

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 23 August 2024

DOCKET NUMBER: AR20240000200

APPLICANT REQUESTS:

- in effect, reconsideration of his previous requests for an upgrade of his dishonorable discharge to under honorable conditions (General)
- a video/telephonic appearance before the Board

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 4 (Enlistment Contract - Armed Forces of the United States)
- Two SF Forms 88 (Report of Medical Examination), 20 March 1974 and 12 March 1978
- Two SF Forms 93 (Report of Medical History), 20 March 1974 and 20 March 1978
- DA Form 2 (Personnel Qualification Record – Part I)
- DA Form 2-1 (Personnel Qualification Record – Part II)
- Orders Number 002, 2 January 1976
- Orders Number 13, 11 April 1978

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 Docket Number AR20220009506 on 26 April 2023.

2. The applicant provides as new evidence not previously considered by the Board: he was an impressionable young man who made some bad choices that were driven by the firsthand trauma that was experienced from the effects of war. He watched a young man he sat next to on the plane get blown away after the plane landed in Vietnam.

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

- a. He enlisted in the Regular Army on 29 May 1974.

b. His DA Form 2 shows in item 5 (Overseas Service): service in Germany from 14 October 1974 to 5 November 1975.

c. Nonjudicial punishment was imposed on 10 October 1975, under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ), for failing to report to his appointed place of duty on or about 6 October 1975.

d. The applicant appealed the punishment in a letter dated 24 October 1975 wherein he stated, he was not properly treated. He was given an Article 15 before he had a chance to tell his story. The way the whole thing was done showed him how his Battery Commander felt about his work in the supply department. He tried to be one of the best supply departments but the way he was being treated showed in his work. It is not fair to mess him over for nothing.

e. On 28 October 1975, the commander responded to the applicant's statement in which he cites that every reasonable effort was made to locate the applicant prior to him receiving the Article 15, however he was missing from duty. The applicant does acceptable work in his place of duty, but this does not warrant dropping the charges. All matters presented by the applicant in defense and mitigation were considered prior to punishment. It was considered that the only punishment that would have a positive effect on the applicant was forfeiture of pay. Forfeiture of \$30.00 for one month was a reasonable punishment and not excessively harsh. The applicant's appeal was denied.

f. Nonjudicial punishment was imposed on 31 October 1975 for the wrongful possession of 7 grams, more or less, of marijuana on or about 12 October 1975. The imposed punishment consisted of reduction to the grade of private (PVT)/E-1 (suspended for 4 months) and 15 days of extra duty.

g. The applicant appealed the punishment in a letter dated 13 November 1975, wherein he stated, in effect, other individuals were not questioned. His field jacket was not in his possession during the road march. He believed the narcotic was placed in his pocket without his knowledge. Other individuals were not searched as completely or vigorously as he was.

h. The commander responded to the applicant's statement, wherein he stated other individuals were questioned. The first sergeant stated the applicant was wearing his field jacket when he boarded and disembarked the truck for the reforger exercise. The applicant's story that someone put the marijuana in his pocket while he was asleep was not credible. During the course of the hearing, the applicant had no motive as to why the other three individuals would have had to place the marijuana in his field jacket. The applicant was in pre-trial confinement, pending general court-martial charges for the possession and sale of narcotics. The applicant's appeal was denied.

i. Before a general court-martial on or about 1 December 1975, at Fuerth, Republic of Germany, the applicant was found guilty of one specification of the wrongful attempt to sell heroin and one specification of wrongful possession of 1.12 grams, more or less, of heroin, on or about 4 November 1975.

j. The court sentenced him to confinement at hard labor for 8 years, forfeiture of all pay and allowances, reduction to the grade of PVT/E-1, and separation from service with a dishonorable discharge. The sentence was approved, but the portion adjudged in excess of a dishonorable discharge, confinement at hard labor for 12 months, total forfeiture of all pay and allowances, and reduction to PVT/E-1 was suspended until 25 December 1976. The record of trial was forwarded for appellate review.

k. Special Orders Number 002, issued by Headquarters, U.S. Army, Europe and Seventh Army, on 2 January 1976, show the applicant was reduced to the grade of PVT/E-1, effective 31 October 1975.

l. Orders 56-1, issued by Headquarters, U.S. Disciplinary Barracks, on 20 September 1976 show the applicant was released from confinement and restored to duty pending completion of appellate review, as modified by General Court-Martial Order Number 818 on 27 September 1976.

m. Two DA Forms 4187 (Personnel Action) show the following changes in the applicant's duty status: present for duty (PDY) to absent without leave (AWOL) on 20 January 1977 and AWOL to PDY, he surrendered on 20 January 1977.

n. General Court-Martial Order Number 13, issued by Headquarters, U.S. Army Training Center, Fort Dix, NJ, on 11 April 1978, noted that the applicant's sentence had been affirmed and ordered the sentence duly executed.

4. On 3 May 1978, the applicant was discharged pursuant to his court-martial sentence under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 11. His DD Form 214 (Report of Separation from Active Duty) shows:

- his service was characterized as dishonorable
- he completed 3 years and 13 days of active service, with 1 year and 22 days of foreign service
- he had 326 days of lost time from 5 November 1975 to 26 September 1976
- he was awarded or authorized the Marksman Marksmanship Qualification Badge with Rifle Bar (M-16) and the National Defense Service Medal
- he received a separation code of "JJD" and a reentry code of "4"

5. The applicant's record is void of documentation showing service in Vietnam.

6. The applicant petitioned the ABCMR for an upgrade to his service characterization. The ABCMR considered his request on 26 April 2023, the evidence presented did not demonstrate the existence of a probable error or injustice, and the Board denied his request for relief.

7. 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.

8. 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 attempting to sell heroin and possessing heroin. The Board found no error or injustice in the separation proceedings. The Board concluded that the characterization of service the applicant received upon separation was appropriate.

2. The applicant was given a dishonorable 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. 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 amendment of the ABCMR decision rendered in Docket Number AR20220009506 on 26 April 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. 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.

2. 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.

3. 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.

5. Army Regulation 15-185 (ABCMR), paragraph 2-11, states applicant's do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//