

IN THE CASE OF: ██████████

BOARD DATE: 15 December 2023

DOCKET NUMBER: AR20230005012

APPLICANT REQUESTS: Upgrade of his bad conduct discharge (BCD) to under honorable conditions (general), and a different, presumably more favorable narrative reason for separation.

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

- DD Form 149 (Application for Correction of Military Record)
- Legal Brief (10 pages)
- In-service personnel records
- Character reference Letters (3)

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, through counsel:

a. The applicant was the subject of a criminal investigation division (CID) operation to detect and apprehend Soldiers who bought and sold narcotic drugs. Soldiers in Germany in the 1980s were known to travel off-base to partake in the night life and party scene, including its seedy elements. At this time, many young adults - locals and service members alike-who engaged in that lifestyle consumed narcotics. As such, the Army had a justified interest in snuffing out the distribution of narcotics in and among its ranks. Unfortunately, for a brief period the applicant was involved in the possession and use of narcotics. He received non-judicial punishment (NJP) for possession of hashish prior to the incident in question, but otherwise had a clean record. The applicant admits he made a mistake and, somewhat surprisingly, is grateful for the punishment he received for setting him on the right track.

b. The applicant stood trial by general court-martial before a military judge for selling five units of Lysergic Acid Diethylamide (LSD) to an undercover agent. The defense

proceeded under a theory of entrapment and lack of intent, considering the applicant was not engaged in the business of regularly selling narcotics, and did not make a profit, or seek to bring any benefit to himself, from the singular transaction for which he was charged. These theories ultimately proved unpersuasive, as the applicant was found guilty at the close of an approximately two-hour long trial.

c. After his court-martial, the applicant returned to the U.S. to serve his sentence of confinement. After getting acclimated to what he describes as a "minimum security" facility, the applicant noticed one of his peers, wearing a tool belt and leaving for work every weekday. Upon asking him about this, he learned that civilians on base could essentially supervise Soldiers in maintenance and trades activities. This piqued the applicant's interest, and he ended up working for a plumber for six months before his release. He was exposed to the potential that working as a plumber could offer a young man such as himself and took it upon himself to make the most of that opportunity. After his discharge, the applicant returned to [REDACTED]. He worked for various plumbing companies before obtaining his license in 1997. After a few years of working as a licensed plumber, he ventured out on his own to start his own plumbing company.

d. Considering all of the foregoing information, the applicant asserts that his consumption of LSD was a mistake and certainly inadvisable; but only done due to his environment, circumstances, and lack of resources such as drug counseling, therapy, and psychiatric treatment. Had he been afforded these opportunities to assist in his adjustment to life across the globe, he believes that he would not have chosen to consume narcotics recreationally and would have fulfilled his enlistment contract honorably. Unfortunately, the applicant's mistakes cost him the fruits of that potential, but he hopes that the Board finds it just and proper under the facts and circumstances of this case to change his discharge and his separation reason.

3. On 14 March 1983, the applicant enlisted in the Regular Army. Upon completion of training, he was awarded military occupational specialty 11B (Infantryman).

4. On 23 August 1984, the applicant accepted NJP under Article 15 of the Uniform Code of Military Justice (UCMJ), for violating a lawful general regulation by wrongfully possessing drug paraphernalia, on or about 21 July 1984. His punishment included reduction in grade to E-2, forfeiture of \$100.00 pay per month for two months, and 21 days confinement.

5. Court-martial charges were preferred against the applicant for violation of the UCMJ, on 11 December 1984.

6. Before a general court-martial on 26 February 1985, at Butzbach, Germany, the applicant was found guilty of one specification of distribution of LSD, on 17 October 1984. The court sentenced him to a BCD, forfeiture of all pay and allowances, reduction

to E-1, and confinement for one year. The sentence was approved on 29 March 1985, and the record of trial was forwarded for appellate review.

7. The available record is void of the appellate review and the General Court-Martial Order that ordered the BCD duly executed.

8. The applicant was discharged on 12 December 1985. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms he was credited with 1 year, 11 months, and 18 days of net active service this period, and contains the following entries in:

- item 24 (Character of Service) – Bad Conduct
- item 25 (Separation Authority) – AR [Army Regulation] 635-200, Chapter 3, Section IV
- item 26 (Separation Code) – JJD
- item 27 (Reentry Code) – RE-4
- item 28 (Narrative Reason for Separation) – as a result of court-martial

9. In the processing of this case, a CID Report of Investigation (ROI) was obtained on 18 August 2023. The ROI noted two separate incidents.

a. On or about 21 July 1984, the applicant was cited for violation of lawful general regulation and wrongful possession of drug paraphernalia.

b. On or about 17 October 1984, the applicant was cited for wrongful possession, use and distribution of LSD.

10. The applicant provides three character reference letters that collectively attest to his professionalism, work ethic, good character, and the positive impact he has had on his community. These letters are provided in their entirety for the Board's review within the supporting documents.

11. 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.

12. 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.

BOARD DISCUSSION:

After reviewing the application, supporting documents, evidence found within the military record, the Board found relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, applicable regulatory guidance and published DoD guidance for liberal consideration and clemency in determining discharge upgrade requests. The Board considered the misconduct, court-martial charges and whether there was sufficient evidence of mitigating circumstances to weigh in favor of clemency determination. After due consideration of the request, and, in the absence of sufficient post-service achievements or letters of reference to weigh in support of a clemency determination, the Board determined the applicant was character of service the applicant received upon separation was not in error or unjust.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	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.

2/28/2024

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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 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 635-5-1 (Separation Program Designator (SPD) Codes) provides that separation codes are three-character alphabetic combinations that identify reasons for and types of separation from active duty. Separation code narrative reasons are aligned with applicable regulatory authority paragraphs. The separation code "JJD" is the appropriate code to assign Soldiers separated under the provisions of Army Regulation 635-200, by narrative reason as a result of court-martial, other.

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 3, Section IV provided that a member would be given a BCD 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.

5. 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.

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/NR) 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//