

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 4 November 2024

DOCKET NUMBER: AR20240004122

APPLICANT REQUESTS: a discharge upgrade of his bad conduct discharge to honorable based upon both liberal consideration for a medical condition and on grounds of clemency. He also requests:

- correction to his narrative reason of Secretarial Authority
- a change in his reentry (RE) code
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel Petition (Applicant's Legal Brief in Support of Discharge Upgrade) dated 17 January 2024 (10 pages)
- Court Documents (54 pages)
- DD Form 214 (Certificate of Release or Discharge from Active Duty) for the period ending 21 March 2014

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 he requests a discharge upgrade to honorable with a narrative reason of Secretarial Authority and reentry (RE) code change to 1. He states he was erroneously separated at a General Court-Martial with a Bad Conduct Discharge (BCD) and should receive liberal consideration for his behavioral health issues at the time and now. His discharge is both procedurally and equitably defective and he should also receive clemency. He claims it would be inequitable to not review his discharge.

3. The applicant provides:

a. A legal brief in support of a discharge upgrade from the applicant's civilian defense counsel dated 17 January 2024, states he has exhausted all administrative remedies under existing law and regulation and request relief in the interest of equity, fairness, and justice. And request upgrade of his discharge based on the principles of clemency, racial disparity, procedural defect, and substantive defect.

(1) Requested Relief: the Board upgrade his discharge to Honorable, change the characterization of the discharge to "Secretarial Authority," and change his RE code to 1 and grant clemency.

(2) Representation and basis of Appeal: as a military law attorney representing the applicant, the appeal is based on three errors; (1) the underlying basis of his separation was procedurally defective at the time of the discharge, (2) the adverse action, to include the administrative discharge, was unfair at the time; and (3) the "BCD is inequitable now.

(3) Procedural Posture: the applicant has exhausted all means of appeal and now seek assistance from the discharge review board because the preponderance of the evidence show that an error or injustice exists and respectfully request his appeal is granted. The applicant asks that any negative documents be set aside in their entirety, and he is issued a corrected DD Form 215.

(4) Legal Standard: by law the Secretary of the Army is authorized to correct errors or remove injustices from any military record of their respective service and has an obligation, not only to properly determine the nature of any error or injustice, but also to take such corrective action as will appropriately and fully erase such error or compensate such injustice.

(5) Background: counsel details and relevant facts given by the applicant surrounding the engagement of sexual activity with the victim from the court-martial. The applicant mentions perceived disparities in the severity of his sentence compared to that of the other subject involved in this misconduct; he expressed concern that his BCD and confinement may have been unduly harsh and requests his sentence is amended.

(6) Analysis and Argument:

(a) Clemency - the applicant is remorseful and humbly request clemency and has actively undertaken various initiatives and engaged in programs specifically designed to deepen his understanding of consent and actively prevent sexual assault. These endeavors serve as a testament to his unwavering commitment to personal growth and transformation.

(b) Racial Disparity – the applicant contends that there existed significant racial disparity in his case. He fully acknowledged the gravity and seriousness of his actions but thinks it is crucial to highlight that he faced disproportionately harsher treatment when compared to his white counterparts who have committed analogous offenses.

(c) Procedural Defect - the applicant thinks the military not only failed to provide him with adequate legal representation during the administrative separation proceedings but also neglected to ensure a fair and unbiased process. This resulted in the applicant being deprived of a fair opportunity to present a robust defense and articulate essential aspects of his case which undermines the integrity of the entire proceedings.

(d) Substantive Defect - the evidence presented against the applicant was predominantly circumstantial, lacking concrete proof to establish guilt and the case heavily relied on testimonies that were inconsistent and failed to align with the facts presented. The applicant feels the military, neglected to duly consider the numerous mitigating factors, which could potentially shed light on a different perspective; by disregarding these vital aspects, the fairness and impartiality of the proceedings have been compromise, warranting a careful reevaluation of the overall judgment.

(7) Conclusion - the applicant requests that this derogatory information will be removed from his record. He asks that this appeal through ARBA be given the utmost scrutiny. The success of the appeal and future actions by the ABCMR will have a significant impact on his ability to receive proper benefits and recognition. He will continue to fight this derogatory information up through the Secretary of the Army.

b. Copies (54 pages) of his court documents submitted as a Petition for Grant of Review in the United States Courts of Appeal for the Armed Forces to include a supplemental brief submitted on his behalf to the United States Army Court of Criminal Appeals by appellate defense counsels. The brief includes documents from the general court-martial process and transfer documents/orders to the confinement facility.

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

a. He enlisted in the Regular Army on 29 June 2009.

b. DA Form 4430 (Department of the Army Report of Results of Trial) shows he was tried by general court-martial on 23 September 2011 at Camp Humphreys, Republic of Korea, with the below charges:

- Charge I: Article 81 (one specification) - conspire to commit an offense of aggravated sexual assault, Plea: Not Guilty - Finding: Not Guilty

- Charge II: Article 107 (two specifications) – with intent to deceive make two false official statements to Special Agent L.A.K., Plea: Not Guilty - Finding: Not Guilty
- Charge III: Article 120 (four specifications) – engage in a sexual acts with someone who was substantially incapacitated:

Specification 1 – Plea: Not Guilty – Finding: Not Guilty

Specification 2 – Plea: Not Guilty – Finding: Not Guilty

Specification 3 – Plea: Not Guilty – Finding: Not Guilty

Specification 4 – Plea: Guilty – Finding: Guilty

c. The applicant was sentenced to be confined for eighteen (18) months and to be discharged from the service with a bad-conduct discharge.

d. The sentence was adjudged on 23 September 2011 and the convening authority approved only so much of the sentence extending to confinement for eleven (11) months and a bad-conduct discharge is approved and, except for that portion of the sentence extending to a Bad-Conduct Discharge, will be executed. The accused will be credited with 45 days confinement against the sentence to confinement.

e. DA Form 4187 (Personnel Action) dated 27 November 2011, indicated the applicant duty status changed from Present for Duty to Confined by Military Authorities effective 20 September 2011.

f. DA Form 4187 (Personnel Action) dated 8 May 2012, indicated the applicant duty status changed from Confined by Military Authorities to Present for Duty, 4 May 2012.

g. The appellate review decision and the final general court-martial order ordering execution of the bad conduct discharge are not available for review.

g. On 12 March 2014, 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 4 years, 1 month, and 9 days of net active service with 227 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 Achievement Medal
- National Defense Service Medal
- Global War on the Terrorism Service Medal
- Korean Defense Service Medal
- Army Service Ribbon
- Overseas Service Ribbon

5. By regulation (AR 15-185), an applicant is not entitled to a hearing before the ABCMR. Hearings may be authorized by a panel of the ABCMR or by the Director of the ABCMR.
6. 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.
7. 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.

9. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (EMR - AHLTA and/or MHS Genesis), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting an upgrade of his 21 March 2014 bad conduct discharge (BCD) with a change in is separation authority. He has indicated on his DD 149 that PTSD and Other Mental Health Conditions are issues related to his requests. He states:

"The applicant was erroneously separated at a GCM [General Court Martial] CM with a BCD. The applicant should receive liberal consideration for his behavioral health issues at the time and now. The discharge is both procedurally and equitably defective. The applicant should also receive clemency."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The DD 214 for the period of service under consideration shows he entered the regular Army on 29 June 2009 and was discharged on 21 March

2014 under the separation authority provided chapter 3 of AR 635-200, Active Duty Enlisted Administrative Separations (17 December 2009): Court-Martial (Other). It shows a period of lost time under 10 USC § 972 from 20 September 2011 thru 5 May 2012. There are no periods of service in a hazardous duty pay area.

d. A 23 February 2012 General Court-Martial Order shows the applicant was found guilty of "Did, at or near USAG [United States Army Garrison] Humphreys, Republic of Korea, on or about 7 February 2011, wrongfully commit indecent conduct; to wit: by having sexual intercourse with PVT (E-2) A.V.A, while in the exposed view of others."

e. No medical documentation was submitted with the application. The only behavioral health encounter in the EMR is a screening for depression completed 26 July 2012 in which the applicant answered "No" to the six (6) screening questions. There are no behavioral health diagnoses on his medical problem list. There are no encounters in JLV.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Applicant asserts PTSD and Other Mental Health Conditions.

(2) Did the condition exist or experience occur during military service? Applicant asserts PTSD and Other Mental Health Conditions were present while he was in the Army.

(3) Does the condition or experience actually excuse or mitigate the discharge? NO: There was no probative evidence submitted, found in the EMR, other electronic records, or in JLV (to include VA endorsement), indicating the applicant has been diagnosed with PTSD or a behavioral health disorder of any kind.

g. If the applicant had a mitigating mental health condition, it would not mitigate his misconduct while in the Army: These mitigating mental health conditions would not have affected his ability to differentiate right from wrong and adhere to the right and so could not mitigate the UCMJ violation which led to his incarceration and subsequent bad conduct discharge.

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 medical review, the Board concurred with the advising opinion, which found no behavioral health diagnoses on the applicant's medical problem list. Additionally, no encounters were identified in the Joint Legacy Viewer (JLV).

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2. The Board determined that there was insufficient evidence of in-service mitigating factors to outweigh the applicant's egregious misconduct. Furthermore, the applicant did not provide post-service achievements or character references of support to attest to his post honorable conduct, leaving the Board without sufficient basis for considering clemency. The Army Board for Correction of Military Records (ABCMR) is only authorized to adjust the severity of a sentence imposed in the court-martial process if clemency is deemed appropriate. Based on regulatory guidance, the Board found no sufficient justification to warrant a change to the applicant's Reentry (RE) Code or narrative reason. Given the preponderance of evidence, the Board denied relief.

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:

Mbr 1      Mbr 2      Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
XX	XXX	XXX	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 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//