

IN THE CASE OF: ██████████

BOARD DATE: 11 April 2024

DOCKET NUMBER: AR20230010431

APPLICANT REQUESTS: reconsideration of his previous request for an upgrade of his bad conduct discharge to under honorable conditions (general).

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 AR20140004524 on 30 October 2014.

2. The applicant states as a new argument he indicates he lost 30% of his hearing prior to his discharge from active duty in preparation for Desert Storm/Shield. He recommends reviewing his discharge physical and noted that during training he lost a significant amount of his hearing which resulted in disorientation and had a direct impact on his performance. The ear protection that was issued never really worked for him and he had a difficult time completing tasks and adjusting to his surroundings following the hearing loss. The issue was never raised during his court-martial. He would have continued to serve in the Army National Guard if he did not have challenges with his hearing. His father is a retired Master Sergeant, and he grew up living on Army installations. He exceeded all requirements at basic training and advanced individual training even being selected as a platoon sergeant. Things were never the same after he lost his hearing.

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

a. He enlisted in the Louisiana Army National Guard (LAARNG) on 31 August 1989.

b. The service record includes the applicant's medical evaluations, dated 31 August 1989, for the purpose of enlistment which listed his clinical evaluation as normal. Block 71 (Audiometer) shows the applicant's hearing was tested. The applicant was subsequently marked qualified for service.

c. He entered active duty on 14 September 1989. He was released from active duty training on 13 December 1989 with uncharacterized service. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 3 months and 2 days of active service. He was awarded military occupational specialty (MOS) 13B, Cannon Crewmember.

d. Order 1-3 dated 30 November 1990 ordered members of the LAARNG, to include the applicant (page 3), to active duty in support of "Desert Shield," with a report date of 30 November 1990.

e. On 26 March 1991, the applicant underwent a medical evaluation for the purpose of demobilization. Block 73 (Notes) shows the applicant was referred for follow-up evaluation on 6 April 1991 with no previous audiometric available. The applicant was subsequently marked qualified for demobilization with a rating of 2 under Block 76 (Physical Profile) for hearing.

- SF 88
- DD Form 2215 (Reference Audiogram)
- SF 513 (Consultation Sheet)
- DA Form 4700 (Record Audiological Evaluation)

f. On 30 April 1991, he was convicted by a special court-martial of one specification of absenting himself without authority, with the intent to remain absent, from on or about 27 January 1991 to on or about 8 February 1991. His sentence included reduction to private (E-1), confinement for 4 months, forfeiture of \$475.00 pay per month for 4 months, and a bad conduct discharge.

g. On 19 July 1991, the convening authority approved the sentence and except for the bad conduct discharge, ordered it executed. The record of trial was forwarded to the Judge Advocate General of the Army for appellate review.

h. Special Court-Martial Order Number 28 dated 18 November 1992, after Article 71(c) was complied with and the sentence was affirmed, ordered the bad conduct discharge executed.

i. On 31 March 1993, he was "released from active duty" [sic] with a bad conduct characterization of service as a result of court martial conviction in accordance with Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 3. His DD Form 214 shows he completed 2 years and 3 months of active service with 31 days of lost time and 612 days of excess leave.

4. A review of the applicant's record confirms an administrative entry was not recorded on his DD Form 214. The entry will be added to his DD Form 214 as an administrative correction and will not be considered by the Board.

5. On 30 October 2014, the ABCMR rendered a decision in Docket Number AR20140004524. The Board noted the evidence of record confirmed the applicant's trial by a special court-martial was warranted by the gravity of the offense charged. His conviction, confinement, and discharge were effected in accordance with applicable laws and regulations and his discharge was appropriately characterized the misconduct for which he was convicted. By law, any redress by the ABCMR of the finality of a court-martial conviction is prohibited. The Board is only empowered to change a discharge if clemency is determined to be appropriate to moderate the severity of the sentence imposed. Therefore, he was not entitled to the requested relief.

6. By regulation (AR 635-200), 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.

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

8. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting an upgrade of his 31 March 1993 bad conduct discharge and, in essence, a referral to the Disability Evaluation System (DES). He states:

"I loss 30% of my hearing prior to my discharge from active duty in preparation for Desert Shield/Storm. Please review my exit physical. My MOS [military occupational specialty] was 13B Cannoneer. During training, I loss a significant amount of hearing which resulted in disorientation and had a direct impact on my performance. The ear protection that was issued never really worked for me. I

had a difficult time completing tasks and adjusting to my surroundings after this occurred.

Had this injury not occurred, I would have likely remained in the Army National Guard. My Dad retired as a Master Sergeant in the Army. I grew up and lived on several bases both here and abroad. I exceeded all requirements during Boot Camp /AIT and was selected one of my units platoon sergeants. Things were never the same for me after my loss of hearing.”

c. The Record of Proceedings detail the applicant’s military service and the circumstances of the case. The applicant’s DD 214 for the period of Service under consideration shows the former ARNG Soldier entered active duty in support of Operation Desert Shield/Desert Storm on 30 November 1990 and was discharged on 31 March 1993 under the separation authority provided by Section IV chapter 3 of AR 635-200, Personnel Separations – Enlisted Personnel (17 September 1990): Dishonorable and Bad Conduct Discharge. The separation code JJD denotes “Court Martial (Other).”

d. His pre-entrance audiogram showed significant high frequency hearing loss in the right ear: 10 decibels (dB) at 3,000 hertz (Hz), 55 dB at 4,000 Hz, and 70dB at 6,000 Hz. His demobilization audiogram shows essentially no change in this significant high frequency hearing loss in his right ear: 20 dB at 3,000 Hz, 65 dB at 4,000 Hz, and 65dB at 6,000 Hz. The hearing in his left year was normal on both audiograms. As part of his demobilization, he was placed on a non-duty limiting H2 hearing physical profile and referred for further evaluation.

e. The audiologist’s examination on 6 April 1991 revealed the same threshold shifts, good speech recognition in both ears, and diagnosed him with right sided high frequency hearing loss starting at 4,000Hz. He counseled the applicant on hearing conservation and communication strategies, recommended an H2 permanent hearing profile when he returned to his unit, and recommended he continue annual hearing test.

f. A Special Court-Martial Order dated 19 July 1991, shows the applicant was found guilty of having been absent without leave, with the intent to remain permanently absent from 27 January until he was apprehended on 28 February 1991. The Sentence was adjudged on 30 April 1991: Bad conduct discharge, forfeiture of \$475.00 pay per month for 4 months, confinement for 4 months, and reduction to the grade of E1 .

g. No medical documentation was submitted with the application and his period of service predates AHLTA. There are no encounters or diagnoses in JLV.

h. There is no evidence the applicant had a mental health or other medical condition which would have then contributed to or would now mitigate the UCMJ violation which led to his court martial and bad conduct discharge.

i. It is the opinion of the ARBA medical advisor that while the bad conduct discharge appears unduly harsh, a discharge upgrade based upon a mitigating medical condition is unwarranted.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? NO

(2) Did the condition exist or experience occur during military service? N/A

(3) Does the condition or experience actually excuse or mitigate the discharge? N/A

BOARD DISCUSSION:

The Board carefully considered the applicant's request, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the applicant's claim regarding his health and the review and conclusions of the ARBA Medical Advisor. The applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding his misconduct not being mitigated by a medical condition. Based on a preponderance of the evidence, the Board determined the character of service the applicant received upon separation was not in error or unjust. The Board concurred with the correction described in Administrative Note(s) below.

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:

Other than the correction addressed in Administrative Note(s) below, the Board determined 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 otherwise insufficient as a basis for correction of the records of the individual concerned.

8/27/2024

X [REDACTED]

CHAIRPERSON
[REDACTED]

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.

ADMINISTRATIVE NOTE(S):

A review of the applicant's service records show he completed initial active duty training and was awarded an MOS. As a result, correct his DD Form 214 for the service period ending 13 December 1989 to show an honorable characterization of service.

REFERENCES:

1. Army Regulation 635-8 (Separations Processing and Documents), currently in effect, provides for the preparation and distribution of the DD Form 214. It states for Block 24 (Characterization of Service) when a Reserve Component Soldier successfully completes initial active duty training, the character of service is honorable, unless directed otherwise by the separation authority approval.

2. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a (Honorable discharge) states 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 the 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 (General discharge) states 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.

c. Paragraph 3-7c (Under Other Than Honorable Conditions) states a discharge under other than honorable conditions is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, homosexuality, security reasons, or for the good of the service.

d. Paragraph 3-11 (DD Form 259A (Bad Conduct Discharge Certificate) states 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. Title 10, U.S. Code, section 1552, provides that the Secretary of a Military Department may correct any military record of the Secretary's Department when the Secretary considers it necessary to correct an error or remove an injustice. With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under the UCMJ, action to correct any military record of the Secretary's Department may extend only to correction of a record to reflect actions taken by reviewing authorities under the UCMJ or action on the sentence of a court-martial for purposes of clemency. Such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that Military Department.

4. 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.

5. 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//