

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 September 2024

DOCKET NUMBER: AR20240002045

APPLICANT REQUESTS:

- reconsideration of his previous request for a bad conduct discharge upgrade to under honorable conditions (General)
- 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)
- Self-authored letter

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 AR20130019148 on 12 June 2014.

2. The applicant states he is asking that clemency be granted and that his character of service be upgraded or changed. He believes that the character of the discharge was unwarranted. Mistakes were made and outside forces did influence his decision making that had been addressed. In his self-authored letter, he states:

a. From his time in service, he had developed mental as well as physical disabilities that are negatively impacting his life. Due to the character of his discharge, he has been denied access to any benefits that can assist him in not only treating his disabilities, but also in living a better quality of life. Another issue that contributed to the character of his discharge was the prejudice of his chain of command.

b. Certain charges were alleged against him for the purpose of justifying a general court-martial instead of a special court-martial. Those charges were dropped the day of his court-martial. In addition to the prejudice, members of his chain of command gave false testimony and it was never addressed during the court-martial. Although he suffers from mental disabilities that he developed during service, he still earnestly worked to improve himself.

c. He has become a certified personal trainer and nutrition specialist. Attending college and earning 96 credits toward his bachelor's degree is another accolade he has earned and continues working on. In spite of his best efforts, he still struggles to lead a productive life that is free of conflict in a damaging fashion due to disabilities gained from service.

d. His enlistment was flawed not dishonorable. For him to have a bad conduct discharge, which the Veterans Affairs considered dishonorable for the purpose of receiving benefits is unjust and unwarranted. He volunteered and gave his all to the best of his ability and now being denied the benefits he has earned.

3. The applicant enlisted in the Regular Army on 5 May 2005.

4. General Court-Martial (GCM) Order Number 5, 1st Infantry Division, Fort Riley, KS, dated 16 January 2008 shows the applicant was tried and convicted on 18 September 2007, under the Uniform Code of Military Justice (UCMJ) of violating:

a. Article 86 by being absent without authority from on or about 29 January 2007 to 8 February 2007;

b. Article 128 on or about 23 November 2006, by unlawfully striking a private first class in the face with his closed fist;

c. Article 92 (Specification 1) on or about 12 March 2007, by wrongfully failing to register his privately owned firearm; by failing to gain permission from his unit commander to store his privately owned firearm within the barracks; and by wrongful possession of an unregistered firearm on Fort Riley;

d. Article 92 (Specification 2) on or about 21 May 2007, by wrongfully failing to register his privately owned firearm; by wrongfully possessing an unregistered firearm on Fort Riley; by wrongfully transporting a readily accessible privately owned firearm in a vehicle at Fort Riley; and by wrongfully transporting and possessing a loaded privately owned firearm in a vehicle at Fort Riley;

e. Article 112a between on or about 28 February 2007 and on or about 28 March 2007, wrongfully use marijuana; and

f. Article 134 on or about 21 May 2007, by breaking restriction.

5. The applicant's sentence, as adjudged on 18 September 2007, included:

- reduction to private, pay grade E-1;
- forfeiture of all pay and allowances;

- confinement for nine months; and
- a bad conduct discharge

6. GCM Order Number 21, issued by Headquarters, U.S. Army Field Artillery Center, Fort Sill, OK, on 15 January 2009, shows the sentence to reduction to the grade of Private E1; forfeiture of all pay and allowances, confinement for 9 months, and a BCD, adjudged on 18 September 2007, as promulgated in General Court Martial Order Number 5, Headquarters, 1st Infantry Division and Fort Riley, Fort Riley, KS 66442, dated 16 January 2008, has been finally affirmed. The accused was credited with 135 days of confinement against the sentence to confinement. That portion of the sentence extending to confinement has been served. Article 71(c) having been complied with, the Bad-Conduct Discharge will be executed.

7. Accordingly, he was discharged on 27 March 2009 with a BCD. His DD Form 214 shows he completed 3 years, 10 months, and 23 days net active service this period. It also shows:

- Item 25 (Separation Authority): Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), chapter 3
- Item 26 (Separation Code): JJD
- Item 27 (Reentry Code): 4
- Item 28 (Narrative Reason for Separation): Court-Martial, Other
- Item 29 (Dates of Time Lost During this Period): Not Chargeable Under 10 USC 972: 20070129 – 20070208 (29 January 2007 – 8 February 2007); 20070918 – 20071220 (18 September 2007 – 20 December 2007)

8. On 12 June 2014, the ABCMR considered his case and determined 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 were insufficient as a basis for correction of the records of the individual concerned.

9. By regulation, AR 15-185 (ABCMR) 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.

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. Any redress by this Board of the finality of a court-martial conviction is prohibited by law. The Board is only empowered to change a discharge, if clemency is determined to be appropriate, to moderate the severity of the sentence imposed. Given the

seriousness of the applicant's misconduct, the type of discharge directed and the reasons therefore were appropriate. As a result, clemency is not warranted in this case.

## 12. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting a reconsideration of his previous request to upgrade his bad conduct discharge (BCD) to general, under honorable conditions. On his DD Form 149 the applicant indicated that Other Mental Health Issues are related to his request. More specifically, the applicant indicated that due to his time in service, he developed mental and physical disabilities that are negatively impacting his life and due to the character of his discharge he has been denied access to benefits that can help with treating his disabilities and providing a better quality of life. The applicant's previous consideration by the ABCMR is summarized in Docket Number AR20130019148 dated 12 June 2014. 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: 1) the applicant enlisted in the Regular Army (RA) on 05 May 2005, 2) the applicant was convicted by a General Court-Martial on 18 September 2007 for the following: being absent without authority (AWOL); unlawfully striking another Soldier in the face with a closed fist; two violations of Article 92-Specification 1: wrongfully failing to register his privately owned firearm; by failing to gain permission from his unit commander to store his privately owned firearm within the barracks; and by wrongful possession of an unregistered firearm on Ft. Riley; Specification 2- wrongfully failing to register his privately owned firearm; by wrongfully possessing an unregistered firearm on Fort Riley; by wrongfully transporting a readily accessible privately owned firearm in a vehicle at Fort Riley; and by wrongfully transporting and possessing a loaded privately owned firearm in a vehicle at Fort Riley; wrongful use of marijuana, and breaking restriction. 3) the applicant was discharged on 27 March 2009 with a BCD under the provisions of Army Regulation (AR) 635-200, Chapter 3, with a separation code of JJD and reentry code of '4.' His narrative reason for separation was noted as Court-Martial, Other. 4) on 12 June 2014, the ABCMR considered his case and determined the evidence did not demonstrate the existence of probable error or injustice and his request for relief was denied.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. In-service/Department of Defense (DoD) medical records were available for review via JLV from 10 May 2005 through 18 September 2007. On 06 October 2005, the applicant was cleared for Airborne school. On 17 January 2007, the applicant was command-referred for a Mental Status Examination for Chapter Evaluation. The full assessment was not available for review though documented the applicant's diagnosis

as Adjustment Disorder with Disturbance of Conduct. It was noted that the applicant was released with duty limitations though no additional information was documented in the record. There were no other BH records available for review.

d. A review of JLV shows the applicant is not service-connected for any conditions through the VA. Of note, due to his BCD, he is ineligible for VA services.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence that the applicant had a BH condition while in service. The applicant was diagnosed with Adjustment Disorder with Disturbance of Conduct at the time of his BH Chapter evaluation; however, Adjustment Disorders lasting less than 6 months are not constituted as mitigating conditions and there is no indication that the applicant met criteria for this condition prior to his Chapter separation evaluation. There were no additional in-service records available for review. The applicant is not service-connected through the VA for any conditions and there were no VA or civilian BH records available for review. Based on the available information, BH mitigation is not supported.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends he experienced Other Mental health Issues.

(2) Did the condition exist or experience occur during military service? Yes, per the applicant's assertion.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. Although the applicant's in-service medical records show he was diagnosed with Adjustment Disorder with Disturbance of Conduct at the time of his BH Chapter separation evaluation, this does not constitute a mitigating condition. There were no additional in-service BH records available for review. However, the applicant asserts he experienced Other Mental Health Issues, and, per liberal guidance, his assertion alone is worthy of the Board's consideration. The applicant is not service-connected through the VA for any conditions and there were no VA or civilian BH records available for review. As there is insufficient evidence that the applicant had a mitigating BH condition in-service, there is insufficient evidence to establish that his misconduct was related to or mitigated by Other Mental Health Issues and insufficient evidence to support an upgrade based on BH mitigation.

**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 Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was separated for conviction by court-martial for being absent without leave from 29 January 2007 to 8 February 2007, committing an assault on a Soldier by striking him in the face with a weapon by placing a handgun in his mouth, failing to register his privately owned firearm, possessing an unregistered firearm, wrongfully using marijuana, and breaking restriction. The Board found no error or injustice in the separation proceedings. The Board reviewed and concurred with the medical advisor's review finding sufficient evidence the applicant had an adjustment disorder while on active duty; however, found that not to be mitigating toward the applicant's misconduct. Based on a preponderance of the evidence, the Board concluded that the characterization of service the applicant received upon separation was appropriate.

2. The applicant 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.

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

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 amendment of the ABCMR decision rendered in Docket Number AR20130019148 on 12 June 2014.

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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 (AR) 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.

a. 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.

b. 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.

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

a. Chapter 3 states a Soldier will be given a bad conduct discharge pursuant only to an approved sentence of a general or a special court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed.

b. Paragraph 3-7 states 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.

c. Paragraph 3-7b provides that 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.

3. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, U.S. Code, 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.

4. 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.

5. 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; TBI; sexual assault; sexual harassment. Boards were directed 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. The guidance further describes evidence sources and criteria and requires Boards to consider conditions/experiences presented in evidence as potential mitigation for that misconduct which led to the discharge.

6. 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.

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 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.

//NOTHING FOLLOWS//