

IN THE CASE OF: [REDACTED]

BOARD DATE: 15 December 2023

DOCKET NUMBER: AR20230006463

APPLICANT REQUESTS: in effect -

- his character of service be upgraded from bad conduct discharge (BCD) to under honorable conditions (general)
- his Federal Bureau of Investigation (FBI) record be expunged (name removed from titling block)
- a telephone or video appearance before the Board

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD: a DD Form 149, Application for Correction of Military Record.

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's request to name removed from the titling block/have his FBI record expunged will not be addressed in this Record of Proceedings as the applicant has not provided evidence that he has exhausted all available administrative remedies through the Criminal Investigation Division and was denied relief.
3. The applicant states, in effect, he was a great Soldier for over 3 years. He contends that his misconduct was due to marital issues, youth, and poor judgement. He made a mistake with marijuana during a period when there was zero tolerance; however, he has been a very productive member of society since being released from the U.S. Army. Having his discharge upgraded would make him eligible for Department of Veterans Affairs benefits.
4. The applicant enlisted in the Regular Army on 3 July 1985 for a period of four years. The highest grade he held was specialist four/E-4.

5. General Court-Martial (GCM) Order Number 1, 3 January 1989, issued by Headquarters, 101st Airborne Division (Air Assault) and Fort Campbell, Fort Campbell, Kentucky, shows that before a GCM, at Fort Campbell, Kentucky, the applicant pled guilty and was found guilty of:

- four specifications of conspiracy to wrongfully distribute (various gram amounts) marijuana
- wrongful use of marijuana
- wrongful attempt to distribute cocaine
- wrongful solicitation of another Soldier to wrongfully distribute marijuana

6. The court sentenced him to reduction to E-1, forfeiture of all pay and allowances, 30 months of confinement, and to be discharged from service with a BCD. The sentence was adjudged on 21 November 1988.

7. The U.S. Army Court of Military Review affirmed the findings and sentence on 15 September 1989. On 22 March 1990, the U.S. Court of Military Appeals denied the applicant's petition for review.

8. General Court-Martial Order Number 122, 6 June 1990, issued by U.S. Disciplinary Barracks, U.S. Combined Arms Center and Fort Leavenworth, Fort Leavenworth, Kansas, noted the applicant's sentence having been affirmed and complied with, the BCD would be executed.

9. The applicant was discharged on 22 June 1990. His DD Form 214 shows he was discharged under the provisions of Army Regulation 635-200, Personnel Separations-Enlisted Personnel, Chapter 3, as a result of court-martial (Separation Code JJD/Reentry Code 4), and his service was characterized as bad conduct. He completed 3 years, 4 months, and 22 days of net active service. He was awarded or authorized the:

- Army Good Conduct Medal
- Army Service Ribbon
- Overseas Service Ribbon
- Sharpshooter Marksmanship Qualification Badge with Rifle Bar (M-16)

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

**BOARD DISCUSSION:**

1. 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.
  
2. After reviewing the application, all supporting documents, and the evidence 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 on consideration of discharge upgrade requests. The Board noted the offenses leading to the applicant's separation. After due consideration of the request and, in the absence of any mitigating factors such as post-service accomplishments or letters of reference to weigh in favor of the request, the Board determined that the character of service the applicant received upon separation was not in error or unjust and an upgrade is not warranted.
  
3. The Board further determined that as the applicant has not provided evidence that he has exhausted all available administrative remedies through the Criminal Investigation Division, the Board determined the evidence insufficient to warrant a recommendation for relief and removing his name from the titling block of his FBI record is not warranted.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:	:	:	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.

2/28/2024

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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, USC, Section 1552(b), provides that applications for correction of military records must be filed within three years after discovery of the alleged error or injustice. This provision of law also allows the Army Board for Correction of Military Records (ABCMR) to excuse an applicant's failure to timely file within the three-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, sets 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.

3. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, USC, 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.

4. 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.

5. AR 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 the evidence. Applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//