

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 30 July 2024

DOCKET NUMBER: AR20230013189

APPLICANT REQUESTS: upgrade of his bad-conduct discharge (BCD) to under honorable conditions (general) or honorable

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)
- Motion and Order
- DD Form 214 (Report of Separation from Active Duty)
- Administrative Decision
- Progress Note
- Department of Veterans Affairs (VA) Rating Decision
- Letter from VA
- Radiology Imaging Associates Report
- Authorization for Use and Disclosure of Substance Use Disorder Information
- Statement in Support of Claim

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, 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 had ineffective assistance of counsel at his court-martial. There was not an examination of the investigator. There was reasonable doubt and the government had the burden of proof. He suffered from racial bias. He had an alibi for his defense and there was not a pretrial investigation. The evidence provided was insufficient to support his conviction and he pleaded not guilty to the charges. He never met with his defense counsel before the trial. The statement the investigator made, while doing a hand writing comparison, said the applicant wrote the check. There were three surfaces used to write the check on. He thinks this all was driven by race. The jury was comprised entirely of Caucasian people and he is a black American and the alleged company belonged to a Caucasian in Alabama. The female he was

engaged to was Caucasian. Caucasian Soldiers told him racial jokes. According to the court he did not make a cohesive argument. This shows his defense counsel's failures to build his alibi defense and failure to conduct a thorough investigation.

3. The applicant provides the following documents:

a. Document entitled Administrative Decision, 8 November 1989, conclusion: The discharge for the period of 2 September 1976 to 1 September 1979 is considered to be honorable. The discharge for the period of 2 September 1979 to 19 November 1985 is considered to be dishonorable. The applicant was not entitled to health care for any disabilities determined to be service connected based on his service from 2 September 1979 through 19 November 1985.

b. Progress Note, 2 December 2022, wherein the applicant complained of right knee pain. The assessment was right knee pain, primary osteoarthritis of right knee, primary hypertension, and gastroesophageal reflux disease without esophagitis.

c. VA rating decision, 4 January 2023, shows his requested service connected disabilities were denied. A letter from the VA to the applicant, states his claims were denied because he received a BCD discharge. The entire documents are available for the Board's review.

d. Radiology Imaging Associates Report shows he received an examination for chronic low back pain. The impression was there was evidence of degenerative disc disease L4-S1 with mild degenerative anterolisthesis of L5 on S1, grade 1.

e. Statement in Support of Claim, 10 September 2023, explains the injuries he incurred while in the Army which include pain in his back, shoulders, and lower extremities and migraine headaches. The entire document is available for the Board's review.

4. The applicant's service record contains the following documents:

a. DD Form 4 (Enlistment or Reenlistment Agreement - Armed Forces of the United States) shows he enlisted in the Army on 2 September 1976. He remained in the Army through immediate reenlistments.

b. DD Form 214 (Report of Separation from Active Duty) shows he had honorable service from 2 September 1979 through 13 March 1979. His period of honorable service was 2 years, 6 months, and 12 days.

c. Permanent Orders 156-002, published by Headquarters, 101st Airborne Division (Air Assault) and Fort Campbell, 5 June 1979, awarded him the Air Assault Badge.

d. Permanent Orders 328-2, published by Headquarters, 2d Armored Division, 24 November 1979 awarded him the Army Good Conduct Medal for exemplary behavior, efficiency, and fidelity from 2 September 1976 through 1 September 1979.

e. DA Form 2627 (Record of Proceedings Under Article 15, Uniform Code of Military Justice(UCMJ)), 2 July 1981, shows he accepted nonjudicial punishment (NJP), in the rank of sergeant (SGT), for wrongfully marrying a woman when he was already married. His punishment included reduction to the rank of specialist (SPC) and forfeiture of \$150 for two months. He appealed his punishment. His appeal was denied.

f. Permanent Order 83-4, published by 259th Personnel Service Company, 18 December 1981, awarded him the Expert Infantry Badge.

g. DA Form 2627, 18 July 1983, shows he accepted NJP, in the rank of SGT, for signing an official statement with the intent to deceive. His punishment included reduction to SPC and extra duty for 30 days. He did not appeal his punishment.

h. Permanent Orders 172-1, published by Headquarters, United States Army Infantry Center, 13 September 1983 awarded him the Parachute Badge.

i. DA Forms 4187 (Personnel Action) shows his duty status was changed from present for duty (PDY) to military confinement on 27 November 1984 and from military confinement to PDY on 11 February 1985.

j. SF Form 88 (Report of Medical Examination), 13 February 1985, shows he had no medical conditions and he was qualified for separation. SF Form 93 (Report of Medical History), 13 February 1985, shows he was in good health and he had no medical conditions.

k. Special Court-Martial Order 1, published by Headquarters, United States Army Aviation Center and Fort Rucker, 14 February 1985, shows the applicant, in the rank of SPC, was found guilty at a special court-martial on 27 November 1984 of attempted larceny. His sentence included a BCD, forfeiture of \$200 for six months, confinement for three months, and reduction to the rank of private (PVT)/E1. The convening authority approved the sentence and, except for the BCD, ordered it executed.

l. United States Army Court of Military Review Decision, 29 May 1985, states the Court had considered the error asserted by the appellant and found it to be without merit. The Court found the approved findings of guilty and the sentence correct in law and fact, and determined that they should be approved, such findings of guilty and the sentence were affirmed.

m. Special Court-Martial Order Number 5, published by Headquarters, United States Army Aviation Center and Fort Rucker, 10 October 1985, states the court-martial had finally been affirmed and the sentence would be executed. The portion of the sentence pertaining to confinement had been served.

n. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows the applicant was discharged on 19 November 1985. He had completed 6 years, 5 months, and 20 days of active duty with 2 years, 6 months, and 12 days of prior active duty service. He was discharged as a result of court-martial. His character of service was bad-conduct, his separation code was JDD, and his reenlistment code was RE-3, RE-3B, RE-3C (Corrected by DD Form 215). He was awarded or authorized the Army Service Ribbon, Expert Infantryman Badge Overseas Service Ribbon, Army Good Conduct Medal (2nd Award) Marksman Marksmanship Qualification Badge (Rifle).

5. Based on the applicant's statement in support of his claim, the ARBA Medical Section provided a medical review for the Board's consideration.

MEDICAL REVIEW:

1. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available records in the Interactive Personnel Electronic Records Management System (iPERMS), the Health Artifacts Image Management Solutions (HAIMS) and the VA's Joint Legacy Viewer (JLV). The applicant requests change from Bad Conduct discharge to Honorable or General, Under Honorable Conditions. He essentially contends that he was wrongly convicted due to multiple factors including but not limited to ineffective counsel and racism. He did not make any claims concerning his medical conditions contributing to his discharge.

2. The ABCMR ROP summarized the applicant's available record and circumstances surrounding the case. The applicant's first period of service in the Regular Army was from 19760902 to 19790313. His MOS was 11B Infantryman. His service was characterized as honorable. His second period of service from 197990902 to 19851119 included being stationed overseas in Germany 19780314 to 19780907 and 19800726 to 19830721. He did not have combat deployment. He was discharged under AR 635-200 para 5-9 by court-martial order. He pled not guilty to and was found not guilty of larceny of property valued at \$206.25 on 26Apr1984 and conspiracy to commit larceny. He was found guilty of attempted larceny. His punishment included forfeiture of \$200 per pay month for 6 months, reduction in rank to the lowest enlisted grade, confinement in a military stockade for 3 months (completed from 19841127 until 19850211) and a Bad Conduct discharge for the second period of service.

3. Brief summary of medical records and related

a. 04Jan2023 VA Rating Decision showed service connection was denied for the following due to his Bad Conduct Discharge: Spine (lumbar, cervical), clavicle (bilateral), hands, fingers, left hip, tarsus, tibia, and fibula conditions. In his 10Sep2023 Statement in Support of Claim (VA Form 21-4138) for VA benefits, the applicant described onset of several claimed in-service injuries. Service treatment records show the applicant had intermittent chronic pain. The record showed chronic pain issues in the lower back, and bilateral knee, leg, ankle, wrist, and hand. There was a concern that his chronic joint pain was due to developing arthritis. Despite this, in the 24Apr1979 Enlistment Exam for his second and final enlistment, and in the 04Apr1983 Report of Medical Exam for Airborne qualification the applicant denied physical symptoms. Indeed, he was described as “an avid weightlifter” (08Mar1984). He did endorse multiple joint issues in the 13Feb1985 Report of Medical History for chapter separation.

b. In regard to mental health issues, the applicant was seen on 20Oct1977 and 04Nov1977 for a complaint of headache, stomach issues and nervousness for one month. He reported nervousness and inability to find peace since returning home from six months TDY in Germany. He stated, “sometimes I feel like choking somebody”. At the time, he was married with a 3-year-old child and having family difficulties. Diagnoses during that time period included Situational Stress and Stress Reaction. Recommended treatment included individual counseling. There were scant details in the notes. In the 13Feb1985 Report of Medical History for separation, the applicant did not endorse any BH symptoms, specifically, he denied frequent trouble sleeping, depression or excessive worry, and nervous trouble of any sort. In the 24Apr1979 Enlistment Exam for his second and final enlistment, the 04Apr1983 Report of Medical Exam for Airborne qualification, and in the 13Feb1985 Report of Medical History for chapter separation, the applicant did not endorse BH symptoms. A formal mental status evaluation was not found in the available record.

c. In regard to the applicant’s report of multiple head injuries (10Sep2023 VA Form 21-4138), it does not appear there was sufficient detail in the applicant’s statements, to diagnose traumatic brain injury. The applicant described some incidents in 1978 when he sustained injuries from being pushed from a barrack window which included forehead contusion, fractured nose, and chipped two front teeth. He also reported being hit in the back of his head by the driver hatch of an armored vehicle, twice. This occurred during his first period of service. During his second period of service, he reported falling on his head while wearing protective gear. He did not report loss of consciousness, altered consciousness (being dazed or confused or seeing stars), post event amnesia or memory issues, or sleep issues in association with these head injuries. He did report post event headaches. In the 13Feb1985 Report of Medical History (Standard Form 93) for separation, the applicant endorsed being in good health but did not endorse a head injury, frequent or severe headaches, dizziness or fainting spells, loss of memory and periods of unconsciousness. Review of performance record

showed early on he struggled and did not achieve course standards for Primary Noncommissioned Officers Course for Combat Arms (06Jul1979 12Mar1980). A note indicated he failed Land Navigation V (five) 3 times. However, he improved, passing his Battalion Training Management System on 06Mar1981. His improving performance was also reflected in his evaluations: 09Aug1981 Enlisted Evaluation Report (he “will most certainly become an outstanding NCO if his desire to improve his abilities persists”) and 07Jul1983 Enlisted Evaluation Report (he “has always performed his duties as a M577 driver in a superior manner”). The available record did not include formal assessment for traumatic brain injury or neuropsychiatric testing.

3. The applicant’s chronic pain in multiple joints and report of multiple head injuries and BH (Situational Stress and Stress Reaction) conditions were considered in regard to Liberal Consideration guidance and the attempted larceny offense for which he was found guilty and caused his chapter separation. Stressors reported in the record were personal/family relationships, legal and racial. The applicant did not claim PTSD or TBI conditions and current available evidence is insufficient to diagnose these conditions.

Kurta Questions:

- Did the applicant have a condition or experience that may excuse or mitigate the discharge? No. A mitigating condition or experience was not found in the current record.
- Did the condition exist, or did the experience occur during military service? No. A mitigating condition or experience was not found in the current record.
- Does the condition or experience actually excuse or mitigate the discharge? No. A mitigating condition or experience was not found in the current record for the attempted larceny condition for which the applicant was discharged.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant’s request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The applicant’s trial by a court-martial was warranted by the gravity of the offenses charged (attempted larceny). The applicant’s conviction and discharge were conducted in accordance with applicable laws and regulations and the discharge appropriately characterizes the misconduct for which he was convicted. He was given a bad conduct discharge pursuant to an approved sentence of a court-martial. The appellate review was completed, and the affirmed sentence was ordered duly executed. All requirements of law and regulation were met with respect to the conduct of the court-martial and the appellate review process, and the rights of the applicant were fully protected. The Board also considered the medical records, any VA documents provided

by the applicant and the review and conclusions of the medical reviewing official. The Board concurred with the medical official's determination finding insufficient evidence to support the applicant had a condition or experience that mitigates his discharge. Also, the applicant provided letters of reference in support of a clemency determination; but the Board found these letters did not outweigh the serious misconduct that led to his court-martial conviction and discharge. Therefore, based on a preponderance of available evidence, the Board determined that the character of service the applicant received upon separation were not in error or unjust.

2. Prior to closing the case, the Board did note the analyst of record administrative notes below, and recommended the correction is completed to more accurately depict the military service of the applicant.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

Except for the correction addressed in Administrative Note(s) below, 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.

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):

The applicant's service records show he was awarded the Parachutist Badge and Air Assault Badge, which are not listed on his DD Form 214 for the period ending 19 November 1985. Correct item 13 of his DD Form 214 by adding the Parachutist Badge and Air Assault Badge.

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 Army Board for Correction of Military Records (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 1552(b), provides, with respect to 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 actions taken by reviewing authorities under the UCMJ or action on the sentence of a court-martial for purposes of clemency. The Secretary of the Army shall make such corrections by acting through boards of civilians within the executive part of the Army.
3. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, set forth the basic authority for the separation of enlisted personnel.
 - a. An honorable discharge was separation with honor. Issuance of an honorable discharge certificate was appropriate when the quality of the Soldier's service generally met the standards of acceptable conduct and performance of duty, or was otherwise so meritorious that any other characterization would clearly be inappropriate. Where there were infractions of discipline, commanders were to consider the extent thereof, as well as the seriousness of the offense. Separation authorities could furnish Soldiers an honorable discharge Soldiers when subsequent honest and faithful service over a greater period outweighed any disqualifying entries in the Soldier's military record. It was the pattern of behavior, and not the isolated instance, which commanders should consider as the governing factor.
 - b. A general discharge was a separation from the Army under honorable conditions. When authorized, separation authorities issued general discharges to a Soldier whose military record was satisfactory but not sufficiently meritorious to warrant an honorable discharge.
 - c. A discharge under other than honorable conditions is an administrative separation from the Service under conditions other than honorable. It may be issued in lieu of trial by court martial.
 - d. A Soldier could receive a bad conduct discharge pursuant only to the approved sentence of a general or special court-martial, and, following the completion of an appellate review, such affirmed sentence had been ordered duly executed.

4. Army Regulation 635-5-1 (Separation Program Designators (SPD)) in effect at the time states the SPD as a result of Court-Martial, other would be JJD.

5. AR 601-210 (Regular Army and Reserve Components Enlistment Program) table 3-1 (U.S. Army reentry eligibility codes) states:

a. RE-1: Applies to: Person completing his or her term of active service who is considered qualified to reenter the U.S. Army.

b. RE-3: Applies to: Person who is not considered fully qualified for reentry or continuous service at time of separation or disqualification is waiverable.

c. RE-4: Applies to: Person separated from last period of service with a nonwaiverable disqualification.

d. RE-4R: Applies to: A person who retired for length of service with 15 or more years active federal service.

6. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to carefully consider the revised PTSD criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged under other than honorable conditions and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

7. 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 DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD; traumatic brain injury (TBI); 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. 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.

8. 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 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.

9. Title 10, U.S. Code, section 1556 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//