

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 4 June 2024

DOCKET NUMBER: AR20230011697

APPLICANT REQUESTS:

- an upgrade of his bad conduct discharge to honorable
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- DA Form 2-1 (Personnel Qualification Record – Part II)
- DA Form 4126-R (Bar to Reenlistment Certificate)
- Report of Result of Trial, 9 May 1988
- General Court Martial Order (GCMO) 21, 21 July 1988
- U.S. Army Court of Military Review – Opinion of the Court, 2 December 1988
- Notification of Letter of Intent – Excess Leave, 6 February 1989 with Endorsements
- Memorandum of Approval of Excess Leave, 8 February 1989
- GCMO 265, 6 March 1989
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- National Personnel Records Center (NPRC) Letter, 26 August 2022

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 is respectfully requesting his “separation determination status be changed to honorable.” He believes he was wrongfully charged with distribution when he was purchasing medical marijuana for a friend. He was never a distributor and was a victim of entrapment which is why the correction should be made. He was never a drug dealer and simply did a favor for a friend. The applicant marked post-traumatic stress disorder, other mental health, and sexual assault/harassment on his DD Form 149 as issues/conditions related to his request.

3. The applicant provides:

a. The below listed documents to be referenced in the service record:

- DA Form 2-1
- GCMO 21, 21 July 1988 and GCMO 265, 6 March 1989
- DD Form 214 effective 14 March 1989

b. A DA Form 4126-R (Bar to Reenlistment Certificate) shows on 25 March 1988 the applicant was barred and Block 8 (Record of Nonjudicial Punishment) shows he received nonjudicial punishment for wrongful use of cocaine on 23 March 1988. His punishment included reduction to the grade of private/E-1.

c. A Report of Result of Trial outlined the applicant's charges in his general court-martial on 9 May 1988.

- 23 January 1988 – distribution of marijuana
- 2 February 1988 – distribution of marijuana

d. A U.S. Army Court of Military Review – Opinion of the Court, dated 2 December 1988, affirmed the findings of guilty and the sentence.

e. Documents pertaining to the applicant's excess leave determination include:

- Notification Letter of Intent – Excess Leave
- 1st Endorsement – applicant acknowledged notification and understanding
- 2nd Endorsement – chain of command recommendations for approval
- Memorandum of Approval of Excess Leave, 8 February 1989

f. A letter from NPRC, dated 26 August 2022, directed the applicant to submit his request for correction or amendment of military records to the Review Boards of the military service departments.

4. A review of the applicant's service record shows:

a. He enlisted in the Regular Army on 22 October 1986.

b. On 9 May 1988, he was convicted by a general court-martial of two specifications of wrongful distribution of marijuana, 4.0 grams on or about 23 January 1988 and 2.05 grams on or about 2 February 1988. His sentence included forfeiture of \$300.00 pay per month for 6 months, confinement for 1 year, and a bad conduct discharge.

c. On 21 July 1988, the convening authority approved the sentence and except for the bad conduct discharge, ordered it executed. The record of trial was forwarded to the Judge Advocate General of the Army for appellate review.

d. General Court-Martial Order Number 265, dated 6 March 1989, after Article 71(c) was complied with and the sentence was affirmed, ordered the bad conduct discharge executed.

e. On 14 March 1989, he was discharged from active duty with a bad conduct characterization of service as a result of his general court martial conviction in accordance with Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 3. His DD Form 214 shows he completed 1 year, 7 months, and 4 days of active service with 289 days of lost time. It also shows he was awarded or authorized:

- Army Service Ribbon
- Expert Marksmanship Qualification Badge with Rifle Bar (M-16)
- Sharpshooter Marksmanship Qualification Badge with Hand Grenade Bar

5. On 6 February 2024, the Department of the Army Criminal Investigation Division (CID) provided information for the processing of this case. CID conducted a search of the Army criminal files indexes regarding the applicant's claims regarding sexual assault and no records were found.

6. By regulation (AR 15-185), an applicant is not entitled to a hearing before the ABCMR. Hearings may be authorized by a panel of the ABCMR or by the Director of the ABCMR.

7. By regulation (AR 635-200), a member 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.

8. In reaching its determination, the Board can consider the applicant's petition and her service record in accordance with the published equity, injustice, or clemency determination guidance.

9. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his bad conduct discharge to honorable. 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 22 October 1986.

- On 9 May 1988, he was convicted by a general court-martial of two specifications of wrongful distribution of marijuana, 4.0 grams on or about 23 January 1988 and 2.05 grams on or about 2 February 1988. His sentence included forfeiture of \$300.00 pay per month for 6 months, confinement for 1 year, and a bad conduct discharge.
- On 14 March 1989, he was discharged from active duty with a bad conduct characterization of service as a result of his general court martial conviction in accordance with Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 3.

b. 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, ABCMR Record of Proceedings (ROP), DD Form 214, 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.

c. The applicant states he is respectfully requesting his "separation determination status be changed to honorable." He believes he was wrongfully charged with distribution when he was purchasing medical marijuana for a friend. He was never a distributor and was a victim of entrapment which is why the correction should be made. He was never a drug dealer and simply did a favor for a friend. The applicant marked post-traumatic stress disorder, other mental health, and sexual assault/harassment on his DD Form 149 as issues/conditions related to his request.

d. Due to the period of service, no active-duty electronic medical records were available for review and no hard copy medical documentation from the time of service were submitted for review. The applicant is not service connected and the available VA electronic medical record available for review does not evidence any behavioral health treatment. In addition, no medical documentation post-military service substantiating his assertion of PTSD, OMH, or MST were submitted for review. An emergency room visit on 22 September 2023, for a medical issue, resulted in a mental health consult since the applicant appeared anxious. The consult indicates the applicant has no prior history of inpatient psychiatric hospitalizations, outpatient treatment or psychiatric medication trials. The applicant's anxiety appeared related to "upcoming court dates but would not specify in regard to legal charges". The applicant further disclosed a history of extensive substance abuse including Angel dust, cocaine, alcohol and marijuana.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient medical documentation of any behavioral health condition during military service that would mitigate his misconduct. However, per

Liberal Consideration, the applicant's selection of PTSD, OMH and MST on his application are sufficient to warrant consideration by the Board.

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 selected PTSD, OMH, and MST on his application as issues related to his case.

(2) Did the condition exist or experience occur during military service? No. The applicant did not provide any medical documentation and, in his statement, did not indicate the reason he selected these issues as related to his case.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is insufficient evidence of any mitigating BH conditions. There is no evidence of any in-service BH diagnoses, the VA has not diagnosed the applicant with any BH condition, and the applicant is not service connected. And while the applicant selected PTSD, OMH, and MST on his application, he did not provide any medical documentation or details of the traumatic experience that might have caused PTSD. In addition, the applicant did not provide any details regarding an MST and did not state whether an incident occurred during his time in service. Overall, it is unclear whether the applicant mistakenly selected this option on his application since his statement does not provide information regarding an MST. No evidence of MST was found in the medical record. However, regardless of BH diagnosis, it is unlikely a BH condition or other experience would mitigate the applicant's misconduct of repeated drug sale/distribution.

BOARD DISCUSSION:

1. The Board determined 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 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 offenses charged (distribution). 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. 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 the separation processing. The Board 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 medical documentation of any behavioral health condition during military service that would mitigate his misconduct. 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:

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. Army Regulation 15-185 (ABCMR) 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, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

3. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a (Honorable discharge) states an honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of the 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 (General discharge) states a general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Paragraph 3-7c (Under Other Than Honorable Conditions) states a discharge under other than honorable conditions is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, homosexuality, security reasons, or for the good of the service.

d. Paragraph 3-11 (DD Form 259A (Bad Conduct Discharge Certificate) states a member 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. Title 10, U.S. Code, section 1552, provides that the Secretary of a Military Department may correct any military record of the Secretary's Department when the Secretary considers it necessary to correct an error or remove an injustice. With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under the UCMJ, action to correct any military record of the Secretary's Department may extend only to correction of a record to reflect actions taken by reviewing authorities under the UCMJ or action on the sentence of a court-martial for purposes of clemency. Such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that Military

5. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (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 based on equity, injustice, or clemency grounds, BCM/NRs 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//