

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 23 July 2024

DOCKET NUMBER: AR20230013782

APPLICANT REQUESTS:

- reconsideration of his previous request for upgrade of his bad conduct discharge
- an appearance before the board via video/telephone.

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)
- Applicant Email
- Character Letters (thirteen)/Emails (four)

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Dockets Number:

- AR20110022700 on 29 May 2012
- AR20230003011 on 17 October 2023

2. As a new argument, the applicant notes post-traumatic stress disorder (PTSD) and other mental health as related to his request.

a. The applicant states he has turned his life around and made major changes. It has been over 30 years since the incident. His former discharge was honorable as a specialist/E-4. He also lists his personal problems as: homelessness, alcohol abuse, mental health from Desert Storm (PTSD), and traumatic experiences while he served.

b. In an email, dated 24 April 2021 the applicant states while he was at Fort Stewart, GA, he was in a terrible accident on his way to work and totaled his privately owned vehicle and he was again injured while playing football for the company. He was given a permanent profile, which inhibited him from doing his Infantry training. He asked for reassignment to another company but was denied by the new platoon sergeant he did

not “mix” with. He feels that his feelings toward the applicant were racially motivated or something to that effect. He regrets his choice during this period. He is a husband, father, and grandfather, gainfully employed and attends church and is active with his city’s youth.

3. The applicant enlisted in the Regular Army on 1 November 1977 for a period of 3 years. His military occupational specialty was 11B (Infantryman).
4. The applicant served in Korea from 9 March 1978 through 9 March 1979.
5. The applicant had honorable service from 1 November 1977 to 30 April 1980. His DD Form 215 (Correction to DD Form 214) period ending 10 December 1982 also shows he completed his first full term of service.
6. The applicant accepted non-judicial punishment (NJP) under the provisions of Article 15 of the Uniformed Code of Military Justice (UCMJ) on:
 - 21 June 1978, for dereliction in the performance of his duties, on or about 13 June 1978; his punishment consisted of reduction to E-1 and forfeiture of one week’s pay \$105.00 (suspended)
 - 31 October 1978, for unlawfully striking Specialist DM___ in the face with a fist, on or about 28 October 1978; his punishment consisted of reduction to E-2 (suspended) and extra duty
 - 21 December 1979, for disobeying a lawful order from a superior noncommissioned officer (NCO) and being disrespectful in language to a superior NCO, on or about 15 December 1979; his punishment consisted of reduction to private first class/E-3, forfeiture of \$100.00 pay (suspended), and extra duty
7. The applicant reenlisted on 1 May 1980 for a period of 6 years.
8. The applicant received counseling between 21 October 1980 and 6 May 1981 for:
 - being absent to formation
 - late for formation and loaning a car to unlicensed individual
 - failing to get a haircut
 - negative attitude toward superiors
 - disrespect to a noncommissioned officer
 - failure to return to appointed place of duty
 - being absent from place of duty for entire day
 - reporting for duty in the wrong uniform and missing formation
 - being absent from formations

9. The applicant accepted NJP under the provisions of Article 15 of the UCMJ on:

- 16 December 1980, for failure to go at the time prescribed to his appointed place of duty, on or about 11 December 1980; his punishment consisted of reduction to E-3 (suspended), forfeiture of \$100.00 pay, extra duty, and restriction
- 23 February 1981, for failure to go at the time prescribed to his appointed place of duty, on or about 16 February 1981; his punishment consisted of reduction to E-2, forfeiture of \$100.00 pay (suspended), and extra duty
- 23 March 1981, for failure to go at the time prescribed to his appointed place of duty, on or about 23 March 1981; his punishment consisted of reduction to E-2 and forfeiture of \$50.00 pay (suspended)
- 10 July 1981, for failure to go at the time prescribed to his appointed place of duty, on or about 14 April 1981 and on or about 17 April 1981; his punishment consisted of reduction to private/E-1, forfeiture of \$200.00 pay for two months, extra duty, and restriction (suspended)

10. The applicant was absent without leave (AWOL) on 2 June 1981, and present for duty (PDY) on 29 June 1981.

11. The suspension of punishment, dated 20 July 1981, shows the punishment imposed on 10 July 1981 against the applicant was vacated.

12. The applicant accepted NJP under the provisions of Article 15 of the UCMJ on 23 September 1981, for failure to go at the time prescribed to his appointed place of duty, on 28 August 1981. His punishment consisted of grade reduction (suspended), forfeiture of \$80.00 pay for 4 months (suspended), restriction and extra duty.

13. The applicant was AWOL on 11 March 1982, PDY on 1 April 1982, AWOL on 2 April 1982, PDY on 21 April 1982, AWOL on 11 May 1982 and PDY on 12 May 1982.

14. The applicant was confined by military authorities on 13 May 1982 and PDY on 29 July 1982.

15. The previous case shows court-martial charges were preferred against the applicant for violations of the UCMJ. However, the relevant DD Form 458 (Charge Sheet) is not available for review.

16. Before a special court martial on 13 May 1982 the applicant was found guilty of the following charges:

- wrongfully selling some amount of marijuana, on or about 7 July 1981 and on or about 6 August 1981

- AWOL, from on or about 12 March 1982 until on or about 1 April 1982 and on or about 5 April 1982 until on or about 21 April 1982

17. The court sentenced the applicant to discharge from the service with a bad conduct discharge, to forfeit of \$200.00 pay for four months, to be confined at hard labor for four months, and to reduction to private/E-1.

18. The sentence was approved on 14 July 1982, except for the portion adjudging confinement at hard labor in excess of three months and forfeiture of pay in excess of \$150.00 pay for four months. The record of trial was forwarded to the U.S. Army Court of Military Review for appellate review.

19. The U.S. Army Court of Military Review affirmed the findings of guilty and the sentence on 31 August 1982.

20. Special Court-Martial Order Number 132, issued by Headquarters, 24th Infantry Division (Mechanized), Fort Stewart, GA on 10 December 1982, shows the sentence was finally affirmed, the provisions of Article 71(c) had been complied with, and the sentence was ordered duly executed.

21. The applicant was discharged on 10 December 1982. His DD Form 214 shows he was discharged 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 bad conduct with Separation Code JJD and Reenlistment code RE-3, 3B, 3C. He completed 4 years, 8 months, and 15 days of net active service. He had five periods of lost time. His awards include the Army Service Ribbon and the Overseas Service Ribbon. Item 18 (Remarks) lists his immediate reenlistment but not his continuous honorable service.

22. 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.

23. The applicant provides:

- a. A copy of his DD Form 214 as discussed above.
- b. Character letters/emails dated 5 March 2001 to 10 March 2021, that attest to the excellent moral character of the applicant. Those who served with him state he was a

dedicated Soldier who was treated unfairly. He accepts that he made poor choices as a young man after being placed in a desperate situation. He has experienced tremendous personal and professional growth. He is a hard-working, dependable citizen, who is an asset to his community. He is an excellent father, friend, and leader.

24. On 13 May 2012, the ABCMR determined that the evidence presented did not demonstrate the existence of a probable error or injustice. Therefore, the Board determined that the overall merits of this case are insufficient as a basis for correction of the applicant's records.

25. On 17 October 2023, the ABCMR determined the evidence present was sufficient to warrant partial amendment of the ABCMR's decision in AR20110022700 on 29 May 2012.

a. As a result, the Board recommends that all Department of the Army records of the applicant be corrected by adding the following additional statement to block 18 (Remarks) of his DD Form 214: "Soldier has Completed First Full Term of Service" and "Continuous Honorable Service from 19771101 until 19800430." A DD Form 215 was issued.

b. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the applicant that pertains to upgrading the characterization of the applicant's discharge.

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

27. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting reconsideration of an upgrade to his bad conduct discharge. He contends he experienced an undiagnosed mental health condition, including 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 November 1977. He served in Korea from March 1978 to March 1979, and he reenlisted on 1 May 1980. His initial three-year term of service is considered honorable based on a previous ABCMR case.
- The applicant received NJP in 1978 and 1979 for dereliction of duties, striking another soldier in the face, and disobeying an order as well as being disrespectful in language. The applicant was counseled for a variety of behaviors

indicative inattention to military standards and protocols, and he received another NJP for four instances of failure to be at his appointed place of duty in 1980 and 1981. He was then AWOL in June 1981, March 1982, and May 1982. Before a special court martial on 13 May 1982, the applicant was found guilty of selling marijuana in July 1981 and being AWOL in March and April 1982.

- The applicant was discharged on 10 December 1982 and was credited with 4 years, 8 months, and 15 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 experienced personal problems, alcohol abuse, and "mental health from Desert Storm (PTSD), traumatic experiences" as related to his discharge (of note, applicant's service dates are not of Desert Storm era). The application did not contain any medical or mental health records. There was insufficient evidence that the applicant was diagnosed with PTSD or another psychiatric condition while on active service.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed that the applicant initially engaged mental health care at the VA in November 2017. Documentation indicated he reported symptoms of depression and anxiety, and he denied trauma history exposure. He was initially diagnosed with "problems related to psychosocial circumstance." He followed up in April 2018 and was diagnosed with Adjustment Disorder associated with psychosocial stressors (i.e. financial problems). In December 2018 during a visit with a new provider, he reported having witnessed a friend commit suicide and an accidental discharge of a firearm that resulted in a friend's death while in service, but he did not meet full criteria for PTSD. He was evaluated by a psychiatrist a few days later and diagnosed with Major Depressive Disorder, Stimulant Use Disorder in remission, and Alcohol Use Disorder in remission. He was continued on an antidepressant that had been started by his primary care provider, and he declined psychotherapy. Documentation from 2019 indicated he was trialed on a different medication, targeting mood and pain, and he eventually discontinued it as well as treatment. The applicant was seen for four more visits between 2022 and 2024 and was diagnosed with Adjustment Disorder. The content of sessions primarily focused on his pursuit of VA service-connection, financial problems, and relationship problems. His most recent visit was on 16 May 2024, and he declined a follow up appointment. Records do not indicate that he is service connected for any conditions.

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 mental health condition,

including PTSD, at the time of the misconduct. VA records indicate he has been diagnosed with Major Depressive Disorder, Adjustment Disorder, and Substance Use Disorders, but the content of the documentation focuses on situational stressors and his pursuit of service connection.

(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.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is insufficient evidence, beyond self-report, that the applicant was experiencing a mental health condition while on active service. There were no in-service mental health records provided. VA records indicate he was diagnosed with a mental health condition in 2017 and has engaged treatment intermittently since then. While avoidance behaviors, such as being AWOL, and behaviors associated with difficulty with authority (i.e. dereliction of duty) can be a natural sequelae of trauma exposure, there is no nexus between his mental health conditions, including PTSD, and the misconduct of selling marijuana: 1) these types of misconduct are not part of the natural history or sequelae of his mental health conditions; 2) his mental health conditions do not affect one's ability to distinguish right from wrong and act in accordance with the right.

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. 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.

a. The evidence shows the applicant's trial by a court-martial was warranted by the gravity of the offenses charged (sale of marijuana, AWOL). 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 his separation processing. The Board found no error or injustice in his available separation processing. The Board also 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 determination that there is insufficient evidence, beyond self-report, that the applicant was experiencing a mental health condition while on active service.

b. The Board further noted that the applicant provides multiple character reference letters/emails that attest to the applicant's excellent moral character. The authors speak of him as a dedicated Soldier who was treated unfairly. He accepts that he made poor choices as a young man after being placed in a desperate situation. He has experienced tremendous personal and professional growth. He is a hard-working, dependable citizen, who is an asset to his community. However, the Board also noted that when it comes to drug distribution, the applicant was not only impacting himself, but also impacting the lives of other Soldiers. Given his extensive misconduct and given his serious offense of sale of illegal drugs, and 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 to amend the decision of the ABCMR set forth in Docket Number AR20110022700 on 29 May 2012 and AR20230003011 on 17 October 2023.

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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 (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 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. AR 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 provided that an enlisted person 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. 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 (DRB) and Service 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. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part to 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.

6. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and Service BCM/NRs on 25 July 2018 [Wilkie Memorandum], 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 court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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//