

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 August 2024

DOCKET NUMBER: AR20230013512

APPLICANT REQUESTS: an upgrade of his bad conduct discharge.

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

- DD Form 293 (Application for the Review of Discharge)
- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Report of Separation from Active Duty), for the period ending 24 September 1979
- Applicant's Resume
- Boylan-Haven-Mather Academy Transcript
- Two Character Letters

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 has worked so hard from turning into a drug addict in and out different jail systems. He drove a school bus for 2 years, personal training, mentoring kids and driving access a ride for disabled people.

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

a. He enlisted in the Regular Army on 27 January 1976.

b. His DA Form 2-1 (Personnel Qualification Record – Part II) shows in item 5 (Overseas Service): service in Germany from 18 July 1976 to 31 July 1977

c. His DA Form 2-1 shows in item 18 (Appointments and Reductions):

- private (PVT)/E-1: 27 January 1976
- private (PV2)/E-2: 25 March 1976

- private first class (PFC)/E-3: 23 March 1977
- private (PVT)/E-1: 1 August 1977

4. A DA Form 4465 (Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) Client Intake and Follow-up Record), dated 15 June 1977, shows the applicant was enrolled in the non-resident rehabilitation program due to the improper use of a controlled substance.

5. The applicant accepted nonjudicial punishment (NJP), under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) on the following dates for the following misconduct –

- on 21 March 1978, wrongfully have in his possession two partially burned hand rolled cigarettes and seeds on or about 14 March 1978
- on 28 March 1978, wrongfully have in his possession one hand rolled cigarette and one partially burned hand rolled cigarette, marijuana, on or about 20 March 1978
- on 14 December 1978, fail to go at the prescribed appointed place of duty between 15 October 1978 and 4 December 1978
- on 21 March 1979, without authority absent himself from his unit

6. Special Court-Martial Order Number 69, issued by Headquarters, 3rd Infantry Division, APO New York, dated 18 October 1977:

a. The applicant was found guilty of the following charges/specifications:

(1) Charge I: Violation of UCMJ, Article 134 (Indecent Conduct), two specifications of while at Wildflecken Training Center Area on or about 18 April 1977, wrongfully sell and have in his possession 6.28 grams more or less of marijuana.

b. The sentence, which was adjudged on 1 August 1977, included confinement at hard labor for 3 months, reduction to private/E-1, forfeiture of \$200.00 pay per month for 3 months, and separation from the military with a bad conduct discharge.

c. The sentence was approved on 18 October 1977. The record of trial was forwarded to the U.S. Army Court of Military Review for appellate review.

d. The U.S. Court of Military Review (USACMR) on 30 December 1977 affirmed the findings of guilty and the sentence.

7. A DA Form 4465 (Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) Client Intake and Follow-up Record), on an unspecified date, shows the

applicant was released from the non-resident counseling program due to his confinement.

8. On 23 March 1979, the applicant underwent a medical and mental status examination. His DA Form 3822-R (Report of Mental Status Evaluation) shows he had no significant mental illness and had the mental capacity to understand and participate in board proceedings. He was psychiatrically cleared for administrative separation.

9. Special Court-Martial Order Number 83, dated 27 August 1979, the sentence to confinement at hard labor for 3 months, reduction to the grade of private/E-1, forfeiture of \$200.00 pay per month for 3 months (forfeitures to apply to pay becoming due on and after 18 October 1977, the date of the convening authority's action), and a bad conduct discharge, has finally been affirmed. The portion of the sentence to confinement has been served. Article 66 having been complied with; the Bad-Conduct discharge will be duly executed.

10. On 24 September 1979, the applicant was discharged pursuant to his court-martial sentence under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Paragraph 11. His DD Form 214 shows -

- he was discharged in the rank/grade of private/E-1 with a date of rank of 17 October 1977
- his service was characterized as under conditions other than honorable
- he was credited with completing 3 years, 5 months, and 10 days of net active service, with 1 year, and 14 days of foreign service
- he had 74 days of lost time from 1 August 1977 to 13 October 1977 and from 16 March 1979 to 18 March 1979 and 181 days of excess leave from 17 March 1979 to 24 September 1979
- he was awarded or authorized one expert marksmanship rifle M-16 qualification badge
- he received a separation code of "JJD" and a reentry code of "4"

11. The applicant petitioned the Army Discharge Review Board (ADRB) for an upgrade to his service characterization. The ADRB considered his request on 13 April 1982, determined after careful consideration of his military records and all other available evidence, determined that he was properly discharged, and denied his request for relief.

12. The applicant provides:

- a. Personal Resume
- b. Boylan Haven Mather Academy Transcript dated 16 June 1975

c. A character reference letter from a close friend of his sister and family for over 50-years. He has made many positive life changes to improve himself since 2001. She hopes the applicant discharge can be upgraded.

d. A character reference letter from his brother who attest to him changing once he went overseas. He made poor decisions and then began self-destructive behavior. Since being discharged and serving time in in Leavenworth Federal Prison, he found it difficult to adjust to a sober life back in society. In 2001 with counseling, he began to turn his life around. Since that time in 2001 he has been clean, sober, maintaining his own apartment and bills for the past 20-year. He volunteers with street youth and is a positive and productive man. He is the happy positive productive man that anyone would be proud to call brother. I am requesting he be given consideration to upgrade his discharge due to his unfortunate inability to cope in the military.

13. 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.

14. Regulatory guidance provides a Soldier will receive 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.

15. In reaching its determination, the Board can consider the applicants petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

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 possessing marijuana and wrongfully selling marijuana. The Board found no error or injustice in the separation proceedings. The Board noted the applicant's provided resume, transcript and character references. 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 general 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. Additionally, the applicant requested restoration of his rank/grade, medical benefits, disability compensation, and retroactive pay and allowances, which the Board determined based on their denial of the discharge upgrade from a bad conduct characterization of service that the requests were without merit and voted to deny relief.

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, USC, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by 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.

2. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.

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 11, of the version in effect at the time provided that an enlisted person would be given a bad conduct discharge (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. The service of Soldiers sentenced to a BCD was to be characterized as under conditions other than honorable.

3. 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.

4. 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 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//