

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 November 2024

DOCKET NUMBER: AR20240003602

APPLICANT REQUESTS: upgrade of his under other than honorable conditions discharge to honorable.

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

- DD Form 149 (Application for Correction of Military Record), 17 January 2024
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 19 May 1987
- Letter of support, CA____, 8 January 2024
- Letter of support, GEP____, 8 January 2024
- Letter of support, JB____, undated
- Letter of support, JB____, 10 January 2024 undated

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:

a. He was wrongfully charged for something he had nothing to do with, there was no evidence. Evidence was kicked out. He served 9 months but after 5 months he was released.

b. His conviction was overturned, he was given the opportunity to remain on active duty, and he chose to separate from the military. He was told that he would get an honorable discharge but he received an under other than honorable conditions discharge.

3. The applicant provided copies of:

- a. A letter of support from C.A. in which he states he has known the applicant for many years in his county where he lives. He is a dedicated and hard-working person and has a natural gift for working with others. His family attends the same house of worship with his family, and he would be a valuable asset to any organization.
- b. A letter of support from G.E.P., a State House Legislator, who supports his upgrade. He notes the applicant is a constituent and has been an upstanding citizen and a positive role model and family man.
- c. A letter of support from J.B. (several copies), in which notes he has known the applicant for 20 years and has been an upstanding citizen since he separated from the military. He has been a 25-year market manager and then started a business as a pallet consultant which lasted 15-years.

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

- a. On 2 May 1983, he enlisted in the Regular Army for 3 years.
- b. On 12 September 1983, he was assigned to Headquarters and Headquarters Company, 8th Cavalry, 1st Cavalry Division in the principle duty role of cook; and he was promoted to private first class (PFC) on 2 November 1983.
- c. A DA Form 1574 (Report of Proceedings by Investigating Officer/Board of Officers), showing the findings and recommendations of an investigating officer (IO); and a DD Form 458 (Charge Sheet) showing the charges and specifications leading to a General Court-Martial, and the associated Staff Judge Advocate review of an IO's findings and recommendations, are not contained in the available records.
- d. On 12 October 1984, the Staff Judge Advocate, Judge Advocate Corps, Headquarters (HQ), 1st Cavalry Division, Fort Hood, notified his commanding officer of the offenses, pleas, and findings of a General Court Martial convened on 12 October 1984; he entered pleas of not guilty but was found guilty of two specifications of violation of Article 112a, of the Uniform Code of Military Justice (UCMJ) for distribution of marijuana. He was sentenced to total forfeiture of pay for 9 months, confinement for 9 months, reduction to private/E-1, and a bad conduct discharge.
- e. On 12 October 1984, he was confined by military authorities.
- f. General Court-Martial Order Number 17, issued by HQ, 1st Cavalry Division, Fort Hood, dated 19 November 1984, shows he was arraigned, tried, and found guilty of two specifications of violation of Article 112a of the UCMJ: distribution of marijuana on 18 June 1984 and distribution of marijuana on 19 July 1984. Following pleas on both specifications of not guilty, the court found him guilty and sentenced him to total

forfeiture of pay for 9 months, confinement for 9 months, reduction to private/E-1, and a bad conduct discharge. The sentence was adjudged on 12 October 1984. On 19 November 1984, the sentence was approved and except for the part of the sentence extending to a bad conduct discharge, was ordered executed.

g. Orders 95-7, issued by U.S. Army Correctional Activity, dated 15 May 1985, assigned him to involuntary excess leave, awaiting completion of appellate review, effective 5 June 1985.

h. On 30 May 1985, he underwent a mental status evaluation. A DA Form 3822-R (Report of Mental Status Evaluation) shows the examining psychiatrist found his behavior normal, he was fully alert, and he was fully oriented. His mood or effect was unremarkable with clear thinking process, normal thought content, and good memory. He had the mental capacity to understand and participate in proceedings, he was mentally responsible, and he met the retention requirements of Chapter 3, Army Regulation 40-501 (Physical Standards).

i. On 8 November 1985, the U.S. Army Correctional Activity, Fort Riley, notified him of an appellate court decision authorizing a full rehearing in his General Court-Martial case and appointed a defense attorney to discuss the facts surrounding this rehearing. He was further directed to return to the U.S. Army Correctional Activity, Fort Riley within 5 days. He would receive pay and allowances commensurate with the rank he held at the time of his court-martial.

j. On 15 November 1985, he was recalled to duty from leave status and ordered to report to the Commander, 6th Company, 3rd Battalion, Fort Riley.

k. On 31 January 1986, he waived a medical examination in conjunction with his separation.

l. On 6 February 1986, he was granted voluntary excess leave.

m. On 6 February 1986, the U.S. Army Correctional Facility, Fort Riley, notified his commander of the result of the applicant's trial by hearing before a General Court-Martial convened on 29 January 1986 at Fort Riley. After entering pleas of guilty and a finding of guilty on two counts of violation of Article 134 of the UCMJ, he was sentenced to forfeiture of \$500.00 pay per month for 4 months, 4 months of confinement and a bad conduct discharge. The sentence was adjudged on 29 January 1986.

n. General Court-Martial Order Number 9, issued by HQ, 1st Infantry Division, Fort Riley, dated 26 March 1986, shows he was arraigned, tried, and found guilty after entering pleas of guilty for two specifications of violation of Article 134 of the UCMJ; specification 1: on or about 18 June 1984, distribute 114.61 grams of marijuana;

specification 2: on or about 19 July 1984, distribute 93.30 grams of marijuana. The military judge adjudged the sentence on 29 January 1986: to be discharged from the service with a bad conduct discharge, forfeiture of \$500.00 pay per month for 4 months, and to be confined for 4 months. The General Court Martial Convening Authority approved only so much of the sentence as provided for forfeiture of \$455.00 pay per month for 4 months, to be confined for 4 months and a bad conduct discharge; and except for the part of the sentence extending to a bad conduct discharge, would be executed. He was credited with any portion of the punishment served from 12 October 1984 to 13 September 1985.

o. On 28 January 1987, the U.S. Army Court of Military Review published an opinion of the Court on further review.

(1) The appellant was originally tried in October 1984 by a general court-martial. He was found guilty of two specifications of wrongful distribution of marijuana in violation of Article 112a of the UCMJ. The convening authority approved the sentence. Article 112a did not become effective until after the date of the offenses; the court therefore set aside the findings and sentence and authorized a rehearing.

(2) On 29 January 1986, a rehearing was held. He was found guilty by a military judge sitting as a general court-martial convening authority for the June and July 1984 marijuana distribution offenses. He was sentenced to a bad conduct discharge, confinement to 4 months, and forfeiture of \$500.00 pay per month for 4 months. The convening authority approved the sentence except that he reduced the forfeitures to \$455.00 pay per month for 4 months.

(3) The appellant alleged, and the U.S. Army Court of Military Review agreed that the second court-martial lacked jurisdiction because it was purportedly convened by a commander without authority to convene a general court-martial. At the time appellant's case was referred to trial by general court-martial, the 1st Infantry Division was absent from Fort Riley participating in Return of Force to Germany (REFORGER). The single commander of both units was with 1st Infantry Division and was therefore absent from HQ, Fort Riley, which remained at Fort Riley.

(4) As a requisite for court-martial jurisdiction, "[t]he court-martial must be convened by an official empowered to convene it."

(5) The U.S. Army Court of Military Review found that the command at Fort Riley did not devolve to the Deputy Post Commander. He therefore was not a commander in one of the positions designated to convene a general court-martial. Consequently, the court-martial was not convened by a person empowered to convene it and without jurisdiction to try appellant.

(6) Accordingly, the findings of guilty and the sentence are set aside. An "other trial" may be ordered.

p. On 26 February 1987, U.S. Army Judiciary, Falls Church, VA, notified the U.S. Army Correctional Activity the U.S. Army Court of Military Review had set aside the findings of guilty and the sentence in the applicant's case. If it was determined that another trial was impracticable, action must be taken to dismiss the charges.

q. After consulting with legal counsel on 25 March 1987, the applicant voluntarily requested discharge for the good of the service, under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10. In doing so, he acknowledged that the charges preferred against him under the UCMJ, authorized the imposition of a bad conduct discharge or dishonorable discharge. He further acknowledged:

- he had not been subjected to coercion with respect to his request for discharge
- he had been advised of the implications that were attached to it
- by submitting the request, he was acknowledging he was guilty of the charge(s) against him or of (a) lesser included offense(s) therein contained which also authorized imposition of a bad conduct or dishonorable discharge
- he could be discharged under other than honorable conditions and he could be ineligible for many or all benefits administered by the Department of Veterans Affairs (VA)
- he could be deprived of many or all Army benefits and he could be ineligible for many or all benefits as a veteran under both Federal and State laws
- he would forfeit all accrued leave and be reduced to the lowest grade of E-1
- he could expect to encounter substantial prejudice in civilian life by reason of an under other than honorable conditions discharge
- he was advised he could submit any statements he desired in his own behalf, and elected to do so
- he was advised of his right to request a separation physical but he elected not to do so

r. His company and battalion commanders recommended approval of his request with an under other than honorable conditions characterization of service on 27 April 1987 and 5 May 1987 respectively.

s. On 6 May 1987, the Staff Judge Advocate recommended approval of his discharge for the good of the service.

t. General Court-Martial Order Number 307, issued by U.S. Army Correctional Facility, Fort Riley, dated 7 May 1987, restored all rights and privileges and property of

which he was deprived in General Court-Martial Order Number 7, dated 26 March 1986. The accused's application for discharge from the Army under the provisions of Chapter 10, Army Regulation 635-200 was approved on 6 May 1987. A rehearing was not practicable.

s. On 19 May 1987, the applicant was discharged. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of Army Regulation 635-200, Chapter 10, for the good of the service, with a character of service of under other than honorable conditions, and a separation code of KFS. It further shows he had 111 days' time lost from 12 October 1984 to 31 January 1985 and 536 days of excess leave from 5 June 1985 to 30 December 1985 and from 7 February 1986 to 19 May 1987. His DD Form 214 further reflects:

- (1) Block 4a (Grade, Rate, or Rank) – PV1.
- (2) Block 12c (Record of Service), he completed 3 years, 8 months, and 26 days of net active service this period.
- (2) Block 13 (Decorations, Medal, Badges, Citations, and Campaign Ribbons Awarded or Authorized: Army Service Ribbon and Marksman Marksman Qualification Badge with Rifle (M-16)).
- (3) Block 27 (Reenlistment Code) – 3B.

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. 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 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 request and available military records, the Board determined there is sufficient evidence of in-service mitigating factors to upgrade the applicant's characterization of service.

2. The Board determined the court-martial was not convened by a person empowered to convene it and without jurisdiction to try appellant. Evidence shows U.S. Army Correctional Facility, Fort Riley, dated 7 May 1987, restored all rights and privileges and property of which the applicant was deprived in General Court-Martial Order Number 7, dated 26 March 1986. The Board noted the applicant's character letters of support attesting to his character, integrity, and his 25-year commitment as a manager and leader. The Board agreed, based on the applicant's dismissal and his conviction being overturned, due to improper authority to convene a general court-martial, the Board granted relief to correct his record with and upgrade to honorable, restoration of his rank to E-3/PFC, correction to his separation code and narrative reason to show Secretarial Authority.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

■	■	■	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of Army records of the individual concerned be corrected by amending the applicant's DD Form 214 for the period ending 19 May 1987 to show in:

- item 4a (Grade, Rate or Rank) PFC
- item 4b (Pay Grade) E-3
- item 24 (Character of Service) Honorable
- item 26(Separation Code): JFF
- item 28 (Narrative Reason): Secretarial Authority

[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. Army Regulation 15-185 (Army Board for Correction of Military Records) 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. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.
3. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, set policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons.

a. Chapter 3-7 provided:

(1) An honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier'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. Only the honorable characterization may be awarded a member upon completion of his/her period of enlistment or period for which called or ordered to active duty or active duty training or where required under specific reasons for separation unless an entry level status separation (uncharacterized) is warranted.

(2) 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. A characterization of under honorable conditions may be issued only when the reason for separation specifically allows such characterization. It will not be issued to Soldiers solely upon separation at expiration of their period of enlistment, military service obligation, or period for which called or ordered to active duty.

b. Chapter 10 stated a member who has committed an offense or offenses, the punishment of which under the UCMJ and the Manual for Court Martial, 1969 (Revised Edition) includes a bad conduct or dishonorable discharge, may submit a request for discharge for the good of the service. The discharge request may be submitted after court-martial charges are preferred against the member, or, where required, after referral, until final actions by the court-martial convening authority.

(1) A medical examination is not required but may be requested by the member under Army Regulation 40-501 (Medical Services – Standards of Medical Fitness), chapter 10. A member that requests a medical examination must also have a mental status evaluation before discharge.

(2) Commanders will insure that a member will not be coerced into submitting a request for discharge for the good of the service. The member will be given a reasonable time (not less than 72 hours) to consult with consulting counsel and to consider the wisdom of submitting such a request for discharge. Consulting counsel will advise the member concerning:

- the elements of the offense or offenses charged
- burden of proof
- possible defenses
- possible punishments
- provisions of Chapter 10

- requirements of voluntariness
- type of discharge normally given under provisions of Chapter 10
- rights regarding the withdrawal of the member's request
- loss of Veterans Administration benefits
- prejudice in civilian life because of the characterization of the discharge

(3) The separation authority will be a commander exercising general court-martial jurisdiction or higher authority. However, authority to approve discharges in cases in which a member has been AWOL for more than 30 days and has been dropped from the rolls of his or her unit as absent in desertion, and has been returned to military control, may be delegated to the commander exercising special court-martial convening authority over the member.

(4) An under other than honorable discharge certificate normally is appropriate for a member who is discharged for the good of the service. However, the separation authority may direct a General Discharge Certificate if such is merited by the member's overall record during the current enlistment.

4. Army Regulation 635-5-1 (Personnel Separations – Separation Program Designators), in effect at the time, listed the specific authorities, regulatory, statutory, or other directive, and reasons for separation from active duty, active duty for training, or full time training duty. The separation program designator "KFS" corresponded to "For the good of the service" and the authority, Army Regulation 635-200, chapter 10.

5. 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/NR) 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. 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. 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//