

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 September 2024

DOCKET NUMBER: AR20230011855

APPLICANT REQUESTS:

- in effect, an upgrade of his bad conduct 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), 31 July 2023
- DD Form 214 (Certificate of Release or Discharge from Active Duty), for the period ending 22 February 1983
- Three letters of support

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 marked on his application post-traumatic stress disorder (PTSD) as an issue related to his request.
3. The applicant provides three letters of reference authored by several friends and colleagues, including:
 - a. An acquaintance, CEG____, who has known him over 20 years. He knows the applicant as a good neighbor and friend who is a father. The applicant helped he and his neighbors during illness by transporting them to hospital. He is creative and mature and helpful by watching and guiding children in his neighborhood.
 - b. A retired sergeant, AT____, who knew the applicant for 30 years. While the sergeant served in Iraq, the applicant helped his family by taking his children to school, helping his wife with repairs, and completing other household tasks. He was a volunteer

youth football and basketball coach while remaining employed. He believes the applicant deserves a second chance and requests to Board to upgrade his discharge.

c. An undated letter from City Councilmember KDF____, a brother of the applicant, who requests he be given an upgrade so he can seek help from the Veterans Administration for his long term mental health disability.

4. A review of the applicant's service records show:

a. On 3 January 1980, he enlisted in the Regular Army for a period of three years. He was awarded military occupational specialty 94B (Food Service Specialist) and he attained the grade/pay grade specialist 4/E-4.

b. On 24 April 1980, he was assigned to Services Battery, 1st Battalion, 30th Field Artillery, U.S. Army Field Station, Augsburg, Germany.

c. On 22 February 1982, he was placed in confinement.

d. The complete facts and circumstances surrounding the applicant's separation are unavailable for the Board's review.

e. AE (Army Europe) Form 3358 (Review of Staff Judge Advocate (SJA)), dated 14 April 1982, outlining the charges with a summary of the evidence (testimony), and the findings and sentence of a special courts-martial. The review further contains a written discussion of the charges and specifications:

- two Specifications of wrongfully have in his possession 2.57 grams, 7.24 grams of marijuana, in hashish form
- two Specifications of wrongfully selling 2.57 grams and 7.24 grams of marijuana, in hashish form; and
- one Specification of wrongful transfer of 2.57 grams of marijuana, in hashish form

f. The applicant pled not guilty to all the specifications and was found guilty of all specifications.

g. In a memorandum: Subject: Review of the SJA in the case of United States v. (Applicant), reflects the applicant requested in writing a trial by a court composed only of a military judge, which was approved. The Military Judge inquired into the applicant's understanding of his rights and his right to counsel. The applicant acknowledged in concurrence.

h. The SJA provided documentation and an opinion on the credibility of the witnesses, an evaluation of the evidence, and an opinion of the SJA as to the legal sufficiency of the trial, findings, and sentence of the court. The SJA found the findings of guilty were correct in law and fact and the sentence was legally correct. . This document is available for Board review.

i. On 23 April 1982, the applicant's defense counsel provided the Judge Advocate General (JAG), VII Corps, a written objection to the admission of testimony from a certain witness.

j. On 27 April 1982, the JAG, VII Corps, adhered to his original opinions and recommendations outlined in AE Form 3358, dated 14 April 1982.

k. Special Court-Martial Order (SCMO) Number 26, issued by Headquarters (HQ), VII Corps, dated 29 April 1982, shows the applicant was arraigned and tried before a Special Court-Martial, convened at Neu Ulm, Germany. The applicant was charged with five specifications of violation of the Uniform Code of Military Justice, Article 134; while assigned to U.S. Army Field Station Augsburg; tried with findings:

(1) Specification 1: at Augsburg, Germany, or about 31 October 1981, wrongfully have in his possession 2.57 grams of marijuana, more or less, in the hashish form, while outside the territorial limits of the United States or a United States military installation; and found guilty;

(2) Specification 2: at Augsburg, Germany, or about 13 November 1981, wrongfully have in his possession 7.24 grams, more or less, of marijuana in the hashish form, while outside the territorial limits of the United States or a United States military installation; and found guilty;

(3) Specification 3: at Augsburg, Germany, or about 31 October 1981, wrongfully sell 2.57 grams, more or less, of marijuana in the hashish form, while outside the territorial limits of the United States or a United States military installation; and found guilty;

(4) Specification 4: at Augsburg, Germany, or about 13 November 1981, wrongfully sell 7.24 grams, more or less, of marijuana in the hashish form, while outside the territorial limits of the United States or a United States military installation; and found not guilty;

(5) Specification 5: at Augsburg, Germany, or about 13 November 1981, wrongfully transfer 2.57 grams, more or less, of marijuana in the hashish form, while outside the territorial limits of the United States or a United States military installation; and found guilty;

(6) Applicant was sentenced to be discharged from the Army with a bad conduct discharge, to be confined at hard labor for 2 months, and to be reduced to private/E-1.

l. The sentence was adjudged on 22 February 1982.

m. The record of trial was forwarded to the JAG of the United States Army Court of Military Review.

n. On 7 October 1982, the United States Army Court of Military Review having found the approved findings of guilty and sentence correct, and having determined on the basis of the entire record that they should be approved, such findings of guilty and the sentence of the court were affirmed.

o. On 24 November 1982, the Department of the U.S. Army Judiciary, notified the applicant of the decision of the United States Army Court of Military Review and gave him 60 days to petition for grant of review. There is no evidence contained in the applicant's record that he responded to this notification.

p. HQ, U.S. Army Field Artillery Center and Fort Sill issued SCMO Number 12, dated 10 February 1983, executing the BCD, confinement at hard labor for 2 months, and reduction to the grade of private/E-1; adjudged on 22 February 1982, as promulgated in SCMO Number 26, HQ, VII Corps. The provisions of Article 71(c) having been complied with, the sentence would be duly executed. The portion of the sentence pertaining to confinement had been served.

q. On 17 February 1983, he was reassigned to U.S. Army Transfer Point, Fort Sill with a reporting date and discharge date of 22 February 1983.

r. On 22 February 1983, he was discharged. His DD Form 214 shows he completed 3 years and 3 days of active service with 45 days of time lost from 22 February 1982 to 8 April 1982; and he had 287 days excess leave from 12 May 1982 to 22 February 1983. His DD Form 214 further shows in:

- block 13 (Decorations, Medals, Badges, Citations, and Campaign Ribbons Awarded or Authorized) – Army Service Ribbon and Sharpshooter Marksmanship Qualification Badge with Rifle Bar (M-16)
- block 24 (Character of Service) – bad conduct discharge
- block 25 (Separation Authority) – SCMO Number 12, 10 February 1983 (Army Regulation 635-200, Section IV)
- block 26 (Separation Code) – “JJD”
- block 27 (Reenlistment Code) – RE-3B
- block 28 (Narrative Reason for Separation) – as the result of court-martial-other

5. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (EMR – AHLTA and/or MHS Genesis), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting an upgrade of his 22 February 1983 Bad Conduct discharge and, in essence, a referral to the Disability Evaluation System. He has indicated on his DD Form 149 that PTSD is a condition related to his request.

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD 214 shows he entered the regular Army on 3 January 1980 and was discharged on 22 February 1983 under with a Bad Conduct Discharge. His separation code of JJD denotes this separation was the result of court martial.

d. No medical documentation was submitted with the application. Because of the period of Service under consideration, there are no encounters in AHLTAs. JLV shows he is not registered with the VA.

e. A Special Court Martial Order dated 29 April 1982 shows the applicant was found guilty of the possession, the transfer, and the selling of marijuana in the hashish form.

f. The applicant was sentenced to 2 months of confinement with hard labor, reduction in rank to private E-1, and a bad conduct discharge.

g. It is the opinion of the ARBA medical advisor that neither a referral to the DES nor a discharge upgrade is warranted.

h. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Applicant asserts he has duty-incurred PTSD.

(2) Did the condition exist or experience occur during military service? Applicant asserts the PTSD is due to his Service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant has submitted no medical documentation indicating a diagnosis of PTSD.

Review of the EMR and VA medical records show that the applicant has not been diagnosed with either a service connected or nonservice connected BH condition.

i. In the event the applicant was to have a potentially mitigating diagnosis, it would partially mitigate the misconduct for which he was separated. These conditions are associated with self-medicating with drugs and/or alcohol. As such, it would mitigate his possession of marijuana in the form of hashish. However, these conditions do not interfere with one's abilities to differentiate right from wrong and adhere to the right and so cannot mitigate his transferring and selling marijuana in the form of hashish.

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 possessing, selling, and transferring marijuana. The Board found no error or injustice in the separation proceedings. The Board noted the applicant's significant post-service accomplishments. The Board reviewed and concurred with the medical advisor's review finding mitigation for possessing marijuana; however, no mitigation for transferring or selling marijuana. 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 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.

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. 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. Army Regulation 15-185 (Army Board for Correction of Military Records) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the Army Board for Correction of Military Records (ABCMR).

a. Paragraph 2-9 states that the ABCMR begins its consideration of each case with the presumption of administrative regularity. 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 (sometimes referred to as an evidentiary hearing or an administrative hearing) or request additional evidence or opinions. 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, then in effect, (1 October 1982), set policies, standards, and procedures to insure the readiness and competency of the force while providing for the orderly administrative separation of enlisted members for a variety of reasons.

a. An honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier'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. A characterization of under honorable conditions may be issued only when the reason for separation specifically allows such characterization. It will not be issued to Soldiers solely upon separation at expiration of their period of enlistment, military service obligation, or period for which called or ordered to active duty.

c. An under other than honorable conditions characterization was authorized when the reason for separation and was warranted by the circumstances of the case.

d. Paragraph 3-11, Section IV. 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 duty executed.

4. Army Regulation 635-5-1 (Personnel Separations – Separation Program Designators), in effect at the time, listed the specific authorities, regulatory, statutory, or other directive, and reasons for separation from active duty, active duty for training, or full time training duty. The separation program designator "JJD" corresponded to "As the Result of Court-Martial-Other," and the authority, Army Regulation 635-200, Section IV.

5. Army Regulation 601-210 (Active and Reserve Components Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment processing into the Regular Army, U.S. Army Reserve, and Army National Guard. Chapter 3 prescribes basic eligibility for prior-service applicants for enlistment and includes a list of Armed Forces reentry eligibility (RE) codes.

- RE-1 applies to persons completing an initial term of active service who are considered qualified to reenter the U.S. Army if all other criteria are met
- RE-3 applies persons who are not considered fully qualified for reentry or continuous service at the time of separation, but disqualification is waivable
- RE-4 applies to persons separated from their last period of service with a nonwaivable disqualification.
- RE-4R applies to persons who retired for length of service with 15 or more years of active Federal service

6. On 3 September 2014 the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) 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.

7. The acting Under Secretary of Defense for Personnel and Readiness provided clarifying guidance on 25 August 2017, which expanded the 2014 Secretary of Defense memorandum, that directed the BCM/NRs and DRBs to give liberal consideration to veterans looking to upgrade their less-than-honorable discharges by expanding review of discharges involving diagnosed, undiagnosed, or misdiagnosed mental health conditions, including PTSD; traumatic brain injury; or who reported sexual assault or sexual harassment.

8. 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.

a. 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.

b. 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. 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

9. Section 1556 of Title 10, United States Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (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.

//NOTHING FOLLOWS//