

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 11 December 2024

DOCKET NUMBER: AR20240005752

APPLICANT REQUESTS: reconsideration of his previous request(s) to upgrade his bad conduct discharge.

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

- DD Form 149 (Application for Correction of Military Record)
- Letter, 5 February 2024, Subject: Request Reconsideration of Upgrading Certificate of Release or Discharge
- Statement in Support of VA (Department of Veteran's Affairs)
- Multiple certificates of training, achievement, and accomplishment (previously considered)
- DA Form 2-1 (Personnel Qualification Record) (previously considered)
- Letter, 6 April 2016, to the VA (diagnosis: Chronic Major Depression, Generalized Anxiety Disorder, and Hypertension)

FACTS:

1. For Reconsiderations.) 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 Dockets Number:

- AC94-09645 on 21 September 1994
- AR20190009601 on 23 September 2021

2. The applicant states while stationed at Fort Lewis, WA from 20 December 1979 to 5 June 1981 (exact date unknown due to lack of memory), he was physically assaulted and hit in the head with a bottle, diagnoses with post-traumatic stress disorder (PTSD), and prescribed medication (unknown) for the injury. At that time, he had no knowledge of PTSD. After the attack, he continued to Soldier until he was discharge after serving 11 years in the United States Army. On April 6, 2016, he had a psychiatric examination by Dr. EDW, M.D. (Attached). [The applicant marked PTSD in his application]. He also adds in a separate statement:

a. This request is in conjunction with his Application for Correction of Military Record Under the Provisions of Title 10, U.S. Code, Section 1552 and based on his honorable service and a change in his career that resulted in unfavorable action.

b. His DD Form 214 reflects that out of 11 years of service from 10 July 1979 until 1 January 1991, as a volunteer to serve honorable in the United States Army, and to serve his country, his career had ups and downs. Being promoted from private to sergeant with an Army Achievement Medal, awarded three Good Conduct Medals, the Noncommissioned Officer professional Development Ribbon, and two Overseas Ribbon.

c. In addition to his career and during the Cold War, he was recognized with a United States Army Europe and Seventh Army Certificate of Achievement for meritorious service from 7 January 1985-31 January 1985 during exercise Central Guardian, REFORGER 1985.

d. Although this request is outside the required window, recent medical diagnosis (dated 6 April 2016) has indicated his medical condition has worsened over the years after being physically assaulted while stationed at Fort Lewis, WA. He was in hit in the head with a bottle that required medical treatment and prescription medication. The doctor indicated that he suffered Post Traumatic Stress Disorder (PTSD). At that time, he had no idea what PTSD was. Undoing the past can't be done, but please reconsider his request in lieu of the medical diagnosis dated April 6, 2016.

3. The applicant enlisted in the Regular Army on 10 July 1979 and held military occupational specialty 76P, Materiel Control and Accounting Specialist.

a. He served through multiple reenlistments (reenlisted on 16 April 1982 and again on 18 September 1987) in a variety of assignments, including Germany from June 1981 to July 1982 and November 1984 to December 1986.

b. The applicant was promoted to sergeant (SGT)/E-5 on 4 April 1986.

c. On 13 February 1989, court-martial charges were preferred against the applicant for two specifications of failure to repair; five specifications of disobeying a lawful order; one specification of disrespect to a noncommissioned officer; two specifications of operating a vehicle while drunk; two specifications of assault on a civilian; and one specification of wrongfully using marijuana.

d. On 21 February 1989, the applicant was issued a letter of reprimand for driving a motor vehicle while under the influence of alcohol. He was referred to the Alcohol and Drug Abuse Prevention and Control Program on 5 March 1989, for treatment and rehabilitation. He was declared a rehabilitation failure on 28 March 1989.

e. On 11 April 1989, a sanity board hearing was ordered and found the applicant was alcohol dependent and that he abused cannabis. Further, there was no personality disorder diagnosed.

f. On 5 May 1989, at Fort Riley, KS, the applicant was arraigned and tried at a Special Court-Martial on the following charges. He was found guilty and convicted of:

- two specifications of failing to repair
- four specifications of failure to obey lawful orders
- one specification of operating a vehicle while drunk
- one specification of wrongful use of marijuana

g. The court sentenced him to reduction to the lowest enlisted grade of E-1, confinement at hard labor, and to be separated from service with a bad conduct discharge.

h. On 24 July 1989, the convening authority approved the sentence and except for the bad conduct discharge, ordered it executed. The applicant was confined from 5 May to 24 September 1989. The record of trial was forwarded to the appellate authority for appellate review.

i. On 13 August 1990, the U.S. Army Court of Military Review affirmed the findings and guilty and the sentence.

j. Special Court-Martial Order Number 60, issued by U.S. Army Correctional Brigade, Fort Riley, KS on 19 December 1990, noted that the sentence had been finally affirmed and ordered the BCD duly executed.

k. The applicant was discharged from active duty on 7 January 1991. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 3, as a result of court-martial, with his service characterized as bad conduct (Separation Code JJD and Reentry Code 4). He completed 11 years, 1 month, and 5 days of active service. His DD Form 214 also shows:

(1) He was awarded or authorized the Army Service Ribbon, Overseas Service Ribbon (2nd Award), NCO Professional Development Ribbon, Good Conduct Medal (3rd Award), Army Achievement Medal, and Sharpshooter Badge with Rifle Bar.

(2) The Remarks Block listed his immediate reenlistments as well as his continuous honorable service.

4. On 20 September 1994, the Board denied his request for an upgrade of the discharge. The Board stated:

a. In order to justify correction of a military record, the applicant must show to the satisfaction of the Board, or it must otherwise satisfactorily appear, that the record is in error or unjust. The applicant has failed to submit evidence that would satisfy the aforementioned requirement. The discharge was accomplished in accordance with the direction of a properly constituted military court-martial and after exhaustion of all appellate reviews.

b. Title 10, United States Code, section 1552, as amended, does not permit any redress by this Board which would disturb the finality of a court-martial conviction. The applicant has stated that there was nothing unjust or in error about his court-martial and discharge. In view of the foregoing, there is no basis for granting the applicant's request. The applicant has failed to submit sufficient relevant evidence to demonstrate the existence of probable error or injustice.

5. On 23 September 2021, the Board reconsidered his request for an upgrade and again denied it.

a. Prior to adjudicating his case, the Agency psychologist reviewed his request. Documentation reviewed includes the applicant's completed DD149 and supporting documentation and his military separation packet. The VA electronic medical record, Joint Legacy Viewer (JLV) was also reviewed. The military electronic medical record (AHLTA) was not reviewed, as it was not in use during his time in service. Based on the available information and in accordance with the Liberal Consideration guidance, Agency psychologist determined there is insufficient evidence to support the presence of PTSD or any other behavioral health conditions which led to his Bad Conduct Discharge. Very limited medical records supporting the presence of significant psychological symptoms or diagnoses during his time in service were provided for review. Additionally, a conviction of an assault to a woman's head is not part of the natural history or sequelae of PTSD, or other behavioral health conditions and, as such, is not mitigated under Liberal Consideration. A discharge upgrade is not recommended at this time.

b. After reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined relief was not warranted. The Board considered the applicant's statement, his record of service, the frequency and nature of his misconduct, the outcome of court-martial proceedings and the reason for his separation. The Board considered review and conclusions of the medical advising official as well as the post service documents the applicant provided. The Board found insufficient in-service mitigation for the serious misconduct and the post-service evidence insufficient to

support clemency. Based upon a preponderance of evidence, to include the lengthy pattern of misconduct leading to the applicant's separation and the findings and recommendation of the medical advisor, the Board concluded there was insufficient evidence of an error or injustice which would warrant a change to the applicant's characterization of service.

6. By regulation (AR 635-200), 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.

7. 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.

8. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting reconsideration of his previous request to upgrade his bad conduct discharge. He contends he experienced mental health conditions including PTSD, which 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 enlisted in the Regular Army on 10 July 1979; 2) On 5 May 1989, the applicant was arraigned, tried, found guilty, and convicted at a Special Court-Martial on the following charges: A) two specifications of failing to repair; B) four specifications of failure to obey lawful orders; C) one specification of operating a vehicle while drunk; and D) one specification of using marijuana; 3) The applicant was discharged from active duty on 7 January 1991, Chapter 3, as a result of court-martial, with his service characterized as bad conduct; 4) The applicant's request for an upgrade has been reviewed and denied in 1994 and 2021.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the available supporting documents and the applicant's available military service and medical records. The VA's Joint Legacy Viewer (JLV) and hard-copy medical records was also examined.

c. The applicant asserts he was experiencing mental health conditions including PTSD while on active service, which are related to his request. There is insufficient evidence the applicant reported or was diagnosed with a mental health condition including PTSD, while on active service. The applicant was enrolled in military substance abuse treatment (ADAPCP) on 5 March 1989 till he was declared a rehabilitation failure on 28 March 1989. On 11 April 1989, a sanity board hearing was ordered, and the applicant was diagnosed with alcohol dependence and cannabis

abuse. There was insufficient evidence the applicant was diagnosed with a mental health condition beyond substance abuse/dependence.

d. A review of JLV provided insufficient evidence the applicant has been diagnosed with a service-connected mental health condition including PTSD, and he does not receive service-connected disability. The applicant did provide hard-copy civilian medical documentation from 2016 from a physician directed to the VA. The applicant was reported to at that time fit criteria for Major Depression and Generalized Anxiety Disorder. The applicant was reported to have mental health symptoms since his service, and he also began to experience nightmares in 2007 and later panic attacks.

e. Based on the available information, it is the opinion of the Agency Medical Advisor that there is sufficient evidence to support the applicant had a condition or experience that partially mitigates his discharge.

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, which mitigates his discharge. The applicant was diagnosed with Major Depression and Generalized Anxiety Disorder in 2016.

(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, which mitigates his discharge.

(3) Does the condition or experience actually excuse or mitigate the misconduct? Partially, there is some evidence beyond self-report the applicant was experiencing a mental health condition, while he was on active service. The applicant did report to a medical provider in 2016 that he experienced mental health symptoms since his military service, but it is uncertain if that is during or after his discharge. Yet, there is insufficient evidence beyond self-report the applicant was ever diagnosed with PTSD. The applicant did demonstrate alcohol dependence and cannabis use while on active service, which could be a natural sequelae to anxiety or depressive symptoms. However, the presence of continued alcohol dependence, alcohol related misconduct, (i.e. DUI) and cannabis use are not sufficient evidence of the presence of a mental health condition beyond substance abuse/dependence. In addition, there is no nexus between the applicant's report of depressive and anxiety symptoms and his other misconduct of repeated failure to follow orders or to repair in that: 1) these types of misconduct are not a part of the natural history or sequelae of the applicant's reported mental health conditions; 2) the applicant's reported mental health conditions do 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 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 determinations requests for upgrade of his characterization of service. Upon review of the applicant's request, available military records and the medical review, the Board notwithstanding considered the advising opine finding sufficient evidence to support the applicant had a condition or experience that partially mitigates his discharge. The opine noted there is insufficient evidence beyond self-report the applicant was ever diagnosed with PTSD.

2. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the pattern of misconduct and operating a vehicle while drunk. 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 carefully considered the applicant's periods of honorable service, awards, character letters and accomplishments. However, the Board found the applicant's serious misconduct could not be mitigated. 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 AC94-09645 on 21 September 1994 and AR20190009601 on 23 September 2021.

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. Army Regulation 635-200 (Personnel Separations (then) and Active Duty Enlisted Administrative Separations (now)) provides for the separation of enlisted personnel:

a. Paragraph 3-7a provides that an honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of 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 provides that 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.

c. Paragraph 3-7c 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, security reasons, or for the good of service in selected circumstances.

d. Paragraph 3-11 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.

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 Uniform Code of Military Justice, 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 Uniform Code of Military Justice 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. 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 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.

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; TBI; sexual assault; sexual harassment. Boards were directed 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 that misconduct which 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. 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.

6. 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.

//NOTHING FOLLOWS//