

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 September 2024

DOCKET NUMBER: AR20230011415

APPLICANT REQUESTS: his bad conduct (BCD) discharge be upgraded to under honorable conditions (general) or honorable.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)

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 he and four fellow Soldiers were involved in an on base bar fight with another group of four Soldiers. The Military Police (MP) broke up the altercations and sent everyone back to their barracks. The following day he was singled out and informed that he injured three Soldiers during the altercation. Of the nine Soldiers involved in the altercation, he was the only one to be charged and ultimately discharged from the service. He feels that this action by his command was inequitable and not consistent with the policies and traditions of the military. The applicant indicates other mental health is related to his request.

3. The applicant enlisted in the Army National Guard (ARNG) on 9 April 1972 for six years. He entered active duty service on 27 July 1972 and was honorably released from active duty on 26 November 1972 and transferred back to the ARNG. His DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows he completed 4 months and 9 days of net active service.

4. The applicant was honorably discharged from the ARNG on 20 November 1973. His National Guard Bureau (NGB) Form 22 (Report of Separation and Record of Service) shows he completed 1 year, 7 months, and 12 days of service this period.

5. The applicant enlisted in the Regular Army on 21 November 1973 for 4 years. His military occupational specialty was 13B (Cannon Crewman).
6. The applicant accepted nonjudicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ) on 5 January 1976 for without authority, failing to go at the time prescribed to his appointed place of duty on or about 3 January 1976. His punishment consisted of reduction to private first class/E-3, forfeiture of \$56.00 pay for one month, and extra duty.
7. A Mental Health Clinical Record, Consultation Sheet, dated 7 January 1976, shows the applicant was familiar to the clinic and stated he feels like he was losing his mind at times. No suicidal or homicidal tendencies.
8. A Review of Bar to Reenlistment, dated 14 January 1977 shows the applicant's attitude and conduct had remained at about the same level as when the initial bar to reenlistment was imposed. He had done nothing to distinguish himself one way or the other, and his commander recommended that the bar remain in effect until the applicant demonstrated some positive improvement.
9. The applicant accepted NJP under Article 15 of the UCMJ on 8 March 1977 for failing to disobey a lawful order on or about 25 February 1977 and for being disrespectful in language on or about 25 February 1977. His punishment consisted of reduction to private 2/E-2, and correctional custody facility for 30 days.
10. The applicant was counseled by his commander about his undesirable traits which were the basis for the bar to reenlistment. He was advised of the adverse consequences that may ensue from this or similar action.
11. Before a special court-martial, arraigned and tried on 21 December 1977, the applicant was charged with the following [a portion of the charges are missing]:
 - providing a claim against the U.S. which was false and fraudulent in the amount of \$163.00 on or about 3 November 1975
 - providing a claim against the U.S. which was false and fraudulent in the amount of \$181.00 on or about 17 November 1975
 - providing a claim against the U.S. which was false and fraudulent in the amount of \$133.00 on or about 30 September 1976
 - providing a claim against the U.S. which was false and fraudulent in the amount of \$90.00 on or about 29 October 1976
 - providing a claim against the U.S. which was false and fraudulent in the amount in the amount of \$90.00 on or about 7 December 1976
 - providing a claim against the U.S. which was false and fraudulent in the amount of \$191.00 on or about 7 December 1976

12. The court sentenced him to be discharged from the service with a BCD. The sentence was approved on 14 March 1978 and would be duly executed, but the execution of that portion thereof adjudging a BCD was suspended for six months. The record of trial was forwarded for review by the Court of Military Review.

13. The applicant was restored to active duty pending appellate review. He was being held past his 20 November 1977 expiration term of service date for the purpose of trial by court-martial. He would be retained in the Army until the appellate review was completed or until he was discharged under the provisions of Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Personnel), Chapter 10, for the good of the service.

14. The applicant's chain of command recommended approval of his retention on active duty.

15. The Court of Military Appeals denied the applicant's petition for a grant of review. The applicant was informed, and the sentence was approved and final.

16. Before a general court-martial on 31 January 1979 the applicant was found guilty of:

- unlawfully striking a sergeant/E-5 in the face and on the body with his fists and feet on or about 30 August 1978
- being disorderly in quarters on or about 17 December 1978
- the court sentenced him to forfeiture of \$200.00 per month for 5 months, to be discharged from the service with a BCD, and confinement at hard labor for period of 2 months
- the sentence was approved on 12 March 1979

17. The U.S Army Court of Military Review affirmed the findings and sentence on 27 June 1979. The applicant acknowledged receipt on 1 August 1979.

18. The applicant's check cashing privileges were suspended on 1 October 1979 for insufficient funds.

19. The applicant accepted NJP under Article 15 of the UCMJ on 12 October 1979 for threatening to injure private 2/E-2 [REDACTED] by stating he would kill him on or about 25 September 1979. His punishment consisted of reduction to private/E-1 (suspended), forfeiture of \$50.00 pay per month for one month (suspended), and extra duty.

20. General Court-Martial Order Number 98, dated 19 December 1979, issued by Headquarters, U.S. Armor Center, Fort Knox, KY, shows the sentence had been finally affirmed and ordered the BCD to be duly executed.

21. The applicant was discharged on 18 January 1980. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of AR 635-200, Chapter 11, as a result of court-martial (other). His service was characterized as BCD. He completed 6 years and 17 days of net active service. He had lost time from 30 December 1974 to 4 January 1975 and 16 February 1979 to 21 March 1979.

22. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

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

24. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to his characterization of service from bad conduct discharge (BCD) to under honorable conditions (general) or honorable. He contends he experienced an undiagnosed mental health condition that mitigates his misconduct.

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:

- The applicant enlisted into the Army National Guard on 9 April 1972 and entered active duty service on 27 July 1972 with an honorable discharge on 26 November 1972. He discharged from the ARNG on 20 November 1973 and enlisted in the Regular Army on 21 November 1973.
- The applicant accepted 3 NJPs between January 1976 and February 1977 related to: failing to go at the time prescribed to his appointed place of duty; failing to disobey a lawful order; and being disrespectful on language. In December 1977, he was tried and sentenced related to multiple charges of providing false or fraudulent claims (of various monetary values) against the government, and in January 1979 before a general court-martial he was found guilty of: unlawfully striking a sergeant and being disorderly in quarters. In October 1979 he accepted an NJP for threatening to injure a private by stating he would kill him.
- The applicant was discharged on 18 January 1980 under the provisions of AR 635-200, Chapter 11, as a result of court-martial (other) with Separation Code JJD and Reenlistment Code 3 and 3B. His service was characterized as BCD. He completed 6 years and 17 days of net active service.

c. Review of Available Records: The Army Review Boards Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts he was singled out and inequitably discharged from the military following an altercation between nine soldiers. A medical record document dated 7 January 1976 indicated the applicant was "familiar to the clinic" and that he was presenting stating he felt like he was "losing his mind at times," but he denied suicidal or homicidal ideation. A provisional diagnosis of anxiety reaction was noted. On a Report of Medical History dated 19 March 1979, which was an out-processing examination, the applicant stated, "I feel in good health" and denied symptoms associated with mental health problems. A review of medical documentation showed notation of a visit to the Psych Clinic on 10 November 1975 with indication of anxiety, insomnia, and marital conflict, and a separate notation with the same date stated, "22 year old with multiple complaints of memory loss, voices telling him to destroy things this weekend." There was sufficient evidence that the applicant was experiencing mental health symptoms while on active service.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed that the applicant initially engaged with VA for mental health services through an ER visit in May 2022. He endorsed substance abuse and was at risk for homelessness. He was referred to the substance abuse clinic, but he did not respond to attempts for scheduling. In a Suicide Prevention High Risk Flag Consult note dated 7 October 2022 there is documentation that the applicant was experiencing psychosis upon admission and that he had attempted suicide by walking into traffic. Inpatient provider documentation noted history of depression, Schizophrenia, and Alcohol and Cocaine Use Disorders as well as multiple medication trials. He reported a history of 2-3 prior, non-VA hospitalizations due to suicidal ideation or behavior and significant alcohol and cocaine abuse. He was inpatient for one month with some improvement in symptoms, but he presented to the ER four days after discharge with hallucinations and suicidal ideation. He was again hospitalized for one month and diagnosed with Unspecified Schizophrenia, Alcohol Use Disorder, and Stimulant Use Disorder. On 4 January 2023, he presented to the ER again due to hallucinations and suicidal ideation and was transferred to a non-VA facility for hospitalization. This pattern of inpatient stays, discharges, substance use, suicidal ideation, and readmission continued through 2023 and into early 2024. The applicant appears to currently be utilizing the VA's homeless services and is in a transitional housing program. The most recent note dated 15 May 2024 indicated he is sober and stable on medication.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support that 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 discharge? Yes. The applicant asserts he had a mental health condition at the time of the misconduct. Medical records from his time in service show that he sought counseling for mental health related symptoms, and VA records provide diagnoses of Schizophrenia and substance use disorders.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition while on active service, and there is documentation to support this assertion.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is evidence, beyond self-report, that the applicant was experiencing a mental health condition while on active service, and the symptoms reported are consistent with his later in life diagnosis of Schizophrenia. Some of his behaviors while on active service are evidence of disorganized thinking and erratic behavior, and there is documentation that he reported anxiety, insomnia, and auditory hallucinations, which are consistent with an early presentation of a psychotic process. However, there is no nexus between his mental health diagnosis and his misconduct related to violence and disorderly conduct: 1) these types of misconduct are not part of the natural history or sequelae of his mental health conditions; 2) his mental health conditions do not affect one's ability to distinguish right from wrong and act in accordance with the right.

g. However, the applicant contends he was experiencing mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

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 mental health claim and the review and conclusions of the ARBA Behavioral Health 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 mental health 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.

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.

3/6/2025

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. Title 10, USC, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

3. AR 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

a. 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. 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 11 provides for the separation of personnel because of unsatisfactory performance or conduct (or both) while in an entry-level status. When separation of a Soldier in an entry-level status is warranted by unsatisfactory performance or minor disciplinary infractions (or both) as evidenced by inability, lack of reasonable effort, or failure to adapt to the military environment, he or she will normally be separated per this chapter.

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 Service 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 (PTSD); traumatic brain injury; sexual assault; or sexual harassment. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part to 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.

6. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and Service BCM/NRs on 25 July 2018, 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 court-martial forum.

However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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, Boards 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//