

(3) On or about 12 August 1997, wrongfully distributed 1.5 grams of cocaine.

(4) On or about 15 August 1997, attempted to distribute approximately one half of a pound of marijuana and approximately one eighth of an ounce of cocaine.

b. The sentence was adjudged on 15 May 1998: to be reduced to Private/E1, to forfeit all pay and allowances, to be confined for 28 months, and to be discharged with a BCD. Only so much of the sentence as provides for reduction to Private/E1, forfeiture of all pay and allowances, confinement for 12 months, and a BCD is approved and, except for the part of the sentence extending to a BCD, will be executed. The forfeiture of all pay and allowances required by Article 58b, UCMJ, was waived on 3 June 1998, effective 15 May 1998 until 4 November 1998, with the direction that such moneys be paid to [REDACTED].

c. GCM Order 119, Department of the Army, Headquarters, U.S. Army Armor Center and Fort Knox, Fort Knox, KY, 17 June 1999, the sentence of reduction to the grade of Private/E1, forfeiture of all pay and allowances, confinement for 12 months, and a BCD, adjudged on 15 May 1998, as promulgated by GCM Order Number 25, Headquarters, 1st Cavalry Division, Fort Hood, TX 76544-5034, dated 3 September 1998, has been finally affirmed. Article 71(c) having been complied with, the BCD will be executed. The forfeiture of all pay and allowances required by Article 58b, UCMJ, was waived on 3 June 1998, effective 15 May 1998 until 14 November 1998, with the direction that such monies be paid to [REDACTED]. That portion of the sentence pertaining to confinement has been served.

5. On 16 February 2000, the applicant was discharged accordingly. The DD Form 214 he was issued shows he was discharged as the result of court-martial and received a BCD. The DD Form 214 lists a Separation Program Designator (SPD) code of "JJD" with a corresponding Reentry (RE) code of "4." It also shows at the time of his discharge he completed 5 years, 2 months, and 22 days of creditable active military service with lost time for the period 15 May 1998 to 7 March 1999.

6. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. Under the provisions of 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.

7. The applicant provided argument or evidence that the Board should consider in accordance with the published equity, injustice, or clemency determination guidance.

8. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available records in the Interactive Personnel Electronic Records Management System (iPERMS), the Armed Forces Health Longitudinal Technology Application (AHLTA), the Health Artifacts Image Management Solutions (HAIMS) and the VA's Joint Legacy Viewer (JLV). The applicant requests discharge upgrade from Bad Conduct. He indicated that a recent deployment in 1997-1998 in Kuwait and PTSD diagnosis contributed to the reason for his discharge.

b. The ABCMR ROP summarized the applicant's record. Of note, he was a member of the Regular Army and enlisted 19Aug1994. His MOS was 71L10 Administrative Specialist. The DD 214 showed he was deployed in Korea 19950222 to 19960221. Documentation concerning deployment in Kuwait was not submitted/found. He was discharged from service 16Feb2000 under provisions of AR 635-200 due to court-martial. On 15May1998, he was found guilty of the following specifications: Failed to go to appointed place of duty (06Feb1998); wrongfully distributed 55 grams of marijuana (05Aug1997) and 1.5 grams of cocaine (12Aug1997); attempted to distribute ½ pound of marijuana and 1/8th of an ounce of cocaine (15Aug1997). His service was characterized as "Bad Conduct".

c. JLV search did not reveal any treatment records at a VA facility. The applicant did not submit any private treatment records. A service incurred physical injury was not found in the record. A behavioral health diagnosis was also not found in the record. The 03Sep2014 Secretary of Defense Liberal Guidance Memorandum and the 25Aug2017 Clarifying Guidance were considered. Under Liberal Consideration, the applicant's self-assertion of PTSD alone is sufficient to merit consideration of discharge upgrade by the board and change in narrative reason for separation.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant claims PTSD in relation to deployment.

(2) Did the condition exist, or did the experience occur during military service? Yes. The applicant claims PTSD in relation to deployment.

(3) Does the condition or experience actually excuse or mitigate the discharge? PTSD is associated with avoidant behavior, substance abuse and self-destructive behavior. PTSD is not considered a mitigating factor for the illegal distribution of controlled substances.

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 official finding PTSD is associated with avoidant behavior, substance abuse and self-destructive behavior. However, PTSD is not considered a mitigating factor for the illegal distribution of controlled substances. The Board determined there is insufficient evidence supporting the applicant's contentions of behavioral health conditions to consider with respect to mitigation of his misconduct.

2. The Board noted, the applicant provided no post service achievements or character letters of support attesting to his honorable conduct for the Board to weigh a clemency determination. 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 found insufficient evidence of in-service mitigating factors for the misconduct. Based on a preponderance of evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust. Therefore, the Board 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
■	■	■	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.

2/6/2024

X

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 635-200 (Personnel Separations - Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel.
 - a. Chapter 3, Section IV, provides the policies and procedures for separating members with a dishonorable discharge or a BCD. It stipulates that a Soldier will be given a BCD pursuant only to an approved sentence of a general or special court-martial, and that the appellate review must be completed and affirmed before the BCD portion of the sentence is ordered duly executed.
 - b. 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.

c. 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.

3. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. Under the provisions of 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. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards 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.

5. Army Regulation 15-185 prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR considers individual applications that are properly brought before it. The ABCMR will decide cases on the evidence of record. It is not an investigative body. 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.

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//