

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 30 April 2025

DOCKET NUMBER: AR20240009046

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

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs Records

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 AC90-09421 on 11 May 1992.

2. The applicant states he is a child molestation survivor and none of this was ever brought up. He also has undiagnosed PTSD that was never brought in as evidence. The PTSD would have borne great bearing upon the court-martial and the verdict, and he would have gotten help. His lawyer was in collusion with the prosecution against him which was a violation of his constitutional rights.

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

a. On 30 March 1977, he enlisted in the U.S. Army Reserve under the delayed entry program.

b. On 11 April 1977, he was discharged from the U.S. Army Reserve for the purpose of enlistment in the Regular Army on 12 April 1977.

c. He reenlisted for a period of four years on 19 December 1978.

d. He served overseas in Italy from 3 November 1980 to 1 November 1982.

e. He reenlisted for a period of six years on 30 August 1984.

f. He served overseas in Germany from 13 May 1985 to 3 December 1986.

g. On 26 September 1986, the applicant was found guilty by a special court-martial for violation of a lawful general regulation by using a Government facility during normal duty hours to contract for the making of a pornographic movie in a Government facility in violation of Article 92, UCMJ, and for wrongfully committing an indecent act with a female with the intent to gratify his sexual desires, and wrongfully soliciting two females to engage in acts of prostitution for the purpose of making a pornographic movie in a Government facility during normal duty hours in violation of Article 134, UCMJ. The sentence imposed consisted of a bad conduct discharge.

h. On 10 June 1987 the Army Court of Military Review dismissed the special court-martial findings pertaining to Article 92, UCMJ; however, the court affirmed the findings and sentence as they pertained to the violation of Article 134, UCMJ.

i. On 11 September 1987, the United States Court of Military Appeals denied the applicant's petition to review his case. The appeals process having been exhausted he was discharged on 29 December 1987 with a bad conduct discharge. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged in the rank/grade of private/E-1 because of court-martial in accordance with Army Regulation 635-200 (Personnel Separation – Enlisted Personnel), Sec IV, Chapter 3.

4. On 6 November 1989, the Army Discharge Review Board denied his request to upgrade his discharge.

5. The applicant provided a statement from VA, 20 May 2024 verifying his service-connected disabilities for a combined rating of 100 percent.

6. 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.

## 7. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his bad conduct discharge (BCD). He contends he experienced PTSD during his military service that mitigates his misconduct. 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 12 April 1977; 2) On 26 September 1986, the applicant was found guilty by a special court-martial for the violation of soliciting two females to engage in acts of prostitution for the purpose of making a pornographic movie in a Government facility; 3) The applicant was discharged on 29 December 1987, Chapter 3- as a result of court-martial with a BCD.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the available supporting documents and the available military service records. The VA's Joint Legacy Viewer (JLV) and VA medical documentation provided by the applicant were also reviewed.

c. The applicant asserts he experienced PTSD that mitigates his misconduct. There is insufficient evidence the applicant reported or was diagnosed with a mental health condition including PTSD while on active service.

d. A review of JLV provided evidence the applicant began to engage with the VA starting in 2008, predominantly for service-connected physical concerns. Later in 2017, he underwent a Compensation and Pension evaluation for mental health concerns including PTSD, and he was diagnosed with service-connected PTSD. The applicant has undergone some treatment for PTSD related to childhood sexual trauma and for combat related events. He is currently determined to be 50% disabled for service-connected PTSD.

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

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 PTSD, which mitigates his misconduct. He was diagnosed with service-connected PTSD by the VA in 2017.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced PTSD while on active service, which mitigates his misconduct. He was diagnosed with service-connected PTSD by the VA in 2017.

(3) Does the condition or experience actually excuse or mitigate the misconduct? No, there is sufficient evidence beyond self-report that the applicant has been diagnosed with a service-connected PTSD. However, there is no nexus between the applicant's PTSD and the applicant's misconduct in that: 1) this type of misconduct is not a part of the natural history or sequelae of PTSD and; 2) PTSD does not impact one's ability to distinguish right from wrong and act in accordance with the right. Yet, the applicant contends he experienced a mental health condition or experience while on active service that mitigates his misconduct, and the applicant's contention is sufficient for consideration per the Liberal Consideration Policy.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition, and executed a comprehensive review based on law, policy, and regulation. The Board found the applicant was found guilty by a special court-martial for wrongfully committing an indecent act with a female with the intent to gratify his sexual desires and wrongfully soliciting two females to engage in acts of prostitution for the purpose of making a pornographic movie in a Government facility during normal duty hours. The Board concurred with the medical advisory official who found there is insufficient evidence to support the applicant had a condition or experience that mitigates his misconduct. As a result, the Board found no error or injustice, but noted the applicant had prior honorable service which should have been annotated on his DD Form 214; thereby granting partial relief.

2. Based upon the misconduct leading to the applicant's separation and the following recommendation found in the medical review related to the liberal consideration:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant asserts he experienced PTSD, which mitigates his misconduct. He was diagnosed with service-connected PTSD by the VA in 2017.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced PTSD while on active service, which mitigates his misconduct. He was diagnosed with service-connected PTSD by the VA in 2017.

(3) Does the condition or experience actually excuse or mitigate the misconduct? No, there is sufficient evidence beyond self-report that the applicant has been diagnosed with a service-connected PTSD. However, there is no nexus between the applicant's PTSD and the applicant's misconduct in that: 1) this type of misconduct is not a part of the natural history or sequelae of PTSD and; 2) PTSD does not impact one's ability to distinguish right from wrong and act in accordance with the right. Yet, the applicant contends he experienced a mental health condition or experience while on active service that mitigates his misconduct, and the applicant's contention is sufficient for consideration per the Liberal Consideration Policy.

The Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant's characterization of service.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

|     |     |     |                      |
|-----|-----|-----|----------------------|
| :   | :   | :   | GRANT FULL RELIEF    |
| XXX | XXX | XXX | GRANT PARTIAL RELIEF |
| :   | :   | :   | GRANT FORMAL HEARING |
| :   | :   | :   | DENY APPLICATION     |

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief in the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AC90-09421 on 11 May 1992. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending his DD Form 214, item 18 (Remarks) to reflect "Continuous Honorable Service from 19 December 1978 through 29 August 1984".
2. The Board further determined that 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 any additional amendments of his DD Form 214 in excess of the above.

X //SIGNED//

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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, 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 (AR) 635-200 (Personnel Separations – Enlisted Personnel) sets forth the basic authority for separation of enlisted personnel.

a. Chapter 3 states a member will be given a bad conduct discharge pursuant only to an approved sentence of a general or a special court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed.

b. 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 acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

c. 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.

d. 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.

3. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, U.S. Code, 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.

4. The Acting Principal Deputy Under Secretary of Defense (Personnel and Readiness) provided clarifying guidance to Service DRBs and Service BCM/NRs on 24 February 2016 [Carson Memorandum]. The memorandum directed the BCM/NRs to waive the statute of limitations. Fairness and equity demand, in cases of such magnitude that a Veteran's petition receives full and fair review, even if brought outside of the time limit. Similarly, cases considered previously, either by DRBs or BCM/NRs,

but without benefit of the application of the Supplemental Guidance, shall be, upon petition, granted de novo review utilizing the Supplemental Guidance.

5. The Under Secretary of Defense (Personnel and Readiness) provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017 [Kurta Memorandum]. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD, traumatic brain injury (TBI), 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. 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.

a. Guidance documents are not limited to under other than honorable conditions discharge characterizations but rather apply to any petition seeking discharge relief including requests to change the narrative reason, re-enlistment codes, and upgrades from general to honorable characterizations.

b. An honorable discharge characterization does not require flawless military service. Many veterans are separated with an honorable characterization despite some relatively minor or infrequent misconduct.

c. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with mental health conditions, including PTSD; TBI; or behaviors commonly associated with sexual assault or sexual harassment; and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.

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.

//NOTHING FOLLOWS//