

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 10 December 2024

DOCKET NUMBER: AR20240004755

APPLICANT REQUESTS: reconsideration of his prior request for an upgrade of his bad conduct discharge to an honorable discharge.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)

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 AR20090006457 on 1 December 2009.

2. The applicant states he has been having mental problems since he got out of the military. He had the problem before he got discharged out of the Army. He was hearing voices but did not know what was going on. Since he has been out of the Army, he has had a hard time making it and only receives a small Social Security disability check. He feels he was treated unfairly.

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

- a. He enlisted in the Regular Army on 21 June 1979.
- b. On 4 August 1983, charges were preferred under the Uniform Code of Military Justice (UCMJ).

(1) Charge I, violation of Article 89, one specification for disrespect toward a superior commissioned officer by saying "fuck the big man," or words to that effect.

(2) Charge II, violation of Article 90, one specification for willfully disobeying a lawful command from a commissioned officer by not remaining "at ease" when so ordered.

(3) Charge III, violation of Article 111, for one specification) for operating a vehicle in a reckless manner by driving a two and a half ton truck at a speed of 60 miles per hour in a 45 mile per hour zone and by driving through a stop sign without stopping.

(4) Charge IV, violation of Article 134, for two specifications. Specification one for wrongful communication of a threat to another Soldier by saying, "If you send me back to the battery I'll deal with you later because I will not forget," and thereafter saying, "I'm going to beat your mother fuc**ng faces," or words to that effect. Specification two for wrongful communication of a threat to another Soldier by saying, "Your face needs rearranging and I'm going to do it," and by saying, "Your face needs to be rearranged and I'm going to rearrange your mother fuc**ng face," and thereafter saying, "I'm going to beat your mother fuc**ng faces," or words to that effect.

c. A DA Form 2-2 (Insert Sheet to DA Form 2-1 Record of Court-Martial Conviction) shows the applicant was convicted on 7 February 1984 by a special court-martial at Fort Bliss, TX of

- Charge I: on or about 15 July 1983, behave w/disrespect toward his superior commissioned officers
- Charge II: honor about 15 July 1983 wrongfully disobeyed a lawful command
- Charge IV: on or about 11 July 1983 wrongfully communicate provoking words to a service member

d. The court sentenced the applicant to be reduced to private (E-1), confined at hard labor for 90 days; discharged from service with a bad conduct discharge. The sentence was adjudicated 28 November 1983 and approved on 7 February 1984.

e. On 31 July 1984, the U.S. Army Court of Military Review affirmed the approved findings of guilty and the sentence. On 16 April 1985, the convening authority issued an order indicating that the sentence had been affirmed pursuant to Article 71c. The sentence to a bad conduct discharge was ordered executed.

f. On 16 August 1985, the applicant was issued orders 159-12 with a discharge date of 21 August 1985.

g. On 21 August 1985, he was discharged from active duty in accordance with chapter 3 of Army Regulation 635-200 (Personnel Separations) with a bad conduct discharge. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 5 years, 11 months, and 18 days of active service with 71 days of lost time. He was assigned separation code JJD, the narrative reason for separation as "As a Result of Court-Martial," with reentry code 4.

(1) The Remarks block listed his immediate reenlistments (790621 to 811221, 811222 to 850821) but did not list his continuous honorable service

(2) He was awarded or authorized the:

- Expert Marksmanship Qualification Badge with M16 Rifle
- Army Service Ribbon
- Overseas Service Ribbon
- Expert Marksmanship Qualification Badge with Hand Grenade
- Army Good Conduct Medal

4. A review of the applicant's record confirms he is eligible for an award and campaign credits that are not recorded on his DD Form 214. The entries will be added to his DD Form 214 as administrative corrections and will not be considered by the Board.

5. On 1 December 2009, the ABCMR rendered a decision in Docket Number AR20090006457. The Board considered the applicant's request for an upgrade of his discharge and his PTSD. The Board found no available evidence of disabling mental condition at or prior to the time of discharge. The Board considered the conclusion of the trial by court-martial was warranted by the gravity of the offenses charged. Based on a preponderance of evidence, the Board determined the overall merits of the case are insufficient as basis for correction of the records of the applicant

6. There is no evidence the applicant has applied to the Army Discharge Review Board for review of his discharge within that board's 15-year statute of limitations.

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 his service record in accordance with the published equity, injustice, or clemency determination guidance.

9. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting a reconsideration of his prior request for an upgrade of his Bad Conduct Discharge (BCD) to honorable. The applicant's previous consideration by the ABCMR is summarized in Docket Number AR20090006457 dated 1 December 2009. More specifically, the applicant asserts that he had mental health problems that started in the military and have continued since his discharge. He noted that he was hearing voices but did not know what was going on. 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 (RA) on 21 June 1979, 2) DA Form 2-2 shows the applicant was convicted by court-martial of behaving with disrespect toward his superior commissioned officers (15 July 1983), wrongfully disobeyed a lawful command (15 July 1983), and wrongfully communicating provoking words to a service member (11 July 1983), 3) the complete facts and circumstances surrounding the applicant's discharge are unavailable for review, 4) the applicant was discharged on 21 August 1985. His DD Form 214 shows the narrative reason for separation as "As a Result of Court-Martial" and the separation code as JJD.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. The electronic military medical record (AHLTA) was not reviewed as it was not in use during the applicant's time in service. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. There were no in-service medical records available for review.

d. A review of JLV shows the applicant is not service-connected through the VA for any conditions. There were limited VA medical records available for review in JLV from 03 June 1991 through 06 February 2024. He contacted social work through the Health Care for Homeless Veterans (HCHV) program on 06 February 2024 requesting assistance with housing. There were no other BH-related records available for review in JLV. However, it is of note that due to the applicant's BCD, he is ineligible for VA treatment.

e. Based on the available information, it is the opinion of the Agency Medical Advisor that there is insufficient evidence that the applicant had a condition or experience during his time in service that mitigated his misconduct. However, he contends that his misconduct was related to Other Mental Health Issues, and, per liberal guidance, his assertion is sufficient to warrant the Board's consideration.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends his misconduct was related to Other Mental Health Issues.

(2) Did the condition exist or experience occur during military service? Yes, per the applicant's assertion.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of records was void of any BH diagnosis or treatment history for the applicant during or after service and he provided no medical documentation supporting his assertion of Other Mental Health Issues. In absence of documentation supporting his assertion, there is insufficient evidence to establish his misconduct was related to or mitigated by Other Mental Health Issues and insufficient evidence to support an upgrade based on BH mitigation. However, he contends that his misconduct was related to Other Mental Health Issues, and, per liberal guidance, his assertion is sufficient to warrant the Board's consideration.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial 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.

a. The applicant's trial by a court-martial was warranted by the gravity of the offense charged (behaving w/disrespect toward his superior commissioned officers, wrongfully disobeying a lawful command, and wrongfully communicating provoking words to a service member). The applicant's conviction and discharge were conducted in accordance with applicable laws and regulations and the discharge appropriately characterizes the misconduct for which he was convicted. He 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. 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.

b. Continuous honorable service: Grant. The Board noted that the applicant's service from first date of enlistment to the date before his last reenlistment was honorable. For enlisted Soldiers with more than one enlistment period during the time covered by this DD Form 214, in addition to listing immediate reenlistment(s), an entry is required for continuous honorable service from first day of service for which DD Form 214 was not issued until date before commencement of current enlistment. The entries in the Remarks Block of his DD Form 214 are erroneous and require correction.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

: : : GRANT FULL RELIEF

█ █ █ GRANT PARTIAL RELIEF

: : : GRANT FORMAL HEARING

: : : DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. In addition to the correction addressed in Administrative Note(s) below, the Board determined the evidence presented is sufficient to warrant partial amendment of the ABCMR's decision in AR20090006457 on 1 December 2009, dated 5 November 2033. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by adding to the Remarks Block of his DD Form 214 the entry "Continuous honorable service 19790621 – 19850821."

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to upgrading his discharge.

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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 NOTE(S):

A review of the applicant's records shows his DD Form 214 omitted an award. As a result, amend the DD Form 214 by adding in item 13 the Korea Defense Service Medal.

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 635-8 (Separations Processing and Documents), currently in effect, provides for the preparation and distribution of the DD Form 214. It states for item 18 (Remarks) to Soldiers who have previously reenlisted without being issued a DD Form 214 and are separated with any characterization of service except "Honorable", enter "Continuous Honorable Active Service from" (first day of service for which DD Form 214 was not issued) Until (date before commencement of current enlistment).
3. Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.
 - a. Paragraph 3-7a (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. Paragraph 3-7b (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. Paragraph 3-7c (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. Paragraph 3-11 (DD Form 259A (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.
4. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to carefully consider the revised post-traumatic stress disorder (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.

5. 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.

6. 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.

7. 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.

//NOTHING FOLLOWS//