

IN THE CASE OF: [REDACTED]

BOARD DATE: 14 November 2024

DOCKET NUMBER: AR20240004401

APPLICANT REQUESTS:

- clemency and upgrade of his bad conduct discharge to general, under honorable conditions
- a video/telephonic hearing with the Board

APPLICANT'S SUPPORTING DOCUMENT CONSIDERED BY THE BOARD:

DD Form 149 (Application for Correction of Military Record), 4 January 2024.

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. His trial was a total injustice because it would have been dismissed in Federal Court. There was absolutely no physical evidence, they got someone to say he purchased marihuana by offering them immunity to testify against him.
 - b. He was sentenced to reduction to private/E-1, forfeiture of all pay, and hard labor for 3 months.
 - c. He was due to be discharged with only one infraction on his record and that was nonjudicial punishment for being off post in uniform. He had just returned from Korea after 13 month tour and had no idea that he was not supposed to wear a uniform off post because in Korea he could go off base in uniform.
 - d. He should have received a restriction to base for 30 days, not a loss of rank from specialist fourth class to private first class. He was not a perfect Soldier, but he was not a bad Soldier either.

e. He was given a bad conduct discharge close to the end of his active duty in Germany which was a bad place to serve because there was nothing to do.

f. He was charged with a crime that did not exist. He was never addicted to any drug and has never been charged in civilian life with anything to do with drugs.

g. He does not want to pass away with this on his record.

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

a. On 31 May 1968, he enlisted in the Regular Army for a period of 3 years.

b. He served in Korea from 2 December 1968 to 20 December 1969, and he attained the rank/grade of specialist fourth class/E-4.

c. On 20 February 1970, he accepted nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for failing to obey a lawful order by appearing in the city of [REDACTED] in fatigue uniform. His punishment consisted of reduction to private first class/E-3. He did not appeal this punishment.

d. On 3 April 1970 he permanently changed station to U.S. Army Europe, and he was assigned to Headquarters and Headquarters Company (HHC), 18th Aviation Battalion, Hanau, Germany.

e. On 6 July 1970, he accepted NJP under the provisions of Article 15, UCMJ for three instances of failing to go to his appointed place of duty, to wit: formation at HHC, 18th Aviation Battalion on 11 June 1970, 16 June 1970, and 17 June 1970. His punishment consisted of reduction to private/E-2, 14 days of restriction, and 14 days of extra duty. He did not appeal this punishment.

f. A DA Form 458 (Charge Sheet), listing the charges and dates of alleged offenses pursuant to arraignment and trial before the Special Court Martial Coinventing Authority, Headquarters (HQ) V Corps, Frankfurt, Germany, is not contained in the available records.

g. Special Court Martial Order (SCMO) Number 28, issued by HQ, V Corps, Frankfurt, Germany, dated 8 June 1971, reflecting the charges, pleas, a conviction, and the date adjudged by the Trial Judge is not contained in the available records.

h. His records do contain an Army Europe Form 3358 (Review of the Staff Judge Advocate) promulgated to the Commanding General, V Corps, dated 8 June 1971. It reflects:

(1) The applicant was arraigned and tried at Frankfurt Germany, for violation of Article 81 of the UCMJ: Charge I, specification: conspire with Specialist Fifth Class 5 [REDACTED] and Specialist Fourth Class 4 [REDACTED] to purchase marihuana on 22 October 1970; and violation of Article 86 of the UCMJ: Charge II, specification: being absent without leave (AWOL) from 27 November 1970 to 29 January 1971.

(2) He entered guilty pleas on both charges, and he was found guilty on both charges.

(3) He was sentenced to a reduction to private/E-1, hard labor for 2 months, and a bad conduct discharge.

(4) The sentence was adjudged on 29 April 1971.

(5) The summary of the evidence reflects on 21 October 1970, the applicant received \$4,000.00 lump sum and added \$930.00 of his and SPC [REDACTED] and traveled with him by train to Frankfurt to purchase as much Hashish as their money would allow. They met two German nationals at Club 65 they thought to be sellers of Hashish and proceeded with them in their Mercedes. Prior to completion of any transaction, German Police stopped their vehicle and detained the occupants.

(6) The accused pleas of guilty admitted each act alleged and every element of the offenses to which the plea related without further proof.

(7) The accused, originally charged with conspiracy, 1 day of AWOL, and desertion, offered to plead guilty providing the charge of AWOL was dismissed and the charge of desertion reduced to AWOL and providing further that no sentence in excess of a bad conduct discharge, confinement at hard labor for 2 months, and reduction to private/E-1 would be approved. The Military Judge determined the accused was aware of his legal and moral right to plead not guilty, and that he had ample time to consult with his counsel and was satisfied with his counsel's advice.

i. On 7 July 1971, he underwent a mental status evaluation. The examining psychiatrist noted he had normal behavior, was fully alert and fully oriented; he had normal mood and clear thinking process with normal thought content and good memory. In the opinion of the examining physician, he was mentally responsible, able to distinguish between right and wrong and able to adhere to the right. He had the mental capacity to understand and participate in board proceedings and met the retention

standards prescribed in chapter 3, Army Regulation 40-501 (Standards of Medical Fitness).

j. On 19 July 1971, he was granted excess leave.

k. On 3 February 1972, the U.S. Army Court of Military Review having found the findings of guilty, and sentence as approved by proper authority correct in law and fact and having determined, on the basis of the entire record, that they should be approved, affirmed the findings of guilty and the sentence.

l. Special Court Martial Order (SPCM) Number 1, issued by HQ, U.S. Army Air Defense Center and Fort Bliss, Fort Bliss, TX, dated 24 May 1972, reflects that in the applicant's special court-martial case, the sentence to Bad Conduct Discharge, confinement at hard labor for 2 months, and reduction to private/E-1, adjudged on 29 April 1971, as promulgated in SPCMO Number 28, HQ, V Corps, dated 8 June 1971, was finally affirmed. That portion of the sentence extending to confinement was served. Article 71C having been complied with, the bad conduct discharge would be executed.

m. On 14 June 1972, he was discharged. His DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows he was discharged under the provisions of Army Regulation 635-200, chapter 11 with a separation program number of 292 and character of service of under other than honorable conditions. He completed 3 years, 5 months, and 21 days of net service this period and was discharged at grade/pay grade private/E-1. He had 203 days of time lost from 27 November 1970 to 17 June 1971. He had 2 days of excess leave from 30 March 1970 to 31 March 1971. He was awarded the Armed Forces Expeditionary Medal.

4. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition. By regulation, an applicant is not entitled to a hearing before the Board.

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. The Board found no error or injustice in the separation proceedings. 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 was given a bad conduct discharge pursuant to an approved sentence of a 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

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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.

6/10/2025

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 (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 may, in its discretion, hold a hearing (sometimes referred to as an evidentiary hearing or an administrative hearing) or request additional evidence or opinions. 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. By law (Title 10 U.S. Code, Section 1552), court-martial convictions stand as adjudged or modified by appeal through the judicial process. This Board 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. The ABCMR does not have authority to set aside a conviction by a court-martial.
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 1-9 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.

(3) An Undesirable discharge is an administrative separation from the Service under conditions other than honorable. It may be issued for unfitness, misconduct, or for security reasons.

b. Chapter 11 provided that an enlisted person 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 ordered duly executed.

4. Army Regulation 635-5 (Separation Documents), then in effect, prescribed the separation documents that would be furnished each individual who was separated from the Army, including Active Duty Training (ACDUTRA) personnel, and established standardized procedures for the preparation and distribution of these documents.

a. A DD Form 214 will be issued at the time of separation to each member of the Regular Army and to each member of the Reserve Components, and the Army of the United States without component, called or ordered to active duty for ACDUTRA for a period of 90 days or more.

b. Appendix A. Separation Program Number and Authority Governing Separation. The separation program number "292" corresponded to the authority, Army Regulation 635-200, chapter 11, and the narrative reason "Other than desertion (Court-Martial)."

//NOTHING FOLLOWS//