

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 March 2025

DOCKET NUMBER: AR20240006351

APPLICANT REQUESTS: an upgrade of his bad conduct discharge (BCD) to honorable.

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

- DD Form 149 (Application for Correction of Military Record)
- Legal Brief
- Army Service Records (7 pages), dated 15 September 2000 to 9 July 2004
- Service Treatment Records (3 pages), dated 24 April 2001 to 4 March 2003
- statements of support (2)

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 is still suffering the material injustice of his discharge.
3. Counsel states that during the applicant's period of service, he began to experience anxiety and was seen by psychiatry for further evaluation. Before a general court-martial, the applicant was sentenced to a BCD. He has been improperly stigmatized and harmed by his discharge status and robbed of his good name, which injures his economic and social potential. Despite this, he is successful in his civilian life. He started his own business and employs other Veterans. He continually shows his commitment to serving his family, county, and community.
4. The applicant enlisted in the Regular Army on 15 September 2000.
5. The complete facts and circumstances surrounding the applicant's discharge are not available for review. However, General Court-Martial Order Number 75, issued by Headquarters, U.S. Army Armor Center, Fort Knox, KY, dated 13 April 2004, shows that before a general court-martial on 10 March 2003, the applicant was sentenced to a

BCD, confinement for 21 months, and forfeiture of all pay and allowances. The sentence was finally affirmed on 13 April 2004. The portion of the sentence pertaining to confinement was served. Article 71(c) was complied with, and the BCD was ordered executed.

6. The applicant was discharged on 9 July 2004, presumably under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3, by reason of court-martial, other, with his service characterized as bad conduct. He completed 2 years, 3 months, and 27 days of net active service.

7. The applicant provides:

a. Three pages of service treatment records which will be reviewed and summarized, in pertinent part, in the "MEDICAL REVIEW" section of this Record of Proceedings (ROP).

b. In two statements of support, dated 10 January 2022 and 8 March 2023, the authors attest to the applicant's character. He is a self-made man of integrity, dedication, and loyalty. He was an exemplary Soldier, who easily outdid his peers. He was always willing to go above and beyond to ensure the safety and success of his team. He is a man of moral and spiritual good standing in society and repeatedly shows his commitment to serving his family, country, and community.

8. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his Bad Conduct Discharge (BCD). The applicant did not specify an issue/condition related to his request on his DD Form 149; however, through counsel, the applicant stated he was treated for anxiety in-service. 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 15 September 2000, 2) The complete facts and circumstances surrounding the applicant's discharge are not available for review. However, General Court-Martial Order Number 75, dated 13 April 2004, shows that before a general court-martial on 10 March 2003, the applicant was sentenced to a BCD, confinement for 21 months, and forfeiture of all pay and allowances. The sentence was finally affirmed on 13 April 2004. The portion of the sentence pertaining to confinement was served. Article 71(c) was complied with, and the BCD was ordered executed, 3) the applicant was discharged on 09 July 2004. On his DD Form 214, the narrative reason for separation shows Court-Martial, Other.

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. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. In-service medical records available via JLV and provided as part of his application were reviewed. There were three medical encounters in JLV from 27 January 2004 through 21 March 2004, none of which were BH-related. Review of the applicant's prescriptions in JLV shows he was prescribed several antidepressant and sleep medications during his time in service to include Fluoxetine (11 June 2002-15 July 2002), Paxil for anxiety (06 December 2002), Bupropion for anxiety (28 January 2003-07 August 2003), Trazodone for sleep (21 January 2003-25 April 2003), and diphenhydramine for insomnia (Benadryl) (19 May 2003-18 July 2003). Included as part of his application, a primary care telephone consult note dated 30 December 2002 shows the applicant requested a refill of Zantac (heartburn) and Paxil (antidepressant), noting decreased anxiety and worry since starting Paxil. A primary care telephone consult dated 04 March 2003 shows the applicant needed a refill of Zyban and was waiting to see psychiatry for further evaluation. The diagnosis was noted as Anxiety.

d. A character reference dated 10 January 2022 submitted by a friend who previously served with the applicant was reviewed. The author indicated that the applicant's mental health deteriorated following 9/11, which resulted in stricter rules regarding leaving post while stationed in Korea and continued to have mental health issues at his following duty station.

e. A review of JLV shows the applicant is not service connected through the VA for any conditions; however, it is of note that his BCD renders him ineligible for VA clinical services.

f. Based on the available information, it is the opinion of the Agency Medical Advisor that there is sufficient evidence that the applicant was diagnosed with a potentially mitigating BH condition in-service, Anxiety. However, as the circumstances that led to the applicant's discharge are unavailable for review, a nexus cannot be established between the misconduct that led to his discharge and his diagnosis of Anxiety. Thus, BH mitigation is unclear.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, in-service medical records show a history of treatment for Anxiety.

(2) Did the condition exist or experience occur during military service? Yes, the applicant was treated for Anxiety in-service.

(3) Does the condition or experience actually excuse or mitigate the discharge? Unclear. Review of the applicant's medical records show he was diagnosed with Anxiety in-service and had been trialed on several antidepressant and sleep medications for treatment of the condition. The applicant is not service connected through the VA for any conditions; however, due to his BCD, he is ineligible for VA clinical services. Although there is evidence that the applicant was diagnosed and treated for Anxiety in-service, as the circumstances that led to his discharge are unavailable for review, a nexus cannot be established between his diagnosis of Anxiety and the conduct that led to his discharge. Thus, BH mitigation is unclear.

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. One potential outcome was to grant an upgrade to general under honorable conditions discharge based on the advising opine and his post service achievements. However, upon review of the applicant's petition, available military records and the medical review, the Board majority considered the advising opinion of the Agency Medical Advisor that there is sufficient evidence that the applicant was diagnosed with a potentially mitigating BH condition in-service, Anxiety. However, as the circumstances that led to the applicant's discharge are unavailable for review, a nexus cannot be established between the misconduct that led to his discharge and his diagnosis of Anxiety.

2. The Board notwithstanding the advising opine finding there is sufficient evidence of an in-service behavioral health condition specifically, anxiety that could be potentially mitigating. However, the Board noted that the complete facts and circumstances surrounding the misconduct leading to the applicant's court-martial and discharge are unavailable for review. Without this critical information, a nexus between the applicant's diagnosis and the misconduct cannot be established. 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 acknowledged the applicant's honorable post-service conduct, and the character references submitted on his behalf, however, it must rely on the available record and applicable standards. In the absence of compelling evidence to support clemency or a clear connection between the behavioral health condition and the misconduct, the Board determined that relief is not warranted and denied the request for upgrade.

3. Consideration was given to the Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, in-service medical records show a history of treatment for Anxiety.

(2) Did the condition exist or experience occur during military service? Yes, the applicant was treated for Anxiety in-service.

(3) Does the condition or experience actually excuse or mitigate the discharge? Unclear. Review of the applicant's medical records show he was diagnosed with Anxiety in-service and had been trialed on several antidepressant and sleep medications for treatment of the condition. The applicant is not service connected through the VA for any conditions; however, due to his BCD, he is ineligible for VA clinical services. Although there is evidence that the applicant was diagnosed and treated for Anxiety in-service, as the circumstances that led to his discharge are unavailable for review, a nexus cannot be established between his diagnosis of Anxiety and the conduct that led to his discharge. Thus, BH mitigation is unclear.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
XXX	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.

X //SIGNED//

CHAIRPERSON

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 (USC), 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 Army Board for Correction of Military Records (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. Section 1556 of Title 10, USC, requires the Secretary of the Army to ensure that an applicant seeking corrective action by Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and 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, and reviews to ABCMR applicants prior to adjudication.
3. 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 regulation provides that 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.

4. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations) sets forth the basic authority for the separation of enlisted personnel. The regulation provides:

a. 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. 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. Chapter 3, Section IV provided that a member would be given a BCD pursuant only to an approved sentence of a general or special court-martial, after completion of appellate review, and after such affirmed sentence has been ordered duly executed.

5. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, USC, Section 1552, the authority under which this Board acts, the ABCMR 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.

6. 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 Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder; traumatic brain injury; sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. 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.

7. 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-

marital; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

//NOTHING FOLLOWS//