

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 September 2024

DOCKET NUMBER: AR20230011744

APPLICANT REQUESTS:

- an upgrade of his dishonorable discharge
- a video/telephonic appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty), for the period ending 15 July 1987
- letter, National Personnel Records Center (NPRC), dated 3 July 2023
- statements of support (5), dated 23 February 2016 to 20 June 2023
- civilian medical documentation (103 pages), dated 28 December 2012 to 11 December 2023

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 following his dishonorable discharge, he managed to build a wonderful family, establish a thriving business, and actively contribute to society. The blemish on his record led to various challenges, including limited post-military career prospects, ineligibility for civilian government benefits, and access to adequate healthcare. The lingering effects of post-traumatic stress disorder (PTSD) from his time in service, compounded by the loss of his leg due to Vibrio, have intensified his need for proper medical care. The charges against him were unjust and have unfairly tainted his reputation. The applicant notes PTSD as a condition related to his request.
3. The applicant enlisted in the Regular Army on 1 February 1983, for a 4-year period. Upon completion of initial entry training, he was awarded military occupational specialty

63B (Power Generator/Light Wheel Vehicle Mechanic). The highest rank he attained was specialist fourth class/E-4.

4. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice, on 25 June 1985, for wrongfully ingesting marijuana at some time prior to giving a urine specimen which tested positive for tetrahydrocannabinol, on or about 1 April 1985. His punishment consisted of reduction to private first class/E-3, forfeiture of \$100.00 pay, 14 days of extra duty, and 14 days of restriction.

5. Before a general court-martial, at Wallace Barracks, Stuttgart, Federal Republic of Germany, on 28 August 1986, the applicant pled guilty to and was found guilty of nine specifications of wrongfully distributing hashish, between on or about 1 August 1985 and 15 May 1986, and eleven specifications of wrongfully using hashish, between on or about 1 February 1985 and 30 April 1986.

a. He was sentenced to reduction to private/E-1, forfeiture of all pay and allowances, confinement for 10 years, and separation from service with a dishonorable discharge.

b. On 1 December 1986, the convening authority approved only so much of the sentence that provided for reduction to private/E-1, forfeiture of all pay and allowances, confinement for 6 months, and separation from service with a dishonorable discharge, and except for the portion of the sentence pertaining to the dishonorable discharge, ordered the sentence executed.

c. The record of trial was forwarded to the U.S. Court of Military Review for appellate review. The U.S. Court of Military Review found the findings and sentence correct in law and fact, and subsequently affirmed the findings and the sentence on 24 March 1987.

6. The applicant underwent a mental status evaluation on 8 January 1987. The evaluating provider determined he was mentally responsible and able to understand and participate in administrative proceedings.

7. On that same date, the applicant underwent a medical examination. The relevant Standard Form (SF) 93 (Report of Medical History) and the corresponding SF 88 (Report of Medical Examination) show the applicant reported being in good health and was physically qualified for separation.

8. General Court-Martial Order Number 422, issued by the U.S. Army Correctional Activity, Fort Riley, KS, on 7 July 1987, shows the sentence was finally affirmed, the

provisions of Article 71(c) had been complied with, and the dishonorable discharge was ordered duly executed.

9. The applicant was discharged on 15 July 1987, under the provisions of Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel), Chapter 3, as a result of court-martial, in the rank of private/E-1. His DD Form 214 shows his service was characterized as dishonorable, with separation code JJD and reentry code RE-4. He was credited with 4 years and 12 days of active service, with lost time from 28 August 1986 to 27 January 1987.

10. The applicant provides:

a. A letter from NPRC, dated 3 July 2023, shows the applicant requested copies of his separation/discharge documents.

b. In five statements of support, dated 23 February 2016 to 20 June 2023, the authors attest to the quality of the applicant's masonry work, his work ethic, and abilities as a supervisor. He is a compassionate, moral person, who loves his family and works hard. His strength of character and perseverance allowed his company to flourish and continue making a profit after he fell ill. He put the time and effort into the military the same should be due back to him.

11. In the processing of this case, the Army Review Boards Agency (ARBA) sent a letter to the applicant, on 29 November 2023, requesting medical documentation to support his request. The applicant provides 103 pages of civilian medical documentation, dated 28 December 2012 to 11 December 2023, which will be summarized, in pertinent part, in the Medical Review portion of this Record of Proceedings.

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.

13. The Board should consider the applicant's argument and/or evidence in accordance with the published equity, injustice, or clemency determination guidance.

14. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to his dishonorable characterization of service. He contends he experienced an undiagnosed PTSD that mitigates his misconduct.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following:

- The applicant enlisted into the Regular Army on 1 February 1983.
- The applicant accepted NJP on 25 June 1985 for wrongfully ingesting marijuana. Before a general court-martial on 28 August 1986, the applicant pled guilty to and was found guilty of nine specifications of wrongfully distributing hashish, between on or about 1 August 1985 and 15 May 1986, and eleven specifications of wrongfully using hashish, between on or about 1 February 1985 and 30 April 1986.
- The applicant was discharged on 15 July 1987 under the provisions of Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel), Chapter 3, as a result of court-martial. His service was characterized as dishonorable, and he was credited with 4 years and 12 days of net active service.

c. Review of Available Records: The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts he has lingering effects of PTSD from his time in service and that the charges against him were unjust and unfair. Medical documentation dated 21 December 2023 showed diagnoses of Depression with anxiety, Mild episode of recurrent Major Depressive Disorder, and Anxiety Disorder, unspecified, and the applicant was offered medication (he declined) and referral to see a behavioral health provider. This documentation also discusses that the applicant has never seen a mental health provider, but he has been experiencing anxiety and nightmares since 1987 when he left the Army. He declined to talk about the experiences in the past that create anxiety, and he discussed depression associated with the loss of his leg (amputation in 2012). A Mental Status Evaluation dated 8 January 1987 indicated that the applicant demonstrated both "normal" and "confused" thinking process, but he was determined to have the capacity to understand and participate in proceedings and was considered "mentally responsible." It also indicated that he met retention requirements. The Report of Medical History that was completed as part of the discharge process showed that the applicant was in overall good health, but he checked the box indicating trouble sleeping and depression/excessive worry. There was insufficient evidence that the applicant was diagnosed with PTSD while on active service.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed no history of mental health related treatment or diagnoses.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support that the applicant had a condition or experience that mitigates his misconduct.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts he had an undiagnosed PTSD at the time of the misconduct. Medical documentation provided by the applicant show diagnoses of Major Depressive Disorder and Anxiety Disorder in 2023, but there was no indication of treatment for any mental health conditions.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition while on active service. Documentation he provided indicates he attributes his mental health symptoms to experiences from his time in service and from the loss of his leg in 2012.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is insufficient evidence that the applicant was experiencing a mental health condition, including PTSD, while on active service. Medical and mental health documentation completed as part of the discharge process indicate the applicant reported some minor symptoms, but that he met retention standards. Records provided by the applicant from 2023 are insufficient for determining any nexus to the applicant's misconduct resulting in discharge.

g. However, the applicant contends he was experiencing mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

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 Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was separated for conviction by court-martial for wrongfully distributing hashish on nine occasions and wrongfully using hashish on 11 occasions. The Board found no error or injustice in the separation proceedings. The Board reviewed and concurred with the medical advisor's review finding insufficient evidence to support the applicant had a condition or experience that mitigated his misconduct. Based on a preponderance of the evidence, the Board concluded that the characterization of service the applicant received upon separation was appropriate.

2. The applicant was given a dishonorable 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.

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, 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.

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.

■

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. Section 1556 of Title 10, USC, 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. AR 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation provides that the ABCMR may, in its discretion, hold a hearing. 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.
4. AR 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.
 - a. Paragraph 3-7a provided that 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. Paragraph 3-7b provided that 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 provided that an enlisted person would be given a bad conduct discharge 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.

d. A dishonorable discharge will be given to a Soldier pursuant only to an approved sentence of a general court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed. Questions concerning the finality of appellate review should be referred to the servicing staff judge advocate.

5. 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.

6. 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 Discharge Review Boards (DRBs) and 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 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 sexual assault or sexual harassment was unreported, or 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. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

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, 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//