

IN THE CASE OF: [REDACTED]

BOARD DATE: 31 December 2024

DOCKET NUMBER: AR20240005814

APPLICANT REQUESTS:

- reconsideration of his prior request for an upgrade of his bad conduct discharge to a general, under honorable conditions.
- 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)
- Department of Veterans Affairs Appeals case with supporting documents.

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 AR20070008471 on 13 December 2007.
2. The applicant states due to injuries endured during his time in service under nunc pro tunc (now by then). He feels that none of the supporting documents were shared with the past boards/appeals, because he gave the wrong address.
3. The applicant provides Department of Veterans Affairs (VA) Board of Veterans' Appeal, docket number 12-10-754 dated 24 January 2013 decision and supporting documents. The board received the new and material evidence to reopen a decision that the character of the applicant's period of service from October 1990 to September 1993 is a bar to entitlements to VA benefits, to that extent, the appeal is granted. The applicant is bar to entitlement to VA benefits.
4. A review of the applicant's service record shows:
 - a. He enlisted in the Regular Army on 10 October 1990.

b. On 12 November 1992, the applicant, by and through defense counsel, submits matters under RCM 1105 for your consideration prior to taking final action pursuant to RCM 1107, MCM (1984).

c. On 12 November 1992 a General Court-Martial Orders Number 112, he was convicted by a general court-martial of one specification of on or about 1 July 1991 and 31 August 1991 attempt to distribute .75 grams of marijuana through the United States Postal system, one specification of wrongful use of marijuana on or about 1 December 1991 and 3 January 1992. His sentence was adjudged on 4 August 1992: to forfeit all pay and allowances, to be confined for 6 months, and to be discharged with a bad conduct discharge.

d. On 5 February 1993, the convening authority approved the sentence and except for the bad conduct discharge, ordered it executed. The record of trial was forwarded to the Judge Advocate General of the Army for appellate review.

e. General Court-Martial Order Number 104 dated 13 August 1993, after Article 71(c) was complied with and the sentence was affirmed, ordered the bad conduct discharge executed.

f. On 9 September 1993, he was discharged from active duty with a bad conduct discharge characterization of service. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 2 years, 6 months, and 3 days of active service with 146 days of lost time. He was assigned separation code JJD and the narrative reason for separation listed as "Court-Martial," with reentry code 4. It also shows he was awarded or authorized the:

- National Defense Service Medal
- Army Service Ribbon
- Marksman Marksmanship Qualification Badge with M-16 Rifle
- Marksman Marksmanship Qualification Badge with Hand Grenade

5. On 13 December 2007, the ABCMR rendered a decision in Docket Number AR20070008471. The Board considered applicant was tried by a general court-martial and there is no provision of law that would allow for a change of the record to reflect his conviction was as the result of a special court-martial. In order to justify correction of a military record the applicant must show to the satisfaction of the Board, or it must otherwise satisfactorily appear, that the record is in error or unjust. The applicant has failed to submit evidence that would satisfy this requirement. The evidence presented did not demonstrate the existence of a probable error or injustice. Therefore, the Board determined that the overall merits of the case are insufficient as a basis for correction of the records of the individual concerned.

6. There is no evidence the applicant has applied to the Army Discharge Review Board for review of his discharge within that board's 15-year statute of limitations.

7. By regulation (AR 635-200), a member 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.

8. In reaching its determination, the Board can consider the applicant's petition and her service record in accordance with the published equity, injustice, or clemency determination guidance.

9. By regulation (AR 15-185), an applicant is not entitled to a hearing before the ABCMR. Hearings may be authorized by a panel of the ABCMR or by the Director of the ABCMR.

10. MEDICAL REVIEW:

a. Background: The applicant is requesting reconsideration of his prior request for an upgrade of his bad conduct discharge (BCD) to a general, under honorable conditions. The applicant selected PTSD and OMH 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 10 October 1990.
- On 12 November 1992, General Court-Martial Orders Number 112, the applicant was convicted by a general court-martial of one specification of on or about 1 July 1991 and 31 August 1991 attempt to distribute .75 grams of marijuana through the United States Postal system, and one specification of wrongful use of marijuana on or about 1 December 1991 and 3 January 1992. His sentence was adjudged on 4 August 1992: to forfeit all pay and allowances, to be confined for 6 months, and to be discharged with a bad conduct discharge.
- On 9 September 1993, he was discharged from active duty with a bad conduct discharge characterization of service. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 2 years, 6 months, and 3 days of active service with 146 days of lost time. He was assigned separation code JJD and the narrative reason for separation listed as "Court-Martial," with reentry code 4.
- On 13 December 2007, the ABCMR rendered a decision in Docket Number AR20070008471. The applicant failed to submit evidence demonstrating the existence of a probable error or injustice. Therefore, the Board determined the overall merits of the case were insufficient as a basis for correction of the record.

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, due to injuries endured during his time in service under nunc pro tunc (now by then). He feels that none of the supporting documents were shared with the past boards/appeals, because he gave the wrong address.

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 from his time in service. The applicant provided a Permanency and Service Planning document, dated 11 February 1985, indicating he was placed in custody at a group home as a youth, prior to military service, due to perpetrating sexual abuse on younger children. The document does not indicate a mental health diagnosis.

e. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is not service connected. However, the applicant has sought services via the VA due to homelessness and/or support during incarceration. Although being ineligible for VA services, he has sought to fraudulently access care by indicating he is a combat veteran with PTSD. On 9 April 2007, the applicant presented to the VA since he was charged with domestic abuse and as a result was experiencing homelessness. Contrary to his service record, he reported receiving a less than honorable discharge due to alcohol and shared a military history of gulf war service. Based on his report of gulf war service, the clinician noted that PTSD should be ruled-out. The applicant was scheduled for an urgent appointment on 11 April 2007, where he reported "I have some issues that I keep trying to deal with, I have relationship problems and history of violence since I got back, some domestic and some police battery, resisting arrest, that I never had before." He reported flashbacks and lots of anxiety since his return from war. Based on his presenting concern of homelessness, his reported symptoms, and alleged history of combat he was provided with an immediate, same-day, intake session. He once again reported combat related PTSD as well as a long history of arrests for assault and battery and domestic violence. He reported being incarcerated for three years and being recently released. Due to his indication that his arrests were related to his combat related PTSD, the applicant was provided with a PTSD in-depth assessment. Contrary to his service record he provided the following index traumas:

- While in Kuwait, 9 members of his battalion were killed by Blackhawk friendly fire, he did not witness the event, but they were people he knew.
- In Germany a couple members of his battalion overdosed from excessive alcohol, they were his friends.
- A lot of fighting between battalion members, he believed military-intelligence was selling information, and the barracks would get scudded as they were pulling out. The battalion didn't trust command, he turned to drugs and alcohol or spoke with the chaplain to cope.

f. Upon further assessment, the applicant reported symptoms of PTSD that were inconsistent with the diagnoses and the clinician noted “he does not report typical symptoms”.

g. On 16 April 2007, the applicant was informed that he remained ineligible for VA services other than emergency treatment and he was referred elsewhere for mental health care. He became tearful and stated he has assault charges and considers it “unfair the VA will not continue to treat him because there were no women in the infantry, so he never learned to deal with them and emerged with the idea of them as his inferiors”. On 6 May 2009, the applicant was discharged from shelter housing. On 18 September 2009, he presented as a walk-in requesting a substance abuse assessment, he was ineligible for service but reported receiving services elsewhere. His wife had apparently filed another restraining order after having allowed him to return home. The applicant was provided shelter housing and was discharged on 23 November 2009 when he returned to live with his wife. The applicant once again experienced homelessness due to domestic abuse from 9 to 23 October 2019. An encounter dated 15 January 2020 shows he participated in group psychotherapy while incarcerated. He was released on 12 February 2020, after two months of incarceration related to domestic assault. The record shows ongoing involvement with the VA related to homelessness until March 2021, with no further notes past this time frame.

h. 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.

i. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant selected PTSD and OMH on his application as related to his request.

(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 and the VA has not service-connected the applicant for any BH condition. The available VA electronic record shows the applicant has receive assessment and supportive services related to his issues of homelessness and incarceration due to domestic violence. The applicant has attempted to access VA services by claiming combat-related PTSD, which is in contradiction to the available service record. Prior to confirming his service record, an evaluator noted the applicant’s

reported symptoms were not typical of someone with PTSD. And while the applicant self-asserted PTSD and OMH, he did not provide any medical documentation substantiating his assertion. However, regardless of diagnosis his misconduct of attempted distribution of marijuana would not be mitigated by his asserted condition.

j. Per Liberal Consideration, the applicant's assertion of PTSD and OMH is sufficient to warrant consideration by the Board.

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 lack of mitigation found in the medical review, 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.

3/31/2025


_____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) 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.
 - a. Paragraph 3-7a (Honorable discharge) states an honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of the acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.
 - b. Paragraph 3-7b (General discharge) states a general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.
 - c. Paragraph 3-7c (Under Other Than Honorable Conditions) states a discharge under other than honorable conditions is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, homosexuality, security reasons, or for the good of the service.

d. Paragraph 3-11 (DD Form 259A (Bad Conduct Discharge Certificate) states a member 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.

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. 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 post-traumatic stress disorder (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, traumatic brain injury, 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, 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 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.

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 based on 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.

7. Title 10, U.S. Code, section 1552, provides that the Secretary of a Military Department may correct any military record of the Secretary's Department when the Secretary considers it necessary to correct an error or remove an injustice. With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under the UCMJ, action to correct any military record of the Secretary's Department may extend only to correction of a record to reflect actions taken by reviewing authorities under the UCMJ or action on the sentence of a court-martial for purposes of clemency. Such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that Military Department.

//NOTHING FOLLOWS//