

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 October 2024

DOCKET NUMBER: AR20240001593

APPLICANT REQUESTS:

- an upgrade of his characterization of service from under honorable conditions (General)
- a personal 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), 28 December 2023
- self-authored statement
- DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge), 8 October 1971
- Bachelor of Science Diploma, 1 February 1980
- certificate letter, 6 April 2009
- identification forms

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 during his service when hundreds of Vietnam Soldiers were returning home, he went out one evening and smoked a joint. The police arrested him, and he received 4 years suspended for the minor offense, he was released from probation after 16 months.

a. He since has had a clean record, in college, grad school, trade school, Veterans Affairs loan, and he has put his family through college. He has helped other Veterans at the homeless shelter transition into civilian life.

b. He believes the punishment outweighed the misconduct. He served as cadre, was too young to go to Vietnam, and completed his enlistment. He marched to the

motor pool daily, did his detail work as asked and served honorably. He is now 72 and does not receive Veterans status because of his marijuana offense.

3. On his DD Form 149, he annotates other mental health is related to his request.

4. The applicant enlisted in the Regular Army on 9 December 1968.

5. He accepted nonjudicial punishment on three occasions, under the provisions of Article 15, of the Uniform Code of Military Justice (UCMJ):

a. On 6 September 1969, for violating a lawful general regulation on or about 29 August 1969, by having beer and wine in the Company Commander's office. His punishment imposed was forfeiture of \$35.00, 14 days of restriction, and 14 days of extra duty.

b. On 21 August 1970, for not going to his appointed place of duty, the motor pool on or about 20 August 1970 and for disobeying a lawful order issued by his noncommissioned officer, to get a haircut on or about 20 August 1970. His punishment imposed was reduction to the grade of E-3.

c. On 2 October 1970, for going absent without leave (AWOL) on or about 20 September 1970 and remaining AWOL until on or about 28 September 1970, and for going AWOL on or about 29 September 1970 and remaining AWOL until on or about 1 October 1970. His punishment imposed was forfeiture of \$57.00 per month for one month and reduction to the grade of E-3.

6. The applicant received a felony probation on 16 April 1971, for the offense of "unlawful possession of a narcotic drug, to wit: marihuana".

7. The applicant was notified on 9 August 1971, of his immediate commander's intent to initiate separation action against him under the provisions of Army Regulation (AR) 635-206 (Personnel Separations – Discharge – Misconduct [Fraudulent Entry, Conviction by Civil Court, AWOL, Desertion]), by reason of misconduct.

8. On 9 August 1971, the applicant's immediate commander formally recommended his separation from service, under the provisions of AR 635-206, by reason of misconduct. Specifically, due to the applicant's conviction by civil court of a felony on 14 April 1971 for unlawful possession of a narcotic drug, to wit: marijuana.

9. The applicant acknowledged receipt of the proposed separation notification and consulted with counsel on 16 August 1971. He requested consideration and a personal appearance of his case by a board of officers and representation by counsel. He further acknowledged understanding that he may be deprived of many rights and benefits as a

Veteran under both Federal and State law, and he may encounter substantial prejudice in civilian life if he were issued a general discharge. Additionally, he elected not to submit a statement in his own behalf.

10. The applicant's intermediate commanders recommended his separation from service, under the provisions of AR 635-206, by reason of misconduct. Additionally, recommending the applicant be issued an Undesirable Discharge Certificate.

11. A Board of officers convened to consider the applicant's separation in accordance with AR 635-206. The Board recommended the applicant was unsuitable for retention in the U.S. Army due to civil conviction for possession of marijuana, additionally the Board recommended he be eliminated from the service and furnished a general discharge.

12. The separation authority approval memorandum is void in the applicant's official military personnel file. His DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows the applicant was discharged on 8 October 1971, under the provisions of AR 635-206, in the grade of E-3. He completed 2 years, 10 months, and 18 days of active service with time lost from 20 September 1970 to 1 October 1970. He received an under honorable conditions (General) characterization of service with Separation Program Number 284 [Misconduct/convicted or adjudged a juvenile offender by a civil court during current term of active military service] and reenlistment code RE-4.

13. The applicant provides his Bachelor of Science degree, multiple forms of identification, a letter congratulating him for successfully meeting the challenge of the LEED Professional Accreditation exam, and medical documentation stating he has shown symptoms of anxiety, depression, and post-traumatic stress disorder.

14. On 22 September 1977, the Army Discharge Review Board carefully considered his military records and all other available evidence and determined he was properly discharged. His request for a change in the type and nature of his discharge was denied.

15. Regulatory guidance, in effect at the time, provided for the elimination of enlisted personnel for misconduct by reason of conviction by civil court. An under other than honorable conditions discharge was normally considered appropriate.

16. The Board should consider the applicant's overall record in accordance with the published equity, injustice, or clemency determination guidance.

17. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to his characterization of service from under honorable conditions (general) to honorable. 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 on 9 December 1968.
- The applicant accepted NJP on three occasions for the following: violating a lawful general regulation by having beer and wine in the Company Commander's office; for not going to his appointed place of duty and for disobeying a lawful order to get a haircut; for going AWOL on 20 September 1970 until 28 September 1970, and for going AWOL on 29 September 1970 and remaining AWOL until 1 October 1970.
- The applicant received a felony probation on 16 April 1971, for the offense of "unlawful possession of a narcotic drug, to wit: marijuana."
- His immediate commander formally recommended his separation from service, under the provisions of AR 635-206, by reason of misconduct. Specifically, due to the applicant's conviction by civil court of a felony on 14 April 1971 for unlawful possession of a narcotic drug, to wit: marijuana.
- The applicant was discharged on 8 October 1971 and was credited with 2 years, 10 months, and 18 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 a mental health condition as a mitigating factor in his discharge. The application did not contain any medical or mental health records. There was insufficient evidence that the applicant was diagnosed with a psychiatric condition while on active service.

d. The Joint Legacy Viewer (JLV), which includes medical and mental health records from DoD and VA, 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.

(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. There is insufficient evidence, beyond self-report, that the applicant was experiencing a mental health condition while on active service. However, the applicant contends he had a 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 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 misconduct with the commander citing conviction by civil court of a felony for unlawful possession of a narcotic drug, to wit: marijuana. The Board found no error or injustice in the separation proceedings and designated characterization of service assigned during separation. The Board noted the applicant's contention of an undiagnosed mental health condition; however, reviewed and concurred with the medical advisor's review finding insufficient evidence to support he had a condition or experience that mitigates his misconduct. 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'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.

■ [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

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. Section 1556 of Title 10, U.S. 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.
3. 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 regulation provides that the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing. 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.
4. Army Regulation 635-200 (Personnel Separations-Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel. This regulation provides 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.

5. Army Regulation 635-206 (Personnel Separations – Discharge – Misconduct [Fraudulent Entry, Conviction by Civil Court, AWOL, Desertion]), in effect at the time, provided the authority for the administrative separation or retention of enlisted personnel who had committed an act and or acts of misconduct. Section VI of that regulation prescribed the standards and procedures for processing cases of individuals who, during their current term of active military service, had been convicted by a civil court. An undesirable (under other than honorable conditions) discharge was normally considered appropriate for members separating under this provision of the regulation; however, the separation authority could issue an honorable or a general discharge if warranted by the member's overall record of 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 Discharge Review Boards (DRB) and 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 Post-Traumatic Stress Disorder; Traumatic Brain Injury; sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences.

7. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and 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, 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//