

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 23 January 2024

DOCKET NUMBER: AR20230006733

APPLICANT REQUESTS: Upgrade of his bad conduct discharge (BCD).

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

- DD Form 293 (Application for the Review of Discharge)
- Self-authored letter
- In-service personnel 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. The applicant states:

a. While at advanced individual training, he had a bad dream and I fell off the top bunk and hit the wall latch, then fell to the concrete floor. His battle buddies picked him up and put him back in bed. He slept until the next morning when his sergeant came to see how he was doing. He was going to call an ambulance, but he did not want to wait for it, so he crawled to the medical facility next door. He ended up getting admitted to the hospital and was in there for at least a few weeks. While in the Army, he did not seek any additional treatment for back pain. He figured he was young, and his back would eventually heal. It did not. It continued to get worse. He tried to use over the counter medication to control the pain, but it did not work. Eventually the pain became so bad that he turned to marijuana for relief. The marijuana helped to take his mind off the pain. Eventually he was caught with marijuana and was court-martialed.

b. During his Army career, he served honorably except for this one thing. He did not miss his duty times, was on time, and did his job whole-heartedly. The only reason he turned to drugs was to help alleviate the extreme pain. If it had not been for this extreme pain, he would not have tried marijuana, never been caught, and would have honorably served his entire enlistment.

3. On 29 August 1984, the applicant enlisted in the Regular Army for 3 years. Upon completion of training, he was awarded military occupational specialty 94B (Food Service Specialist). The highest grade he attained was E-3.
4. Inpatient treatment record shows the applicant was diagnosed and treated for contusion, left flank caused from a fall from his bed, on 10 December 1984.
5. On 4 September 1985, the applicant was command referred and enrolled into the Alcohol and Drug Abuse Prevention and Control Program.
6. Before a special court-martial on 17 April 1986, at Fort Polk, LA, the applicant was found guilty and convicted of three specifications of wrongful distribution of marijuana.
7. The court sentenced him to a BCD, reduction to the grade E-1, forfeiture of \$420.00 pay per month for four months, and confinement for four months. The sentence was approved on 9 June 1986, and the record of trial was forwarded for appellate review.
8. The U.S. Army Court of Military Review affirmed the findings and sentence on 8 August 1986.
9. Special Court-Martial Order Number 74, issued by Headquarters, 5th Infantry Division (Mechanized) and Fort Polk, Fort Polk, LA, on 9 December 1986, noted that the applicant's sentence had been affirmed and ordered the BCD duly executed.
10. The applicant was discharged on 17 December 1986. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms he was discharged under the provisions of Special Court-Martial Order Number 74, as a result of court-martial. His service was characterized as bad conduct. He was assigned Separation Code JJD and Reentry Codes 3, and 3B. He was credited with 2 years, 1 month, and 6 days of net active service this period with 75 days of time lost.
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.

13. 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 (AHLTA), 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 his 17 December 1986 bad conduct discharge. He states he was using marijuana to self-medicate a back injury he incurred when he fell out of the top bunk during advanced individual training.

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 shows he entered the Regular Army on 29 August 1984 and discharged with a bad conduct characterization of service on 17 December 1986 under SPCMO [Special Court Martial Order] #74 DTD 9 DEC 86 and the provisions provided in Section IV of chapter 3 of AR 635-200, Personnel Management – Enlisted Personnel (20 July 1984): Dishonorable and Bad Conduct Discharge. His separation code of JJD denotes this separation was the result of court martial. The DD 214 shows no periods of Service in a hazardous duty pay area.

d. An Inpatient Treatment Record Cover Sheet (DA Form 3647-1) shows the applicant was admitted on 10 December 1984 after sustaining a left flank contusion from a fall from his barracks bed at Ft. Lee, VA. He was discharged and returned to duty on 13 December 1984.

e. SPCMO #38 dated 9 June 1986 show the applicant was found guilty on three specifications of wrongful distribution of marijuana.

f. The applicant underwent a pre-separation medical examination for a pending chapter 14 (Misconduct), AR 635-200 on 25 June 1986. He wrote "Presently I feel in good health. Taking no medications." Other than an old injury to the applicant's right pinky finger, the provider documented a normal examination and determined he was qualified for a chapter 14 discharge.

g. Because of the period of Service under consideration, there are no clinical encounters in AHLTA. JLV shows the applicant is not registered with the VA.

h. There is no evidence the applicant had a mental health or other medical condition which would have then contributed to or would now mitigate his 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 his discharge.

i. It is the opinion of the ARBA medical advisor that a discharge upgrade is not warranted.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? No

(2) Did the condition exist or experience occur during military service? N/A

(3) Does the condition or experience actually excuse or mitigate the discharge? N/A

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, a medical review, and regulatory guidance were carefully considered. The applicant's trial by a court-martial was warranted by the gravity of the offense (3 specifications of wrongful distribution of marijuana). His conviction and discharge were conducted in accordance with applicable laws and regulations and the discharge appropriately characterizes the misconduct for which he was convicted. He was given a bad conduct discharge pursuant to an approved sentence of a court-martial. The appellate review was completed, and the affirmed sentence was ordered duly executed. The Board reviewed and agreed with the medical advisor's finding no evidence the applicant had a mental health or other medical condition which would have then contributed to or would now mitigate his 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 disability evaluation system, prior to his discharge. Additionally, the applicant provided insufficient evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination, and that outweigh the serious misconduct that led to his discharge. Based on a preponderance of evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

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.

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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 635-200 (Personnel Separations – Enlisted Personnel), 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.

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. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval 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, 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//