

IN THE CASE OF: ██████████

BOARD DATE: 25 January 2024

DOCKET NUMBER: AR20230007144

APPLICANT REQUESTS: his under other than honorable conditions (UOTHC) discharge be upgraded.

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

- DD Form 149 (Application for Correction of Military Record)
- Character Letters (two)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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 he was court martialed and given an UOTHC discharge for possession of crumbs of marijuana found in the corner of his field jacket. He has suffered for 60 years, and President Biden has made it a non-criminal offense. The correction should be made because President Biden has pardoned and released from jail anybody who was convicted of smoking or possessing a small amount of marijuana. He fits this because of his possession and usage.
3. The applicant enlisted in the Regular Army on 1 March 1960 for three years. His military occupational specialty was 050 (Low Speed Radio Operator).
4. The applicant served in Korea from 16 January 1962 through 31 January 1963.
5. The applicant's commander received an unpaid account letter pertaining to the applicant's indebtedness on 26 December 1962, 25 January 1963, and 25 February 1963.
6. DD Form 789 (Unit Punishment Record) shows the applicant was punished for violation of Article 92 of the Uniform Code of Military Justice (UCMJ) on 15 March 1962

for curfew violation and on 22 January 1963 for pass violation. His punishment consisted of restriction on each occasion.

7. Court-martial charges were preferred against the applicant on 4 February 1963, for violations of the UCMJ. His DD Form 458 (Charge Sheet) shows he was charged with breaking restriction on or about 26 January 1963 and 29 January 1963.

8. Before a summary court martial the applicant was found guilty of breaking restriction on or about 29 January 1963. The court sentenced him to reduction to private 2/E-2, and forfeiture of \$60.00 pay for one month. The sentence was approved on 7 February 1963.

9. Court-martial charges were preferred against the applicant on 26 February 1963, for violations of the UCMJ. His DD Form 458 shows he was charged with breaking restriction on or about 17 February 1963.

10. Before a summary court martial the applicant was found guilty of breaking restriction on or about 17 February 1963. The court sentenced him to restriction and forfeiture of \$70.00 pay for two months. The sentence was approved on 2 March 1963.

11. A Statement of Medical Examination and Duty Status, dated 14 March 1963, shows the applicant sustained injuries when he allegedly refused to have hand cuffs placed on him by Military Police. Item 30 (Remarks) shows the applicant was not on duty at the time of the injury. He had broken restriction imposed by a court martial and was absent without leave (AWOL) from 12 March 1963 to 13 March 1963.

12. A Neuropsychiatric Service Certificate, dated 23 March 1963, shows the applicant was examined at the request of his commander. He was being considered for separation under the provisions of Army Regulation (AR) 635-208 (Personnel Separations-Discharge-Undesirable Habits and Traits of Character). The staff psychiatrist determined the applicant was mentally able to distinguish right from wrong and to adhere to the right. He was mentally able to understand the nature of the board of proceedings and to testify in his own defense. There was no physical or mental defect warranting medical separation.

13. On 15 April 1963, the medical section provided an extract of the Standard Form 600 (Chronological Record of Medical Record) that shows the applicant's record had been thoroughly reviewed and the applicant had been seen by physicians on multiple dates between 21 December 1960 and 14 March 1963.

14. Before a special court martial adjudged on 11 April 1963 the applicant was found guilty of breaking restriction on or about 12 March 1963. The court sentenced him to

confinement at hard labor for one month, forfeiture of \$70.00 pay and reduction to private/E-1. The sentence was approved on 18 April 1963.

15. The applicant's commander recommended his elimination from service under the provisions of AR 635-208 on 16 April 1963 because of frequent incidents of a discreditable nature and that he be issued an Undesirable Discharge Certificate. As the reasons for this action the commander noted the applicant had received two company punishments. Two summary court martials and a special court martial and was found guilty of all three. During his off-duty time he has demonstrated a lack of ability to control his drinking habits, engaged in numerous fights on his own choosing, and has wrongfully possessed and used marijuana. He has established a pattern of failure to pay just debts.

16. The applicant consulted with counsel on 29 April 1963 and was advised of the recommended discharge under the provisions of AR 635-208.

a. He understood he was entitled to his rights, and he waived his right to have a hearing before a board of officers and he waived submitting a written statement in his own behalf. He understood he may request counsel and he waived his right to counsel.

b. He did not desire to submit statements in his own behalf.

c. Of his own free will he understood that an undesirable discharge may be issued to him and that such a discharge would be UOTHC; that as a result of such a discharge he may be deprived of many or all rights as a veteran under both Federal and state laws and that he may expect to encounter substantial prejudice in civilian life.

17. Before a special court martial adjudged on 8 May 1963 the applicant was found guilty of wrongfully having in his possession 0.094 grams more or less of marijuana. The court sentenced him to confinement at hard labor for three months, and forfeiture of \$71.00 pay for three months. The sentence was approved on 15 May 1963.

18. The applicant's chain of command recommended approval of his discharge recommendation on 16 May 1963. On 28 May 1963 a board of officers was set to convene.

19. The board of officers convened on 5 June 1963. The Board found there was evidence of unfitness, and recommended the applicant be discharged from the service because of unfitness and furnished an DD Form 258A (Undesirable Discharge Certificate), with Separation Program Number (SPN) 28B on 20 June 1963.

20. Special Court Martial Order Number 20, dated 15 July 1963, issued by Headquarters, 11th Engineer Battalion (Combat), shows the unexecuted portion of the

sentence to perform hard labor without confinement for three months only was remitted effective 1 July 1963.

21. The applicant was discharged on 17 July 1963. His DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows he was discharged under the provisions of AR 635-208, with SPN 28B (unfitness). His service was characterized as UOTHC. He completed 3 years, 3 months, and 28 days of net active service.

22. The applicant provides character letters that attest to him being kindhearted with love for the Lord and he is always helping people. He is a favorite uncle who assists in strengthening relationships with God.

23. 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.

24. MEDICAL REVIEW:

a. Background: The applicant is requesting his under other than honorable conditions (UOTHC) discharge be upgraded. He did not assert a mitigating condition or concern on his application though referenced legal changes and presidential pardon's around possession or use.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Below is a summary of information pertinent to this advisory:

- The applicant enlisted in the Regular Army on 1 March 1960.
- The applicant served in Korea from 16 January 1962 through 31 January 1963.
- The applicant's commander received an unpaid account letter pertaining to the applicant's indebtedness on 26 December 1962, 25 January 1963, and 25 February 1963.
- DD Form 789 (Unit Punishment Record) shows the applicant was punished for violation of Article 92 of the Uniform Code of Military Justice (UCMJ) on 15 March 1962 for curfew violation and on 22 January 1963 for pass violation.
- Before a summary court martial the applicant was found guilty of breaking restriction on or about 29 January 1963.
- Before a summary court martial the applicant was found guilty of breaking restriction on or about 17 February 1963.
- The applicant's commander recommended his elimination from service under the provisions of AR 635-208 on 16 April 1963 because of frequent incidents of a discreditable nature and that he be issued an Undesirable Discharge Certificate. As the reasons for this action the commander noted, the applicant had received two company punishments. Two summary court martials and a special court

martial and was found guilty of all three. During his off-duty time he has demonstrated a lack of ability to control his drinking habits, engaged in numerous fights on his own choosing, and has wrongfully possessed and used marijuana. He has established a pattern of failure to pay just debts.

- Before a special court martial adjudged on 8 May 1963 the applicant was found guilty of wrongfully having in his possession 0.094 grams more or less of marijuana. The court sentenced him to confinement at hard labor for three months, and forfeiture of \$71.00 pay for three months.
- The applicant's chain of command recommended approval of his discharge recommendation on 16 May 1963. A board of officers was set to convene.
- On 5 June 1963, the board found there was evidence of unfitness, and recommended the applicant be discharged from the service because of unfitness.
- The applicant was discharged on 17 July 1963 under AR 635-208 (unfitness). His service was characterized as UOTHC.

c. Review of Available Records Including Medical:

The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 149, his ABCMR Record of Proceedings (ROP), his DD Form 214, documents from his service record and separation, as well as two character letters. The VA electronic medical record and DoD health record were reviewed through Joint Longitudinal View (JLV). Lack of citation or discussion in this section should not be interpreted as lack of consideration.

d. The applicant reported that he was court martialed for "possession of crumbs of marijuana found in the corner of my field jacket." He contends that since President Biden has made marijuana a non-criminal offense, and he has pardoned and released people from jail, he feels this scenario fits because of his possession and usage. The applicant also provided character letters which speak to him being kindhearted, always helping others, and living for the Lord. The applicant's service record reflects that he was court martialed for more charges than the applicant reported in his application.

e. The applicant's time in service predates use of electronic health records (EHR) by the Army, hence no EHRs are available for review. His service record and supporting documents did contain his service treatment records (STR), though some were ineligible. There is no indication of any mental health conditions or concerns. His records did reflect an auto accident 24 February 1961, though he was assessed as mentally sound and was not under the influence of any substances. His records reflect several ongoing health concerns, as well as surgeries (to include an appendectomy) and he appeared to utilize seeing the physician regularly. His records also contained administrative documents with relevant medical information. The applicant was seen for his enlistment medical exam on 1 March 1960. His Report of Medical History and

Examination did not indicate any mental health concerns. A Statement of Medical Examination and Duty Status, dated 14 March 1963, shows the applicant sustained injuries when he allegedly refused to have hand cuffs placed on him by Military Police. Item 30 (Remarks) shows the applicant was not on duty at the time of the injury, had broken restriction imposed by a court martial, and was AWOL from 12 to 13 March 1963. A commander's statement from 15 April 1963 also makes note that it was reported prior to being arrested that he had gone to his girlfriend's house and beat her secondary to her being a witness to him possessing and using marijuana (however she refused to press charges). During his separation medical exam on 14 May 1963, he did not report any mental health related concerns on his Report of Medical History nor his Report of Medical Examination.

f. The applicant was seen for psychiatric examination on 23 March 1963, at the request of his commander, who was considering separation under AR 635-208 (Personnel Separations-Discharge-Undesirable Habits and Traits of Character). The applicant was found able to distinguish right from wrong and adhere to the right, was able to understand the nature of the board proceedings and to testify in his own defense, and was not found to have a physical or mental defect warranting medical separation under the provisions of AR 635-40 A&B. No psychiatric condition was noted. No other mental health records were provided.

g. Per the applicant's EHR, he is not service connected. He has had limited engagement with the VA, with four encounters available in his ERH (all in April of 2023). However, given the characterization of his discharge, he would not typically be eligible for most VA benefits. The applicant was contacted and assessed for eligibility for housing resources. His problem was listed as homelessness – unspecified. While the records were not solely focused on mental health, a review indicated that the applicant denied any mental health concerns or psychiatric treatment. Through review of Joint Legacy Viewing, this applicant did have "Community Health Summaries and Documents" available, though there was no record of a mental health treatment nor diagnoses. No other medical records were provided.

h. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a mitigating condition or experience during his time in service.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? No, the applicant did not assert a potentially mitigating condition or experience.

(2) Did the condition exist or experience occur during military service? Not applicable.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant did not assert a potentially mitigating condition or experience but instead noted that President Biden has made marijuana a non-criminal offense, and he has pardoned and released people from jail. While the applicant did not assert a substance use disorder, given one of his charges, this advisor will speak to the possibility of a substance use disorder. First and foremost, any substance use disorder, as a standalone diagnosis, is not currently a mitigating condition. In addition, there were no medical records provided or available that substantiated a substance use disorder diagnosis. Second, there was no medical or mental health documentation that indicated the presence of any mitigating condition or experience. The applicant had a psychiatric evaluation when separation was being considered and no mental health condition was reported. Of note, some of his misconduct such as going AWOL and substance use, are potentially avoidance behaviors associated with the natural history and sequelae of several mental health conditions. However, this behavior is not sufficient to establish a history of a condition during active service. Getting into fights, fleeing arrest, and not paying your debts would not be mitigated by most mental health conditions. In sum, there is insufficient evidence to support the applicant had a mitigating mental health diagnosis nor potentially mitigating experience during his time in service.

BOARD DISCUSSION:

The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the review and conclusions of the ARBA Medical Advisor. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding his misconduct not being mitigated by any behavioral health conditions. Based on a preponderance of the evidence, the Board determined 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.

4/24/2024

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, USC, 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. Title 10, USC, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

3. AR 635-208, in effect at the time, set forth the basic authority for the separation of enlisted personnel for unfitness. The regulation provided for the discharge of individuals by reason of unfitness with an undesirable discharge when it had been determined that an individual's military record was characterized by one or more of the following: frequent incidents of a discreditable nature with civil or military authorities; sexual perversion; drug addiction or the unauthorized use or possession of habit forming narcotic drugs or marijuana; an established pattern for shirking; or an established pattern showing dishonorable failure to pay just debts.

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

5. 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 Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder; traumatic brain injury; sexual assault; or sexual harassment. Boards are 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.

6. The Under Secretary of Defense for Personnel and Readiness issued guidance to Service DRBs and BCM/NRs on 25 July 2018, 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 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.

//NOTHING FOLLOWS//