

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 October 2023

DOCKET NUMBER: AR20230002969

APPLICANT REQUESTS: Upgrade of his under other than honorable conditions (UOTHC) discharge to under honorable conditions (general) or honorable. Additionally, he requests personal appearance before the Board.

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel's Legal Brief
- Self-authored Statement
- Character Reference Letters (three)
- In-service personnel and medical records

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. Counsel states, in pertinent part:

a. The applicant chose to enlist in the U.S. Army in 1972 during the Vietnam War, a period of national emergency for our country. He originally enlisted for basic military journalism. Although, he was disqualified for his enlistment commitment, he waived his enlistment commitment and selected an alternate option for which he qualified and completed the term of service for which he originally enlisted. He was later assigned to work as a social work assistant, he excelled and thrived in this department. He accomplished his work in an outstanding manner. He was a good leader and set a great example for other Soldiers, too.

b. On June 18, 1975, the applicant was arrested by civil authorities for selling marijuana. He was required to pay a fine as a result of this charge. After paying the fine, he thought that the matter had been dealt with and was over with, and so he was surprised when he was sent to a special court martial a few weeks later. He was

charged with violation of the Uniform Code of Military Justice (UCMJ), Article 134, which is like a catch-all statute that deals with all disorders and neglects to the prejudice of good order and discipline in the Armed Forces, all conduct of a nature to bring discredit upon the Armed Forces, and crimes and offenses of which persons subject to this chapter may be guilty. His original sentence was to be discharged with a bad conduct discharge, confinement for 90 days, and to have his rank reduced to the grade of E-1. Only the confinement and reduction to E-1 were approved and he was given a discharge UOTHC. So, after three years of honorable service and an extension of five months, in which one year, seven months, and three days were served overseas in Okinawa, Japan, the applicant's hard work and dedication to the Army was ignored due to one offense.

c. The applicant's time in the Army was not flawless, but a flawless record is not required for an honorable discharge. He served his country well at a time when his country needed him most. His service was then cut short because of a mistake that has affected him to this day. He has worked hard every day to be successful and support himself and his family in spite of his UOTHC discharge. His discharge should be upgraded to accurately reflect the quality and length of his service.

3. The applicant states:

a. He worked as a social work assistant at several different military installations throughout his career. Although he did not realize it at the time, his job was very emotionally taxing and entailed counseling clients with various issues every day. While working at Fort Benning, GA, he worked with counselees that ranged from simple charges all the way up to individuals charged with violent offenses, such as rape and murder. Even though it has been over 40 years since his military service, he still vividly remembers some of the counselees he worked with and the things they talked about.

b. Social workers also handled many counselees from Vietnam. At the time, counselors were not well-trained on how to cope with the demands of the job and how to take care of their mental health. At that time, he always thought of marijuana use to be fairly common, especially when he talked to counselees that spent time in Vietnam. He was not given any counseling for what he was handling as a social worker, and this was a main contributing factor in his marijuana indiscretions. Almost 50 years later, he still regrets his actions and wishes he had not engaged in this behavior.

4. The applicant enlisted in the Regular Army on 24 February 1972.

5. On 14 March 1972, the applicant accepted non-judicial punishment (NJP) under Article 15 of the UCMJ, for sleeping on his post on or about 13 March 1972. His punishment included forfeiture of \$25.00 pay for one month.

6. Before a special court-martial on or about 22 June 1972, at Fort Polk, LA, the applicant was found guilty of one specification of wrongfully possessing 5.95 grams, more or less, of marijuana, on or about 3 April 1972.
7. The court sentenced him to confinement at hard labor for four months, and forfeiture of \$100.00 pay for five months. The sentence was approved on 5 July 1972 and the period of confinement was suspended for six months.
8. On 24 August 1972, the applicant accepted NJP under Article 15 of the UCMJ, for failing to go at the time prescribed to his appointed place of duty on or about 17 August 1972. His punishment included forfeiture of \$30.00 pay for one month.
9. On 30 August 1973, the applicant accepted NJP under Article 15 of the UCMJ, for failing to repair at the time prescribed to his appointed place of duty on or about 27 August 1973. His punishment included forfeiture of \$25.00 pay for one month and 14 days extra duty.
10. The applicant voluntarily extended his enlistment on 20 February 1975, for five months. He was promoted to the rank/grade of specialist five/E-5 on 8 April 1975.
11. On 11 June 1975, the applicant underwent an expiration term of service physical examination and was deemed medically qualified for separation.
12. Before a special court-martial on or about 27 August 1975, at Fort Benning, GA, the applicant was found guilty of one specification of wrongfully selling marijuana, on or about 18 June 1975. The court sentenced him to a bad conduct discharge, reduction to the grade E-1, and confinement at hard labor for 90 days. The sentence was approved on 21 October 1975; however, the applicant was already discharged from the service.
13. The applicant's record is void of a separation packet containing the specific facts and circumstances surrounding his discharge processing.
14. The applicant was discharged on 17 September 1975. His DD Form 214 (Report of Separation from Active Duty) confirms he was discharged under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10, for the good of the service - in lieu of court-martial. He was discharged in the lowest enlisted grade and his service was characterized as UOTHC. He was assigned Separation Program Designator (SPD) code KFS and Reentry Codes 3, 3B, and 3C. He completed 3 years, 6 months, and 3 days of net active service this period with 21 days of lost time.
15. The applicant provides three character reference letters that collectively attest to his exemplary conduct, selfless service he provides others, work ethic, and good character.

These letters are provided in their entirety for the Board's review within the supporting documents.

16. The applicant was charged due to the commission of an offense punishable under the UCMJ with a punitive discharge. Subsequent to being charged, he consulted with counsel and requested discharge under the provisions of Army Regulation 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.

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

18. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) discharge. He asserts he was experiencing a mental health condition during his active service, which contributed to his misconduct.

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: 1) The applicant enlisted into the Regular Army on 24 February 1972; 2) Before a special court-martial on 27 August 1975, the applicant was found guilty of selling marijuana. The court sentenced him to a bad conduct discharge, reduction to the grade E-1, and confinement at hard labor for 90 days. The sentence was approved on 21 October 1975. However, the applicant was already discharged; 3) The applicant's record is void of a separation packet containing the specific facts and circumstances surrounding his discharge processing. Yet, the applicant was discharged on 17 September 1975, Chapter 10, for the good of the service - in lieu of court-martial. His service was characterized as UOTHC.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical documentation was provided for review.

d. The applicant noted a mental health condition as a contributing and mitigating factor in the circumstances that resulted in his separation. He described experiencing stress as a result of his military duties as a social work assistant. There is insufficient evidence the applicant reported mental health symptoms while on active service. A review of JLV was void of medical documentation, and the applicant does not receive any service-connected disability.

e. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence to support the applicant had condition or experience that mitigated his misconduct.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes, the applicant contends he was experiencing a mental health condition that contributed to his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he was experiencing a mental health condition while in active service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No, there is insufficient evidence beyond self-report the applicant was experiencing a mental health condition while on active service. In addition, there is no nexus between the applicant's reported mental health condition and the applicant's misconduct of selling marijuana given that: 1) this type of misconduct is not part of the natural history or sequelae of his reported mental health condition; 2) his 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 that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

1. The applicant's request for a personal appearance 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 before the Board is not necessary to serve the interest of equity and justice in this case.

2. 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 DoD guidance for liberal consideration and clemency in determining discharge upgrade requests. The Board noted the multiple offenses leading to the applicant's separation, the severity of the misconduct and whether there was sufficient evidence of mitigating circumstances to weigh in favor of clemency determination. After due consideration of the request, the Board determined the evidence presented insufficient to warrant a recommendation for relief.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

█	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	█	█	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined 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 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 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR.

a. Paragraph 2-9 states 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 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. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

a. 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. 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 10 provided that a member who had committed an offense or offenses, for which the authorized punishment included a punitive discharge, could submit a request for discharge for the good of the service in lieu of trial by court-martial. The request could be submitted at any time after charges had been preferred and must have included the individual's admission of guilt. Although an honorable or general discharge was authorized, a UOTHC discharge was normally considered appropriate.

5. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Navy Records (BCM/NR), on 3 September 2014, 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.

6. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD, 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 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.

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

//NOTHING FOLLOWS//