

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 September 2024

DOCKET NUMBER: AR20230007666

APPLICANT REQUESTS: his bad conduct discharge (BCD) be upgraded to an honorable discharge.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
DD Form 149 (Application for Correction of Military Record) with personal statement

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 his discharge was reviewed and upgraded by the "Veterans Upgrade Center" in Manhattan, NY in 1981 or 1982. He was told by the Veterans Upgrade Center that his BCD would be upgraded to honorable in about a year. The documentation of this action was sent to his sister's address; however, with her death the paperwork was lost. Following his discharge, he worked as a nurse assistant [REDACTED] Hospital.
3. On the applicant's DD Form 149, he indicates post-traumatic stress disorder (PTSD) and mental health issues as contributing and mitigating factors in the circumstances that resulted in his separation. However, the applicant has not provided any official documentation to support the diagnoses.
4. A review of the applicant's service record shows he enlisted in the Regular Army for 3 years on 9 October 1979. He completed training with award of the military occupational specialty 91B (Medical Specialist). The highest grade he held was E-2.
5. Special Court-Martial Order Number 2, issued by Headquarters, U. S. Army Infantry Center and Fort Benning, GA, issued on 9 January 1981, shows the applicant was found guilty and convicted of:

- Charge I, one specification of wrongfully selling marijuana and one specification of wrongfully using marijuana
- Charge II, one specification of escaping from Military Police custody

6. The court sentenced him reduction in grade to E-1, forfeiture of \$334.00 pay and allowances per month for 6 months, confinement for 6 months, and separation from service with a BCD.

7. The court-martial convening authority approved the court-martial findings and sentencing recommendations on 9 January 1981 and directed that, except for the BCD, the sentence be executed. The record of trial was forwarded to the U.S. Army Court of Military Review.

8. Following his release from confinement while awaiting the U.S. Army Court of Military Review, the applicant accepted nonjudicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice on the following dates for the indicated offenses:

- 11 August 1981, for being absent without leave from on or about 2359 hours, 31 July 1981 until on or about 1600 hours, 5 August 1981
- 2 September 1981, for being disorderly in command on 29 August 1981

9. An undated document titled 'Conduct, Attitude, Performance and Discreditable Acts' lists 24 actions between 22 October 1980 and 2 September 1981 that included the following negative actions:

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| • his court-martial | failed barracks inspections (2 occasions) |
| • his two NJPs | sleeping in class |
| • Letter of Reprimand (24 August 1981) | lack of military bearing |
| • security violations (2 occasions) | poor military appearance |
| • failure to repair | inappropriate horseplay |
| • disobeying a lawful order (7 occasions) | |
| • being disorderly in command | |

10. Special Court-Martial Order Number 575, issued by United States Army Retraining Brigade, Fort Riley, KS, on 8 September 1981, noted that the applicant's sentence had finally been affirmed and ordered the BCD duly executed.

11. The applicant was discharged on 8 September 1981, under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 11, due to a court-martial conviction. The DD Form 214 (Certificate of Release or Discharge from Active Duty) he was issued confirms his service was characterized as bad conduct, Separation Code JJD and Reenlistment Code 4. He completed 1 year, 6 months, and 4 days of net active service with 145 days of lost time.

12. 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.

131. There is no evidence of an agency called the "Veterans Upgrade Center" in Manhattan, NY having any authority to issue an upgrade of a BCD for any purpose, or that if this agency issued an upgrade under any state or local authority for any purpose. The New York State Discharge Upgrade Advisory Board is a free state service that assists veterans in applying to the different military review boards for upgrades of their discharges but does not itself issue an upgrade.

14. In determining whether to grant relief the Boards for Correction of Military/Navy Records (BCM/NR) can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance.

15. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his bad conduct discharge (BCD) to honorable. On his DD Form 149, the applicant notes post-traumatic stress disorder (PTSD) and other mental health issues as related to his request.

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:

- Applicant enlisted in the RA on 9 October 1979.
- Special Court-Martial Order Number 2, issued by Headquarters, U. S. Army Infantry Center and Fort Benning, GA, issued on 9 January 1981, shows the applicant was found guilty of possession and sale of marijuana and for escape from lawful custody. The recommended sentence included reduction in grade to E-1, forfeiture of \$334.00 pay and allowances per month for 6 months, confinement for 6 months, and separation from service with a BCD.
- Applicant was discharged on 8 September 1981, under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 11, due to a court-martial conviction. The DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms his service was characterized as bad conduct. He was assigned Separation Code JJD and Reentry Code 4.

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, DD Form 214, his ABCMR Record of Proceedings (ROP), and documents from his service record and separation packet. 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 states his discharge was reviewed and upgraded by the "Veterans Upgrade Center" in Manhattan, NY in 1981 or 1982. He was told by the Veterans Upgrade Center that his BCD would be upgraded to honorable in about a year. The documentation of this action was sent to his sister's address; however, with her death the paperwork was lost. Following his discharge, he worked as a nurse's assistant at [REDACTED] Hospital.

e. Due to the period of service, no active-duty electronic medical records were available for review. No VA electronic medical records were available for review and the applicant is not service connected for any BH condition. The applicant has not provided any medical documentation indicating he engaged in any behavioral health care services or has been diagnosed with a BH condition. On 15 August 2023, the ABCMR Case Management Division requested the applicant provide medical documents to support his contention of PTSD and OMH. He did not respond.

f. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a behavioral health condition/diagnosis during his time in military service. However, regardless of diagnosis, the applicant's misconduct is unlikely to be mitigated by a BH condition.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes. The applicant asserts a mitigating condition.

(2) Did the condition exist or experience occur during military service? No. The applicant self-asserts PTSD and OMH. However, no medical documentation was provided substantiating his contention.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant did not provide any medical documentation evidencing a BH condition or diagnosis. However, regardless of diagnosis, the record indicates the applicant was court-martialed due to being found guilty of possession and sale of marijuana and for escaping from lawful custody. This misconduct is not part of the natural history or

sequelae of any behavioral health condition. And, even if PTSD symptoms were present at the time of his misconduct, they do not affect one's ability to distinguish right from wrong and act in accordance with the right.

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 Board carefully considered the applicant's request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The applicant's trial by a court-martial was warranted by the gravity of the offense charged (sale and possession of illegal drugs and escaping from MP custody). The applicant's 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. All requirements of law and regulation were met with respect to the conduct of the court-martial and the appellate review process, and the rights of the applicant were fully protected. The Board found no error or injustice in his separation processing. The Board also considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewing official. The Board concurred with the medical official's finding insufficient evidence to support the applicant had a behavioral health condition/diagnosis during his time in military service. Also, the applicant provided no evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination. 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:

<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.

9/9/2024

X

[Redacted Signature]

CHAIRPERSON

[Redacted Name]

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:

- 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.
- Title 10, U.S. Code, section 1556 provides the Secretary of the Army shall ensure that an applicant seeking corrective action by the Army Review Boards Agency (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. . Army Regulation 635-200 (Personnel Separations) 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 Soldiers whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 3 provides that a Soldier will be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial. The appellate review must be completed and the affirmed sentence ordered duly executed.

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. 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. 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//