

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 22 October 2024

DOCKET NUMBER: AR20240002147

APPLICANT REQUESTS: through his Attorney-in-fact E.I., the former service member (SM) requests his bad conduct discharge (BCD) be upgraded. Additionally, he requests an appearance before the Board via video/telephone.

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

- DD Form 149 (Application for Correction of Military Record)
- Power of Attorney (POA)
- Medical Documents

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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 SM is incapacitated and the offense was a nonviolent offense. It has been nearly 40 years since the offense. The SM has never committed such an offense since then. He was very young when the offense occurred. He does not have military documents, nor can he access them. Traumatic brain injury (TBI) is indicated as related to the request. Additionally, performance evaluations/derogatory information and disability are noted as related to his request.
3. The SM enlisted in the U.S. Army Reserve (USAR) on 24 March 1982. He entered active duty for training on 12 May 1982. He was honorably released from active duty on 14 September 1982. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 4 months and 3 days of net active service this period.
4. The SM enlisted in the Regular Army on 1 December 1982, for 3 years. His military occupational specialty was 31K (Combat Signaler). The SM served in Germany from 11 December 1982 through 29 May 1984.

5. Before a general court-martial adjudged on 25 April 1985 at Fort Lewis, WA, the SM was found guilty of:

- wrongful distribution of 28.58 grams of marijuana on 13 September 1984
- wrongful distribution of 14.60 grams of marijuana on 10 October 1984
- the court sentenced him to reduction to private/E-1, forfeiture of \$300.00 per month for six months, confinement for six months, and to be discharged from the service with a BCD
- the SM was confined by military authorities on 25 April 1985 and the sentence was approved on 5 July 1985

6. DA Form 3822-R (Report of Mental Status), dated 9 December 1985 shows the SM had the capacity to understand and participate in the proceedings, was mentally responsible, and met retention requirements.

7. The U.S. Army Court of Military Review affirmed the findings of guilty and the sentence as approved by the convening authority.

8. General Court-Martial Order Number 58, dated 21 January 1986, issued by the U.S. Army Correctional Activity, Fort Riley, KS, shows the sentence having been complied with, the BCD was ordered to be duly executed.

9. The SM was discharged on 31 January 1986. His DD Form 214 shows he was discharged under the provisions of Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Personnel), Chapter 3, Section IV, as a result of court-martial, with Separation Code JJD and Reenlistment Code 4. His service was characterized as bad conduct. He completed 2 years, 9 months, and 2 days of net active service this period. He lost time from 25 April 1985 to 19 September 1985. His awards include the Army Service Ribbon and the Overseas Service Ribbon.

10. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

11. The SM provides POA that names the name E.I. as his Attorney-in-fact, and medical documents that show the SM has a disability, and history of cerebrovascular accident (CVA).

12. In reference to his performance/evaluations/derogatory information AR 635-5 (Separation Documents), states, 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 release from active

duty, retirement, or discharge. The information entered thereon reflects the conditions as they existed at the time of separation.

13. In reaching its determination, the Board can consider the FSMs petition and service record in accordance with the published equity, injustice, or clemency determination guidance.

14. MEDICAL REVIEW:

a. 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 is incapacitated and resides in long term care facility status post cerebral vascular accident (a stroke) in August 2023. The applicant through his Attorney-in-fact requests a discharge upgrade from Dishonorable. He contends that his offence was nonviolent, and the offense was committed nearly 40 years ago. He also endorses that TBI is related to his request.

b. The ABCMR ROP summarized the applicant's record and circumstances surrounding the case. The applicant enlisted in service 19820324. His MOS was 36K Tactical Wire Operations Specialist and later 31K Combat Signaler. He was stationed in Germany 11Dec1982 through 29May1984. The record did not show combat deployment. He was discharged 31Jan1986 under AR 635-200 chapter 3 as a result of court-martial. He was found guilty of wrongful distribution of 28.58 grams of marijuana on 13Sep1984 and of wrongful distribution of 14.60 grams of marijuana on 10Oct1984. The court-martial adjudged on 25Apr1985 led to a sentence of Bad Conduct Discharge, confinement for 6 months, reduction in grade, and forfeiture of \$300 pay per month for 6 months.

c. The 26Apr1985 Confinement Examination showed a normal physical exam. In the 12Sep1985 Report of Medical History (SF Form 93, completed for separation), the applicant did not endorse any BH symptoms. Of note, he did not endorse 'head injury', 'frequent or severe headaches', or 'dizziness or fainting spells'. The Report of Medical Examination revealed sole diagnosis Tendinitis of Medial Collateral Ligament Secondary to Trauma. He was deemed qualified for separation. The 09Dec1985 Report of Mental Status Examination (DA Form 3822-R) showed no abnormality in behavior, mood or affect, thought process, thought content, or memory. He had the mental capacity to understand and participate in discharge proceedings; he was mentally responsible; and he met retention standards of AR 40-501 chapter 3. The mental status evaluation did not yield a mental health diagnosis.

d. The applicant submitted service treatment records which described multiple and varied medical conditions. The records were carefully reviewed but none were concerning a mental health condition, a head injury or traumatic brain injury while in service. An August 2023 VA community health record (found in JLV) revealed that the applicant had suffered a large left middle cerebral artery (MCA) ischemic cerebrovascular accident (or stroke) with resultant cerebral edema and herniation. He underwent emergency decompressive left hemicraniectomy for repair on 12Aug2023. While admitted, he was placed on psychotropic agent escitalopram. There were no DoD or VA records found during JLV search today.

e. On 15Nov2023, the State of Colorado, Department of Health Care Policy and Financing endorsed that the applicant has a disability. The applicant's record did not show that he has been diagnosed with a service incurred or service-related mental health condition or traumatic brain injury. The record did reveal that the applicant sustained ischemic brain injury in August 2023, almost 40 years after discharge from military service. While in service the applicant's blood pressure readings were normal. In addition, the service treatment records did not show elevated cholesterol levels or treatment/diagnosis of such.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. As per Liberal Consideration, the applicant self-asserts he sustained traumatic brain injury while on active duty.

(2) Did the condition exist, or did the experience occur during military service? Yes. As per Liberal Consideration, the applicant self-asserts his head injury occurred while on active duty.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There were no in-service BH or TBI records. Beyond self-report, there was no evidence that the applicant was experiencing sequela from traumatic brain injury or a mental health condition while in active service. Therefore, there was insufficient medical evidence to support a nexus between a TBI or mental health condition, and his chapter separation and Bad Conduct Discharge. Liberal Consideration guidance was considered; however, even if a TBI or mental health condition had been found, they would not be considered mitigating for misconduct involving the distribution of a controlled substance. The selling of a controlled substance is not part of the natural history of mental health illness or traumatic brain injury.

**BOARD DISCUSSION:**

1. The Board determined 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.
  
2. 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 (distribution of illegal drugs). 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 found no error or injustice in his separation processing. 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 agreed with the medical reviewer's finding insufficient evidence to support that the applicant had a condition or experience that mitigates his misconduct. Also, the applicant provided no evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination. Based on a preponderance of evidence, the Board determined that 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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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 (USC), 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. Section 1556 of Title 10, USC, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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.

3. Army Regulation 15-185 (ABCMR) 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, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. 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 or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that 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.

4. Army Regulation 635-200 (Personnel Separations-Enlisted Personnel), sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

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 provided that an enlisted person would be given a BCD pursuant only to an approved sentence of a general or special court-martial, after completion of appellate review, and after such affirmed sentence has been ordered duly executed.

5. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, USC, 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.

6. Army Regulation 635-5 (Personnel Separations-Separation Documents) prescribed the separation documents prepared for Soldiers upon retirement, discharge, or release from active military service or control of the Army. It established the standardized policy for the preparation of the DD Form 214. The DD Form 214 is a synopsis of the Soldier's most recent period of continuous active service. The general instructions stated all available records would be used as a basis for preparation of the DD Form 214. The information entered thereon reflects the conditions as they existed at the time of separation.

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 Service Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder (PTSD); traumatic brain injury (TBI); sexual assault; or sexual harassment. Boards are 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.

8. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and BCM/NRs on 25 July 2018, 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.

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, Boards 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.

//NOTHING FOLLOWS//