

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 November 2024

DOCKET NUMBER: AR20240003092

APPLICANT REQUESTS: in effect, reconsideration of his previous request for an upgrade of his bad conduct discharge. He further requests:

- the narrative reason for separation to show “disability”
- 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
- Three Letters of Support
- VA Form 21-4138 (Department of Veterans Affairs (VA) Statement in Support of Claim)

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 Numbers:

- AR20200011443 on 10 October 2010
- AR20180010669 on 23 January 2020

2. The applicant states his discharge was inequitable because it was based on one isolated incident in 11 years of service with no other adverse actions. After his last overseas tour, he turned to drugs and substance abuse to deal with the stress of situations such as deployments. While attending a funeral, the niece of the deceased was discussing the symptoms of her uncle's undiagnosed post-traumatic stress disorder (PTSD) and it was from that conversation that he realized he had the same ongoing symptoms. The VA has denied him health care due to the characterization of his service.

3. The applicant enlisted in the Regular Army on 12 July 1973. He executed multiple reenlistments with his final reenlistment occurring on 26 October 1983. The highest

grade he held was staff sergeant (SSG/E6). He completed two overseas assignments to Germany.

4. The record contains General Court-Martial (GCM) Order Number 12, 9 May 1985, issued by Headquarters, U.S. Army Field Artillery Center, Fort Sill, OK, which shows that before a GCM, at Fort Campbell, KY, the applicant pled not guilty and was found guilty of violating Article 112a of the Uniform Code of Military Justice:

- one specification of wrongful distribution of two bags of marijuana
- one specification of wrongful possession of marijuana

5. The court sentenced him to reduction to E-1, forfeiture of all pay and allowances, 5 years confinement, and to be discharged from service with a bad conduct discharge. The sentence was adjudged on 4 April 1985 and approved on 9 May 1985.

6. The U.S. Army Court of Military Review affirmed the findings and sentence on 17 October 1985. On 22 March 1990, the U.S. Court of Military Appeals denied the applicant's petition for review.

7. The applicant petitioned for an appeal of his conviction on 30 October 1985. The U.S. Court of Military Appeals denied his petition on 18 December 1985.

8. GCM Order Number 25, 13 January 1986, issued by U.S. Disciplinary Barracks, U.S. Combined Arms Center, Fort Leavenworth, Kansas, noted the applicant's sentence having been affirmed and complied with, the BCD would be executed.

9. The applicant was discharged on 7 March 1986. His DD Form 214 shows he was discharged under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 3, as a result of court-martial, and his service was characterized as bad conduct (Separation Code JJD and Reenlistment Code 4). He completed 12 years, 6 months, and 25 days of active duty with lost time from 4 April 1985 to 7 March 1986.

10. The applicant previously applied to the ABCMR and on 10 October 2010 and on 23 January 2020, 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 that although the applicant served satisfactorily for the first 9 years, it did not mitigate the fact that he was convicted of the wrongful distribution and possession of marijuana with the intent to distribute. The Board found insufficient evidence of in-service mitigating factors for the misconduct and the applicant provided no evidence of post-service achievements or letters of support to weigh a clemency determination.

11. He provides:

a. Three-character references which state that the mistakes the applicant made have molded his integrity and ambition to live a responsible and respected life. He is a great father, husband, and child of God. He is dependable, loyal, sincere and will lend a hand to anyone. He is worthy of consideration for an upgrade to the characterization of his service.

b. A VA Statement in Support of Claim wherein he states that his lawyer never tried to contact him or help him during his incarceration.

12. The Board should consider the applicant's overall record in accordance with the published equity, injustice, or clemency determination guidance.

13. 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.

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

15. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his bad conduct discharge (BCD) and a change in the narrative reason for separation to "disability". The applicant did not indicate or select any issue or condition as related to his request.

b. 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:

- The applicant enlisted in the Regular Army on 12 July 1973.
- The record contains General Court-Martial (GCM) Order Number 12, 9 May 1985, issued by Headquarters, U.S. Army Field Artillery Center, Fort Sill, OK, which shows that before a GCM, at Fort Campbell, KY, the applicant pled NOT guilty and was found guilty of violating Article 112a of the Uniform Code of Military Justice:
- one specification of wrongful distribution of two bags of marijuana
- one specification of wrongful possession of marijuana

- The court sentenced him to reduction to E-1, forfeiture of all pay and allowances, 5 years confinement, and to be discharged from service with a BCD. The sentence was adjudged on 4 April 1985 and approved on 9 May 1985.
- The applicant was discharged on 7 March 1986. His DD Form 214 shows he was discharged under the provisions of Army Regulation 635-200, Personnel Separations-Enlisted Personnel, Chapter 3, as a result of court-martial, and his service was characterized as bad conduct (Separation Code JJD and Reenlistment Code 4). He completed a total of 12 years, 6 months, and 25 days of active duty with lost time from 4 April 1985 to 7 March 1986.

c. Review of Available Records: The Army Review Board Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant states, his discharge was inequitable because it was based on one isolated incident in 11 years of service with no other adverse actions. After his last overseas tour, he turned to drugs and substance abuse to deal with the stress of situations such as deployments. While attending a funeral, the niece of the deceased was discussing the symptoms of her uncle's undiagnosed post-traumatic stress disorder (PTSD), and it was from that conversation that he realized he had the same ongoing symptoms. The Department of Veterans Affairs (VA) has denied him health care due to the characterization of his service.

d. Due to the period of service no active-duty electronic medical records were available for review and the applicant did not provide any hardcopy medical documentation.

e. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is not service connected. No VA electronic medical records were available for review, and he did not submit any medical documentation post-military service substantiating his assertion of suspected PTSD. The applicant does not even provide an indication of the incident or index trauma that may have caused PTSD.

f. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a behavioral health condition during military service that mitigates his discharge. In addition, there is no evidence the applicant failed the medical retention standards of AR 40-501, chapter 3, Standards of Medical Fitness, prior to his separation. Based on the documentation available for review, there is no indication that an omission or error occurred that would warrant a referral to the IDES process. In summary, his separation process appears proper, equitable and free of error, and insufficient new evidence has been provided to determine otherwise.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant did not indicate or select any issue or condition as related to his request on his application. However, the applicant reports he suspects having undiagnosed post-traumatic stress disorder (PTSD).

(2) Did the condition exist or experience occur during military service? No. There is no medical documentation indicating the applicant was diagnosed with any BH condition during military service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is insufficient evidence of any mitigating BH condition. There is no evidence of any in-service BH diagnoses, the VA has not service-connected the applicant for any BH condition, and there is no VA electronic record indicating he has been treated for any mental health condition. And while the applicant self-asserted PTSD, he did not provide any medical documentation substantiating his assertion.

h. Per Liberal Consideration, the applicant's assertion of undiagnosed post-traumatic stress disorder (PTSD) is sufficient to warrant consideration by the Board.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was 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. The Board minority found no error or injustice in the separation proceedings. The Board reviewed the medical advisor's review finding insufficient evidence to support the applicant had a behavioral health condition during military service that mitigates his discharge. The Board majority determined based on the applicant's provided character reference letters and lack of trouble post-discharge, a discharge upgrade was warranted to under honorable conditions (General). The Board further concluded the evidence was insufficient to amend his narrative reason for separation to disability.

2. 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
RB:	MB:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	SP:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant's DD Form 214, for the period ending 7 March 1986, to show his characterization of service as under honorable conditions (General).
2. The Board further determined that the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to amending his narrative reason for separation to disability.

3/28/2025

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. 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 (AR) 635-5, Personnel Separations-Separation Documents, 15 August 1979, in effect at the time did not provided for adding an entry for continuous honorable active service, when a Soldier who had previously reenlisted without being issued a DD Form 214 was discharged with any characterization of service that was not honorable. However, an interim change, published on 2 October 1989 does provide for such an entry as does the current regulation.

3. AR 635-200, Personnel Separations-Enlisted Personnel, 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 provided that an enlisted person would be given a bad conduct discharge 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.

4. 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.

5. Title 38, U.S. Code section 1110, General - Basic Entitlement: 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: 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. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records 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.

8. 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.

9. 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. 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. 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//