

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 September 2024

DOCKET NUMBER: AR20240000893

APPLICANT REQUESTS: reconsideration of a previous request in ABCMR Docket Number AR20160019367, 9 May 2019, to amend his DD Form 214 (Certificate of Release or Discharge from Active Duty) to show in item 24 (Character of Service) from a bad conduct discharge to and honorable. In addition:

- In effect, provide the applicant an updated copy of his DD Form 214 that reflects an honorable discharge
- In effect, amend his DD Form 214 to reflect he is not on active duty

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 AR20160019367 on 9 May 2019.
2. The applicant states, he is requesting an upgrade of his BCD to honorable, and for an updated copy to be mailed to him. He also requests an update of his DD Form 214 to reflect he is not on active duty.
3. The applicant's request of an amendment to his DD Form 214 to reflect he is not on active duty is unclear. His DD Form 214 shows he was discharged on 30 July 1993 with a BCD. Therefore, this request will not be discussed further in these proceedings.
4. The applicant's service record reflects the following:
 - a. He enlisted in the Regular Army on 7 April 1977 followed by multiple reenlistments.
 - b. Memorandum subject: Request for Retention After Expiration of Term of Service (ETS), 12 September 1991, shows his commanding officer requested the applicant be retained beyond his expiration term of service (ETS) of 11 July 1991. This document

further shows he was undergoing an Article 32 investigation (Pretrial investigation in the military justice system) pending a General Court-Martial (GCM). Charges were preferred against him on 9 July 1991. This request was subsequently approved on 13 September 1991, and the applicant was to be retained until 10 January 1992 or final disposition of the court-martial charges, whichever occurred first.

c. DA For 4430-R (Department of the Army Report of Result of Trial) shows he was tried by GCM on 19 November 1991 at Fort Bliss, Texas (TX). Summary of offences and findings are as follows:

(1) Charge I: Violation of the UCMJ, Article 134

- Specification 1: Indecent, assault, – pled not guilty – found not guilty
- Specification 2: Indecent, assault, – pled not guilty – found not guilty
- Specification 3: Indecent, assault, – pled not guilty – found guilty
- Specification 4: Indecent, assault, – pled not guilty – found guilty
- Specification 5: Indecent, assault, – pled not guilty – found guilty
- Specification 6: Indecent, assault, – pled not guilty – found guilty
- Specification 7: Indecent, assault, – pled not guilty – dismissed by the military judge (MJ) as being multiplicitious with specification 6
- Specification 8: Indecent, assault, – pled not guilty – dismissed by MJ as being multiplicitious with specification 6
- Specification 9: Indecent, assault, – pled not guilty – found guilty by exceptions
- Specification 10: Indecent, assault, – pled not guilty – found not guilty

(2) Charge II: Violation of the UCMJ, Article 92

- Specification 1: Dereliction of Duty – pled not guilty – found guilty by exceptions
- Specification 2: Dereliction of Duty – pled not guilty – dismissed by MJ as being multiplicitious with specification 1 of Charge II

(3) He was sentenced to a reduction in grade to the rank of private (PVT)/E-1, four-years and six-months of confinement, and to be discharged with a BCD.

d. Orders 223-142, 20 November 1991, show he was ordered to proceed with a permanent change of station, with an assignment to the regional confinement facility, in Fort Leavenworth, Kansas (KS). His reporting date was 21 November 1991.

e. GCM Order Number 2, 6 February 1992, shows the applicant's sentence was approved and, except for the sentence extending to a BCD, will be executed.

f. On 30 June 1992, the record of trial was forwarded to the Judge Advocate General of the Army for review by a Court of Military Review. Pending completion of appellate review, the findings of guilty and the sentence were affirmed.

g. On 5 March 1993, the decision of the United States Army Court of Military Review was affirmed.

h. Order 099-02, 16 June 1993, shows the applicant was to be released from confinement effective 30 June 1993 and begin Commandant's parole. Upon the successful completion/termination of parole, the GCM case has not been finalized and the individual not been discharged from the service, the applicant will arbitrarily be placed on excess leave status until the appellate process is complete and all final administrative action is taken.

i. GCM Order Number 283, 8 July 1993, shows the applicant will be confined in the Security Battalion United States Disciplinary Barracks, Fort Leavenworth, KS, and the confinement will be served therein, or elsewhere as competent authority may direct.

j. Order 116-02, 20 July 1993, shows that pursuant Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), and due to the Adjudged/Sentenced Parole Discharge BCD, the applicant was to be discharged from the military on 30 July 1993.

k. Memorandum subject: Separation Documents, 30 July 1993, reflects his case has become final pursuant to GCM Number 283, Department of the Army, Fort Leavenworth, KS, 8 July 1993. This document also shows he was directed to surrender his military identification by 20 August 1993.

l. His DD Form 214 for the period ending 30 July 1993, shows he was discharged pursuant to AR 635-200, Chapter 3-11. with a BCD, as a result of Court-Martial-other. He completed 14 years, 7 months, and 12 days of active service. He had continuous honorable active service from 7 April 1977 to 18 November 1991. Additionally, he had lost time, after his normal ETS, from 19 November 1991 to 30 July 1993. His grade at the time of discharge was PVT/E-1.

m. GCM Order Number 178, 20 June 1994, show the sentence to BCD, confinement for four-years and six-months, and reduction to the grade of PVT/E-1, adjudged 19 November 1991, as promulgated in GCM Order Number 2, Department of the Army, Headquarters, U.S. Army Air Defense Artillery Center and Fort Bliss, Fort Bliss, TX, dated 6 February 1992, has been finally affirmed. Article 71(c) having been complied with; the BCD will be executed.

5. In a prior ABCMR Docket Number AR20160019367, 9 May 2019, the applicant requested an upgrade of his BCD to honorable. The Board determined the overall merits of this case were insufficient as a basis for correction of the records of the applicant. After reviewing the application and all supporting documents, to include the Department of Defense (DoD) guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined that relief was not warranted. Based upon the seriousness of the misconduct, the Board concluded that the characterization of service received at the time of discharge was appropriate. The evidence presented did not demonstrate the existence of a probable error or injustice.
6. The applicant did not provide any medical documentation to substantiate his claim of PTSD, TBI and other mental health issues.

7. 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 30 July 1993 bad conduct discharge. He has indicated on his DD 149 the PTSD, TBI, and Other Mental Health conditions are issues related to his request.
- c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD 214 for the period of Service under consideration shows he entered the Regular Army on 7 April 1977 and was discharged on 30 July 1993 under the separation authority provided by paragraph 3-11 of AR 635-200, Personnel Separations – Enlisted Personnel (17 September 1990): Dishonorable and Bad Conduct Discharge. The separation code JJD denotes "Court Martial (Other)." A Special Court-Martial Order dated 6 February 1992 shows the applicant was found guilty of five (5) specifications of indecent assault.
- d. JLV shows he has been diagnosed with PTSD and that he has numerous VA service-connected disabilities, but not for PTSD or any other mental health condition.
- e. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? PTSD

(2) Did the condition exist or experience occur during military service? NO: Despite having numerous VA service-connected disabilities, they do not include his PTSD or any other mental health condition.

(3) Does the condition or experience actually excuse or mitigate the discharge? N/A In the event the applicant was to have a potentially mitigating diagnosis, it could not mitigate the numerous UCMJ violations of which he was convicted as these conditions do not adversely affect one's abilities to differentiate right from wrong and adhere to the right.

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 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 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 that the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Number AR20160019367 on 9 May 2019.

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. Army Regulation 15-185 (Army Board for Correction of Military Records), currently in effect, prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.
2. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, provided the authority for separation of enlisted personnel upon expiration term of service, prior to ETS, and the criteria governing the issuance of honorable, general, and undesirable discharge certificates.
 - 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. A characterization of under honorable conditions may be issued only when the reason for separation specifically allows such characterization. It will not be issued to Soldiers solely upon separation at expiration of their period of enlistment, MSO, or period for which called or ordered to active duty.

c. 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, security reasons, or in lieu of trial by court-martial.

d. Chapter 3-11, provides that a Soldier will be given a BCD 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. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. By law, Title 10 (Armed Forces), U.S. Code, section 1552, this Board 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. The ABCMR does not have authority to set aside a conviction by a court-martial.

4. 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.

5. Army Regulation 635-5 (Personnel Separations - Separation Documents), in effect at the time, provides the DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of REFRAD, retirement, or discharge. The DD Form 214 is not intended to have any legal effect on termination of a Soldier's service.

6. Army Regulation 601-210 (Active and Reserve Components Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment and processing into the Regular Army, U.S. Army Reserve, and Army National Guard. Table 3-1 provides a list of RE codes:

- RE code "1" applies to personnel who have completed their obligated term of active service and are considered qualified to reenter the U.S. Army if all other criteria are met
- RE code "2" Applies to persons not eligible for immediate reenlistment
- RE code "3" applies to personnel who are not considered fully qualified for reentry or continuous service at time of separation, but whose disqualification is waivable. They are ineligible unless a waiver is granted
- RE code "4" applies to personnel separated from last period of active-duty service with a nonwaivable disqualification

7. Army Regulation 635-5-1 (Separation Program Designator Codes) states that the Separation Program Designator (SPD) codes are three-character alphabetic combinations which identify reasons for, and types of, separation from active duty. SPD code "JJD" is the appropriate code to assign to enlisted Soldiers who are administratively discharged under the provisions of Army Regulation 635-200, Chapter 3, based on Court-Martial. RE code of "4" is the appropriate corresponding RE code for SPD code "JJD".

8. 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.

9. The acting Under Secretary of Defense for Personnel and Readiness provided clarifying guidance on 25 August 2017, which expanded the 2014 Secretary of Defense memorandum, that directed the BCM/NRs and DRBs to give liberal consideration to veterans looking to upgrade their less-than-honorable discharges by expanding review of discharges involving diagnosed, undiagnosed, or misdiagnosed mental health conditions, including PTSD; traumatic brain injury; or who reported sexual assault or sexual harassment.

10. 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. 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. 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.

11. Title 10 (Armed Forces), 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//