

IN THE CASE OF: [REDACTED]

BOARD DATE: 10 January 2024

DOCKET NUMBER: AR20230005877

APPLICANT REQUESTS:

- an upgrade of her characterization of service from under other than honorable conditions to honorable
- correction of her record to show she was discharged due to a medical disability

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

- DD Form 149 (Application for Correction of Military Record)
- Personal Statement
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 3 April 2003

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, in effect:

a. It started back when she was in basic training. She injured her knee and went to sick call. When she got to advanced individual training (AIT) she found out that she had torn her meniscus and it could only be fixed with surgery, overtime. She was on jump status, so she had to change her military occupational specialty to 77F (Petroleum Supply Specialist), and change her duty station. She was sent to Germany, where she continued to go to sick call for her knee because it was becoming difficult to do her job. The doctor told her he was going to send her home on a medical discharge because she was a liability, and she could not perform her duties.

b. She waited for the paperwork for the medical discharge and when she received it, she found out that she would be leaving in two weeks. She was upset about having to leave because she really wanted to stay and finish her time. She did something that she

should not have done; she smoked pot (marijuana) not thinking that she could get in trouble because she only had one week left. At 4:00am one morning, the sergeants knocked on all the Soldiers doors and told them to go to the auditorium for drug screening. After the drug screening came back, she got a visit from the Criminal Investigation Division (CID). CID told her that someone had told on her and that was the reason the screening had taken place, so they could find out which Soldiers would fail. CID told her that if she worked for them and helped them make a purchase from the individuals, they would make sure that she still received her medical discharge. She cooperated and did what they asked of her and in the end, they screwed her, and she was put out with an under other than honorable discharge.

c. She feels that she deserves an honorable discharge and the disability because she still has problems with her knee, which she injured while serving in the U.S. Army. She lives with the knee problem every day of her life and has no way of seeing a doctor for the injury, no job, and no medical insurance. She has been depressed ever since she was sent home. She has not been able to hold a job for very long because of her medical and physical state.

3. A review of the applicant's service record shows:

a. She enlisted in the Regular Army on 5 September 2001.

b. A DD Form 2624 (Specimen Custody Document-Drug Testing) dated 10 December 2002 shows the applicant tested positive for tetrahydrocannabinol (THC).

c. DA Form 4856 (Developmental Counseling Form), dated 2 January 2003, shows she was counseled for testing positive for THC (marijuana) during a company urinalysis that was conducted on 10 December 2002. She was instructed to report to CID on January 2003 and was referred to the Army Substance Abuse Program.

d. DA Form 3881 (Rights Warning Procedure/Waiver Certificate), dated 3 January 2003, shows a CID investigator read the applicant her rights and stated that he wanted to question her about the following offense: wrongful possession, use and distribution of a controlled substance. The applicant signed the document, stating she understood her rights and was willing to discuss the offense(s) under investigation.

e. On 3 January 2003, she made the following sworn statement:

1) On 7 December 2002, at about 1900hrs, she and private (PVT) [REDACTED] were invited to a party at an apartment. She stated that she did not remember the apartment number. They sat around for a few minutes and later went to a bedroom. (Name redacted) pulled out a plastic baggie containing approximately 1 ounce of marijuana. (Name redacted) pulled out a small amount of marijuana and placed it into the bong

(water pipe). (name redacted), PVT [REDACTED], and the applicant smoked out of the bong. They all took about 10 to 20 hits (inhaled) from the bong. (Name redacted) did not charge them anything. Once they finished, (name redacted) rolled up a blunt (cigarette laced with marijuana) and they all smoked it together. At about 2130 hours, she purchased \$50.00 worth of marijuana from (name redacted) and left. She took the marijuana back to her room. At about 2300 hours, the applicant, PVT [REDACTED], and private first class (PFC) [REDACTED] consumed what she had purchased from (name redacted).

2) She stated she met (name redacted) at the club and had been to the apartment about nine times, not including the incident. During the nine times that she had been to the apartment, she had seen (name redacted) smoking or distributing marijuana to people that would just come in and out of the apartment. She had smoked or purchased marijuana twice. She provided marijuana that she had purchased to PVT [REDACTED] and PFC [REDACTED]. When asked if she knew it was illegal to consume controlled substances in the Army, she answered yes.

f. A DD Form 2624 shows a specimen was collected on 11 January 2003 and the applicant tested positive for THC. The test basis code was IU (Unit Sweep Inspection).

g. On 6 February 2003, she was counseled for testing positive for THC (marijuana) during the company urinalysis that was conducted on 11 January 2003. She was instructed to report to CID and informed that this was her second offense.

h. The CID Investigative Summary, dated 20 February 2003, states:

1) CID was notified by Staff Sergeant (SSG) [REDACTED], Headquarters and Headquarters Company (HHC), 2nd Battalion, 501st Aviation Regiment, APO AE, that PFC [REDACTED] and (applicant), tested positive for THC, the active ingredient in marijuana, during a unit urinalysis conducted on 11 January 2003. SSG [REDACTED] provided copies of the DD Form 2624, Specimen Custody Document-Drug Testing for both the applicant and PFC [REDACTED].

2) The investigation established probable cause to believe PFC [REDACTED] and (applicant) committed the offense of wrongful use of a controlled substance when, on 11 January 2003, they both submitted urine samples which tested positive for THC.

i. On 22 March 2003, she accepted nonjudicial punishment under the provisions of Article 15, Uniform Code of Military Justice (UCMJ), for the following misconduct: at or near an unknown location, between on or about 11 December 2002 and 11 January 2003, wrongfully using marijuana, a violation of Article 112a, UCMJ.

j. Her punishment included reduction to the rank/grade of (PVT/E-1), extra duty for 30 days, and 30 days restriction to the limits of the battalion area, dining facility, medical facility, place of duty and place of worship.

k. On 22 March 2003, the applicant's immediate commander notified the applicant of his intent to initiate separation actions against her under the provisions Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), chapter 14, Section III, paragraph 14-12c, by reason of commission of a serious offense. The commander listed the following reasons for the proposed action: wrongfully using marijuana and coming up positive on two separate occasions, and wrongfully distributing some amount of marijuana. The commander informed the applicant he was recommending she receive an under other than honorable conditions characterization of service and explained her rights.

l. On 22 March 2003, the applicant acknowledged receipt of the notification and after being advised by her consulting counsel of the basis for the contemplated action to separate her for commission of a serious offense under AR 635-200, chapter 14, paragraph 14-12c, and its effects; of the rights available to her; and the effect of any action she took in waiving her rights. She understood if she had less than 6 years of total active and Reserve military service at the time of separation and was being considered for separation under AR 635-200, Chapter 14, she was not entitled to have her case heard by an administrative separation board unless she was being considered for a discharge under other than honorable conditions.

1) She was advised of her right to submit a conditional waiver of her rights to have her case considered by an administrative separation board.

2) She waived consideration of her case by an administrative separation board.

3) She did not submit statements on her own behalf.

4) She understood that she may expect to encounter substantial prejudice in civilian life if a general discharge under honorable conditions was issued to her. She further understood that, as a result of issuance of a discharge under other than honorable conditions discharge, she may be ineligible for many or all benefits as a veteran under both Federal and State laws and that she may expect to encounter substantial prejudice in civilian life.

5) She understood that if she received a discharge/character of service that is less than honorable, she may make application to the Army Discharge Review Board (ADRB) or the ABCMR for upgrading; however, that an act of consideration by either Board did not imply that her discharge would be upgraded.

6) She understood that she would be ineligible to apply for enlistment in the U.S. Army for a period of 2 years after discharge.

7) She elected to waive counsel.

8) She understood that her willful failure to appear before the administrative separation board by absenting herself without leave will constitute a waiver of her rights to personal appearance before a board.

9) She understood that up until the date the separation authority approves the separation, he may withdraw the waiver of any rights.

m. On 22 March 2003, the applicant's immediate commander formally initiated separation under the provisions of AR 635-200, chapter 14, Section III, paragraph 14-12c.

n. On 23 March 2003, the intermediate commander recommended the applicant be separated from the Army prior to the expiration of her current term of service, under the provisions of AR 635-200, Chapter 14, Section III, Paragraph 14-12c, for commission of a serious offense, and recommended her service be characterized as under other than honorable conditions.

o. On 23 March 2003, the separation authority approved the recommended discharge and directed the applicant be issued an under other than honorable conditions discharge.

p. The applicant was discharged on 3 April 2003. Her DD Form 214 shows she was discharged under the provisions of AR 635-200, chapter 14-12c, by reason of misconduct, in the rank/grade of private (PVT)/E-1, and her service was characterized as under other than honorable conditions. She completed 1 year, 6 months, and 29 days of net active service during the covered period. Additionally, her DD Form 214 shows in:

- Item 13 (Decorations, Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized): National Defense Service Medal and the Army Service Ribbon
- Item 18 (Remarks): Member has not completed first full term of service

4. The applicant's record is void of documentation that shows she was treated for an injury or an illness that warranted her entry into the Physical Disability Evaluation System (PDES). Additionally, there is no indication she was issued a permanent physical profile or underwent a medical evaluation board (MEB) or a physical evaluation board (PEB).

5. There is no indication the applicant applied to the ADRB for review of her discharge processing within that Board's 15-year statute of limitations.
6. Regulatory guidance states when an individual is discharged under the provisions of Chapter 14, AR 635-200 for misconduct, an under other than honorable conditions characterization of service is normally appropriate. However, the separation authority may direct a general discharge if such is merited by the Soldier's overall record.
7. The Board should consider the applicant's overall record in accordance with the published equity, injustice, or clemency determination guidance.

8. MEDICAL REVIEW:

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

b. The applicant is applying to the ABCMR requesting an upgrade of her 3 April 2003 under other than honorable conditions discharge and, in essence, a referral to the Disability Evaluation System (DES). She indicated on her DD 293 that Other Mental Health conditions are related to her request. She states:

"It started back in basic [combat training]. I messed up my left knee and was at sick call with it. Turns out after I get to AIT [advanced individual training] is where I find out that it is a torn meniscus and can only be fixed with surgery overtime. So that changed my whole MOS because I was in jump status so I had to change my MOS and also changed my duty station ...

That's when the Doc said he was going to send me home on a medical discharge because I was a liability and could not perform my duties as needed from me. I waited for my paperwork to be processed for my medical discharge and I got the paper and was leaving in 2 weeks. I was upset that I was having to leave and really wanted to stay and finish my time.

I did something I shouldn't have done. I smoked pot because I was upset I had to leave not thinking I could get in trouble cause I had a week left when I smoked it ...

The reason I feel I deserve the honorable discharge and the disability is because I still have problems with my knee that I messed up while in the US Army and have been depressed ever since I was sent home. I have not been able to hold a job for very long because of my medical and physical state. My knee has never been fixed since it was found when I was in the us Army and I still have problems with it today.”

c. The Record of Proceedings details the applicant’s military service and the circumstances of the case. Her DD 214 shows she entered the regular Army on 5 September 2001 and was discharged on 3 April 2003 under the separation authority provided by paragraph 14-12c of AR 635-200, Personnel Separations – Enlisted Personnel (1 November 2000): Commission of a serious offense. It does not contain a period of Service in a hazardous duty pay area.

d. The applicant was positive for tetrahydrocannabinol (THC) on a 100%-unit urinalysis performed on 10 December 2002. She was counseled on this finding and was to be referred to the Army Substance Abuse Program (ASAP). She agreed with the counseling.

e. The applicant was again positive for THC on a 100%-unit urinalysis performed on 11 January 2003. The counselor noted the applicant had already been referred to ASAP. She disagreed with the counseling without comment.

f. She received a field grade Article 15 for these two UCMJ violations on 22 March 2003..

g. On 22 March 2003, her company commander notified her of the initiation of separation action under paragraph 14-12c of AR 635-200: “The reason for my proposed action is: You wrongfully used Marijuana and crime up positive on two separate occasions. Furthermore, you wrongfully distributed some amount of Marijuana.”

h. No medical documentation was submitted with the application. The EMR contains just one clinical encounter. It was a physical therapy encounter dated 9 January 2003 in which the provider stated the applicant’s knee symptoms and examination were consistent with iliotibial band syndrome (located on the lateral or outside of the knee) and not a medial meniscal tear (located on the medial or inside of the knee) which had been seen on her MRI. There are no mental health encounters or diagnoses.

i. There are no diagnoses or clinical encounters in JLV.

j. There is no evidence the applicant had a mental health or other medical condition which would have then contributed to or would now mitigate her multiple UCMJ violations; or that would have failed the medical retention standards of chapter 3, AR 40-501, Standards of Medical Fitness, and been a cause for referral to the DES prior to

her discharge. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of her office, grade, rank, or rating prior to his discharge.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Applicant claims an unidentified mental health condition.

(2) Did the condition exist or experience occur during military service? Applicant claims an unidentified mental health condition.

(3) Does the condition or experience actually excuse or mitigate the discharge? NO: The applicant has submitted no medical documentation indicating a diagnosis of a mental health condition. Review of the VA medical records indicates that the applicant has not been diagnosed with either a service connected or nonservice connected BH condition. However, as per Liberal Consideration guidance, the applicant's self-assertion alone merits consideration by the board.

k. A mitigating mental health condition associated with self-medication with drugs and/or alcohol would mitigate her wrongful use of marijuana. However, it most likely would not have affected her ability to differentiate right from wrong and adhere to the right and therefore could not mitigate her distribution of marijuana.

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 her characterization of service. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding no evidence the applicant had a mental health or other medical condition which would have then contributed to or would now mitigate her multiple UCMJ violations; or that would have failed the medical retention standards and been a cause for referral to the DES prior to her discharge.

2. The Board found insufficient evidence of in-service mitigating factors to overcome the misconduct of wrongfully using marijuana and coming up positive on two separate occasions, and wrongfully distributing some amount of marijuana. The applicant provided no post service achievements or character letters of support attesting to her honorable conduct for the Board to weigh a clemency determination. The Board agreed,

there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of her office, grade, rank, or rating prior to his discharge. Based on the preponderance of evidence, the Board denied relief.


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 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.

2/18/2024

X 

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. 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. 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. A general discharge is a separation from the Army under honorable conditions. When authorized, it is used for a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 14 established policy and procedures for separating members for misconduct. Specific categories include minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, or absences without leave. Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. A discharge under other than honorable conditions is normally considered appropriate. However, the separation authority may direct a general discharge if such is merited by the Soldier's overall record.

3. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

a. Paragraph 3-2 states disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

b. Paragraph 3-4 states Soldiers who sustain or aggravate physically unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

c. Chapter 5 provides for separation of an enlisted Soldier for non-service aggravated existed prior to service (EPTS) conditions when soldier requests waiver of Physical Evaluation Board (PEB) evaluation. Separation under the authority of this chapter is not to be confused with separation under the provisions of AR 635-200, chapter 5. The latter provides for involuntary separation within 'the first 6 months of entry onto active duty for failure to meet procurement fitness standards. If the time period exceeds 6 months or if the condition is disqualifying under AR 40-501, chapter 3, a Soldier is entitled to evaluation by a PEB or may waive evaluation under this chapter.

4. Army Regulation 40-501 (Standards of Medical Fitness) governs medical fitness standards for enlistment, induction, appointment (including officer procurement programs), retention, and separation (including retirement). The Department of Veterans Affairs Schedule for Rating Disabilities (VASRD) is used by the Army and the VA as part of the process of adjudicating disability claims. It is a guide for evaluating the severity of disabilities resulting from all types of diseases and injuries encountered as a result of or incident to military service. This degree of severity is expressed as a percentage rating which determines the amount of monthly compensation.

5. Title 38 U.S. Code, section 1110 (General - Basic Entitlement), states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

6. Title 38 U.S. Code, section 1131 (Peacetime Disability Compensation - Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

7. 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.

8. 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.

9. Section 1556 of Title 10, United States 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 Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

10. 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. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. 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.

//NOTHING FOLLOWS//