

IN THE CASE OF: [REDACTED]

BOARD DATE: 15 February 2024

DOCKET NUMBER: AR20230007829

APPLICANT REQUESTS: reconsideration of his previous request for an upgrade of his bad conduct discharge (BCD), and a new request for an appearance before the Board via video or telephone.

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

DD Form 149 (Application for Correction of Military Record)

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 AR20050010089 on 13 April 2006.
2. As a new request, the applicant states, in effect, he has missed out on all of the benefits of his service for over 30 years since his court-martial. He has been a productive citizen. He is a law citizen with two children who are college graduates. He currently works at a law firm, fighting for the rights of those who have no one to speak for them, those much like himself in 1988. At the time of his court-martial, his background and upbringing were not considered. He was railroaded and misled by the attorney representing him. He was a 19 year old, with no legal knowledge and no true understanding of the events or how he should plead. He never got to use his G.I. Bill or home loan. He needs help paying off college loans, and he wants his honor restored. The applicant notes other mental health as a condition related to his request.
3. The applicant enlisted in the Regular Army on 10 September 1986 for a 3-year period. Upon completion of initial entry training, he was awarded military occupational specialty 19E (Armor Crewman). The highest rank he attained was private/E-2.
4. General Court Martial Order Number 34, issued by Headquarters, 4th Infantry Division (Mechanized), Fort Carson, CO, on 17 June 1987, shows:
 - a. The applicant pled guilty to and was found guilty of one specification of larceny of one Security Service Federal Credit Union Automatic Teller Card and five specifications

of larceny of U.S. currency, the property of another Soldier, between on or about 9 February 1987 and 18 February 1987.

b. He was sentenced to reduction to private/E-1, forfeiture of all pay and allowances, confinement for two years, and separation from service with a BCD. The sentence was adjudged on 15 May 1987.

c. On 17 June 1987, the convening authority approved the sentence, with the exception of the portion pertaining to confinement in excess of 20 months and the forfeiture of all pay and allowances in excess of 20 months, which were suspended for 12 months unless vacated sooner, at which time the suspended portion of the sentence would be remitted without further action.

d. The record of trial was forwarded for appellate review. The U.S. Army Court of Military Review affirmed the findings of guilty and the sentence on 30 July 1987.

5. General Court-Martial Order Number 692, issued by U.S. Army Correctional Activity, Fort Riley, KS, on 20 October 1988, shows the sentence was finally affirmed, the provisions of Article 71(c) had been complied with, and the BCD was ordered duly executed.

6. The applicant underwent a mental status evaluation on 26 October 1988. The examining provider determined he was mentally responsible and able to participate in any administrative proceedings deemed appropriate by the command.

7. On that same date, the applicant waived his option to elect a medical examination prior to separation. Subsequently, his medical records were reviewed, and it was further determined a pre-separation medical examination was not required.

8. The applicant was discharged on 28 October 1988, under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 3, as a result of court-martial, in the rank of private/E-1. His service was characterized as bad conduct, with separation code JJD and reentry code RE-4. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was credited with 8 months and 25 days of net active service, with lost time from 15 May 1987 to 19 October 1988

9. The ABCMR reviewed the applicant's petition for an upgrade of his discharge on 13 April 2006. After careful consideration, the Board determined the applicant's discharge was accomplished in compliance with applicable regulations with no indication of procedural errors. Trial by general court-martial was warranted due to the serious nature of the multiple offenses charged. The conviction was final and the sentence commensurate with the misconduct of which the applicant was convicted. The Board denied the applicant's request for relief.

10. The Army Review Boards Agency, Case Management Division, sent the applicant a letter on 4 August 2023, requesting additional documentation to support his contention of other mental health issues. To date, no additional documentation has been received.

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

12. The Board should consider the applicant's argument and/or evidence in accordance with the published equity, injustice, or clemency determination guidance.

13. MEDICAL REVIEW:

a. The applicant requests reconsideration of his previous request to upgrade his BCD discharge to honorable. He contends his misconduct was related to Other Mental Health Issues.

b. 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 into the Regular Army on 10 September 1986; 2) The applicant pled guilty to and was found guilty of one specification of larceny of one Security Service Federal Credit Union Automatic Teller Card and five specifications of larceny of U.S. currency, the property of another Soldier, between on or about 9 February 1987 and 18 February 1987; 3) He was sentenced to reduction to private/E-1, forfeiture of all pay and allowances, confinement for two years, and separation from service with a BCD. The sentence was adjudged on 15 May 1987; 4) General Court-Martial Order Number 692, issued by U.S. Army Correctional Activity, Fort Riley, KS, on 20 October 1988, shows the sentence was finally affirmed, the provisions of Article 71(c) had been complied with, and the BCD was ordered duly executed; 5) The applicant was discharged on 28 October 1988, under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 3, as a result of court-martial.

c. The VA electronic medical record (JLV), ROP, and casefiles were reviewed. The military electronic medical record, AHLTA, was not reviewed as it was not in use during the applicant's period of service. Included in the applicant's casefile was a Report of Mental Status Evaluation dated 26 October 1988. The examining provider determined the applicant was mentally responsible and able to participate in any administrative proceedings deemed appropriate by the command. On that same date, the applicant waived his option to elect a medical examination prior to separation. Subsequently, his

medical records were reviewed, and it was further determined a pre-separation medical examination was not required. No other military BH-related records were provided for review. A review of JLV was void of any treatment history for the applicant and he does not have a service-connected disability. No civilian BH records were provided for review.

d. The applicant is requesting reconsideration of his previous request to upgrade his BCD discharge to honorable. He contends his misconduct was related to Other Mental Health Issues. A review of the records was void of any BH diagnosis or treatment for the applicant during service or after service and he provided no documentation supporting his assertion of Other Mental Health Issues. In absence of documentation supporting his assertion of Other Mental Health Issues, there is insufficient evidence to establish that his misconduct was related to or mitigated by Other Mental Health Issues and insufficient evidence to support an upgrade of his discharge based on medical mitigation.

e. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence that the applicant had an experience or condition during his time in service that would mitigate his misconduct. However, the applicant contends his misconduct was related to Other Mental Health Issues, and per liberal guidance, his contention is sufficient to warrant the Board's consideration.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes. The applicant contends his misconduct was related to Other Mental Health Issues.

(2) Did the condition exist or experience occur during military service? Yes.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of the records was void of any BH diagnosis or treatment for the applicant during service or after service and he provided no documentation supporting his assertion of Other Mental Health Issues. In absence of documentation supporting his assertion of Other Mental Health Issues, there is insufficient evidence to establish that his misconduct was related to or mitigated by Other Mental Health Issues and insufficient evidence to support an upgrade of his discharge based on medical mitigation.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, the Board determined relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the short term of honorable service completed prior to the misconduct leading to the applicant's separation, the criminal nature of the misconduct, and the findings of the medical advisor, 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
:	:	:	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.

5/14/2024

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. Section 1556 of Title 10, USC, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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.
2. 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 may, in its discretion, hold a hearing. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.
3. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.
 - a. Paragraph 3-7a provided 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 provided 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. Chapter 3 provided that an enlisted person would be given a bad conduct discharge 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.
4. 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.

5. 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.

6. 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//