

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 7 May 2025

DOCKET NUMBER: AR20240011852

APPLICANT REQUESTS:

- in effect, upgrade of his bad conduct character of service
- personal appearance before the board via video/telephone

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

- DD Form 149 (Application for Correction of Military Record), 19 July 2024
- Department of Veterans Affairs (VA) eBenefits Letter, 19 July 2024
- VA Disability Ratings
- Identification Card

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 is not proud of his past and feels embarrassed, at the time he did not understand what he was going through. Since the incident, he has progressed positively in life and serves as a police sergeant.
3. On his DD Form 149, he annotates other mental health is related to this request.
4. A review of the applicant's service record shows the following:
 - a. He enlisted in the Regular Army on 23 March 1984, for a 3-year period. He was honorably released from active duty due to reduction in authorized strength on 11 February 1987. He enlisted in the U.S. Army Reserve on 8 July 1987 and was honorably discharged on 22 March 1990.
 - b. He enlisted in the Regular Army on 28 September 1990, for a 4-year period.

c. Court-martial charges were preferred against the applicant for violations of the Uniform Code of Military Justice (UCMJ); the relevant DD Form 458 (Charge Sheet) is void in his service record.

d. Summary Court-Martial Order Number 4 dated 17 March 1992 shows he was convicted by a summary court-martial for one specification of stealing four items on or about 3 October 1991 and for one specification of stealing one item on or about 20 October 1991. The court sentenced him to confinement for four months, reduction to the grade of private/E-1, and a bad conduct discharge. The sentence was adjudged on 7 January 1992. The sentence was approved, and the record of trial was forwarded to the U.S. Court of Criminal Appeals for appellate review.

e. On 9 July 1992, the United States Army Court of Military Review affirmed the findings of guilty and the sentence.

f. Special Court-Martial Order Number 13, dated 4 January 1993, shows his sentence was finally affirmed and the bad conduct discharge was ordered to be duly executed.

g. Accordingly, he was discharged on 5 February 1993, in the grade of E-1. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he received a bad conduct character of service. He was credited with 2 years and 29 days of net active service, with 2 years, 10 months, and 19 days of prior active service, and had time lost from 7 January 1992 to 15 April 1992.

5. He provides his VA benefits letter showing he is considered disabled and receives 100% service-connected compensation, his disability rating to include his service connected ratings, and an identification card showing he works for the office of the sheriff, as a correctional sergeant -dual cert.

6. In reaching its determination, the Board can consider the applicant's petition, service record, and statements in light of the published guidance on equity, injustice, or clemency.

7. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his bad conduct discharge. He contends he experienced mental health conditions, which 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 September 1990 after prior service in the Regular Army and the U.S. Army Reserve; 2) On 17 March 1992, the applicant was convicted by a summary court-martial for stealing; 3) The applicant was

discharged on 5 February 1993, Chapter 3. He received a bad conduct character of service.

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) and VA medical documentation provided by the applicant were also examined.

c. The applicant contends he experienced mental health conditions, which mitigate 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 evidence the applicant has been diagnosed with service-connected Major Depression (SC 70%) by the VA in 2019. There is insufficient evidence the applicant has been engaged with behavioral health treatment at the VA.

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 mental health conditions, which mitigate his misconduct. He was diagnosed with service-connected Major Depression by the VA in 2019.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing mental health conditions while on active service, which mitigates his misconduct. He was diagnosed with service-connected Major Depression by the VA in 2019.

(3) Does the condition or experience actually excuse or mitigate the misconduct? No, there is sufficient evidence beyond self-report the applicant was experiencing a mental health condition while on active service. However, there is no nexus between the applicant's Major Depression and his misconduct of theft in that: 1) this type of misconduct is not a part of the natural history or sequelae of Major Depression; 2) Major Depression 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 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 evidence of record establishes that the applicant was convicted by a summary court-martial for theft. As a result of the conviction, the applicant was sentenced to a bad conduct discharge. The Board reviewed and concurred with the medical advisory opinion. The advisory concluded that there was insufficient evidence to support a finding that the applicant suffered from a condition or experience that would mitigate the misconduct. The record does not demonstrate medical circumstances sufficient to alter the characterization of service or to warrant relief. Therefore, the Board denied relief.

2. The Board considered the following Kurta questions under liberal consideration:

a. Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant asserts he was experiencing mental health conditions, which mitigate his misconduct. He was diagnosed with service-connected Major Depression by the VA in 2019.

b. Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing mental health conditions while on active service, which mitigates his misconduct. He was diagnosed with service-connected Major Depression by the VA in 2019.

c. Does the condition or experience actually excuse or mitigate the misconduct? No, there is sufficient evidence beyond self-report the applicant was experiencing a mental health condition while on active service. However, there is no nexus between the applicant's Major Depression and his misconduct of theft in that: 1) this type of misconduct is not a part of the natural history or sequelae of Major Depression; 2) Major Depression 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.

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:

<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 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.

//SIGNED//

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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. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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 (AR) 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation provides that the ABCMR has the discretion to hold a hearing; applicants do not have a right to appear personally before the Board. The Director or the ABCMR may grant formal hearings whenever justice requires.
4. 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 states that an honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier'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. Paragraph 3-7b states that a general discharge (GD) 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. Paragraph 3-10, section IV, of this chapter, states a soldier will be given a dishonorable discharge pursuant only to an approved sentence of a general court-martial. The appellate review must be completed and the affirmed sentence ordered

duly executed. Questions concerning the finality of appellate review should be referred to the servicing staff judge advocate.

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.

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

//NOTHING FOLLOWS//