

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 22 March 2024

DOCKET NUMBER: AR20230008759

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

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 293 (Application for the Review of Discharge)
- Self-Authored 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 he was enthusiastic about serving his country in order to provide for his mother and family. He had dreamed of being in the military way before he joined the Army. He had an older brother who served in the military. He would go to Germany with his brother in his younger years for the summertime. He enlisted in the Armed Forces, following in his brothers' footsteps. Soon afterwards his brother was murdered. He was experiencing issues with adjusting to the people and organizational structure, along with not being able to go and be there for his family while mourning the murder of his brother. He was not "ok." Since he was stationed in Germany the flashbacks of the times spent there with his brother was not making it any easier nor allowing him to forget. He felt alone and isolated within the Army. He was going through the loss of his brother and no one was empathetic. This change at that age, he didn't understand so he looked towards servicemembers for answers. Little to his knowledge they were not the servicemembers he should have been around. He was introduced to hash in Germany not really knowing what it could do to his career nor his freedom.
3. On his DD Form 149, the applicant notes post-traumatic stress disorder (PTSD) and other mental health issues are related to his request.

4. The applicant enlisted in the Regular Army on 19 May 1982. Upon completion of training, he was awarded military occupational specialty 13B (Cannon Crewman).
5. On 21 June 1982, the applicant accepted nonjudicial punishment under Article 15 of the Uniform Code of Military Justice for going from his appointed place of duty without authority, on or about 19 June 1982.
6. Before a general court-martial on 30 August 1983, at Neu Ulm, Germany, the applicant was found guilty of three specifications of wrongfully possessing with intent to distribute 100 grams, more or less, of marijuana in the hashish form.
7. The court sentenced the applicant to confinement at hard labor for 6 months and discharge from the service with a BCD. The sentence was approved on 19 September 1983 and the record of trial was forwarded for appellate review.
8. The applicant voluntarily waived a separation medical examination on or about 5 January 1984.
9. The U.S. Army Court of Military Review affirmed the findings and sentence on 17 January 1984.
10. General Court-Martial Order Number 175, issued by U.S. Army Correctional Activity, Fort Riley, Kansas on 21 May 1984, noted that the applicant's sentence had been affirmed and ordered the BCD to be duly executed.
11. The applicant was discharged on 31 May 1984. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 3, Section IV, as a result of court-martial. His service was characterized as bad conduct. He was assigned Separation Code JJD and Reentry Code 4. He was credited with 1 year, 7 months, and 29 days of active service with 134 days of lost time.
12. On 1 September 2023, an Army Review Boards Agency representative requested the applicant provide medical documents to support his issue of PTSD. He was advised that he could contact the doctor who diagnosed him or his Veterans Affairs regional office for assistance. The applicant did not respond.
13. 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.

14. 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.

15. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his bad conduct discharge (BCD) to under honorable conditions (general) or 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 19 May 1982.
- On 21 June 1982, the applicant accepted non-judicial punishment under Article 15 of the Uniform Code of Military Justice, for going from his appointed place of duty without authority, on or about 19 June 1982.
- Before a general court-martial on 30 August 1983, at Neu Ulm, Germany, the applicant was found guilty of three specifications of wrongfully possessing with intent to distribute 100 grams, more or less, of marijuana in the hashish form.
- The court sentenced the applicant to confinement at hard labor for six months, and discharge from the service with a BCD. The sentence was approved on 19 September 1983 and the record of trial was forwarded for appellate review.
- The applicant was discharged on 31 May 1984. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms he was discharged under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 3, Section IV, as a result of court-martial. His service was characterized as bad conduct. He was assigned Separation Code JJD and Reentry Code 4.

c. The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 293, DD Form 149, 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 he was enthusiastic about serving his country in order to provide for his mother and family. He had dreamed of being in the military way before he joined the Army. He had an older brother who served in the military. He would go to Germany with his brother in his younger years for the summertime. He enlisted in the Armed Forces, following in his brothers' footsteps. Soon afterwards his brother was murdered. He was experiencing issues with adjusting to the people and organizational structure, along with not being able to go and be there for his family while mourning the murder of his brother. He was not "ok." Since he was stationed in Germany the flashbacks of the times spent there with his brother was not making it any easier nor allowing him to forget. He felt alone and isolated within the Army. He was going through the loss of his brother, and no one was empathetic. This change at that age, he didn't understand so he looked towards servicemembers for answers. Little to his knowledge they were not the servicemembers he should have been around. He was introduced to hash in Germany not really knowing what it could do to his career nor his freedom. I would smoke hash with the servicemembers on many occasions. I also was selling. Eventually I got caught. I had never done any of these things before.

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 1 September 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? Yes. 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

discharged for three specifications of wrongfully possessing with intent to distribute 100 grams, more or less, of marijuana in the hashish form. 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:

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 request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests.
2. The Board reviewed and noted the applicant provided no documentation for consideration of post-service achievements or statements in support of his application. Additionally, the Board noted the applicant did not take responsibility or accountability for his misconduct. The Board determined that an upgrade to the applicant's characterization of service was not warranted. The court-martial sentenced the applicant to a bad conduct discharge. All requirements of law and regulation were met.

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 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 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 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//