

IN THE CASE OF: [REDACTED]

BOARD DATE: 7 November 2024

DOCKET NUMBER: AR20240002775

APPLICANT REQUESTS:

- upgrade of her bad conduct discharge (BCD) to under honorable conditions (general) or honorable
- a favorable change of her reentry eligibility (RE) code
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- in-service documents
- professional resume
- certificates of training

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states at the time of her court-martial, she was triggered by past trauma and manipulation by her roommate. She served her time and changed her life while under corrective treatment. She has reached out over 100 times for help. Due to the characterization of her service; she has missed out on many opportunities. All she needs is a fair chance because she was not given one the first time.
3. On her DD Form 149, the applicant notes post-traumatic stress disorder (PTSD), and other mental health issues are related to her request.
4. The applicant enlisted in the Regular Army on 12 September 2007 for 4 years. The highest grade she attained was E-2.

5. Court-martial charges were preferred against the applicant for violations of the Uniform Code of Military Justice; however, the relevant DD Form 458 (Charge Sheet) is not available for review.
6. Before a general court-martial on 23 December 2008, at Yongsan Garrison, Republic of Korea, the applicant was found guilty of nine specifications of stealing currency or items, the property of Army and Air Force Exchange service, between on or about 4 July 2008, and on or about 8 September 2008; four specifications of with intent to defraud, forge and issue checks, between on or about 4 July 2008, and on or about 24 July 2008; and one specification of going absent without leave from on or about 10 September 2008, until on or about 17 September 2008.
7. The court sentenced the applicant to confinement for 18 months and to be discharged from the service with a BCD. The sentence was approved on 6 May 2009, and the record of trial was forwarded for appellate review.
8. General Court-Martial Order Number 16, issued by Headquarters, U.S. Army Fires Center of Excellence and Fort Sill, Fort Sill, OK, on 27 January 2011, noted the applicant's sentence had been affirmed and ordered the BCD to be duly executed.
9. The applicant was discharged on 29 April 2011. Her DD Form 214 (Certificate of Release or Discharge from Active Duty) shows she was discharged under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3, by reason of court-martial. Her service was characterized as bad conduct. She was assigned Separation Code JJD and Reentry Code 4. She was credited with 2 years, 4 months, and 27 days of net active service this period with 446 days of lost time.
10. Additionally, her DD Form 214 shows she was awarded or authorized the National Defense Service Medal, Global War on Terrorism Service Medal and Army Service Ribbon.
11. The applicant provides her professional résumé and certificates of training detailing her accomplishments and qualifications.
12. 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.

13. 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.

14. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of her bad conduct discharge (BCD) and a more favorable change to her RE code. She contends she experienced mental health conditions including PTSD that mitigates her misconduct. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following: 1) The applicant enlisted in the Regular Army on 12 September 2007; 2) Before a general court-martial on 23 December 2008, the applicant was found guilty of nine specifications of stealing currency or items between 4 July 2008 and 8 September 2008; four specifications of with intent to defraud, forge and issue checks, between 4 July 2008 and 24 July 2008; and one specification of going AWOL from 10-17 September 2008; 3) The applicant was discharged on 29 April 2011, Chapter 3, by reason of court-martial. Her service was characterized as bad conduct. She was assigned Separation Code JJD and Reentry Code 4.

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

c. The applicant asserts she experienced mental health conditions including PTSD, which mitigates her misconduct. There is evidence the applicant was initially seen by behavioral health services as part of a Chapter separation proceedings on 09 July 2008. The applicant described being demoted for being late to formation eight times and receiving six negative counselings for being late and being disrespectful. She reported difficulty with stressors such as adapting to the Army and a loss of a cousin. She described experiencing some depressive symptoms. The applicant was diagnosed with an adjustment disorder with depressed mood with a rule out of bereavement and cluster B personality traits. The applicant declined the recommended psychiatric medication at the time. The applicant's commander was provided the results of the evaluation, and she was recommended for further behavioral health treatment. The applicant did not continue in behavioral health treatment, but she was seen later on 19 December 2008, for an emergency psychiatric evaluation for depressive symptoms. The applicant was expressing increased stress and depression as a result of her court martial charges. The applicant was diagnosed with major depression, alcohol abuse, and adjustment disorder with disturbance of emotions and conduct. She was prescribed psychiatric medication with a follow-up appointment scheduled at psychiatry. The applicant

continued with regular medication management appointments at psychiatry till her discharge and was diagnosed consistently with major depression.

d. A review of JLV provided insufficient evidence the applicant has been diagnosed by the VA with a service-connected mental health condition, and she does not receive any service-connected disability.

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

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant asserts she experienced mental health conditions including PTSD while on active service that mitigates her misconduct. The applicant was diagnosed with major depression and an adjustment disorder while on active service.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts she experienced mental health conditions including PTSD while on active service that mitigates her misconduct. The applicant was diagnosed with major depression and an adjustment disorder while on active service.

(3) Does the condition experience actually excuse or mitigate the misconduct? No, there is insufficient evidence beyond self-report the applicant experiencing major depression and an adjustment disorder, while on active service. At this time, there is insufficient evidence the applicant has been diagnosed with PTSD. The applicant did go AWOL, which could be an avoidant behavior, which could be a natural sequela to the applicant's diagnosed mental health conditions. However, there is no nexus between the applicant's diagnosed mental health conditions and her misconduct of stealing and fraud: 1) these types of misconduct are not a part of the natural history or sequelae of the applicant's diagnosed mental health conditions; 2) the applicant's mental health conditions do not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends she was experiencing a mental health condition or an experience that mitigated her misconduct, and per Liberal Consideration her contention is sufficient for the board's consideration.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, the evidence found within the military record and published Department of Defense Guidance for consideration of discharge upgrade requests, the Board found that relief was not warranted.

2. The Board carefully considered the applicant’s request, her record of service, the frequency and nature of her misconduct, the charges levied against her, the outcome of the court-martial proceedings, the reason for her separation and the character of service she received when discharged. The Board considered the evidence of post-service accomplishments and qualifications. The Board considered the review and conclusions of the medical advising official to include the applicant’s in-service diagnoses. The Board found: (1) the applicant asserts she experienced mental health conditions including PTSD while on active service that mitigates her misconduct. The applicant was diagnosed with major depression and an adjustment disorder while on active service; (2) the applicant asserts she experienced mental health conditions including PTSD while on active service that mitigates her misconduct. The applicant was diagnosed with major depression and an adjustment disorder while on active service; (3) beyond the applicant’s self-report, there is insufficient evidence of a condition or experience that mitigates the totality of her misconduct. The Board agrees that there is no nexus between the applicant’s diagnosed mental health conditions and her misconduct of stealing and fraud. Based on a preponderance of evidence, the Board determined that the applicant’s character of service was not in error or unjust.

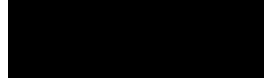
3. The applicant’s request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

BOARD VOTE:

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

BOARD DETERMINATION/RECOMMENDATION:

The 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 601-210 (Regular Army and Army Reserve Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment and processing into the Regular Army, U.S. Army Reserve, and Army National Guard. Table 3-6 provides a list of RE codes.

- RE code "1" applies to Soldiers completing an initial term of active service, who are considered qualified for enlistment if all other criteria are met
- RE code "2" is no longer in use but applied to Soldiers separated for the convenience of the government, when reenlistment is not contemplated, who are fully qualified for enlistment/reenlistment

- RE code "3" applies to Soldiers who are not considered fully qualified for reentry or continuous service at time of separation, whose disqualification is waivable – they are ineligible unless a waiver is granted
- RE code "4" applies to Soldiers separated from last period of service with a non-waivable disqualification

5. 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.

6. 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.

7. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval 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.

8. 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.

9. 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//