

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 22 January 2025

DOCKET NUMBER: AR20240007873

APPLICANT REQUESTS: an upgrade of his bad conduct discharge.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
DD Form 293 (Application for Review of Discharge from the Armed Forces of the United States) in lieu of a DD Form 149 (Application for Correction of Military Record)

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 had 6 years of honorable military service. He had two combat deployments in operations supporting Operation Iraqi Freedom, and he has post-traumatic stress disorder due to combat operations. The applicant also indicates sexual assault/harassment is related to his request.
3. The applicant enlisted in the Regular Army on 14 January 2003. After completing initial entry training, he was awarded military occupational specialty 25C (Radio Operator/Maintenance). He reenlisted on 18 February 2006.
4. His service record shows he served in Iraq from 21 September 2005 to 31 August 2006 and again from 26 September 2007 to 17 November 2008.
5. General Court-Martial Order Number 2, issued by Headquarters, 101st Airborne Division (Air Assault) and Fort Campbell on 2 February 2010 shows the applicant, at the time serving in the rank/grade of specialist/E-4, was charged with one specification of violating Article 120, Uniform Code of Military Justice. The specification reads that on or about 6 April 2009, he caused L.A.E. to engage in a sexual act, to wit: sexual intercourse by body weight to push against L.A.E. strength sufficient that she could not avoid or escape the sexual conduct.

a. The applicant pleaded not guilty but was found guilty.

b. He was sentenced to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 3 years, and to be discharged from the service with a bad conduct discharge. The sentence was approved and ordered executed except for the part of the sentence pertaining to a bad conduct discharge. He was confined at the Personnel Control Facility at Fort Sill, OK.

6. On 30 November 2012, Headquarters, U.S. Army Fires Center of Excellence and Fort Sill, issued General Court-Martial Order Number 198, which noted the applicant's sentence had been finally affirmed and the sentence to a bad conduct discharge was to be executed.

7. On 8 February 2013, the applicant was discharged. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged in the lowest enlisted grade by reason of court-martial under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), chapter 3, and his service was characterized as bad conduct. The DD Form 214 also shows:

- He completed 9 years and 26 days of net active service
- He had continuous honorable active service from 14 January 2003 to 17 February 2006
- His awards included the Iraq Campaign Medal with two campaign stars, the Army Commendation Medal, and the Army Good Conduct Medal (2nd Award)
- He had lost time from 10 September 2009 to 8 September 2010
- He was on excess leave from 16 October 2011 to 8 February 2013

8. 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 Board 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.

9. Army Regulation 635-200 provides that a Soldier would be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial and that the appellate review must be completed, and the affirmed sentence ordered duly executed.

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

11. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his Bad Conduct Discharge (BCD). On his DD Form 293, the applicant indicated Posttraumatic Stress Disorder (PTSD) and Sexual Assault/Harassment are related to his request. More specifically, he noted that he had six years of honorable military service, two combat deployments supporting Operation Iraqi Freedom, and has PTSD due to combat operations. 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 14 January 2003 and reenlisted on 18 February 2006, 2) he served in Iraq from 21 September 2005 to 31 August 2006 and again from 26 September 2007 to 17 November 2008, 3) General Court-Martial Order Number 2 dated 2 February 2010 shows the applicant was charged with one specification of violating Article 120. The specification reads that on or about 6 April 2009, he caused [the victim] to engage in a sexual act, to wit: sexual intercourse, by body weight to push against [the victim] with strength sufficient that she could not avoid or escape the sexual conduct. The applicant plead not guilty but was found guilty, 4) the applicant was discharged on 08 February 2013 by reason of court-martial under the provisions of Army Regulation (AR) 635-200, Chapter 3.

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 were available for review VIA JLV from 16 March 2005 through 30 August 2011. Records show that he sought treatment for Marital Problems on-and-off from 10 April 2007 through 17 August 2007, for a total of five sessions [*Advisor's Note:* it appears treatment was discontinued due to the applicant's pending deployment in September 2007]. The applicant was command referred to BH on 17 April 2009 for a risk assessment. It was noted that the applicant expressed an interest in medication to help with sleep and to help cope with marital discord and legal trouble. He was diagnosed with Adjustment Disorder with Depressed Mood and was released without limitations. Regarding his treatment plan, he was scheduled for individual psychotherapy, referred for marriage and family therapy for couple's work, and referred to psychiatry for a medication evaluation. He presented to BH on 21 April 2009 as a walk-in due to experiencing suicidal ideation over the weekend following divorce-related actions taken by his wife. The applicant was agreeable to a voluntary psychiatric admission and his diagnosis was documented as Depression. [*Advisor's Note:* The inpatient psychiatric records were not available for review.] On 04 May 2009, he presented to BH following discharge from his inpatient psychiatric admission. It was documented that he denied experiencing any suicidal/homicidal ideation (SI/HI) and was not prescribed any medications while hospitalized. The provider documented that

the applicant reported he felt “a lot better” and had a “better outlook and is relieved” due to passing the PT test which allowed him to become promotable. The diagnosis was deferred and it was noted that he was scheduled to follow-up with the High-Risk group. A note dated 07 May 2009 shows the applicant did not show for his BH appointment and was notified by the applicant’s command that the applicant was charged with a Court Martial the previous evening and that his wife was pursuing divorce. He presented to BH on 08 May 2009 noting overall he was feeling better emotionally post hospitalization though he reported having some anxiety about his upcoming Article 32 hearing. The diagnosis was deferred and he was released without limitations. He no showed an appointment on 12 May 2009. The applicant followed-up with BH on 03 June 2009 noting he had plans to visit family during block leave and was preparing to deploy to Afghanistan. At the time of the visit, he was uncertain as to the status of his court-martial though had completed an Article 32 hearing. It was also noted he was coping well with his pending divorce. It was also noted that he stated he was prescribed a sleep medication while hospitalized but that he did not feel the need to take the medication. His diagnosis was deferred and he was released without limitations. A BH out-processing note dated 14 December 2009 shows the applicant was detained at the time of the note and was cleared for PCS for confinement. Records show he was evaluated by BH while in confinement; however, no additional BH diagnoses were rendered. While in confinement, it was documented that he completed group treatment for anger management, impact of crimes on victims, and stress management.

d. A review of JLV shows the applicant is not service-connected through the VA for any conditions. It is of note that his BCD renders him ineligible for VA clinical services.

e. Based on the available information, it is the opinion of the Agency Medical Advisor that there is sufficient evidence that the applicant has been diagnosed with a potentially mitigating BH condition in-service, Depression. Records show he was also diagnosed with Adjustment Disorder with Depressed Mood; however, a diagnosis of Adjustment Disorder that is acute (e.g., less than 6 months) does not constitute a mitigating condition. Additionally, psychosocial stressors, such as his diagnosis of Marital Problem, is not constituted as a mitigating condition. Although records show the applicant was diagnosed with a potentially mitigating BH condition in-service, this Advisor would contend that the applicant’s misconduct is not mitigated by his diagnosis of Depression.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant was diagnosed with Depression in-service.

(2) Did the condition exist or experience occur during military service? Yes, the applicant was diagnosed with Depression in-service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. review of the applicant's in-service medical records shows that he was diagnosed with Depression, Adjustment Disorder with Depressed Mood, and Marital Problem. His diagnoses of Adjustment Disorder with Depressed Mood and Marital Problem do not constitute mitigating conditions. Although records show the applicant was diagnosed with Depression in-service, it is of note that Depression does not interfere with the ability to distinguish between right and wrong and act in accordance with the right. Moreover, sexual misconduct is not part of the natural history and sequelae of Depression. As such, BH mitigation is not supported.

g. Regarding applicant's assertion of PTSD, while there is no evidence to support this diagnosis, applicant's self-assertion of PTSD alone merits consideration by the board. Although the applicant checked 'sexual assault/harassment' on his application, it is unclear if he is requesting consideration of his application based on a history of Military Sexual Trauma (MST) as there were no details provided in his application and no report of MST available for review in his medical records.

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 of the Agency Medical Advisor that there is sufficient evidence that the applicant has been diagnosed with a potentially mitigating BH condition in-service, Depression. Records show he was also diagnosed with Adjustment Disorder with Depressed Mood; however, a diagnosis of Adjustment Disorder that is acute (e.g., less than 6 months) does not constitute a mitigating condition. Additionally, psychosocial stressors, such as his diagnosis of Marital Problem, is not constituted as a mitigating condition. Although records show the applicant was diagnosed with a potentially mitigating BH condition in-service, this Advisor would contend that the applicant's misconduct is not mitigated by his diagnosis of Depression.

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3. The Board acknowledged the applicant’s six years of honorable service, including two combat deployments in support of Operation Iraqi Freedom, as well as his claims of post-traumatic stress disorder (PTSD) and experiences of sexual assault and harassment during service. While these factors were considered, the applicant did not provide any post-service achievements or character references to support a clemency determination. The record reflects that the applicant was convicted by a general court-martial for a serious offense involving non-consensual conduct. Given the gravity of the misconduct, the absence of mitigating medical documentation, and the lack of compelling justification for clemency, the Board found no evidence of error or injustice in the discharge process. The Board determined the characterization of service was appropriate and denied relief.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	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, 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 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, USC, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.
3. Title 10, USC, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Court-martial convictions stand as adjudged or modified by appeal through the judicial process, 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.
4. 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. 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. It is not an investigative body.

5. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. An honorable discharge was separation with honor. Issuance of an honorable discharge certificate was appropriate when the quality of the Soldier's service generally met the standards of acceptable conduct and performance of duty or was otherwise so meritorious that any other characterization would clearly be inappropriate. Where there were infractions of discipline, commanders were to consider the extent thereof, as well as the seriousness of the offense. Separation authorities could furnish an honorable discharge when subsequent honest and faithful service over a greater period outweighed disqualifying entries in the Soldier's military record. It was the pattern of behavior, and not the isolated instance, which commanders should consider as the governing factor.

b. A general discharge was a separation from the Army under honorable conditions. When authorized, separation authorities could issue a general discharge to Soldiers whose military record was satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. A discharge under other than honorable conditions (UOTHC) is an administrative separation from the Service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, homosexual conduct, security reasons, or in lieu of trial by court martial in the following circumstances.

(1) An under-other-than-honorable-conditions discharge will be directed only by a commander exercising general court-martial authority, a general officer in command who has a judge advocate or legal advisor available to his/her command, higher authority, or the commander exercising special court-martial convening authority over the Soldier who submitted a request for discharge in lieu of court-martial (see chapter 10) when delegated authority to approve such requests.

(2) When the reason for separation is based upon one or more acts or omissions that constitutes a significant departure from the conduct expected of Soldiers of the Army. Examples of factors that may be considered include the following:

- Use of force or violence to produce bodily injury or death
- Abuse of a position of trust
- Disregard by a superior of customary superior-subordinate relationships

- Acts or omissions that endanger the security of the United States or the health and welfare of other Soldiers of the Army
- Deliberate acts or omissions that seriously endanger the health and safety of other persons

d. A bad conduct discharge will be given to a Soldier pursuant only to an approved sentence of a general or special court-martial. The appellate review had to have been completed and the affirmed sentence then ordered duly executed. Questions concerning the finality of appellate review should be referred to the servicing staff judge advocate.

e. A dishonorable discharge will be given to a Soldier pursuant only to an approved sentence of a general court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed. Questions concerning the finality of appellate review should be referred to the servicing staff judge advocate.

f. Chapter 5, paragraph 5-3 states separation under this paragraph is the prerogative of the Secretary of the Army. Secretarial plenary separation authority is exercised sparingly and seldom delegated. Ordinarily, it is used when no other provision of this regulation applies, and early separation is clearly in the best interest of the Army. Separations under this paragraph are effective only if approved in writing by the Secretary of the Army or the Secretary's approved designee as announced in updated memorandums.

6. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Navy Records (BCM/NR) to carefully consider the revised PTSD criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged UOTHC 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.

7. 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 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 misconduct that led to the discharge.

8. 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-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 on the basis of 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.

//NOTHING FOLLOWS//