

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 15 January 2025

DOCKET NUMBER: AR20240003288

APPLICANT REQUESTS: reconsideration of his previous request for an upgrade of his Bad Conduct Discharge (BCD) in order to be eligible for Veterans benefits.

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Counsel Brief and 4 Exhibits (14 pages)

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20060016742 on 17 July 2007.

2. Counsel provides a personal statement rendered by the applicant as Exhibit 2 for counsel's brief. The applicant states, in part:

a. While in the military, he did not know or understand that the symptoms he was experiencing were related to his mental health. Had he known and received treatment like he is now, he believes the outcome would have been different. He has learned through treatment that his mental health had a significant impact on his decision making and believes it was a significant contributing factor to the allegations of misconduct that resulted in his court-martial.

b. Since his discharge, through counseling and treatment for his mental health issues, he has been able to lead a successful civilian life. He has been employed by Home Depot since 2005. He also completed the following training courses: 10-hour Occupational Safety and Health Administration course, electrician school, and department manager school for leadership. He is also a First Responder. Lately, he has been helping his mother with caregiving for his father who is ill. He has helped with feeding, giving pills, transporting to appointments, and even changing diapers. He is also a member of a church and abstains from alcohol and illegal substances.

c. The person he was, does not reflect who he is now. He wants closure and a sense of healing by having his discharge upgraded and his Veterans benefits restored. He is grateful for all the experiences he gained in the Army and has many fond memories with fellow Soldiers that he would like to be the focal point of his Army experience and not have them eclipsed by the stigma of how it all ended.

3. Counsel provides a brief wherein he provides a synopsis of the applicant's service and his misconduct that led to his trial by General Court-Martial. Additionally, counsel states, in part,

a. Following his discharge, the applicant has been diagnosed with Unspecified Mood Disorder, Generalized Anxiety Disorder, Attention Deficit Hyperactivity Disorder (ADHD), and Post-Traumatic Stress Disorder (PTSD) by a civilian medical facility. The applicant respectfully submits that these conditions existed in 2002, but were undiagnosed and therefore, untreated. Moreover, the applicant respectfully submits that his mental health conditions were significant contributing factors to his misconduct. Thus, the applicant submits the present application for correction of his military records as a request for clemency.

b. The evidence of the applicant's mental health conditions contributes significantly to the argument that correction of his discharge is warranted for reasons of clemency, especially considering the increased awareness of mental health conditions and how they impact servicemembers. Following the applicant's discharge, the Hagel Memo was issued and established that PTSD and related mental health conditions can be a mitigating factor in misconduct. Furthermore, two additional advisory memoranda, namely the Kurta Memo and the Wilkie Memo, were issued following the Hagel Memo. These memoranda further developed the status of mental health conditions as a mitigating factor and emphasized the need for clemency, respectively.

c. The applicant was discharged from the Army on 11 March 2005. On 3 September 2014, the Hagel Memo was issued, which was the first formal change to military policy regarding mental health conditions. In particular, the Hagel Memo recognized that PTSD and related conditions can influence servicemembers' behavior and play a role in misconduct and can therefore, be a mitigating factor in requests for relief from the military's various review boards.

d. Thereafter, the Kurta Memo was issued on 25 August 2017, and clarified and strengthened the content of the Hagel Memo. In particular, the Kurta Memo stated that liberal consideration of cases involving PTSD and other mental health conditions means that it is "unreasonable to expect the same level of proof" regarding PTSD and mental health-based injustice at times when such conditions were not as well screened for or understood. The Kurta Memo also acknowledges that mental health conditions often are

diagnosed years after their symptoms manifest, as in the applicant's case. As a result, this memorandum states that "relief may be appropriate [for] some significant misconduct sufficiently justified or outweighed by the facts and circumstances." The Kurta Memo also makes clear that evidence of mental health conditions "may come from sources other than a veteran's service record." Particularly relevant are sources that include: "requests for transfer to another military duty assignment;" "episodes of depression," and "relationship issues." Additionally, the "veteran's testimony alone, oral or written, may establish the existence of a condition or experience, that the condition or experience existed during or was aggravated by military service, and that the condition or experience excuses or mitigates the discharge." In the present case, the evidence of the applicant's mental health conditions contributes significantly to the argument that correction of the applicant's discharge is warranted for reasons of clemency. The applicant's testimony in his written statement as well as the diagnoses made by his treating physician provide evidence that the applicant is currently suffering from various mental health issues, including symptoms of PTSD, which likely contributed significantly to the actions that led to his court-martial and ultimate discharge from the Army.

e. The Wilkie Memo, issued on 25 July 2018, also encourages the military's various review boards to recognize the importance of clemency. In particular, the Wilkie Memo states that "it is consistent with military custom and practice to honor sacrifices and achievements, to punish only to the extent necessary, to rehabilitate to the greatest extent possible, and to favor second chances in situations in which individuals have paid for their misdeeds." The misconduct for which the applicant was eliminated from the Army arose can be linked to his mental health conditions. As a result, the applicant now seeks the exact kind of clemency described in the Wilkie Memo. The Wilkie Memo also lists several specific factors that should be considered in determining whether relief is warranted based on clemency. These factors include: (1) aggravating and mitigating facts, (2) positive or negative post-conviction conduct, (3) severity of misconduct, (4) length of time since misconduct, (5) acceptance of responsibility, (6) the degree to which the requested relief is necessary for the applicant, (7) evidence of rehabilitation, and (8) character references or letters of recommendation. In the applicant's case, ample evidence supporting these factors indicate that relief is in the interest of clemency.

f. Counsel provides the following documents in support of the brief, most of which will be discussed further in this Record of Proceedings:

- (1) Exhibit 1 - DD Form 214 (Certificate of Release or Discharge from Active Duty).
- (2) Exhibit 2 - The applicant's previously discussed self-authored statement.

(3) Exhibit 3 - General Court-Martial Order (GCMO) Number 13 issued by Headquarters, 25th Infantry Division (Light) and U.S. Army, Hawaii, Schofield Barracks, HI on 15 May 2003.

(4) Exhibit 4 - A letter rendered by a Doctor of Nursing Practice who states the applicant has been a patient under their care for his mental health since 10 May 2022. His current diagnoses are:

- Unspecified Mood Disorder
- Generalized Anxiety Disorder
- ADHD
- PTSD

3. On 8 February 2000, the applicant enlisted in the Regular Army in the rank/grade of PV1/E-1 for a period of 3 years. Upon completion of training, he was awarded MOS 11B (Infantryman) and assigned to a unit at Schofield Barracks, HI. He was promoted to private first class (PFC)/E-3 on 1 July 2002, the highest rank he held.

4. General Court-Martial Order (GCMO) Number 13 issued by Headquarters, 25th Infantry Division (Light) and U.S. Army, Hawaii, Schofield Barracks, HI on 15 May 2003 shows the applicant was arraigned before a GCM.

a. He pled guilty and was found guilty of the following charges and specifications in violation of the Uniform Code of Military Justice (UCMJ).

(1) Charge I, Article 92, UCMJ: The Specification: Having knowledge of a lawful order issued by a field grade officer, and order which it was his duty to obey, did on or about 24 August 2002, fail to obey the same by wrongfully being in possession of a billy club.

(2) Charge III, Article 121, UCMJ: The Specification: On or about 24 August 2002, committing an assault upon another Soldier by striking him on the lower leg and head with a wooden baton and did thereby intentionally inflict grievous bodily harm upon him, to wit: a bruised lower leg and deep cut on his head.

b. The applicant's sentence consisted of reduction from PFC/E-3 to PV1/E-1; forfeiture of all pay and allowances; confinement for 14 months; and a BCD. The sentence was adjudged on 9 January 2003 and subsequently approved.

5. GCMO Number 35 issued by Headquarters, U.S. Army Field Artillery Center and Fort Sill, Fort Sill, OK on 5 February 2004 shows the sentence as promulgated in the corrected copy of GCMO Number 13 issued by Headquarters, 25th Infantry Division

(Light) and U.S. Army, Hawaii, Schofield Barracks, HI on 15 May 2003, was finally affirmed, the portion of the sentence pertaining to confinement had been served, and the BCD was ordered to be executed.

6. Orders and his DD Form 214 show the applicant was discharged in the rank/pay grade of PV1/E-1 on 11 March 2005 under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3, as a result of "Court-Martial (Other)." His service was characterized as "Bad Conduct." He was credited with completion of 4 years, 2 months, and 14 days of net active service. He had lost time due to confinement from 9 January 2003 until 24 November 2003. He did not complete his first full term of service.

7. The applicant petitioned the ABCMR for relief. On 23 July 2007, the applicant was informed the ABCMR had considered his application under procedures established by the Secretary of the Army and denied his application.

8. 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.

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

10. 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.

11. MEDICAL REVIEW:

a. Background: The applicant is requesting reconsideration of his previous request for an upgrade of his Bad Conduct Discharge (BCD) in order to be eligible for Veterans benefits. He contends PTSD and OMH as conditions 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:

- Applicant enlisted in the Regular Army on 8 February 2000.
- General Court-Martial Order (GCMO) Number 13 issued by Headquarters, 25th Infantry Division (Light) and U.S. Army, Hawaii, Schofield Barracks, HI on 15 May 2003 shows the applicant was arraigned before a GCM.
- He pled guilty and was found guilty of the following charges and specifications in violation of the Uniform Code of Military Justice (UCMJ):
- Charge I, Article 92, UCMJ: The Specification: Having knowledge of a lawful order issued by a field grade officer, and order which it was his duty to obey, did on or about 24 August 2002, fail to obey the same by wrongfully being in possession of a billy club.
- Charge III, Article 121, UCMJ: The Specification: On or about 24 August 2002, committing an assault upon another Soldier by striking him on the lower leg and head with a wooden baton and did thereby intentionally inflict grievous bodily harm upon him, to wit: a bruised lower leg and deep cut on his head.
- Orders and his DD Form 214 show the applicant was discharged in the rank/pay grade of PV1/E-1 on 11 March 2005 under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3, as a result of "Court-Martial (Other)." His service was characterized as "Bad Conduct." He was credited with completion of 4 years, 2 months, and 14 days of net active service. He had lost time due to confinement from 9 January 2003 until 24 November 2003. He did not complete his first full term of service.
- The applicant petitioned the ABCMR for relief. On 23 July 2007, the applicant was informed the ABCMR had considered his application under procedures established by the Secretary of the Army and denied his application.

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 via counsel, while in the military, he did not know or understand that the symptoms he was experiencing were related to his mental health. Had he known and received treatment like he is now, he believes the outcome would have been different. He has learned through treatment that his mental health had a significant impact on his decision making and believes it was a significant contributing factor to the allegations of misconduct that resulted in his court-martial. Following his discharge, the applicant has been diagnosed with Unspecified Mood Disorder, Generalized Anxiety Disorder, Attention Deficit Hyperactivity Disorder (ADHD), and Post-Traumatic Stress Disorder (PTSD) by a civilian medical facility. The applicant respectfully submits that these conditions existed in 2002, but were undiagnosed and therefore, untreated. Moreover, the applicant respectfully submits that his mental health conditions were significant contributing factors to his misconduct. Thus, the applicant submits the present application for correction of his military records as a request for clemency.

d. Due to the period of service no active-duty electronic medical records were available for review.

e. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is not service connected and there is no evidence of the applicant receiving any mental health services via the VA. The applicant provides a one-page undated letter, indicating he has been under the care of a civilian provider for his mental health needs since 10 May 2022. The letter states the applicant is diagnosed with Unspecified Mood Disorder, Generalized Anxiety Disorder, Attention Deficit Hyperactivity Disorder (ADHD), and Post-Traumatic Stress Disorder (PTSD). However, no treatment records or progress notes were available for review.

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.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts PTSD and OMH as related to his request.

(2) Did the condition exist or experience occur during military service? No. There is no medical documentation indicating the applicant was diagnosed with any BH condition during military service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant was discharged due to "committing an assault upon another Soldier by striking him on the lower leg and head with a wooden baton and did thereby intentionally inflict grievous bodily harm upon him." Although, the applicant asserts PTSD and OMH, there is no evidence of any in-service diagnoses, and the VA has not service-connected the applicant for any BH condition. And while the applicant provides medical documentation showing he has been treated for Unspecified Mood Disorder, Generalized Anxiety Disorder, ADHD, and PTSD, since 10 May 2022, these diagnoses were given 20 years post-discharge. However, regardless of diagnosis, neither PTSD nor any of his other diagnoses would mitigate assault by intentionally inflicting grievous bodily harm. Assault is not a natural sequela of any of his BH conditions and would not mitigate the reason for his discharge. In addition, neither PTSD, Unspecified Mood Disorder, Generalized Anxiety Disorder, nor ADHD impact the ability to distinguish right from wrong and act in accordance with the right.

h. Per Liberal Consideration guidelines, his assertion of PTSD and OMH are 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 record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant's petition, available military records and the medical advisory the Board concurred with the advising official finding there is insufficient evidence to support the applicant had a behavioral health condition during military service that mitigates his discharge.
2. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the serious misconduct of assaulting another Soldier. The Board applauds the applicant for his post service accomplishments and community engagement. The Board noted, the applicant provided no character letters of support for the Board to weigh a clemency determination. The ABCMR 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. Under liberal consideration, the Board carefully reviewed the applicant's behavioral health issues, however the Board found neither PTSD nor any of his other diagnoses would mitigate assault by intentionally inflicting grievous bodily harm. Based on a preponderance of evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust. Therefore, the Board denied relief.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
			DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board found the evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Number AR20060016742 on 17 July 2007.

[REDACTED]

[REDACTED]

[REDACTED]

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. 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.

b. 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.

c. 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

d. 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.

e. 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.

7. 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.

8. 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; TBI; sexual assault; or sexual harassment. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part to those conditions or experiences. 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.

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, 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//