

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 September 2024

DOCKET NUMBER: AR20240000960

APPLICANT REQUESTS:

- an upgrade of his under other than honorable conditions discharge to general, under honorable conditions or honorable
- a video/telephonic appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record), 27 November 2023
- Self-authored Statement, 15 October 2023
- Letter, Ms. [REDACTED] undated
- Letter, Seasoned with Love Outreach (SWLO), Undated
- Letter, Mr. [REDACTED] undated
- 569 pages of consultation and medical progress notes

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 his under other than honorable conditions discharge was unfairly given due to poor legal counsel and his case not being fully portrayed. At the time he was sick from seizures, chronic back pain, and fatigue. He went to the infirmary for treatment, and he felt they were not taking his condition seriously. He developed high blood pressure from stress at home. His wife was pressuring him to remain at home more. Money was tight and he was backed into a wall. He decided to leave and find medical help. His wife was gone all the time and came home at all hours of the night. He considered suicide and decided to return and ask for a medical discharge. The military police picked him up and he received a court-martial. He has lived as an outstanding citizen and has worked hard to overcome his bad decisions. All through this

he has battled kidney cancer and severe sleep apnea. He is asking for consideration of his circumstances.

3. The applicant provides:

a. A letter of support from Ms. [REDACTED] noting he is a very respectable person always willing to help anyone, and he loves God. He became seriously ill and not able to work. Prayers have brought him back through his situation.

b. A letter of support from SWLO, noting they have known him for over 40 years. He is the youngest son of three brothers, and he came from a close-knit family. He grieved the loss of his brother and pushed through his pain and became closer to God. His mother had a stroke and he helped take care of her. He was involved in construction of an addition to his church.

c. A letter of support from Mr. [REDACTED] noting he had been the applicant's friend for 50 years. He was an ambitious person, held many jobs, and has been thorough and dependable. He has been a bail bondsman and runs a successful lawn care service. He has helped feed people in his community.

d. Medical documents consisting of 569 pages of treatment and progress notes. The diagnoses include treatment for sepsis, left kidney removal, bowel obstruction, pain hypertension, type 2 diabetes mellitus, venous thrombosis or pulmonary embolism, and renal cell cancer.

4. A review of the applicant's service records shows:

a. On 25 February 1985, he enlisted in the Regular Army for 3 years. He was subsequently awarded military occupational specialty 77F (Petroleum Supply Specialist). He attained the rank/pay grade of private first class/E-3.

b. On 24 January 1986, he accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for being disrespectful language towards a noncommissioned officer in the execution of his office on or about 7 January 1986. His punishment consisted of restriction and extra duty for 14 days, and forfeiture of \$173.00 pay for 1 month (suspended for 90 days). He did not appeal this punishment.

c. Four DA Forms 4187 (Personnel Actions) show the applicant's duty status changed as follows:

- 24 September 1986 from present for duty (PDY) to absent without leave (AWOL)

- 24 October 1986 from AWOL to dropped from the rolls (DFR)
- 5 February 1987 from DFR to PDY
- 9 February 1987 from PDY to confined by military authorities

d. The service record is void of the DD Form 458 (Charge Sheet) listing the preferred charge(s) against the applicant.

e. After consulting with legal counsel on 13 February 1987, he voluntarily requested discharge for the good of the service, under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), chapter 10. In doing so, he acknowledged that the charges preferred against him under the UCMJ authorized the imposition of a bad conduct discharge or dishonorable discharge. He further acknowledged:

- he had not been subjected to coercion with respect to his request for discharge
- he had been advised of the implications that were attached to it
- by submitting the request, he was acknowledging he was guilty of the charge(s) against him or of (a) lesser included offense(s) therein contained which also authorized imposition of a bad conduct or dishonorable discharge
- he could be discharged under other than honorable conditions and he could be ineligible for many or all benefits administered by the Department of Veterans Affairs (VA)
- he could be deprived of many or all Army benefits and he could be ineligible for many or all benefits as a veteran under both Federal and State laws
- he would forfeit all accrued leave and be reduced to the lowest grade of E-1
- he could expect to encounter substantial prejudice in civilian life by reason of an under other than honorable conditions discharge
- he was advised he could submit any statements he desired in his own behalf, and elected to do so

f. On the same date, he provided a written statement, in which he detailed his reason for going AWOL. He was married for the last 5 years and had three children. During this time his wife said she did not feel she had enough time with him. Most of the time they were asleep when he came home. He told his son he was in the Army, and it was his duty to be there. He had a seizure and was not on medication because he was afraid of admitting it. His wife was unemployed, so he decided to leave. He planned on returning. His wife found employment at a university. While he was at home, he felt more relaxed. There was a lot of turmoil to deal with in the military. With his condition he could not deal with it.

g. On 24 February 1987, the Commanding Officer, 2d Battalion, 8th Cavalry recommended disapproval of his request. It was believed his decision to go AWOL was

made on the spur of the moment. He had been read the charges under the provisions of Article 15 of the UCMJ for falsely making the signature of the unit's first sergeant while seeking financial aid from the Army Relief Fund. He also spoke to his friends prior to his departure. As regards the matter of family problems he mentioned, the chain of command spoke to him and his wife and offered to set up professional counseling for them, but they refused the counselor. It was believed he had no intention of returning from AWOL voluntarily as evidenced by the fact that he was returned to military control after being apprehended by civilian authorities.

h. On the same date, a flag was imposed against him. The DA Form 268 (Report for Suspension of Favorable Personnel Actions) shows he was apprehended by civilian authorities on 5 February 1987 and returned to Fort Hood on 9 February 1987.

i. On 25 February 1987 and 26 February 1987, his battalion and brigade commanders recommended disapproval of his request for discharge under the provisions of Army Regulation 635-200, chapter 10, respectively.

j. On 2 March 1987, the separation approval authority disapproved his request.

k. Special Court-Martial Order Number 10 showing the charge(s) and promulgating the finding(s) of a special court-martial convened by the Court-Martial Convening Authority, Headquarters (HQ), 1st Cavalry Division, Fort Hood, and the date adjudged, is not contained in the available records.

l. Special Court-Martial Order Number 29, dated 30 September 1987, issued by HQ, U.S. 1st Cavalry Division, Fort Hood, affirmed the sentence to a bad conduct discharge, confinement for 105 days, forfeiture of \$438.00 pay per month for 4 months, and reduction to E-1, adjudged on 24 March 1987. Article 71(c) having been complied with the bad conduct discharge would be executed. The portion of the sentence pertaining to confinement had been served.

m. On 21 October 1987, he was discharged. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 2 years and 26 days of net active service with 134 days' time lost from 24 September 1986 and 4 February 1987 (AWOL); 79 days' time lost from 9 February 1987 to 28 April 1987 (confinement); and he had 175 days' excess leave from 30 April 1987 to 21 October 1987. It further shows in:

- block 4 (Grade, Rate, or Rank) – PV1
- block 13 (Decorations, Medals, Badges, Citations, and Campaign Ribbons Awarded or Authorized) – Army Service Ribbon, and Expert Marksmanship Qualification Badge with Rifle Bar
- block 24 (Character of Service) – under other than honorable conditions

- block 25 (Separation Authority) – Army Regulation 635-200, Chapter 3
- block 28 (Narrative Reason for Separation) – as the result of court-martial

5. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. 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.

6. 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 (EMR – AHLTA and/or MHS Genesis), 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 21 October 1987 discharge characterized as under other than honorable conditions and, in essence, a referral to the Disability Evaluation System (DES). In his self-authored letter, he states he was “sick from having seizures and chronic back pain and fatigue;” the medical providers “were not taking my condition serious;” and issues with his family life with thoughts of suicide led him to go absent without leave.

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 25 February 1985 and was discharged under other than honorable conditions on 21 October 1987 under the separation authority provided by chapter 3 of AR 635-200, Personnel Management – Enlisted Personnel (15 September 1986): Dishonorable and Bad Conduct Discharge. His separation code of JJD denotes this separation was the result of court martial. The DD 214 shows no periods of Service in a hazardous duty pay area.

d. The applicant's separation packet is incomplete. Available documentation shows the applicant went absent without leave (AWOL) and was apprehended by civilian authorities and then returned to military custody on 9 February 1987.

e. On 13 February 1987, the applicant voluntarily requested discharge in lieu of trial by court-martial under chapter 10 of AR 635-200. On 24 September 1987, his company commander “strongly” recommended disapproval:

It is not believed that SP4 [Applicant]’s decision to go AWOL was made on the spur of the moment. He had been read charges under the provisions of Article 15 on 9 September 1986 for falsely making the signature of the unit’s first sergeant while seeking financial aid from the Army Emergency Relief Fund. He also talked to his friends prior to his departure and told them goodbye.

In regards to the matter of family problems mentioned by SP4 [Applicant], the chain of command had talked to his wife and him and had offered to set up professional counselling for them. They refused to see a counsellor.

It is believed that SP4 [Applicant] had no intention of returning from AWOL voluntarily as evidenced by the fact that he was returned to military control only after being apprehended by civilian authorities.”

f. The Commanding General of the 1<sup>st</sup> Cavalry Division denied his request and the applicant was subsequently found guilty of unknown specification(s) at a general court-martial.

g. The applicant’s period of service predates the EMR and JLV shows he is not registered with the VA.

h. The submitted medical documentation is from civilian providers covering the period from approximately 2016 thru 2022 and are thus non-contemporaneous and so of no significant probative value. Even if the applicant would have had a condition which failed medical retention standards and been cause for a referral to the DES, his misconduct made him ineligible. Paragraph 4-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (13 December 1985) states:

The case of a member charged with an offense, or is under investigation for an offense which could result in dismissal or punitive discharge, may not be referred for disability processing unless

a. The investigation ends without charges.

b. The officer exercising proper court-martial jurisdiction dismisses the charge.

c. The officer exercising proper court-martial jurisdiction refers the charge for trial to a court-martial that cannot adjudge such a sentence.

i. There is no evidence any of these criteria were met.

j. It is the opinion of the Agency medical advisor that neither an upgrade of his discharge nor a referral to the DES is warranted.

k. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? NO

(2) Did the condition exist or experience occur during military service? N/A

(3) Does the condition or experience actually excuse or mitigate the discharge? N/A

#### 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, 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 health claim and the review and conclusions of the ARBA Medical Advisor. 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 any health conditions. 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.

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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. Army Regulation 15-185 (Army Board for Correction of Military Records) 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.

a. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing (sometimes referred to as an evidentiary hearing or an administrative hearing) or request additional evidence or opinions. 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.

3. By law (10 USC 1552), court-martial convictions stand as adjudged or modified by appeal through the judicial process. 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. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), then in effect, set policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons.

a. Paragraph 3-7a Honorable discharge: an honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the soldier'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. Paragraph 3-7b. General discharge: 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, military service obligation, or period for which called or ordered to active duty.

c. Paragraph 3-7c. Under other than honorable conditions. A discharge under other than honorable conditions is an administrative separation for the service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, security reasons, or for the good of service.

d. Paragraph 3-11. Bad conduct discharge. A Soldier will be given a bad conduct discharge 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. Questions concerning the finality of appellate review should be referred to the servicing staff judge advocate.

5. 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.

6. 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.

7. 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.

8. Section 1556 of Title 10, United States Code, 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//