

IN THE CASE OF: [REDACTED]

BOARD DATE: 5 September 2024

DOCKET NUMBER: AR20230013944

APPLICANT REQUESTS:

- honorable physical disability retirement in lieu of bad conduct discharge as a result of court-martial
- removal of a block on his National Instant Criminal Background Check System (NICS)
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Army Good Conduct Medal Certificate, 26 April 2018
- partial DA Form 199-1 (Formal Physical Evaluation Board (PEB) Proceedings), 13 February 2019
- Department of Veterans Affairs (VA) letter, 13 February 2019
- Headquarters, 101st Airborne Division (air Assault) and Fort Campbell Orders 058-0602, 27 February 2019
- DD Form 214 (Certificate of Release or Discharge from Active Duty), Member Copies 1 and 4, ending 14 May 2019
- U.S. Uniformed Services Identification (ID) Card, 15 May 2019

FACTS:

1. The applicant states:

a. In 2021, he took a plea deal that resulted in his separation from the military. At the time, he was medically retired from the military and he still currently possesses all the pertinent paperwork (DD Form 214, retirement orders, and retirement ID card) that state he is retired. He still to this day regrets not making better decisions that led him to receive a bad conduct discharge.

b. Now he is married with a kid and one due in January 2024, and is seeking to upgrade his discharge along with remove a lock on his NICS. These things are interfering with his ability to provide healthcare for his family, which he was told by the

prosecution would not be an issue if he took the plea deal. He was told he would still be able to receive an armed license for work if he took the deal.

c. He is requesting to be granted his honorable medical retirement along with the removal of the NICS block so he can continue to better his life and be a positive impact, not only for his family, but also for the community as well. He cannot even access his Tricare for life because of his current status.

d. He admits his actions that led to his court-martial could have been better, but he takes full responsibility for them. He was not in any trouble while being out-processed from the military and has continued to keep a clean record since then. He wants to be able to give his children and wife a better life with the maximum health care and benefits he would have received if his medical retirement were recognized.

e. He is asking for a second chance that he will not waste or take for granted. He completed the required anger management programs while in the Army prior to his court-martial and continues to utilize those teachings and give back to the community. He is hoping and praying his request is granted because he just wants to take care of his family.

2. The NICS is a background check system created by the Brady Handgun Violence Prevention Act of 1993 to prevent firearm sales to people prohibited under the Act and is operated by the Federal Bureau of Investigation (FBI). The Army Board for Correction of Military Records (ABCMR) has no purview over the NICS; therefore, that portion of the applicant's request will not be further discussed in this Record of Proceedings.

3. The applicant enlisted in the Regular Army on 27 April 2015, and was awarded the Military Occupational Specialty (MOS) 91C (Utilities Equipment Repairer).

4. An Army Good Conduct Medal Certificate shows the applicant was awarded the Army Good Conduct Medal for exemplary behavior, efficiency, and fidelity in active Federal military service from 27 April 2015 through 26 April 2018.

5. A VA letter, dated 13 February 2019, informed the applicant the VA proposed the following evaluation for his service-connected disabilities:

- chronic right leg exertional compartment syndrome status post-surgery, increased from 10 percent to 20 percent
- chronic left leg exertional compartment syndrome status post-surgery, increased from 10 percent to 20 percent
- all other proposed decisions remained unchanged from the Integrated Disability Evaluation System (IDES) rating dated 24 September 2018

- the VA proposed his total combined rating for service-connected disabilities be increased from 60 percent to 70 percent after completion of his reconsideration request

6. A partial DA Form 199-1 shows:

a. A formal PEB convened on 13 February 2019, where the applicant was found physically unfit with a recommended rating of 40 percent and that his disposition be permanent disability retirement.

b. The applicant's medical conditions determined to be unfitting are:

(1) Chronic exertional compartment syndrome with surgery, right leg (Medical Evaluation Board (MEB) Dx 1), 20 percent.

(2) Chronic exertional compartment syndrome with surgery, left leg (MEB Dx 2), 20 percent.

c. The applicant's medical conditions determined not to be unfitting are MEB Dx 3 - 12 (asthma, mild persistent; left inguinal hernia; scar, surgical, abdomen; allergic rhinitis; migraines; insomnia disorder with other medical comorbidity, musculoskeletal conditions, chronic pain, persistent; left sensorineural hearing loss, right ear tinnitus; left ear tinnitus; and constipation).

7. Headquarters, 101st Airborne Division (Air Assault) and Fort Campbell Orders 058-0602, dated 27 February 2019, released the applicant from assignment and duty because of physical disability incurred while entitled to basic pay and under conditions that permit his retirement for permanent physical disability, with a disability rating of 40 percent and an effective date of retirement of 14 May 2019.

8. Headquarters, 101st Airborne Division (Air Assault) and Fort Campbell Orders 127-0216, dated 7 May 2019, revoked above Orders 058-0602, dated 27 February 2019, pertaining to the applicant's retirement.

9. The applicant provided a copy of a DD Form 214, which shows he was honorably retired on 14 May 2019, under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirement or Separation), due to permanent disability, with corresponding separation code SEJ. He was credited with 4 years and 18 days of net active service this period.

10. The applicant also provided a photocopy of a U.S. Uniformed Services, U.S. Army Retired ID Card, issued on 15 May 2019.

11. A Statement of Trial Results Findings Worksheet shows:

a. On 28 January 2021, the applicant was arraigned and tried by a General Court-Martial which convened at Fort Campbell, KY, where he was charged with and found guilty of:

(1) Committing assault of his spouse on 7 March 2019, with intent to inflict bodily harm, by pointing a loaded firearm at her while stating to her, "You can either get out of my house or I'm going to kill you."

(2) Unlawfully grabbing the hair of his spouse with his hand on 7 March 2019.

b. Two additional charges were dismissed after arraignment and prior to findings.

12. A Statement of Trial Results shows:

a. On 28 January 2021, the applicant was sentenced by a Military Judge alone via general-court martial convened at Fort Campbell, KY, to a bad conduct discharge and 10 days confinement.

b. The limitations on punishment contained in the plea agreement shows a minimum of 0 days confinement and a bad conduct discharge and a maximum of 30 days confinement and a bad conduct discharge, per specification. Confinement to be served concurrently.

c. The Military Judge did not recommend a suspension of any portion of the sentence. DNA processing was required in accordance with Title 10, U.S. Code, section 1565. The applicant was convicted of a crime punishable by imprisonment for a term exceeding 1 year and he was convicted of a misdemeanor crime of domestic violence.

13. A Convening Authority Action in the case of the applicant shows on 10 February 2021, after having reviewed any matters submitted by the accused and the victim, and after consulting with the Staff Judge Advocate, the Military Judge disapproved request for deferment of reduction in grade, and deferment of automatic forfeitures and approved request for waiver of automatic forfeitures. The findings and sentence were approved.

14. A Judgment of the Court, dated 7 March 2021, shows the Statement of Trial Results was modified to show:

- the request to defer the adjudged reduction in rank was disapproved
- the request to defer the automatic forfeitures was disapproved

- the request to waive the automatic forfeitures was approved; the automatic forfeitures were waived for 6 months and shall be paid as support to the victim
- the findings and sentence were approved

15. A U.S. Army Physical Disability Agency (USAPDA) memorandum, dated 7 May 2021, shows the applicant's IDES case was administratively terminated and all authorizations and the PEB Proceedings are void. The USAPDA requested the applicant's disenrollment from the IDES in the Veterans Tracking Application.

16. A U.S. Army Legal Services Agency, U.S. Army Court of Criminal Appeals memorandum, dated 9 November 2021, shows:

a. The appellate review in the General Court-Martial case of the applicant, currently assigned to the U.S. Army Personnel Control Facility, U.S. Army Garrison, U.S. Army Fires Center of Excellence and Fort Sill, OK was complete.

b. The findings of guilty and the sentence, adjudged on 28 January 2021 and as entered by the judgment dated 7 March 2021, were affirmed.

c. The appellate review is complete, and the bad conduct discharge may be executed. The personnel office for the applicant shall prepare the final discharge order and certificate.

17. A reissued DD Form 214 shows the applicant was given a bad conduct discharge on 19 November 2021, under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations) due to court-martial. He was credited with 6 years, 6 months, and 15 days of active service, including lost time from 26 January 2021 through 3 February 2021.

18. In the adjudication of this case, the USAPDA legal advisor provided an advisory opinion, dated 18 July 2024, on the applicant's request to upgrade his bad conduct discharge that resulted from a General Court-Martial conviction and termination of his case in the IDES as well as a requested removal of the "block" on his NICS, which shows:

a. The applicant's request was found legally insufficient.

b. On 13 February 2019, the formal PEB found the applicant unfit for continued service due to chronic exertional compartment syndrome with surgery, right and left legs, with a 40 percent disability rating based on VA Ratings. On 10 May 2019, the General Court-Martial Convening Authority involuntarily retained the applicant beyond his expiration term of service (ETS) due to a criminal investigation started with a view toward trial by court-martial. On 13 June 2019, criminal charges were preferred against

the applicant pursuant to the Uniform Code of Military Justice (UCMJ). On 23 February 2021, the applicant was convicted by a Military Judge alone and sentenced to 10 days confinement and a bad conduct discharge. On 7 May 2021, his IDES case was administratively terminated.

c. The USAPDA terminated the applicant's IDES case on 7 May 2021 as required by Army policy outlined in Army Regulation 635-40, which states: "...enlisted Soldiers who are...charged with a UCMJ offense that could result in a punitive discharge will be disenrolled [from IDES] on the date the punitive discharge has been approved by the Soldier's General Court-Martial Convening Authority."

d. Although the applicant states he was misled about the impact of his conviction on any disability retirement benefits, he does not provide any factual support corroborating such claims and assertions regarding improprieties that occurred during the court-martial process do not fall under the purview of the USAPDA. Similarly, request regarding the NICS is not a matter under the control of the USAPDA.

19. On 19 July 2024, the applicant was provided a copy of the USAPDA legal advisor's opinion and given an opportunity to submit comments, but he did not respond.

20. Title 38, USC, Sections 1110 and 1131, permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.

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, supporting documents, evidence in the records, and published Department of Defense guidance for consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, the frequency and nature of his misconduct, the reason for his separation, and whether to apply clemency. The Board found insufficient evidence of in-service mitigating factors and the applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. Based on a preponderance of the evidence, the Board determined the cancellation of his disability retirement and execution of his court-martial sentence to a bad conduct discharge were 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.

2/26/2025

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. 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 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. This guidance does not mandate relief, but rather provides standards and principles to guide BCM/NRs 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. 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.

2. 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 Uniform Code of Military Justice, 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 Uniform Code of Military Justice 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.

3. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations) sets forth the basic authority for the separation of enlisted personnel.

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 3, paragraph 3-11, provides that an enlisted person would be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial. The appellate review is required to be completed and the affirmed sentence ordered duly executed.

4. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating.

a. The case of a Soldier charged with an offense under the Uniform Code of Military Justice (UCMJ) or who is under investigation for an offense chargeable under the UCMJ which could result in dismissal or punitive discharge, may not be referred for, or continue, disability processing unless:

- the investigation ends without charges
- the officer exercising proper court-martial jurisdiction dismisses the charges
- the officer exercising proper court-martial jurisdiction refers the charge for trial to a court-martial that cannot adjudge such a sentence

b. An enlisted Soldier may not be referred for, or continue, physical disability processing action when action has been started under any regulatory provision which authorizes a character of service of under other than honorable conditions. If the case comes within these limitations, the commander exercising general court-martial jurisdiction over the Soldier may abate the administrative separation. This authority may not be delegated. A case file may be so referred if the general court-martial convening authority finds the following:

- the disability is the cause, or a substantial contributing cause, of the misconduct that might result in a discharge under other than honorable conditions
- other circumstances warrant disability processing instead of alternate administrative separation

5. Title 38, U.S. Code, section 1110 (General – Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

6. Title 38, U.S. Code, section 1131 (Peacetime Disability Compensation – Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be

paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

7. 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.

8. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. Paragraph 2-11 states applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//