

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 21 May 2025

DOCKET NUMBER: AR20240011899

APPLICANT REQUESTS:

- upgrade of his bad conduct discharge
- 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 under the Provisions of Title 10, U.S. Code, Section 1552)

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 due to developments in his personal life and the affects that impacted his military career that has had repercussions in his life he requests a discharge upgrade. He served during the Clinton Administration and was told the Army would be downsizing and he began to drink as a result. His drinking, youth, and mistakes led to his court-martial.
3. On his DD Form 149, the applicant indicates that traumatic brain injury and other mental health issues are related to his request, as a contributing and mitigating factor in the circumstances that resulted in his separation.
4. He enlisted in the Regular Army on 17 September 1987. He was promoted to the rank/grade of specialist four/E-4 effective 1 September 1989. He reenlisted on 12 June 1990.
5. Headquarters, Fort Carson and Headquarters, 4th Infantry Division (Mechanized) Fort Carson, CO Orders 161-727, on 28 August 1991 show he was ordered to proceed

on a permanent change of station to the 1140th U.S. Army Signal Battalion, APO, AP (Okinawa) with a departure date of no earlier than 21 November 1991.

6. A Department of the Army Report of Result of Trial shows at Camp Foster, Okinawa, Japan by General Court-Martial Order Number 2 issued by U.S. Army Japan/IX Corps, Camp Zama, Japan on 14 December 1994, he plead guilty and was found guilty of five specifications of violating Article 121 of the Uniform Code of Military Justice (UCMJ) in that:

- on 16 June 1994 for larceny of property of about \$500
- on 16 June 1994 for larceny of property of about \$200
- on 23 June 1994 for larceny of property of about \$1,940
- on 4 July 1994 for larceny of property of about \$203
- on 4 July 1994 for larceny of property of about \$45

7. He was sentenced to be reduced to private/E-1, confinement for 9 months, and to be discharged from the service with a bad conduct discharge. The sentence was adjudged on 16 December 1994. The sentence was approved except for the part extending to discharge.

8. Headquarters, U.S. Army Japan/IX Corps/9th TAACOM [Theater Army Area Command], APO Area Pacific, Orders 2-1, 3 January 1995 reassigned him to the Regional Correction Facility, Fort Lewis, WA with a reporting date of 9 January 1995.

9. General Court-Martial Orders Number 1 issued by Headquarters, U.S. Army Japan/IX Corps/9th TAACOM, APO Area Pacific on 16 March 1995 shows he plead and was found guilty of five specifications of Article 121 of the UCMJ on diverse occasions for larceny. The sentence was adjudged on 16 December 1994. He was sentenced to be reduced to the grade of private/E-1, confinement for 9 months, and to be discharged from the service with a bad conduct discharge. The approval authority approved the sentence and except for the part of the sentence extending to a bad conduct discharge, was ordered it to be executed. (Note: The following statement was typed on the top of the orders: "There were no General Court-Martial Orders for 1994").

10. General Court-Martial Order Number 13 issued by Headquarters, U.S. Army Field Artillery Center and Fort Sill, Fort Sill, OK, on 26 February 1996 noted his sentence had been affirmed and Article 71(c) having been complied with ordered the bad conduct to be duly executed.

11. The applicant was discharged on 9 April 1996, under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3, as a result of court-martial in the rank/grade of private/E-1. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows:

- he completed 7 years, 11 months, and 16 days of active service
- his character of service as "Bad Conduct"
- his separation code as JJD
- his reentry code as 4
- he had lost time from 16 December 1994 – 20 July 1995 (a period of 7 months and 5 days)

12. The Board should consider the applicant's statement in accordance with the published equity, injustice, or clemency determination guidance.

13. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his bad conduct discharge (BCD). He contends he experienced TBI and mental health conditions during his military service that mitigates his misconduct. 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 17 September 1987; 2) On 14 December 1994, the applicant was found guilty by general court-martial of 5 counts of larceny of property totaling about \$2888; 3) The applicant received a bad conduct discharge on 09 April 1996-Chapter 3, as a result of court-martial. He completed 7 years, 11 months, and 16 days of net active service with time lost between 16 December 1994 to 20 July 1995.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the available supporting documents and the available military service records. The VA's Joint Legacy Viewer (JLV) was also reviewed. No additional medical records were provided for review. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. The applicant asserts he experienced TBI and mental health conditions that mitigate his misconduct. There is insufficient evidence that the applicant reported or was diagnosed with TBI or any mental health condition while on active service.

d. A review of JLV provided insufficient evidence the applicant has been diagnosed with any service-connected mental health condition. The applicant began his connection with physical medical care on 16 March 2023 and initially requested mental health care for ADHD and for continuation of treatment for prior opioid abuse on 22 August 2023. He has received intermittent and infrequent mental health treatment through the VA for the treatment of major depression, ADHD, generalized anxiety disorder, and opiate disorder, mild. There is insufficient evidence that the applicant's mental health and medical providers ever connected his mental health conditions to his time in service. There was insufficient evidence that the applicant was ever diagnosed with a TBI. The applicant is currently 100% service connected for physical disabilities. There is

insufficient evidence at this time that the applicant has ever received any service-connected disability for any mental health condition or TBI, at this time.

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 TBI or mental health condition or experience that may mitigate 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 experienced TBI and mental health conditions that mitigate his misconduct. The applicant is documented as receiving treatment through the VA for major depression, ADHD, generalized anxiety disorder, and opiate disorder, mild.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced TBI and mental health conditions during his time in service.

(3) Does the condition experience actually excuse or mitigate the misconduct? No, there is insufficient evidence beyond self-report that the applicant was experiencing a mental health condition or TBI during his time in service. In addition, there is no nexus between the applicant's reported mental health condition and TBI and the applicant's charge of larceny in that: 1) this type of misconduct is not a part of the natural history or sequelae of the applicant's reported TBI or mental health conditions and; 2) the applicant's reported TBI and mental health conditions broadly does not impact one's ability to distinguish right from wrong and act in accordance with the right. Yet, the applicant contends he experienced a TBI and mental health conditions while on active service that mitigates his misconduct, and the applicant's contention is sufficient for consideration per the Liberal Consideration Policy.

#### 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 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 TBI or mental health condition or experience that may mitigate his misconduct.

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2. The Board determined there was insufficient evidence of in-service mitigating factors to overcome the misconduct of larceny. The Board noted, ABCMR 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. The applicant provided no post service achievements or character letters of support for the Board to weigh a clemency determination. Furthermore, the Board considered the applicant's length of service, however, they 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

#### **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.

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 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 ABCMR applicants (and/or their counsel) prior to adjudication.

3. Army Regulation 15-185 (Army Board for Correction of Military Records) 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. The applicant has the burden of proving an error or injustice by a preponderance of evidence. The ABCMR may, in its discretion, hold a hearing (sometimes referred to as an evidentiary hearing or an administrative hearing) or request additional evidence or opinions. 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. 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.

5. Title 10, U.S. Code, Section 866: Article 66 (Review by Court of Criminal Appeals), directs each Judge Advocate General to establish a Court of Criminal Appeals for the purpose of reviewing court-martial cases.

6. Article 71(c) of the UCMJ stipulates that if a sentence extends to death, dismissal, or dishonorable or bad-conduct discharge and if the right of the accused to appellate review is not waived and an appeal is not withdrawn, that part of the sentence extending to death, dismissal, or a dishonorable or bad-conduct discharge may not be executed until there is final judgment as to the legality of the proceedings. A judgement as to legality of the proceedings is final in such cases when review is completed by a Court of Military Review.

7. 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. Paragraph 3-7a provides that 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.

b. Paragraph 3-7b provides that 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.

c. 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.

8. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) 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.

9. 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 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 misconduct that led to the discharge.

10. The Under-Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, 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 grounds.

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, 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//