

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 December 2024

DOCKET NUMBER: AR20240003933

APPLICANT REQUESTS: and upgrade of his bad conduct discharge (BCD).

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

- DD Form 149 (Application for Correction of Military Record), with self-authored statement
- DD Form 214 (Certificate of Release or Discharge from Active Duty), for the period ending 7 April 1995
- statements of support (7), dated 21 January 2023 to 15 January 2024

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 applicant states:

a. His first period of service was honorable. He was a model Soldier who served during Desert Storm. Everything changed the day he found out he had human immunodeficiency virus/acquired immunodeficiency syndrome (HIV/AIDS). He believed he was given a death sentence and was afraid of dying. He wanted to go home to tell his mother the bad news, but he did not have the money. He borrowed money from the dining facility to purchase a ticket. His intent was to pay it back. He eventually went absent without leave (AWOL).

b. He knows what he did was wrong. His actions ruined his career, and he lost relationships with family, friends, and his fiancé. He believes he has been punished enough. He is active in the American Legion, volunteers in his community with United Way, and coaches Special Olympics. He needs Department of Veterans Affairs Benefits. He notes other behavioral health as a condition related to his request.

3. The applicant enlisted in the Regular Army on 4 March 1987 for a 3-year period. Upon completion of initial entry training, he was awarded military occupational specialty 94B (Food Service Specialist). The highest rank he attained was specialist fourth class/E-4.
4. He reenlisted on 8 February 1990 and subsequently extended his contract on 2 October 1992.
5. A DA Form 4187 (Personnel Action), shows the applicant was reported AWOL on 26 April 1993.
6. Before a general court-martial on 25 October 1993, at Fort Benning, GA, the applicant pled guilty to and was found guilty of being AWOL from 26 April 1993 until 11 June 1993, making a false official statement between 14 January and 21 January 1993, larceny of military property in excess of \$100.00, dereliction of duty, and forgery between 1 October 1992 and 26 April 1993. His sentence consisted of confinement for 2 years and 6 months, forfeiture of all pay and allowances, reduction to private/E-1 and to be discharged from the service with a BCD. The sentence was approved, and except for the BCD, ordered executed on 20 December 1993. The portion of the sentence adjudging confinement in excess of 24 months was suspended for 24 months.
7. The applicant's service record is void of documentation showing the appellate review.
8. General Court-Martial Order Number 58, issued by U.S. Disciplinary Barracks, U.S. Army Combined Arms Center, Fort Leavenworth, KS, dated 20 March 1995, shows the sentence was finally affirmed; the portion of the sentence extending to confinement was served; and the BCD was ordered executed.
9. The applicant was discharged on 7 April 1995, under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), paragraph 3-11, as a result of court-martial – other, in the rank of private/E-1. His DD Form 214 and a DD Form 215 (Correction to DD Form 214) show his service was characterized as bad conduct with separation code JJD and reentry code 4. He completed 6 years and 22 days of net active service, with lost time from 26 April 1993 to 7 March 1994 and from 8 March 1994 to 7 April 1995 after normal expiration term of service. He was awarded or authorized the following:
 - Army Good Conduct Medal (2nd award)
 - Army Achievement Medal
 - National Defense Service Medal
 - Noncommissioned Officer Professional Development Ribbon
 - Army Service Ribbon

10. The applicant provides seven statements of support, wherein friends and family members attest to the applicant's character. He is active in his community with Special Olympics, United Way, and the American Legion. He goes above and beyond to support non-profit fundraisers and volunteers wherever there is a need. He is hard working, polite, trustworthy, and very reliable. Despite his health issues, he is a good provider for his family and an example of what is needed in his community.

11. 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.

12. Regulatory guidance provides a Soldier will receive 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.

13. The Army Review Boards Agency (ARBA), Case Management Division, sent the applicant a letter on 18 September 2024, requesting the applicant provide medical documentation to support his medical and mental health issues. To date, no additional documentation has been received.

14. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his bad conduct discharge (BCD). He contends mental health conditions are related to his request for an upgrade. 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 on 4 March 1987; 2) On 25 October 1993, the applicant pled guilty to and was found guilty of being AWOL from 26 April-11 June 1993, making a false official statement between 14 January and 21 January 1993, larceny of military property in excess of \$100.00, dereliction of duty, and forgery between 1 October 1992 and 26 April 1993; 3) The applicant was discharged on 7 April 1995, Chapter 3-11, as a result of court-martial –other. His service was characterized as bad conduct.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's available military service records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical documentation was provided for review.

c. The applicant stated he experienced mental health conditions, which mitigates his misconduct. There is insufficient evidence the applicant reported or was diagnosed with a mental health condition while on active service.

d. A review of JLV provided insufficient evidence the applicant has been diagnosed with service-connected mental health condition, and he does not receive any service-connected disability.

e. Based on the available information, it is the opinion of the Agency Medical Advisor that there is insufficient evidence to support the applicant had a condition or experience that mitigates his misconduct.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant asserts he was experiencing a mitigating mental health condition.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mitigating mental health condition, while on active service.

(3) Does the condition or experience actually excuse or mitigate the misconduct? No, there is insufficient evidence beyond self-report the applicant experienced mental health symptoms while on active service. The applicant did go AWOL, which could be an avoidant behavior and a natural sequelae to some mental health conditions. However, the presence of misconduct is not sufficient evidence of a mental health condition. In addition, there is no nexus between the applicant's reported mental health condition and his misconduct of making a false official statement, larceny, and forgery in that: 1) these types of misconduct are not a part of the natural history or sequelae of the applicant's reported mental health condition; 2) the applicant's reported mental health condition does not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing a mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the misconduct leading to the applicant's separation and the findings of the medical review stating there was insufficient evidence of any mitigation for the misconduct, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant's characterization of service.

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.

12/27/2024

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 (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 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.

3. Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. 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.

b. 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.

c. 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.

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. 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 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; traumatic brain injury; sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

6. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and 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.

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, 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.

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//