

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 September 2024

DOCKET NUMBER: AR20230013970

APPLICANT REQUESTS:

- an upgrade of his under other than honorable conditions discharge to honorable
- a personal appearance with the Board

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

- DD Form 149 (Application for Correction of Military Record), 13 November 2023
- Self-authored Statement, 7 November 2023
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 4 February 1986
- letter, LR____, 15 September 2023
- letter, JPC____, 23 September 2023
- letter, EJ____, 13 October 2023
- State of NC, (County) Criminal Record Report, 1 November 2023

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 requesting an upgrade of his discharge from under other than honorable conditions to honorable. He believes he failed to receive due process. He was charged and convicted by a non-military court system outside the Continental United States. To the best of his recollection, he had no opportunity for legal representation. No drugs, including marijuana was found in his system, on his person, or at his place of residence. He requests consideration of his age and level of maturity, as well as the length of time since the allegation was made against him. He had no prior history with drugs. He has no recent history of any drug use, and he had no criminal history other than minor traffic violations. As a result of the allegations, he was demoted, and he was denied an opportunity to retire from the Army. He received an administrative discharge, and he lost eligibility for Veterans benefits for over 3 decades.

3. The applicant provides:

a. A letter of reference from LR____, the Chief Operations Officer of a transportation company at which the application is a driver. The applicant is dependable, trustworthy, and responsible as well as committed to everything he does. He is sensitive to the elderly clients and provides safe driving and assistance.

b. A letter of reference from JPC____, the pastor of the applicant's church at which he has been a member for some time. The applicant has grown spiritually and developed into an exceptional individual. He has strong moral and ethical standards, and he goes above and beyond to help anyone he can. His integrity stands out. He is a role mode for others and makes a positive impact on those he encounters.

c. A letter of reference from EJ____, the County Deputy Clerk, who has known the applicant for 30 years or more. The applicant has a high degree of trustworthiness, loyalty, dependability, and honesty. He helped the author's mother during a time of illness. He has wonderful rapport with people of all ages. His caring spirit draws people to him.

d. A county criminal record report showing traffic violations in his county; otherwise, no serious convictions.

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

a. On 16 January 1979, he enlisted in the Regular Army for 3 years. He was awarded military occupational specialty 95B (Military Police).

b. On 4 September 1981, he reenlisted for 3 years beginning at grade/pay grade specialist 4/E-4. He subsequently extended this enlistment for 20 months on 5 May 1983.

c. On 8 July 1982, he accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice for disrespectful language toward his superior noncommissioned officer. His punishment included reduction to private first class (suspended for 60 days).

d. On 1 November 1984 he was promoted to sergeant (SGT), E-5.

e. A DA Form 4187 (Personnel Action), dated 6 October 1985, reflects his status changed from present for duty to confined by civilian authorities (Okinawa, Japan).

f. On 21 October 1985, a flag was imposed against him as a result of charges imposed against him by the Government of Japan.

g. A judgement by the First Criminal Division, Naha District Court, Okinawa, Japan, dated 6 December 1985, Case Number 1985 (WA) reflects the applicant was sentenced to imprisonment at forced labor for a term on 1 year and 2 months. The execution of the sentence was suspended for 3 years from the final date of the judgement. The judgement further shows:

- a seizure of four bags of marijuana was confiscated
- without being authorized as a marijuana handler, on 28 August 1985, the accused possessed about 5.33 grams of marijuana at his residence located in Nakagami-Gun, Okinawa Prefecture
- on 29 August 1985, he possessed approximately 4.02 grams of marijuana at his residence
- on 19 September 1985, he possessed approximately 1.1 grams of marijuana at his residence
- on 6 October 1985, he transferred approximately 3 grams of marijuana to (name redacted) and to (name redacted) at another address in Yomitan-Son
- on the same date, he possessed approximately 3.19 grams of marijuana at his residence

h. On 17 January 1986, the Commanding Officer, Headquarters Detachment, U.S. Army Garrison, Okinawa, notified him of his intent to initiate separation action against him under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), chapter 14, for misconduct, and advised him of his rights. The specific reason for his proposed action were for his misconduct of abuse of illegal drugs while assigned in a position of trust as a military policeman, as shown by his conviction by the Government of Japan.

i. On 17 January 1986, after consultation with legal counsel, he acknowledged:

- the rights available to him and the effect of waiving said rights
- he may encounter substantial prejudice in civilian life if a general discharge under honorable conditions is issued to him
- he may be ineligible for many or all benefits as a Veteran under both Federal and State laws
- he may apply to the Army Discharge Review Board or the ABCMR for upgrading
- he is ineligible to apply for enlistment in the U.S. Army for a period of 2 years following discharge
- he waived his personal appearance and consideration of his case before a board of officers
- he elected not to submit matters on his own behalf

j. On 28 January 1986, his company commander recommended his discharge under the provisions of Section II, Chapter 14, Army Regulation 635-200, and forwarded his recommendation to the approval authority.

k. On 30 January 1986, he underwent a medical examination and provided a report of medical history. The examining physician, U.S. Naval Hospital, Okinawa, noted he was qualified for separation.

l. On 30 January 1986, the immediate commander-initiated separation action against the applicant for misconduct of abuse of illegal drugs.

m. On 30 January 1986, consistent with the chain of command recommendations, the separation authority approved the discharge recommendation for immediate separation under the provisions of AR 635-200, Chapter 14, for misconduct. He would be issued a an under other than honorable conditions discharge and reduced to the lowest enlisted grade, private, E-1.

n. On 4 February 1986, he underwent a mental status evaluation as requested by his command. A DA Form 3822-R (Report of Mental Status Evaluation) shows the applicant met the physical retention standards prescribed in Army Regulation 40-501 (Standards of Medical Fitness). The examiner further determined that he was mentally responsible, able to distinguish right from wrong, able to adhere to the right, and had the mental capacity to understand and participate in proceedings. The examiner cleared him for administrative action deemed appropriate by his command.

o. On 4 February 1986, he was discharged. His DD Form 214 shows he was discharged under the provisions of Army Regulation 635-200, chapter 14 by reason of misconduct-commission of a serious offense with an under other than honorable conditions characterization of service; a separation code of JKM; and reenlistment codes of RE-3/3B/3C. He completed 6 years, 11 months, and 20 days of net active service this period with 41 days' time lost from 6 October 1985 to 26 November 1985. He was awarded or authorized:

- Army Good Conduct Medal (Second Award)
- Army Service Ribbon
- Overseas Service Ribbon
- Army Lapel Button
- Expert Marksmanship Qualification Badge with Rifle Bar (M-16)
- Expert Marksmanship Qualification Badge with Hand Grenade Bar
- Marksman Marksmanship Qualification Badge with Pistol Bar (.45 caliber)

5. There is no evidence indicating he applied to the Army Discharge Review Board for an upgrade of his discharge within that board's 15-year statute of limitations.

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), action will be taken to separate a Soldier for misconduct, when it is clearly established that despite attempts to rehabilitate or develop him or her as a satisfactory Soldier, further effort is unlikely to succeed.

8. In reaching its determination, the Board can consider the applicant's 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 counsel's statement, the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition, available military records, the Board determined there is insufficient evidence of in-service mitigating factors to overcome the repeated misconduct of marijuana possession. The Board considered the applicant post service achievements and character letters of support attesting to the applicant's community contributions, trustworthiness, loyalty, strong moral and ethical standards, and honesty. The Board recognized the applicant's years of service; however, the applicant's misconduct could not be mitigated. Based on the preponderance of evidence, the Board denied relief.

2. 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, 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, 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 14 established policy and prescribed procedures for separating members for misconduct. Specific categories included minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, convictions by civil authorities, and abuse of illegal drugs. Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter.

d. Section II, paragraph 14-1 Under this paragraph members were subject to separation for misconduct because of minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, and absence without leave. Commission of a serious military or civil offense, in the specific circumstances of the offense warranted separation and a punitive discharge, would be authorized for the same or a closely related offense under the MCM. Abuse of illegal drugs. First time drug offenders, grades E-5-E-9 would be processed for separation upon discovery of a drug offense. Second time drug offenders, grades E-1 to E-9 would be process for separation after the second offense.

e. Section II, paragraph 14-9. A member may be considered for discharge when initially convicted by civil authorities, or when action is taken that is tantamount to a finding of guilty, if one of the following conditions is present:

(1) A punitive discharge would be authorized for the same or closely related offense under the MCM, 1984, as amended.

(2) The sentence by civil authorities includes confinement for 6 months or more, without regard to suspension or probation.

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 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//