

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 November 2024

DOCKET NUMBER: AR20240003340

APPLICANT REQUESTS: upgrade of his bad conduct discharge to under honorable conditions (general) or to honorable.

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

- DD Form 149 (Application for Correction of Military Record), 22 January 2024
- DD Forms 214 (Certificate of Release or Discharge from Active Duty), 3 February 2002 and 6 February 2009
- Veterans Administration (VA) list of rated disabilities

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, please consider his post-traumatic stress disorder (PTSD) and his record of service and combat.
3. The applicant provides copies of:
 - a. DD Form 214, dated 3 February 2002, showing deployment to Southwest Asia from 1 February 1998 to 15 June 1998.
 - b. DD Form 214, dated 6 February 2009, which reflects his most recent reenlistments and period of service under review.
 - c. A VA listing of his disability ratings which include, in part, PTSD at 70% graded on 15 January 2019 which was rated as service connected.
4. A review of the applicant's service records shows:

a. On 10 June 2002, he reenlisted in the Regular Army beginning at rank specialist/E-4, following several reenlistments and a prior period of honorable service.

b. A DA form 458 (Charge Sheet) reflecting the charges and specifications leading to a General Court-Martial, a DA Form 1574 (Report of Proceedings by Investigating Officer/Board of Officers), and a Criminal Investigation Division Report of findings by an investigating officer are not contained in the available records.

c. On 20 September 2007, the Judge Advocate General, Fort Bliss, notified his commander of the result of a trial by General Court-Martial, convened on 20 September 2007. This notification reflects the applicant entered pleas of guilty and was found guilty of two charges; between on or about 12 December 2006 and on or about 5 March 2007, on diverse occasions attempt to steal various items, of a value of more than \$500.00, the property of the U.S. Army; between on or about 31 December 2006 and on or about 5 March 2007, on divers occasions, did steal various items of a value of \$500.00, the property of the U.S. Army.

d. General Court-Martial Order Number 5, issued by Headquarters (HQ), U.S. Army Air Defense Artillery and Fort Bliss, dated 5 March 2008, reflects he was arraigned, tried, found guilty, and sentenced to be reduced to private/E-1, confinement for 18 months, and to be discharged from the service with a bad conduct discharge; of the charges and specifications:

(1) Charge I: Specification, between on or about 12 December 2006 and on or about 5 March 2007, did attempt to steal various items at or near Fort Bliss and between El Paso on diverse occasions, of a value of more than \$500.00, the property of the U.S. Army.

(2) Charge II: Specification, between on or about 31 December 2006 and on or about 5 March 2007, did steal various items at or near Fort Bliss and between El Paso on diverse occasions, of a value of more than \$500.00, the property of the U.S. Army.

(3) The sentence was approved and ordered executed except only so much of the sentence extending to a bad conduct discharge. The record of trial was forwarded for appellate review.

e. The U.S. Army Court of Criminal Appeals review and decision affirming the findings and the sentence as promulgated in General Court-Martial Order Number 5, is not contained in the available records.

f. General Court-Martial Order Number 23, issued by HQ, U.S. Army Field Artillery Center and Fort Sill, dated 15 January 2009, affirmed the findings in the general court-

martial case as promulgated in GCMO Number 5, dated 5 March 2008. Article 71(c) having been complied with; the bad conduct discharge would be duly executed.

g. On 6 February 2009, the applicant was discharged under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3, as a result of court-martial. His service was characterized as bad conduct, with separation code JJD and reentry code 4. His DD Form 214 shows he completed 5 years, 7 months, and 2 days of net active service this period with 5 years, 4 months, and 1 days of prior active service; he had 384 days of time lost from 20 September 2007 to 14 October 2008; and he had 71 days excess leave from 28 November 2008 to 6 February 2009. It further shows in:

- block 13 (Decorations, Medals, Badges, Citations, and Campaign Ribbons Awarded or Authorized):
 - Army Achievement Medal (Third Award)
 - Army Good Conduct Medal (Third Award)
 - National Defense Service Medal
 - Global War on Terrorism Service Medal
 - Korean Defense Service Medal
 - Noncommissioned Officer Professional Development Ribbon
 - Army Service Ribbon
- block 18 (Remarks) listed his reenlistment but not his continuous honorable service.

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

6. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his bad conduct discharge. He contends mental health conditions including PTSD are 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 reenlisted in the Regular Army on 10 June 2002; 2) On 20 September 2007, the applicant was found guilty of one specification of an attempt to steal property of the US Army and one specification of stealing property of the US Army; 3) The applicant was discharged on 6 February 2009, Chapter 3, as a result of court-martial. His service was characterized as bad conduct.

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

c. The applicant asserts he experienced mental health conditions including PTSD, which mitigates his misconduct. There is insufficient evidence the applicant reported or was diagnosed with a mental health condition including PTSD while on active service.

d. A review of JLV provided sufficient evidence the applicant has been diagnosed with a service-connected PTSD (SC 70%) in 2013. The applicant has been intermittently engaged for treatment for this condition.

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 his misconduct.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant asserts he experienced mental health conditions including PTSD. The applicant was diagnosed with service-connected PTSD by the VA in 2013.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced mental health conditions including PTSD while on active service. The applicant was diagnosed with service-connected PTSD by the VA in 2013.

(3) Does the condition experience actually excuse or mitigate the misconduct? No, there is sufficient evidence beyond self-report the applicant was experiencing PTSD, while on active service. However, there is no nexus between the applicant's PTSD and his misconduct of attempted theft and theft of US Army property in that: 1) these types of misconduct are not a part of the natural history or sequelae of PTSD; 2) PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing a mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the

records, and published DoD guidance for liberal consideration of discharge upgrade requests. The applicant's trial by a court-martial was warranted by the gravity of the offense charged (theft of various items). The applicant's conviction and discharge were conducted in accordance with applicable laws and regulations and the discharge appropriately characterizes the misconduct for which she was convicted. She was given a bad conduct discharge pursuant to an approved sentence of a court-martial. The appellate review was completed, and the affirmed sentence was ordered duly executed. All requirements of law and regulation were met with respect to the conduct of the court-martial and the appellate review process, and the rights of the applicant were fully protected. The Board found no error or injustice in his separation processing. The Board also considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewing official. The Board agreed with the medical reviewer's finding insufficient evidence to support the applicant had a condition or experience that mitigates his misconduct. Also, the applicant provided insufficient evidence of a persuasive nature of post-service achievements or letters of reference in support of a clemency determination. Therefore, based on a preponderance of available evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

2. Prior to closing the case, the Board did note the analyst of record administrative notes below, and recommended the correction is completed to more accurately depict the military service of the applicant.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

Except for the correction addressed in Administrative Note(s) below, 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.

ADMINISTRATIVE NOTES:

Add to Block 18 of his DD Form 114 the entry "Continuous Honorable Service from 10 June 2002 to 22 February 2007."

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. Army Regulation 15-185 (Army Board for Correction of Military Records) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

3. By law, court-martial convictions stand as adjudged or modified by appeal through the judicial process. This Board 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. The ABCMR does not have authority to set aside a conviction by a court-martial.

4. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), in effect on 6 September 2011, sets policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons. Readiness is promoted by maintaining high standards of conduct and performance.

a. Paragraph 3-7 provides 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. A characterization of under honorable conditions may be issued only when the reason for separation specifically allows such characterization.

b. Paragraph 3-11. Bad conduct discharge. A Soldier will be given a bad conduct discharge pursuant only to an approved sentence of a general or special 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.

5. Army Regulation 635-5-1 (Personnel Separations – Separation Program Designators), in effect at the time, listed the specific authorities, regulatory, statutory, or other directive, and reasons for separation from active duty, active duty for training, or full time training duty. The separation program designator "JJD" corresponded to "Court-Martial (Other)," and the authority, Army Regulation 635-200, Chapter 3.

6. On 3 September 2014 the Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) to carefully consider the revised PTSD criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged under other than honorable conditions and who have been diagnosed with PTSD by a competent mental health professional

representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

7. The acting Under Secretary of Defense for Personnel and Readiness provided clarifying guidance on 25 August 2017, which expanded the 2014 Secretary of Defense memorandum, that directed the BCM/NRs and DRBs to give liberal consideration to veterans looking to upgrade their less-than-honorable discharges by expanding review of discharges involving diagnosed, undiagnosed, or misdiagnosed mental health conditions, including PTSD; traumatic brain injury; or who reported sexual assault or sexual harassment.

8. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and BCM/NRs regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice. 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 based on 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. 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.

9. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (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.

//NOTHING FOLLOWS//