

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 4 November 2024

DOCKET NUMBER: AR20240003703

APPLICANT REQUESTS:

- in effect, reconsideration of his prior request for an upgrade of his bad conduct discharge to a general under honorable conditions
- a video/telephonic appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Medical Documents – Institute for Personal Development (2 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 AR20100018779 on 19 April 2011.

2. The applicant states at the time of the general court-martial he was unaware of his mental illness which caused him to violate military law. He is currently on medication and receiving mental care assistance from a psychiatrist. He has not committed any other criminal activity in 17 years. He believes a correction to his records should be made so he can have peace of mind knowing that he has learned his lesson and so he can be an upstanding Veteran that can help others. He states his psychiatrist is mandating that he submit a request for discharge upgrade and his psychiatrist can provide documentation if needed.

3. The applicant provides copies of medical documents dated 26 January 2024, from the Institute for Personal Development that details a summary of the applicant's medical care provided at their facility.

4. A review of the applicant's service record shows:

- a. He enlisted in the Regular Army on 24 June 1996.

b. On 9 December 2005, he was convicted by a general court-martial of one specification of making a false official statement, committing forcible sodomy without consent, one specification committing an indecent act and one specification of fraternizing with an enlisted Soldier. His sentence included reduction to the private (E1), forfeiture all pay and allowances, confinement for three months, and a discharged with a Bad-Conduct Discharge.

c. On 22 June 2006, the convening authority approved the sentence and except for the bad conduct discharge, ordered it executed. The record of trial was forwarded to the Judge Advocate General of the Army for appellate review.

d. A notice of court-martial from the United States Army of Court of Appeals dated 26 September 2006 corrected the General Court-Martial Order Number 164, to reflect in Charge III a Finding of Guilty.

e. General Court-Martial Order Number 51 dated 20 February 2007, after Article 71(c) was complied with and the sentence was affirmed, ordered the bad conduct discharge executed.

f. On 29 June 2007, he was discharged from active duty with a bad conduct discharge characterization of service. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 10 years, 1 month, and 4 days of net active service with 272 days of lost time. He was assigned separation code JJD and the narrative reason for separation listed as "Court-Martial, Other", with reentry code 4. It also shows he was awarded or authorized:

- Army Commendation Medal
- Army Achievement Medal
- Army Good Conduct Medal
- National Defense Service Medal
- Global War on the Terrorism Service Medal
- Army Service Ribbon

5. On 19 April 2011, the ABCMR rendered a decision in Docket Number AR20100018779. The Board found the evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined that the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

6. By regulation (AR 15-185), the ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

7. By regulation (AR 635-5), the DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of release from active duty, retirement, or discharge. The information entered thereon reflects the conditions as they existed at the time of separation.

8. By regulation (AR 635-200), a member 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.

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

10. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to his characterization of service from bad conduct discharge (BCD) to under honorable conditions (general). He contends he experienced an undiagnosed mental health condition, including PTSD, that mitigates his misconduct.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following:

- The applicant enlisted into the Regular Army on 24 June 1996.
- The applicant was convicted by a general court-martial of the following: making a false official statement, committing consensual sodomy, committing an indecent act, and fraternizing with an enlisted soldier.
- The applicant was discharged on 29 June 2007 and completed 10 years, 1 month, and 4 days of net active service.

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 asserts he had a mental illness at the time he violated military law, and he is currently on medications and receiving treatment. The application includes documentation from the Institute for Personal Development dated 26 January 2024, which showed that the applicant has been under the care of the psychiatric nurse practitioner for the previous three years and has diagnoses of Schizoaffective Disorder, Anxiety, Insomnia, and a trauma history. The documentation showed a history of

medications, including mood stabilizers, antipsychotics, and sleep medication and noted a history of psychosis dating back to age 20. There was insufficient evidence that the applicant was diagnosed with PTSD or another psychiatric condition while on active service.

d. The Joint Legacy Viewer (JLV), which includes medical and mental health records from DoD and VA, was also reviewed and showed the applicant engaged mental health treatment on 21 September 2005 while at the Personnel Control Facility. He expressed having issues of anger related to his perceptions of treatment and depressed mood. He had nine psychotherapy sessions and the content of the documentation focused on adjustment to the facility, his pending legal appeals, and development of coping skills. There is no indication of any psychosis, and his diagnosis was Adjustment Disorder. The applicant attempted to engage the VA for mental health services in April 2010 and reported being homeless, but it was determined that he was ineligible for services. In April 2020, he reached out to the VA homeless program again as he was at risk of being homeless. He reported a history of depression, OCD, anxiety, schizophrenia, and hospitalization due to suicidal ideation secondary to loss of medication. He was provided with housing assistance and secured an apartment. However, in March 2023 he contacted the VA's homeless call center requesting assistance with housing, but services were denied due to his BCD.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support that 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 discharge? Yes. The applicant asserts he had an undiagnosed mental health condition, including PTSD, at the time of the misconduct. Documentation from his time in service showed that he was treated for an Adjustment Disorder secondary to adjusting to confinement in 2005. The applicant provided 2024 documentation from his treating mental health provider, which showed diagnoses of Schizoaffective Disorder, Anxiety, and Insomnia.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition while on active service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of military medical and mental health records revealed documentation of treatment of an Adjustment Disorder associated with adjusting to the Personnel Control Facility and his legal problems. There was no indication of any psychotic process, and at termination, his condition had improved. There is insufficient evidence, beyond self-report, that the applicant was experiencing a mental health condition while on active

service. However, the applicant contends he had 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 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 record and medical review, the Board concurred with the advising opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support that the applicant had a condition or experience that mitigates his misconduct.

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2. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the egregious misconduct. The applicant provided no post service accomplishments or character letters of support for the Board to consider clemency. The Board recognized that the applicant served honorably during his first term of service. However, honorable service in his initial enlistment does not, on its own, justify an upgrade of discharge from a subsequent enlistment. The Board agreed his conduct and achievements during his first term are not sufficient to outweigh or mitigate the misconduct demonstrated during his service in the Regular Army.

3. 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. The Board noted the applicant received a bad conduct discharge following an approved sentence from a General Court-Martial (GCM). After completing the appellate review process, the affirmed sentence was duly executed, ensuring full compliance with all legal and regulatory requirements while safeguarding his rights. The Board found to justify the correction of a military record, an individual must demonstrate through evidence or other satisfactory means that the record is erroneous or unjust. Furthermore, the Board determined, he did not provide sufficient evidence to meet this standard. Given the gravity of the offenses for which he was convicted, there is no basis to warrant reversal of the previous Board determination. Therefore, relief is denied.

4. 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
XX	XXX	XXX	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 AR20100018779 on 19 April 2011.

[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. Section 1556 of Title 10, United States 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.
2. Title 10, U.S. Code, section 1552, provides that the Secretary of a Military Department may correct any military record of the Secretary's Department when the Secretary considers it necessary to correct an error or remove an injustice. With respect to records of 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 correction of a record to reflect actions taken by reviewing authorities under the UCMJ or action on the sentence of a court-martial for purposes of clemency. Such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that Military Department.

3. Hagel Memorandum, dated 3 September 2014, states liberal consideration will be given in petitions for changes in characterization of service to service treatment records entries which document one or more symptoms which meet the diagnostic criteria of PTSD or related conditions. Special consideration will be given to VA determinations which documents PTSD or PTSD related conditions connected to military service. In cases in which PTSD or PTSD related conditions may be reasonably determined to have existed at the time of discharge, those conditions will be considered potential mitigating factors in the misconduct that caused the under other than honorable conditions characterization of service.

4. 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, on 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.

5. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (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 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.

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.

6. 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. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. 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.

7. Army Regulation 635-5 (Separation Processing and Documents), the DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of release from active duty, retirement, or discharge. The information entered thereon reflects the conditions as they existed at the time of separation.

8. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.

a. Honorable discharge states an honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of the acceptable conduct and performance of duty for Army personnel, or is otherwise so meritorious that any other characterization would be clearly inappropriate.

b. General discharge states a general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Under Other Than Honorable Conditions states a discharge under other than honorable conditions is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, homosexuality, security reasons, or for the good of the service.

d. Bad Conduct Discharge Certificate states a member 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.

//NOTHING FOLLOWS//