

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 March 2025

DOCKET NUMBER: AR20240009859

APPLICANT REQUESTS:

- reconsideration of his previous request for an upgrade of his bad conduct characterization of service
- a personal appearance hearing before the Board (via video/telephone)

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

DD Form 149 (Application for Correction of Military Record), 16 May 2023

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 AR20060006548 on 9 January 2007.

2. The applicant states he suffered three separate concussions while on active duty, before the age of nineteen. The record of his concussions was not presented during his court-martial, and the link between his traumatic brain injury and diminished impulse control was not as well studied as it is today. As a teenager, under the influence of alcohol, he made an extremely regrettable decision, and he has lived with the shame ever since. The depression he feels is haunting and inescapable.

3. A review of his record shows:

- a. He enlisted in the Regular Army on 26 April 2001.
- b. Two DA Forms 4187 (Personnel Action), show his duty status changed on the following dates:
 - Present for Duty (PDY) to Confinement – 5 March 2003
 - Confinement to PDY – 23 December 2003

c. Headquarters, V Corps Rear (Provisional), General Court-Martial Order Number 15, 23 November 2003, shows the applicant was convicted of the following violations:

(1) Charge 1: Violation of Article 121 (Larceny and Wrongful Appropriation), specification: the applicant did on or about 16 December 2002, steal a coat, debit/credit cards, and cash, of a combined value greater than \$500.000, the property of S____ Z____ and the Hotel Berghof.

(2) Charge 2: Violation of Article 122 (Robbery), specification: the applicant did, at or near Idar-Oberstein, Germany, on or about 17 December 2002, by means of force and violence, steal from Mr. O____ B____, against his will, a silver necklace, a knife, and cash, of combined value of about \$150.00.

(3) The sentence was adjudged on 9 April 2003. His punishment consisted of confinement for 13 months, reduction to the grade of private (PV1)/E-1, and to be discharged from the Army with a bad conduct discharge.

(4) The sentence was approved, except for the part of the sentence extending to a bad conduct discharge, would be executed. The applicant was credited with sixty-seven days of confinement against the approved sentence.

d. On 27 January 2005, the U.S. Army Court of Criminal Appeals affirmed the court-martial finding and sentence.

e. On 14 February 2005, the applicant's counsel filed a petition for grant of review with the U.S. Court of Appeals for the Armed Forces.

f. On 8 June 2005, the U.S. Court of Appeals for the Armed Forces denied the applicant's request for grant of review.

g. Headquarters, U.S. Army Armor Center and Fort Knox, General Court-Martial Order Number 79, 23 June 2005, affirmed the applicant's sentence of a bad conduct discharge, confinement for 13 months, and reduction PV1/E-1. The portion of the sentence pertaining to confinement had been served and the bad conduct discharge would be executed.

h. The applicant was discharged on 19 August 2005. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of AR 635-200, chapter 3, section IV, by reason of court-martial, in the rank/grade of PV1/E-1, and his service was characterized as bad conduct. He completed 3 years, 6 months, and 1 day of net active service with lost time from 5 March 2003 to 22 December 2003. He was assigned the separation code of JJD and the RE code of 4. Item 26 (Decorations, Medals, Badges, Citations and Campaign

Ribbons Awarded or Authorized) shows he was awarded the National Defense Service Medal and Army Service Ribbon.

i. On 9 January 2007 in Docket Number AR20060006548, the ABCMR denied his request for an upgrade of his bad conduct discharge and reinstatement onto active duty. The Board determined the evidence presented did not demonstrate the existence of a probable error or injustice and the overall merits of this case were insufficient as a basis for correction of his records. Further, the Board determined that the record did not warrant an upgrade of the applicant's bad conduct discharge or his reinstatement to active duty.

4. 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.

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. 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.

7. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. The documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. Due to the period of the applicant's service, there was no documentation available from above database for review that pertain to his request.

c. The applicant is applying to the ABCMR requesting a reconsideration of his previous request for an upgrade of his bad conduct characterization of service. He states:

“I suffered from (3) separate concussions on active duty, before the age of 19. This information was not presented during my Courts-Martial as at the time, the link between TBI and diminished impulse control was not as well studied and understood as it is today. As a teenager, under the influence of alcohol, I made an extremely regrettable decision and I have lived with this shame ever since. The depression I feel is haunting and inescapable, and I have never been able to move on from this feeling. If I were granted a discharge upgrade of any type it would absolutely change my life. PLEASE. I am begging you.”

d. There was no medical information in his supporting documents available for review to support the applicant’s request.

e. Based on the information provided, it is the opinion of the ARBA medical advisor that there is no medical evidence to support his upgrade request at this time.

f. If the Applicant submits additional documentations to support his request, the Agency will certainly reevaluate his request again.

g. Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? No. The applicant has not been diagnosed with a potentially mitigating condition or experience.

(2) Did the condition exist or experience occur during military service? N/A

(3) Does the condition or experience actually excuse or mitigate the discharge? N/A

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 opinion of the ARBA medical advisor that there is no medical evidence to support his upgrade request at this time. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the misconduct of multiple offenses, including larceny and robbery, involving the theft of personal property and cash through the use of force and violence.

2. The Board acknowledged the applicant's completion of over three years of active service and the awards he received. However, the nature and severity of the misconduct—particularly the use of force in the commission of theft represent a serious breach of military discipline and values. The Board noted the applicant's discharge was the result of a lawful conviction and adjudicated punishment under the Uniform Code of Military Justice, and the record does not reflect any error or injustice in the processing or execution of the discharge. 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. The Board found the applicant has not demonstrated by a preponderance of evidence that relief is warranted.

3. Consideration was given to the Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? No. The applicant has not been diagnosed with a potentially mitigating condition or experience.

(2) Did the condition exist or experience occur during military service? N/A

(3) Does the condition or experience actually excuse or mitigate the discharge? N/A

4. 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:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
XXX	XXX	XXX	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board found 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 to amend the decision of the ABCMR set forth in Docket Number AR20060006548 on 9 January 2007.

X //SIGNED//

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. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, set policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons. Readiness is promoted by maintaining high standards of conduct and performance.

a. Chapter 3 stated 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. 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."

5. Title 10, U.S. Code, section 1552(f), 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.

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.

//NOTHING FOLLOWS//