

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 May 2024

DOCKET NUMBER: AR20230011493

APPLICANT REQUESTS: upgrade of his bad conduct discharge (BCD) and a personal appearance hearing 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)
- Self-authored statement, undated

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:

a. It has been 34 years since he was discharged from the Army for misconduct. He admits his conduct while in the military was bad, but he was under a lot of pressure because he was stationed overseas, and many of his family members were passing away. He was not able to be with his family during their time of grieving, which caused him to fall prey to other activities unbecoming a Soldier.

b. He was depressed and did not know where to turn, so he started hanging out with the wrong Soldiers and tried drugs. Before the drug incident, he never got into trouble. Although he wanted to stay in the military, the Army never allowed him or gave him the opportunity for retainment. He served honorably in the Texas National Guard before he enlisted in the Regular Army.

c. He struggled with depression from 1988 to 1991 because he did not finish his career in the Army, but he got back on his feet after meeting a former Marine who guided him to go to school and another career as a truck driver since the late 1990s. He is married with five kids, nine grandchildren, and one great-grandbaby and owns his

home. He has been a faithful member of the Dallas West Church of Christ since 2001 and is ready to retire.

d. He did not realize how his discharge from the Army still affected him until he was not able to purchase a firearm to protect his family in 2010. He wants to travel with his wife to Canada and South America but is scared to ask to leave the country because his passport request might get denied. He also would like to have a military burial when he passes away. He knows he has made mistakes; he thanks the Board for their consideration, and he asks for leniency.

3. The applicant enlisted in the Regular Army on 10 January 1986 for 4 years. The highest rank/grade he held was specialist/E-4.

4. General Court Martial Order (GCMO) Number 80, issued by Headquarters, 21st Theater Army Area Command, Mannheim, Germany on 1 November 1988, shows the applicant was found guilty of:

- one specification of wrongfully possessing and using some amount of marijuana on divers occasions from on or about January 1987 to on or about November 1987
- one specification of willfully and corruptly testifying falsely under oath on or about 4 May 1988

a. The court sentenced him to be discharged from the service with a BCD. The sentence was adjudged on 1 July 1988.

b. The convening authority approved the sentence on 1 November 1988 and the record of trial was forwarded for appellate review.

5. The U.S. Army Court of Military Review upheld the findings of guilty and the sentence as approved by the convening authority. The findings of guilty and the sentence were affirmed on 6 April 1989.

6. GCMO Number 53, issued by Headquarters U.S. Army Armor Center and Fort Knox, Fort Knox, KY on 6 September 1989, shows the sentence having been affirmed, was ordered to be duly executed.

7. The applicant was discharged accordingly on 20 October 1989, under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 3 (Character of Service/Description of Separation), Section IV, as a result of court-martial-other, in the grade of E-1. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows his character of service was bad conduct. He was credited with 3

years, 9 months, and 11 days of net active service with 2 years, 7 months, and 15 days of foreign service during the period covered.

8. On 27 October 2023, the Case Management Division, Army Review Boards Agency (ARBA), sent the applicant an e-mail requesting medical documentation related to his contention of mental health issues. The applicant responded on 2 November 2023 that he did not have access to his medical records from the 1980s. He further stated he was like many military personnel who did not run to the Department of Veterans Affairs for his issues and was not privy to a support system because of his discharge. He thanks God for his mother and grandmother, who helped him during his time of need. He felt thrown away from the military for the mistake he made. He was overwhelmed with emotions after he did not finish his job and was homeless for a while, which compounded his illness. He is thankful for the opportunity to serve his country and will live with whatever the Board decides.

9. 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.

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

11. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to his bad conduct discharge (BCD). 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 Regular Army on 10 January 1986.
- A General Court Martial Order showed that the applicant was found guilty of wrongfully possessing and using some amount of marijuana and willfully and corruptly testifying falsely under oath.
- The applicant was discharged on 20 October 1989 and was credited with 3 years, 9 months, and 11 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 that he was grieving the loss of several family members while overseas in Germany and fell into a depression, resulting in drug use. No medical or mental health records were provided by the applicant. There was insufficient evidence that the applicant was diagnosed with any psychiatric condition while on active service.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed no history of mental health related treatment or diagnoses.

e. Based on the available information, it is the opinion of the ARBA Behavioral Health Advisor that there is insufficient evidence to support that the applicant had a condition or experience that mitigates his misconduct.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts he had an undiagnosed mental health condition at the time of the misconduct.

(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.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is insufficient evidence, beyond self-report, that the applicant was experiencing a mental health condition while on active service. He provided no records of a mental health diagnosis, and no records were found through JLV. Substance use could be an attempt to avoid negative emotions, but the presence of misconduct is not sufficient evidence of a mental health condition. 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:

1. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.

2. 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 other than his own statement and he provided no letters of reference in support of a clemency determination.

3. A majority of the Board found the applicant's sentence to a BCD was too harsh in light of the minor misconduct he committed. Based on a preponderance of the evidence, a majority of the Board determined his character of service should be changed to under honorable conditions (general).

4. The member in the minority found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding there being insufficient evidence to establish that his misconduct was mitigated by a mental health condition. Based on a preponderance of the evidence, the member in the minority 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 Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by reissuing his DD Form 214 to show his character of service as under honorable conditions (general).

9/23/2024

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. 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. Army Regulation 15-185 (ABCMR) states 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.
4. 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 BCD 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.
 - d. 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, homosexual conduct, security reasons, or in lieu of trial by court martial.

5. 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.

6. 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. 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.

7. 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 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//