

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 15 January 2025

DOCKET NUMBER: AR20240005761

APPLICANT REQUESTS:

- an upgrade of his characterization of service from bad conduct to general, under honorable conditions
- a personal appearance hearing before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Applicant Statement
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 24 April 1990
- Character Letter, V_B_, 9 March 2024
- Character Letter, J_D_, 13 March 2024

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 he served in the Army honorably from 28 June 1982 to 5 June 1986. While serving his second tour overseas he was court-martialed for an accident that he had, which resulted in the death of his wife. Prior to his trial he requested a discharge for the good of the Army, but his chain of command denied his request. At his court-martial, his chain of command felt they needed his father-in-law to testify at the trial. He was flown in from Roanoke, VA to Stuttgart, Germany. They paid everything with Army funds, and the applicant felt this was prejudicial because at his co-defendant's trial, the applicant's father-in-law was not present. His co-defendant was cleared of all charges and continued his military career. The applicant was found guilty and received reduction in rank from sergeant (SGT)/E-5 to private (PVT)/E-1, forfeiture of pay and a bad conduct discharge.

3. The applicant provides a character letter from his pastor and supervisor, which state he is a kind, generous, and devoted person, who works hard, and is always willing to go the extra mile to help others. He exudes exceptional leadership skills, and he was recently promoted to a line leader position at the company where he works.

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

a. He enlisted in the Regular Army on 28 June 1982. The highest rank/grade he held was SGT/E-5.

b. A DA Form 4430-R (Department of the Army Report of Result of Trial), shows:

(1) January 1989, a general court-martial, at Cooke Barracks, Goppingen, Germany, convicted the applicant of the following offenses:

- Charge I, Article 111 (Drunken or reckless operation of a vehicle, aircraft, or vessel), specification: operating a passenger car, while drunk
- Charge II, Article 119 (Manslaughter), specification: Involuntary manslaughter. The applicant was found not guilty of the Specification of involuntary manslaughter but guilty of negligent homicide.

(2) His sentence included reduction to private (PV1/E-1), forfeiture of all pay and allowances, confinement for one year, and a bad conduct discharge.

(3) The sentence was adjudged on 12 January 1989, and the applicant was ordered to confinement and ordered to report to the U.S. Army Correctional Activity, Fort Riley, KS on 26 June 1989.

c. On 4 October 1989, the company commander stated the applicant's characterization of performance while serving confinement had been unsatisfactory and he had not demonstrated that he could be productive or beneficial to the Army by continuing on active duty pending appellate review. He recommended the applicant be placed on excess leave.

d. On the same date, the battalion commander concurred with the company commander.

e. On 4 October 1989, the applicant was notified of the intent to place him on involuntary excess leave without pay and allowances, pending the results of the appellate review of his court martial.

f. On 11 October 1989, after thorough review and careful consideration, the applicant was directed to take excess leave.

g. On 27 October 1989, the applicant's duty status changed from confined by military authority to present for duty, and he was placed on involuntary excess leave, awaiting completion of appellate review.

h. On 7 December 1989, the U.S. Army Court of Military Review ordered that General Court-Martial Order Number 6, Headquarters, 1st Infantry Division Forward, dated 8 April 1989 be corrected as follows: by deleting the words "while drunk" from the first sentence of the specification of "Charge II "[sic]

i. General Court-Martial Order Number 214, issued by the U.S. Army Correctional Brigade, Fort Riley, KS on 17 April 1990, shows the sentence had been affirmed. The provisions of Article 71(c) had been complied with; the bad conduct discharge would be duly executed.

j. The applicant was discharged on 24 April 1990. His DD Form 214 shows he was discharged under the provisions of Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel), by reason of court-martial, in the rank/grade of private (PV1)/E-1, and his service was characterized as bad conduct. He completed 7 years and 10 days of net active service during the covered period and had lost time from 12 January 1989 to 25 October 1989. This form also shows in:

- Item 13 (Decorations, Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized): Army Service Ribbon, Overseas Service Ribbon, Noncommissioned Officer Professional Development Ribbon, Army Good Conduct Medal (1st Award), Driver's Badge, Expert Marksmanship Qualification Badge (M-16) and (hand grenade)
- Item 18 (Remarks): Continuous honorable active service from 28 June 1982 to 5 June 1986
- Item 26 (Separation Code): JJD
- Item 27 (Reentry Code): 4

5. By regulation AR 635-200, 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.

6. 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.

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

8. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his bad conduct discharge (BCD). He contends a mental health condition is 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 28 June 1982; 2) In January 1989, the applicant was convicted by a general court-martial of operating a car while drunk and negligent homicide; 4) On 24 April 1990, the applicant was discharged by reason of court-martial. 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 a mental health condition while on active service. In addition, there is no nexus between the applicant's reported mental health condition and his misconduct 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:

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 record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant's petition, available military record and medical review, the Board concurred with the advising official finding insufficient evidence to support the applicant had a condition or experience that mitigates his misconduct. The opine found no nexus between the applicant's reported mental health condition and his misconduct.

2. The Board determined based on the serious misconduct and medical opine, there is insufficient evidence to support the applicant's contentions for an upgrade of his characterization of service from bad conduct to general, under honorable conditions. The Board noted the applicant's character letters of support attesting to his character and the man he has become since his discharge. However, the Board agreed the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief. Therefore, the Board denied relief.

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 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, 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 635-200 (Personnel Separations – Active Duty Enlisted Administrative Separations) sets forth the basic authority for the 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. 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.

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. Army Regulation 601-210 (Active and Reserve Components Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment and processing into the Regular Army, U.S. Army Reserve, and Army National Guard. Table 3-1 provides a list of RE codes.

- RE code "1" applies to Soldiers completing their term of active service, who are considered qualified for enlistment if all other criteria are met
- RE code "2" is no longer in use but applied to Soldiers separated for the convenience of the government, when reenlistment is not contemplated, who are fully qualified for enlistment/reenlistment
- RE code "3" applies to Soldiers who are not considered fully qualified for reentry or continuous service at time of separation, whose disqualification is waivable; they are ineligible unless a waiver is granted
- RE code "4" applies to Soldiers separated from last period of service with a non-waivable disqualification

5. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes), in effect at the time, provided that enlisted Soldiers separated under the provisions of AR 635-200, chapter 3, court-martial, other, would receive a separation code of "JJD."

6. 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 the conditions or experiences presented in evidence as potential mitigation for that misconduct which led to the discharge.

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 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. This guidance does not mandate relief but provides standards and principles to guide Boards in application of their equitable relief authority.

a. 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. 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.

9. 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.

//NOTHING FOLLOWS//