

IN THE CASE OF: [REDACTED]

BOARD DATE: 29 February 2024

DOCKET NUMBER: AR20230008849

APPLICANT REQUESTS: an upgrade of his bad conduct discharge (BCD) to under honorable conditions (general) and a personal appearance before the Board.

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

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- Total Knee Replacement Home Exercise Program, dated 1 February 2017
- Facsimile Cover Sheet, Bon Secours Orthopedic Specialists, dated 6 April 2023
- Preoperative Instructions, [REDACTED] Health System, dated 1 May 2023

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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, in effect, he cannot use the Department of Veterans Affairs (VA) for anything with a BCD. He is homeless and needs some help. He is a cancer patient and needs a knee replacement surgery. He should have gotten an Article 15 and not jail time for the drug issues. He is drug free now and can no longer handle sleeping outside. Patient Angel wants to help him find an apartment, but he cannot get help with a BCD on his record.
3. Following a period of honorable enlisted service in the Army National Guard, the applicant enlisted in the Regular Army on 26 August 1999 for a 3-year period. Upon completion of initial entry training, he was awarded military occupational specialty 13B (Cannon Crewmember). The highest rank he attained was specialist/E-4.
4. On 9 September 1999, the applicant extended his period of enlistment for two months to accommodate overseas service in Hawaii.

5. The applicant's record is void of several documents pertaining to the specific facts and circumstances of his military service, which were outlined in Army Discharge Review Board (ADRB) Docket Number AR20140013816, dated 5 December 2014. The Case Report and Directive provides the following information:

a. The applicant was the subject of a Criminal Investigation Division (CID) investigation, dated 15 November 1999, for the wrongful possession of drug paraphernalia and the wrongful use of cocaine.

b. On that same date, the applicant was counseled for the wrongful use, possession, introduction, purchase, and distribution of a controlled substance.

c. Court-martial charges were preferred against the applicant on 23 November 1999 for the wrongful distribution of an unknown amount of marijuana, the wrongful use of marijuana and crack cocaine, and wrongful possession of an unknown amount of crack cocaine.

d. On 17 December 1999, the applicant voluntarily requested discharge under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10, in lieu of trial by court-martial. His request was disapproved on 22 February 2000.

e. In a unit inspection, the applicant's urine tested positive for cocaine on 13 February 2000.

f. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice on 23 February 2000, for the wrongful use of cocaine. His punishment consisted of reduction to private/E-1, forfeiture of \$502.00 pay per month for two months, 45 days of extra duty, and 45 days of restriction. He appealed the imposed punishment. His appeal was denied on 6 March 2000.

6. Before a special court-martial on 8 March 2000, at Schofield Barracks, Hawaii, the applicant pled guilty and was found guilty of the wrongful distribution of an unknown amount of marijuana and the wrongful use of marijuana, on or about 12 November 1999, and the wrongful possession of an unknown amount of crack cocaine and the wrongful use of crack cocaine, on or about 13 November 1999. He was sentenced to forfeiture of \$600.00 pay per month for six months, confinement for six months, and a bad conduct discharge. The sentence was approved on 4 January 2001, and except for the portion extending to the BCD, was ordered executed. The portion of the sentence extending to confinement in excess of three months was suspended for 12 months.

7. Special Court-Martial Order Number 24, issued by Headquarters, U.S. Army Artillery Center, Fort Sill, OK on 20 February 2003, shows the sentence was finally affirmed, the

provisions of Article 71(c) were complied with, and the BCD was ordered executed. The portion of the sentence extending to confinement was served.

8. The applicant was discharged on 25 August 2003, under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 3, by reason of court-martial, in the rank of private/E-1. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms his service was characterized as bad conduct with separation code JJD and reentry code 4. He was credited with 4 years of net active service.

9. The ADRB reviewed the applicant's request for an upgrade of his BCD on 5 December 2014. After careful consideration, the Board determined there were insufficient mitigating factors to warrant clemency. The applicant's request for relief was denied.

10. The applicant provides a copy of instructions for a total knee replacement home exercise program, dated 1 February 2017, a facsimile cover sheet from [REDACTED] Orthopedic Specialists, dated 6 April 2023, which shows he was scheduled for surgery on 8 May 2023, and preoperative instructions from [REDACTED], dated 1 May 2023.

11. 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.

12. Regulatory guidance provides a Soldier will receive 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.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the repeated drug offenses leading to the applicant's separation and the lack of any mitigation for the misconduct submitted by the applicant, 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.

5/20/2024

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, 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. 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:
 - a. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The ABCMR is not an investigative body and decides cases

based on the evidence presented in the military records provided and the independent evidence submitted with the application.

b. 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. 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.

b. 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. 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.

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 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/NR) 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//