

IN THE CASE OF: [REDACTED]

BOARD DATE: 31 July 2024

DOCKET NUMBER: AR20230014102

APPLICANT REQUESTS:

- an upgrade of his bad conduct discharge to either under other than honorable or general, under honorable conditions
- a video and/or telephonic appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- 16 Certificates of Completion with 12 Corresponding Letters of Completion
- DD Form 214 (Certificate of Release or Discharge from Active Duty)

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 bad conduct discharge to either other than honorable or general, under honorable conditions. He believes it was a one-time incident in an otherwise exemplary six (6) plus years of service related to the stress and financial difficulties of being a single parent while maintaining his military career. During his time in service Army Policy toward single parents placed stressful workplace conditions not placed on married service members by the chain of command. At the time of his discharge, he was informed that he could not apply for an upgrade of his discharge and recently found out this was false. He also noted other mental health as a condition related to his request on the DD Form 149.
3. The applicant provides 16 Certificates of Completion with 12 corresponding Letters of Completion, indicating the applicant enrolled and completed 16 self-help courses, designed to address offenders' thinking errors that contributed to their criminal behavior, between 1 October 2021 and 28 July 2023 (available for review by the Board).

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

a. He enlisted in the Regular Army on 13 April 1976.

b. On 30 April 1982, he was convicted by a special court-martial for violation of Article 134 of the Uniform Code of Military Justice, in that on or about 2000 hours, 4 January 1982, he wrongfully sold 2.89 grams, more or less, of marijuana in hashish form. As a result, he was to be reduced to the grade of private/E-1; confined at hard labor for 30 days; and discharged from the service with a Bad Conduct Discharge.

c. On 22 July 1982, the convening authority approved so much of the sentence as provides for reduction to the grade of E1; confinement for 30 days; and except for the bad conduct discharge, ordered it executed. The record of trial was forwarded to the Judge Advocate General of the Army for appellate review.

d. Special Court-Martial Order Number 38, dated 11 May 1983, after Article 71(c) was complied with and the sentence was affirmed, ordered the bad conduct discharge executed.

e. On 27 May 1983, he was discharged from active duty with a bad conduct discharge. His DD Form 214 shows he completed 7 years and 23 days of active service with 24 days of lost time. He was assigned separation code JJD and the narrative reason for separation is listed as "As a Result of Court-Martial" with reentry code 4. It also shows he was awarded or authorized the:

- Marksman Marksmanship Qualification Badge with Rifle Bar (M-16)
- Expert Marksmanship Qualification Badge with Hand Grenade
- Good Conduct Medal (1st award)

5. 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.

6. By regulation (AR 635-200), a member will 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 executed.

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

8. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to his characterization of service from bad conduct discharge (BCD) to under other than honorable or under honorable conditions (general). He contends he experienced an undiagnosed mental health condition 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 13 April 1976.
- On 30 April 1982, he was convicted by a special court-martial for wrongfully selling 2.89 grams of marijuana in hashish form.
- The applicant was discharged on 27 May 1983 with a bad conduct discharge, and he was credited with 7 years and 23 days of 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 was under a lot of financial stress as a single parent and had a "one time incident" resulting in his discharge. The application did not include any medical or mental health records. There was insufficient evidence that the applicant was diagnosed with any psychiatric condition 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 mental health condition at the time of the misconduct. However, there were no mental health records in the application or in JLV.

(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. A review of military medical and mental health records revealed no documentation of any mental health condition(s) while on active service or after discharge. Additionally, there is no nexus between most mental health conditions, including PTSD, and his misconduct related to selling marijuana: 1) this type of misconduct is not part of the

natural history or sequelae of a mental health condition; 2) most 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. 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 record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant's petition, available military records and the medical review, the Board concurred with the advising official 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.

2. 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 at the time of the misconduct. However, there were no mental health records in the application or in JLV.

(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. A review of military medical and mental health records revealed no documentation of any mental health condition(s) while on active service or after discharge. Additionally, there is no nexus between most mental health conditions, including PTSD, and his misconduct related to selling marijuana: 1) this type of misconduct is not part of the natural history or sequelae of a mental health condition; 2) most mental health conditions do not affect one's ability to distinguish right from wrong and act in accordance with the right.

3. The Board found insufficient evidence of in-service mitigating factors to outweigh the applicant’s misconduct of wrongfully selling marijuana. Although the applicant completed over seven years of active-duty service a duration the Board acknowledges as commendable, this alone does not mitigate the seriousness of the offense. The act of selling a controlled substance represents a significant breach of military law and trust and was properly adjudicated through a lawful special court-martial. Furthermore, the Board notes that the applicant submitted no post-service achievements, documentation of rehabilitation, or character references that might reflect sustained personal growth or behavioral change since separation. In the absence of such supporting evidence, and given the gravity of the offense, the Board determined there is no sufficient basis to warrant clemency or an upgrade of his discharge. Therefore, relief is denied.

4. 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:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	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.

X

CHAIRPERSON

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, sets the criteria governing the issuance of Honorable, General, and Under Other Than Honorable Conditions Discharge Certificates.

a. An honorable discharge is a separation with honor. Issuance of an Honorable Discharge Certificate is predicated upon proper military behavior and proficient performance of duty during the member's current enlistment or current period of obligated service with due consideration for the member's age, length of service, grade, and general aptitude.

b. A general discharge is a separation from the Army under honorable conditions. It is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. An under other than honorable conditions discharge is an administrative separation from the service under conditions other than honorable. It may be used for misconduct, for homosexuality, for security reasons, or for the good of the service.

d. A member will 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 executed.

4. Title 10, U.S. Code, section 1552, provides that the Secretary of a Military Department may correct any military record of the Secretary's Department when the Secretary considers it necessary to correct an error or remove an injustice. With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under the UCMJ, action to correct any military record of the Secretary's Department may extend only to correction of a record to reflect actions taken by reviewing authorities under the UCMJ or action on the sentence of a court-martial for purposes of clemency. Such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that Military Department.

5. 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 post-traumatic stress disorder (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.

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 DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole, or in part, to: mental health conditions, including PTSD; TBI; sexual assault; sexual harassment. Boards were directed 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 that misconduct which led to the discharge.

7. 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 regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records 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. This guidance does not mandate relief but provides standards and principles to guide Boards in application of their equitable relief authority.

a. 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.

8. 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//