from SFC/E-7 to SPC/E-4 and fined \$1,600.00. While he was awaiting the restart of his MEB, which had been suspended while the court-martial proceeded, he learned that further charges were being filed and he would undergo a second court-martial. In that court-martial, he was convicted of falsifying official documents wherein he reportedly claimed a Purple Heart which had not been awarded and attended a hunting trip on the basis of that Purple Heart. His second court-martial was completed in January 2015 and as punishment he received reduction to PV1/E-1, forfeiture of all pay and benefits, a dishonorable discharge, and 120 days confinement.

(11) Exhibit 11 - The applicant's counsel submitted an appeal to the USACCA wherein they argued the evidence was legally and factually insufficient to sustain a conviction for Specifications 2 and 3 of Charge III in the case of the U.S. versus [the applicant] from his trial that was conducted on 20 November 2014, and 15, 20-21 January 2015. On 13 December 2016. The Government respectfully requested the USACCA affirm the findings and sentence as approved by the convening authority.

(12) Exhibit 12 - Orders 146-1308 issued by Headquarters U.S. Army Garrison, Fort Sill, Fort Sill, OK on 26 May 2017 show the applicant was to be discharged from the Regular Army in the rank/grade of PV1/E1 on 26 May 2017.

(13) Exhibit 13 - The Kurta Memo.

3. On 15 July 1997, the applicant enlisted in the Regular Army in the rank/grade of PV1/E-1 for a period of 4 years. Upon completion of training, he was awarded MOS 11B (Infantryman) and assigned to a unit in Germany. He was promoted to sergeant/E-5 on 14 December 2001 and to staff sergeant/E-6 on 1 August 2003.

4. On 13 October 2004, the applicant reenlisted for a period of 3 years.

5. On 12 January 2005, the applicant accepted company grade NJP under the provisions of Article 15, of the UCMJ for, with intent to defraud, falsifying the signature of a lieutenant colonel on a DA Form 31 (Request and Authority for Leave) that would have placed him on leave from 14 December 2004 until 27 January 2005. His punishment consisted of forfeiture of \$588.00 and extra duty for 1 day.

6. On 5 October 2007, the applicant reenlisted for an indefinite period of service.

7. The applicant was promoted to SFC/E-7 on 1 July 2008. He was awarded the primary MOS 44C (Financial Management Technician) skill level 4.

8. On 6 April 2010, a General Officer Memorandum of Reprimand (GOMOR) was imposed upon the applicant for submitting false documentation on 22 December 2006

to support military education he had not completed, including Air Assault School, Sniper School, and Combatives Levels 3 and 4. The applicant declined the opportunity to submit matters in his own behalf before the imposing authority decided where to file the GOMOR. His chain of command unanimously recommended permanently filing the GOMOR in the applicant's Official Military Personnel File. On 28 April 2010, the imposing authority concurred and directed it to be filed accordingly. The applicant held the rank/grade of SFC/E-7 at the time.

9. On 1 June 2012, the applicant reenlisted for a period of 4 years, his rank/grade is shown as SPC/E-4 on his reenlistment document at the time.

10. On 24 August 2012, USAHRC notified the applicant's command that he was recommended for selection to the rank/grade of master sergeant/E-8 by the Fiscal Year 2012 (FY12) MSG Selection Board which convened on 18 October 2011. In accordance with regulatory requirements, HRC regularly screens the promotion standing list to see if anyone thereon has become physically, mentally, morally, or professionally unqualified for promotion. The applicant's records indicated that on 28 April 2010 he received a GOMOR. Therefore, his record would be referred to a Headquarters, Department of the Army (HQDA) Standby Advisory Board (STAB). The STAB would make a recommendation to the Director of Military Personnel Management (DMPM) as to whether he should be retained or removed from the FY12 MSG Selection List. The applicant was afforded until 24 September 2012 to submit a rebuttal on his behalf.

11. On 20 November 2012, the applicant was informed he was considered for removal by a HQDA STAB, which convened on 15 October 2012. The board members recommended, and the DMPM approved, that his name be removed from the FY12 MSG Selection List.

12. The specific facts and circumstances which led to the applicant facing trial by court-martial are not present in his available personnel record. However, General Court-Martial Order Number 3 issued by Headquarters, U.S. Army North (Fifth Army), Fort Sam Houston, TX on 6 June 2014 shows he was arraigned at Lackland Air Force Base, TX at a General Court-Martial convened by Commander, Headquarters, U.S. Army North (Fifth Army).

a. He pled guilty and was found guilty of the following charges and specifications in violation of the UCMJ.

(1) Charge I, Article 81, UCMJ: Specification 2: In that he, did, at or near Contingency Operating Base (COB) Speicher, Iraq, between on or about 1 August 2008 and on or about 31 August 2008; conspire with Captain (CPT) [REDACTED] to commit an offense under the UCMJ, to wit: larceny of \$40,000, the property of the U.S. Army, and in order



to effect the object of the conspiracy the said CPT [REDACTED] did steal \$40,000 from a safe located on COB Speicher. Plea: Guilty, except the words "larceny of \$40,000," substituting therefore the words "larceny of over \$500.00," of the excepted words Not Guilty, of the substituted words, Guilty. Finding: Guilty, except the words "larceny of \$40,000," substituting therefore the words "larceny of over \$500.00," of the excepted words Not Guilty, of the substituted words, Guilty.

(2) Charge II, Article 121, UCMJ: Specification 2: In that he, did, at or near COB Speicher; Iraq, between on or about 1 August 2008 and on or about 31 August 2008, steal \$40,000, military property, the property of the U.S. Army. Plea: Guilty, except the words "steal \$40,000," substituting therefore the words "steal over \$500.00," of the excepted words Not Guilty, of the substituted words, Guilty. Finding: Guilty, except the words "steal \$40,000," substituting therefore the words "steal over \$500.00," of the excepted words Not Guilty, of the substituted words, Guilty.

(3) Charge III, Article 134, UCMJ: Specification 2: In that he, did, at or near Fort Sam Houston, TX, on or about 8 March 2013, wrongfully endeavor to impede a trial by court-martial in the case of [the applicant], by instructing Ms. [REDACTED] to disregard a federal subpoena to testify as a witness against the applicant at a court-martial, by not appearing at the court-martial as ordered via federal subpoena, which said conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

b. The applicant's sentence consisted of forfeiture of \$1,600.00 pay per month for 4 months and reduction from SFC/E-7 to SPC/E-4. The sentence was adjudged on 13 November 2013 and subsequently approved.

13. The applicant's NCOER for the period from 1 June 2013 through 27 November 2013 shows he was relieved for cause and his rating officials rendered unfavorable comments and ratings regarding his performance and potential. His rank at the time was shown as SPC with a date of rank of 27 November 2013.

14. The specific facts and circumstances which led to the applicant facing a second trial by court-martial which resulted in his reduction from SPC/E-4 to PV1/E-1 and the issuance of a dishonorable discharge are not present in his available personnel record. However, Exhibits 8 and 11 provided by the applicant's counsel were both submitted during the appeal process for the applicant's second trial by general court-martial. Each Exhibit contains a "Statement of the Case" which shows: On 20 November 2014, and 15, 20-21 January 2015 at Lackland Air Force Base, TX, a military judge sitting as a general court-martial convicted the applicant, contrary to his pleas, of two specifications of obtaining services under false pretenses, in violation of Article 134, UCMJ, Title 10

U.S. Code, § 934 (2012). The military judge sentenced the applicant to reduction to the grade of E-1, confinement for four months, and a Dishonorable Discharge. The convening authority approved the sentence as adjudged. On 13 December 2016, the Army court summarily affirmed the findings and sentence.

15. The applicant was assigned to the Personnel Control Facility, Fort Sill, OK, with confinement at the Northwest Joint Regional Correctional Facility, Joint Base Lewis-McChord, WA with a reporting date of 27 January 2015.

16. Orders and his DD Form 214 show the applicant was discharged in the rank/pay grade of PV1/E-1 on 26 May 2017 under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3, as a result of "Court-Martial (Other)." He was assigned Separation Code "JJD" and Reentry Eligibility (RE) code "4." His service was characterized as "Dishonorable." He was credited with completion of 19 years, 7 months, and 9 days of net active service. He had lost time due to confinement from 21 January 2015 until 23 April 2015. He completed his first full term of service. He had continuous honorable active service from 15 July 1997 through 4 October 2007.

17. 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.

18. Army Regulation 635-200 provides that a Soldier would be given a dishonorable discharge pursuant only to an approved sentence of a general court-martial and that the appellate review must be completed, and the affirmed sentence ordered duly executed.

19. On 18 March 2024, in response to a written request, a member of the Army CID, Quantico, VA informed a staff member of the Case Management Division of the Army Review Boards Agency (ARBA), that a search of the Army criminal file indexes revealed four CID Reports of Investigation and two Military Police Reports pertaining to the applicant. On 21 March 2024, the applicant was provided a copy of the CID response and afforded a 15-day period during which he could provide a response. To date, the applicant has not responded. These documents are available in their entirety for the Board's consideration. In part, they show the applicant was investigated for committing the following offenses which were determined to be founded:

- Wire Fraud
- Conspiracy
- Receipt of Stolen Moneys
- Theft of Government Funds (2 counts)
- Transportation of Stolen Moneys
- False Statement
- Assault Consummated by Battery (Civil Offense)

20. 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.

21. MEDICAL REVIEW:

1. The applicant is applying to the ABCMR requesting an upgrade of his dishonorable discharge to honorable and his narrative reason for separation to be amended to "Secretarial Authority." On his DD Form 149 the applicant indicated Posttraumatic Stress Disorder (PTSD) is related to his request. 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 (RA) on 15 July 1997, 2) on 12 January 2005, he received an Article 15 for falsifying a signature on a leave form, 4) on 06 April 2010, a General Officer Memorandum of Reprimand (GOMOR) was issued for submitting false documentation to support military education he had not completed, 5) the specific facts and circumstances that led to the applicant facing trial by court-martial are not present in his available personnel record. However, General Court-Martial Order Number 3 issued on 06 June 2014 shows he pled and was found guilty of the following charges and specifications: larceny of over \$500.00, steal military property of over \$500.00, and endeavor to impede a trial by court-martial case by instructing a witness to disregard a federal subpoena to testify against applicant at a court-martial by not appearing at the court-martial as ordered via federal subpoena, 6) the specific facts and circumstances that led to the applicant facing a second trial by court-martial which resulted in reduction in rank and issuance of a dishonorable discharge were not available in his personnel record; however, exhibits were provided by the applicant's counsel. A Statement of the Case shows that on 20 November 2014 and 15, 20-21 January 2015 the applicant was convicted of two specifications of obtaining services under false pretenses, 7) his DD Form 214 shows he was discharged on 26 May 2017 under the provisions of Army Regulation (AR) 635-200, Chapter 3, as a result of Court-Martial (Other). He was assigned a Separation Code of JJD and reentry code of '4.' 8) A search of the Army criminal file indexes revealed four CID Reports of Investigation and two Military Police Reports pertaining to the applicant. The documents show that the applicant was investigated for committing the following offenses which were determined to be founded: Wire Fraud, Conspiracy, Receipt of Stolen Moneys,

Theft of Government Funds (2 counts), Transportation of Stolen Moneys, False Statement, Assault Consummated by Battery (Civil Offense).

2. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

3. In-service medical records were available for review in JLV from 29 July 1998 through 19 August 2016.

- On 12 September 2008, the applicant attended a Soldier Readiness Processing (SRP) psychoeducational group and endorsed experiencing symptoms of PTSD for 3 to 4 years but did not seek treatment due to fear of being separated. He self-referred for a BH intake on 14 July 2009 due to PTSD and emotional and mental abuse. He endorsed psychosocial stressors related to his marriage and his wife threatening to report allegations against him to CID. His psychiatric symptoms were noted as anxiety attacks for the past 1.5 months without any prior history of anxiety or depression. He also reported feeling as though he had PTSD from his first deployment noting that he experienced nightmares. He was diagnosed with Adjustment Disorder, Marital Problem, and Occupational Problem.
- The applicant was referred to the Family Advocacy Program (FAP) on 14 July 2009 as the alleged offender of intimate partner abuse. Due to his legal issues the applicant chose to not discuss his case. The applicant attended group therapy through FAP from 08 December 2009 through 19 February 2010. During an individual FAP session on 07 January 2010, it was documented that the applicant said he was attending the appointment at the request of his command due to his wife's allegations of abuse, which the applicant denied. The applicant was diagnosed with Marital problem.
- He met with psychiatry on 24 July 2009 and was diagnosed with Chronic Major Depression and PTSD with a rule out (R/O) of delayed onset. The applicant was started on Celexa (antidepressant), Quetiapine (antipsychotic), and Trazodone (antidepressant/sleep). The applicant continued to seek treatment through BH, both counseling and medication management, on-and-off from 2009 until 2015. Review of the records shows that he was most often diagnosed and treated for PTSD and Major Depressive Disorder (MDD) though he was also diagnosed with Generalized Anxiety Disorder (GAD). In addition to the psychotropic medications listed above, the applicant was trialed on numerous medications to address his BH symptoms to include Sertraline (antidepressant), Prazosin (sleep), Zolpidem (sleep), Concerta (attention), Modafinil (attention), Bupropion, (antidepressant), Lorazepam (anxiolytic), Lexapro (antidepressant), and Mirtazapine (antidepressant). Outpatient evidence-based treatment for PTSD was initiated on

02 November 2012 and he completed 7 of 12 sessions. After no-showing for several of his appointments, the applicant and provider agreed to suspend treatment for the time-being due to his legal and MEB proceedings though he continued with psychiatry. He was referred for a neuropsychological evaluation by his psychiatrist due to memory problems and history of possible concussions. The neuropsychological report dated 10 May 2013 documented his diagnosis as Malingered Neurocognitive Dysfunction noting that there was conclusive evidence of non-credible performance and significant exaggeration of cognitive, psychiatric, and somatic symptoms during the evaluation. Records show the applicant's psychiatrist initiated a BH profile on 06 August 2013 to restrict his duty day hours.

- The applicant completed a Command Directed Behavioral Health Evaluation (CDBHE) for the purposes of Chapter 14-12 separation on 14 April 2014. The associated DA Form 3822 shows he was diagnosed with PTSD and was determined to be fit for duty. He screened positive for TBI and PTSD. The provider further noted that although there is evidence the applicant is suffering from a BH condition, it is not of sufficient severity to impact his ability to distinguish right from wrong or participate in administrative proceedings. He was cleared for administrative proceedings deemed appropriate by command.
- The applicant completed an inpatient PTSD treatment program from 13 May 2014 through 02 July 2014. On 07 July 2014, the applicant's psychiatrist submitted a referral for an MEB for PTSD and MDD. The provider also recommended the applicant be transferred to the Warrior Transition Battalion (WTB) and recommended referral to a 28-day civilian inpatient PTSD rehabilitation program. As part of his application, the applicant submitted several copies of MEB profiles from 2013 through 2014 showing a '3' for psychiatric on each of the profiles and the BH diagnosis noted as PTSD [*Advisor's note: the profiles also listed his physical limitations and diagnoses that failed retention standards*]. On 22 July 2014, the applicant stated his command had denied his MEB. On 18 November 2014, his psychiatrist documented that his BH profile was modified to include duty limitations. The applicant was seen as a walk-in on 22 January 2015 for a safety assessment due to his second court-martial resulting in a dishonorable discharge, reduction in rank, and 4 months in confinement. The provider documented that he was not added to the high interest list and psychiatric hospitalization was not warranted. Upon his release from confinement, he followed-up with his counselor for supportive counseling and psychiatry for medication management. On 14 May 2015, he was started on Lexapro and Mirtazapine. His last in-service BH appointment was documented as 02 June 2015 and with his diagnoses documented as Generalized Anxiety Disorder and PTSD.

4.. A review of JLV shows the applicant is 100% service-connected through the VA, 70% for Traumatic Brain Disease. He completed a BH Compensation and Pension

(C&P) examination on 13 June 2018 and was diagnosed with PTSD. The stressors associated with his diagnosis included exposure to combat, surviving mortars, and exposure to casualties through collection of body parts. On 19 September 2018, he completed another C&P examination and was diagnosed with TBI. Regarding his functioning in the applicable domains and residuals, the provider noted that his judgment, visuospatial skills, and consciousness were normal. The provider noted some difficulty in the other measured domains: social interaction, orientation, motor activities, subjective symptoms, neurobehavioral, and communication. The residuals were documented as headaches (including migraines) and mental disorder. The applicant has continued to engage in BH treatment through the VA since his discharge from the military.

5. Based on the available information, it is the opinion of the Agency Medical Advisor that there is sufficient evidence that the applicant was diagnosed with several potentially mitigating BH conditions while in service. Review of records indicate he was diagnosed with the following potentially mitigating conditions: PTSD, Major Depressive Disorder, and Generalized Anxiety Disorder (GAD). Adjustment Disorders that are not chronic in nature do not constitute mitigating conditions. The applicant was also diagnosed with Marital Problem and Occupational Problem in-service which are psychosocial problems and do not constitute mitigating BH conditions, nor does his in-service diagnosis of Malingered Neurocognitive Dysfunction. Since being discharged from the military, the applicant has been diagnosed with TBI and 70% service-connected through the VA for Traumatic Brain Disease. Although there is sufficient evidence that the applicant was diagnosed with several potentially mitigating BH conditions in-service, as PTSD, MDD, and GAD do not interfere with the ability to distinguish between right and wrong and act in accordance with the right, BH mitigation is not supported.

6. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant was diagnosed with PTSD, MDD, and GAD in-service. Post-discharge, he has been diagnosed and service-connected through the VA for Traumatic Brain Disease.

(2) Did the condition exist or experience occur during military service? Yes, the applicant was diagnosed with PTSD, MDD, and GAD in-service. Post-discharge, he has been diagnosed and service-connected through the VA for Traumatic Brain Disease.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. Review of the applicant's in-service records show that he was diagnosed with several potentially mitigating BH conditions to include PTSD, GAD, and MDD. Obtaining services under false pretenses is not consistent with the natural history or sequelae of his in-service BH conditions of PTSD, GAD, or MDD. While an in-service

neuropsychological evaluation concluded that the applicant did not have a neurocognitive disorder (i.e., TBI) in-service, since being discharged from the military, he has been diagnosed and service-connected through the VA with Traumatic Brain Disease. His associated C&P examination documented his judgment as 'normal,' thus, indicating that his condition is not of such severity that he is unable to distinguish between right and wrong and act in accordance with the right. As such, BH mitigation is not supported.

#### 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.

2. 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 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 Board considered the applicant's medical record, and the review and conclusions of the medical advisor to include the four Kurta questions. The Board considered the applicant's VA service connected disability ratings. The Board considered the misconduct and agreed with the medical reviewer, finding the misconduct that results in his court-martial convictions is not consistent with the natural history or sequelae of his in-service BH conditions of PTSD, GAD, or MDD. Based on a preponderance of the evidence, the Board concluded that the characterization of service and the reason for separation the applicant received was not in error or unjust.

3. The applicant was discharged 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 the separation proceedings.

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.

4/28/2025

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.

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, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a



member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

3. Title 10, U.S. Code, Section 1552(b), provides, with respect to courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under the UCMJ, action to correct any military record of the Secretary's Department may extend only to actions taken by reviewing authorities under the UCMJ or action on the sentence of a court-martial for purposes of clemency. The Secretary of the Army shall make such corrections by acting through boards of civilians within the executive part of the Army.

4. Title 10, U.S. Code, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Court-martial convictions stand as adjudged or modified by appeal through the judicial process, 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. 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. 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 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. It is not an investigative body.

6. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Paragraph 1-33 (Disposition through medical channels) provides:

(1) Except in separation actions under chapter 10 and as provided in para 1–33b, disposition through medical channels takes precedence over administrative separation processing.

(2) When the medical treatment facility (MTF) commander or attending medical officer determines that a Soldier being processed for administrative separation under chapters 7, 14, or 15, does not meet the medical fitness standards for retention (see Army Regulation 40–501, chapter 3, he/she will refer the Soldier to a MEB in accordance with Army Regulation 40–400. The administrative separation proceedings will continue, but final action by the separation authority will not be taken, pending the results of MEB.

(a) If the MEB findings indicate that referral of the case to a physical evaluation board (PEB) is warranted for disability processing under the provisions of Army Regulation 635–40, the MTF commander will furnish copies of the approved MEB proceedings to the Soldier's General Court-Martial Convening Authority (GCMCA) and unit commander. The GCMCA may direct, in writing, that the Soldier be processed through the physical disability system when action under the UCMJ has not been initiated, and one of the following has been determined:

- The Soldier's medical condition is the direct or substantial contributing cause of the conduct that led to the recommendation for administrative elimination
- Other circumstances of the individual case warrant disability processing instead of further processing for administrative separation.

(b) The authority of the GCMCA to determine whether a case is to be processed through medical disability channels or under administrative separation provisions will not be delegated.

(3) Disability processing is inappropriate if the conditions in (2)(a) do not apply, if UCMJ action has been initiated, or if the Soldier has been medically diagnosed as drug dependent.

b. An honorable discharge was separation with honor. Issuance of an honorable discharge certificate was appropriate when the quality of the Soldier's service generally met the standards of acceptable conduct and performance of duty or was otherwise so meritorious that any other characterization would clearly be inappropriate. Where there were infractions of discipline, commanders were to consider the extent thereof, as well as the seriousness of the offense. Separation authorities could furnish an honorable discharge when subsequent honest and faithful service over a greater period outweighed disqualifying entries in the Soldier's military record. It was the pattern of behavior, and not the isolated instance, which commanders should consider as the governing factor.

c. A general discharge was a separation from the Army under honorable conditions. When authorized, separation authorities could issue a general discharge to Soldiers whose military record was satisfactory but not sufficiently meritorious to warrant an honorable discharge.

d. A discharge under other than honorable conditions (UOTHC) 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) An under-other-than-honorable-conditions discharge will be directed only by a commander exercising general court-martial authority, a general officer in command who has a judge advocate or legal advisor available to his/her command, higher authority, or the commander exercising special court-martial convening authority over the Soldier who submitted a request for discharge in lieu of court-martial (see chapter 10) when delegated authority to approve such requests.

(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:

- Use of force or violence to produce bodily injury or death
- Abuse of a position of trust
- Disregard by a superior of customary superior-subordinate relationships
- Acts or omissions that endanger the security of the United States or the health and welfare of other Soldiers of the Army
- Deliberate acts or omissions that seriously endanger the health and safety of other persons

e. A bad conduct discharge will be given to a Soldier pursuant only to an approved sentence of a general or special court-martial. The appellate review had to have been completed and the affirmed sentence then ordered duly executed. Questions concerning the finality of appellate review should be referred to the servicing staff judge advocate.

f. A dishonorable discharge will be given to a Soldier pursuant only to an approved sentence of a general court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed. Questions concerning the finality of appellate review should be referred to the servicing staff judge advocate.

g. Chapter 5, paragraph 5-3 states separation under this paragraph is the prerogative of the Secretary of the Army. Secretarial plenary separation authority is exercised sparingly and seldom delegated. Ordinarily, it is used when no other provision of this regulation applies, and early separation is clearly in the best interest of the Army. Separations under this paragraph are effective only if approved in writing by the Secretary of the Army or the Secretary's approved designee as announced in updated memorandums.

7. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) implements the specific authorities and reasons for separating Soldiers from active duty. It also prescribes when to enter SPD codes on the DD Form 214.

a. Paragraph 2-1 provides that SPD codes are three-character alphabetic combinations that identify reasons for, and types of, separation from active duty. The primary purpose of SPD codes is to provide statistical accounting of reasons for separation. They are intended exclusively for the internal use of Department of Defense and the Military Services to assist in the collection and analysis of separation data. This analysis may, in turn, influence changes in separation policy. SPD codes are not intended to stigmatize an individual in any manner.

b. Table 2-3 provides the SPDs and narrative reasons for separation that are applicable to enlisted personnel. It shows, in part, SPD JJD is the appropriate code to assign to an enlisted Soldier who is involuntarily separated under the provisions of Army Regulation 635-200, Chapter 3, as a result of trial by court-martial. Additionally, the SPD/RE Code Cross Reference Table established RE code "4" as the proper reentry code to assign to Soldiers separated under this authority and for this reason. JFF is the appropriate SPD to assign to enlisted Soldiers who are voluntarily discharged under Secretarial authority.

8. On 3 September 2014, the Secretary of Defense directed the Service DRBs and Service 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 UOTHC 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.

9. 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 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 misconduct that led to the discharge.

10. 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//