

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 10 December 2024

DOCKET NUMBER: AR20240004435

APPLICANT REQUESTS: reconsideration of his earlier request for upgrade of his under other than honorable conditions discharge, and a telephonic hearing with the Board.

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

- DD Form 149 (Application for Correction of Military Record), 28 Feb 2024
- Veterans Administration (VA) Form Post-Traumatic Stress Disorder (PTSD) Questionnaire, 21 December 2022 (2 copies)
- Clinical Evaluation Assessment, SD\_\_\_\_, Licensed Clinical Social Worker (LSCW), 20 September 2023 (2 copies)
- Congressional Research Paper, Appendix B Descriptions of Statutory and Regulatory Bars to VA Benefits, undated
- Army Board for Correction of Military Records (ABCMR) letter, 12 December 2023
- extract of ABCMR Docket Number AR20230004066, pp 7-12, 12 December 2023
- extract, Abuse of Illegal Drugs, undated
- Special Court Martial Order Number 5, Headquarters (HQ), 15th Supply and Transport Battalion, 1st Cavalry Division, 7 February 1980

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 Dockets Number AR20220001674 and AR20230004066 on 18 August 2022 and 30 November 2023, respectively.

2. The applicant provides new and material evidence consisting, in part, of a VA PTSD Questionnaire, dated 21 December 2022; and a 9-page assessment from SD\_\_\_\_, LSCW, dated 20 September 2023, which warrant Board review at this time.

3. The applicant indicates on his application that PTSD is an issue or condition related to his request. He states, in effect, his PTSD was recognized by a written report of his

behavioral health condition. He suffered inequities as a result of harsh punishment for a first offense. He received a special court-martial for not performing when he was given a doctor's note for disabled feet and was sent to Fort Leavenworth.

4. The applicant provides copies of:

a. A VA PTSD Questionnaire, dated 21 December 2022, in which his was diagnosed with PTSD, and notes he has total occupational and social impairment.

b. A 9-page assessment from SD\_\_\_\_, LSCW, noting he was diagnosed with PTSD and opining it was related to his active duty service. This assessment includes a description of symptoms, a background summary, a description of functional impairment, and a psychological history.

c. A Congressional Research Paper, titled "Appendix B, Descriptions of Statutory and Regulatory Bars to VA Benefits," undated.

d. An extract of a decision from ABCMR Docket Number AR20230004066, dated 12 December 2023.

e. An undated description of a chapter 14 discharge and its subparagraph for abuse of illegal drugs.

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

a. On 23 June 1978, he enlisted in the Regular Army for 3 years beginning at pay grade E-2. He subsequently attained the rank/pay grade of private first class (PFC)/E-3.

b. On 13 August 1979, he accepted company grade nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for disobedience of a lawful order from his first sergeant to get a haircut by 1 August 1979. His punishment consisted of reduction to private 2/E-2, forfeiture of \$100.00 for 1 month, and 7 days of confinement. On the same date he appealed this punishment. On the same date his company commander suspended for 90 days the portion of his punishment consisting of forfeiture of \$50.00 pay for 1 month.

c. On 13 December 1979, he accepted field grade NJP under the provisions of Article 15 of the UCMJ for disobedience of a lawful order from Sergeant (SGT) JM\_\_\_\_, to not wear his hat incorrectly on 6 December 1979; and for disrespectful language towards SGT JM\_\_\_\_ at Fort Hood. His punishment consisted of reduction to private (PV1)/E-1, forfeiture of \$200.00 pay for 2 months, and confinement for 30 days. On 13 December 1979, he appealed this punishment. On 2 January 1980, the staff judge

advocate denied his appeal. On 17 January 1980, his Division Support Commander approved this punishment.

d. On 19 December 1979, a bar to reenlistment was imposed against him and on 20 December 1979, the Commanding Officer, Division Support Command, 1st Cavalry Division, Fort Hood, approved his bar to reenlistment.

e. On 21 December 1979, he accepted field grade NJP under the provisions of Article 15 of the UCMJ for communicating a threat to a sergeant. His punishment consisted of forfeiture of \$200.00 per month for 2 months. On 28 December he appealed this punishment. On 7 January 1980, the staff judge advocate granted his appeal by suspending the forfeiture for 90 days. On 17 January 1980, the Division Support Commander approved this punishment.

f. Summary Court-Martial Order Number 5, issued by HQ, 15th Supply and Transport Battalion, dated 7 February 1980, shows he was arraigned and tried on three specifications of violation of Article 91 of the UCMJ for disobedience of lawful orders given by noncommissioned officers; once on 18 January 1980 and twice on 19 January 1980. He was found guilty and sentenced to forfeiture of \$299.00 pay per month for 1 month, and confinement at hard labor for 30 days. The sentence was approved and ordered executed.

g. A Military Police Report, Number xxxxx-80, dated 22 September 1980, containing witness statements, field evidence, and the findings and report of an investigating officer following a complaint of wrongful possession of marijuana, shows there was probable cause to detain him along with two other Soldiers during a vehicle stop in which his vehicle was impounded. One clear plastic bag containing suspected marijuana was found in a portable console of the car and five plastic bags were found under the driver's seat. A partially burned and rolled cigarette containing suspected marijuana was found in the passenger side door ashtray.

h. On 7 November 1980, the Commanding Officer, HQ Command, Fort Sam Houston, recommended he face trial by special court-martial.

i. A DD Form 458 (Charge Sheet) shows he was charged with three specifications of violation of Article 134 of the UCMJ for wrongful possession of 6 1/2 ounces, more or less, of marijuana on 22 September 1980; wrongful possession of one hand-rolled cigarette containing 1/2 gram, more or less, of marijuana on 22 September 1980; and wrongful use of marijuana on 22 September 1980.

j. After consulting with counsel on 17 November 1980, he voluntarily requested discharge in lieu of trial by court-martial, under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10. In doing so, he

acknowledged that the charge preferred against him under the UCMJ, for violation of Article 134 – wrongful possession of marijuana, wrongful possession of a hand rolled cigarette of marijuana, and wrongful use of marijuana – 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 not to do so

k. On 19 November 1980 and on an unspecified date, his intermediate commanders recommended approval of his request with an under other than honorable conditions characterization of service.

l. On 20 November 1980, he underwent a medical examination and gave a report of medical history. He noted he was in good health and the examining physician found he was medically qualified for separation.

m. On 25 November 1980, the separation approval authority approved his request with an under other than honorable characterization of service.

n. On 12 December 1980, 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, by reason of Conduct Triable by Court-Martial, with a character of service of under other than honorable conditions, a separation code of JFS, and reenlistment code 3. His DD Form 214 further indicates:

(1) Block 4a (Grade, Rate, or Rank) – private (PV1)/E-1.

(2) Block 12c (Record of Service-Net Active Service this Period), he completed 2 years, 4 months, and 28 days net active service this period.

(3) Block 13 (Decorations, Medal, Badges, Citations, and Campaign Ribbons Awarded or Authorized): Marksman Marksmanship Qualification Badge with Rifle Bar (M-16).

6. On 11 March 1982, the Army Discharge Review Board found his discharge was both proper and equitable and voted not to grant his request for an upgrade.

7. On 18 August 2022, in ABCMR Docket Number AR20220001674, the Board found the overall merits of his case were insufficient as a basis to correct his records.

8. On 30 November 2023, in ABCMR Docket Number AR20230004066, the Board reconsidered his application and found insufficient basis upon which to correct his records.

9. 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.

10. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting a reconsideration of his previous request(s) to upgrade his under other than honorable conditions discharge. The applicant's previous consideration(s) by the ABCMR are summarized in Docket Numbers AR20220001674 and AR20230004066 dated 18 August 2022 and 30 November 2023, respectively. On his application, he indicated that Posttraumatic Stress Disorder (PTSD) is related to his request. 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: 1) the applicant enlisted in the Regular Army (RA) on 23 June 1978, 2) on 13 August 1979 he accepted nonjudicial punishment (NJP) for disobedience of a lawful order from his first sergeant to get a haircut by 01 August 1979, 3) 13 December 1979 he accepted NJP for disobeying a lawful order to not wear his hat incorrectly and for disrespectful language towards an NCO. His punishment included confinement for 30 days. 4) a bar to reenlistment was imposed on 19 December 1979, 5) he received NJP on 21 December 1979 for communicating a threat to a sergeant, 6) a Summary Court-Martial Order dated 07 February 1980 shows he was found guilty of three specifications of disobedience of lawful orders given by NCOs. As part of his punishment, he was sentenced to confinement at hard labor for 30 days. 7) a DA Form 458 shows he was charged with wrongful possession of marijuana (22 September 1980), wrongful possession of one hand-rolled cigarette containing marijuana (22 September 1980), and wrongful use of marijuana (22 September 1980), 8) on 17 November 1980, he voluntarily requested discharge in lieu of trial by court-martial, under the provisions of Army Regulation (AR) 635-200, Chapter 10. The applicant was

discharged accordingly on 12 December 1980 under the provisions of AR 635-200, Chapter 10, by reason of Conduct Triable by Court-Martial, with a separation code of JFS.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. The electronic military medical record (AHLTA) was not reviewed as it was not in use during the applicant's time in service. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. An in-service Report of Medical Examination dated 20 November 1980 for the purposes of Chapter 10 shows item number 42, psychiatric, as 'normal' on clinical evaluation and he was medically cleared for separation. The associated Report of Medical History shows that the applicant indicated his statement of present health as "Nothing critical about health (know of). Good." He did not endorse any BH-related items on the form.

d. A VA Rating Decision Letter dated 22 July 2024 shows that service connection for treatment purposes only was granted for PTSD. The stressors associated with his diagnosis were documented as related to military prison confinement, to include circumstances of his transport and confinement, and situations that occurred during that timeframe (February 1980). Review of JLV shows he is also 0% service-connected for Anxiety Disorder, as well as several other health conditions. A VA Compensation and Pension (C&P) examination dated 21 December 2022 shows the applicant was diagnosed with PTSD and noted ongoing medical problems that were ignored by military health professionals as well as his experiences during military confinement as related to his diagnosis.

e. A letter from a Licensed Clinical Social Worker (LCSW) from Changing Perspectives Counseling Services dated 20 September 2023 was reviewed. The LCSW noted her evaluation was based on her review of the applicant's medical history and had been under her care since 20 September 2023. The provider opined that the applicant's mental health symptoms are directly attributed to the traumas he experienced during his military service. She noted his diagnoses as PTSD, Unspecified, Generalized Anxiety (GAD), and Major Depressive Disorder, Recurrent (MDD).

f. The applicant's previous request(s) to the ABCMR for an upgrade of his characterization of service were reviewed. The Medical Advisor's noted, in effect, that there was insufficient evidence to support that the applicant had a condition or experience that mitigated his misconduct and as such BH mitigation was not supported.

[*Advisor's Note:* the applicant's service connection through the VA for PTSD was not granted at the time of his previous requests for upgrade].

g. Based on the available information, it is the opinion of the Agency Medical Advisor that there is sufficient evidence that the applicant had a potentially mitigating condition or experience in service, PTSD. This Advisor contends that the applicant's diagnosis of PTSD mitigates his misconduct of wrongful possession and use of marijuana.

h. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant has been diagnosed and service connected (for treatment purposes only) for PTSD through the VA.

(2) Did the condition exist or experience occur during military service? Yes, the applicant has been diagnosed and service connected (for treatment purposes only) for PTSD through the VA. Service connection establishes that the condition existed during service.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. There were no in-service medical records documenting a BH diagnosis or treatment history. Post-discharge, the applicant has been diagnosed and 0% service-connected through the VA for PTSD. Substance possession and use are often self-medicating behaviors, used to avoid and mask symptoms, which is associated with the natural history and sequelae of numerous disorders, to include trauma/PTSD. As there is a nexus between the applicant's misconduct of possession and use of marijuana and his diagnosis of PTSD, BH mitigation is supported.

#### BOARD DISCUSSION:

1. The Board determined 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.

2. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The applicant was charged with commission of offenses (possession of marijuana; possession of one hand-rolled cigarette containing marijuana and use of marijuana) punishable under the UCMJ with a punitive discharge. After being charged, he consulted with counsel and requested discharge under AR 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial and carry an under other than honorable conditions discharge.

a. A Board majority considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewing official. The Board majority concurred with the medical official's finding sufficient evidence that the applicant had a potentially mitigating condition or experience in service, PTSD. The applicant's diagnosis of PTSD mitigates his misconduct of wrongful possession and use of marijuana. Based on this mitigation, the Board majority determined that given his misconduct, his service did not rise to the level required for an honorable discharge; however, a general, under honorable conditions characterization of service is appropriate under published DoD guidance for liberal consideration of discharge upgrade requests. The Board majority further determined that such upgrade did not change the underlying reason for separation and thus the narrative reason for separation and corresponding codes should not change.

b. A member in the minority noted that this is the applicant's 4th or 5th attempt for upgrade. On one occasion he even claimed MST. The ARBA medical on all of those said no evidence of PTSD or MST. During his 3rd and 4th application he visited the VA to claim PTSD and later a LCSW. The current ARBA medical doctor says mitigating. The member in the minority disagrees and thinks, based on his written statement at the time of arrest, the off post "partner" he was holding 5-6 bags (6 oz) marijuana for was just that, a partner in distribution and sales. The member in the minority sees no medical evidence of the foot problem and all indications are this is all for benefits. The member in the minority sees no error or injustice and no evidence provided for clemency consideration.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

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|---|---|---|----------------------|
| █ | █ | : | GRANT FULL RELIEF    |
| : | : | : | GRANT PARTIAL RELIEF |
| : | : | : | GRANT FORMAL HEARING |
| : | : | █ | DENY APPLICATION     |

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant amendment of the ABCMR's decision in Dockets Number AR20220001674 and AR20230004066 on 18 August 2022 and 30 November 2023, respectively. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant a DD Form 214 for the period ending 12 December 1980 as follows:

- Character of Service: Under Honorable Conditions (General)
- Separation Authority: No Change
- Separation Code: No Change
- Reentry Code: No Change
- Narrative Reason for Separation: No Change

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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 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.

a. 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 (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.

2. 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.

3. 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 "JFS" corresponded to "Administrative Discharge-Conduct Triable by Court-Martial," and the authority, Army Regulation 635-200, chapter 10.

4. On 3 September 2014 the Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) to carefully consider the revised 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.

5. The acting Under Secretary of Defense for Personnel and Readiness provided clarifying guidance on 25 August 2017, which expanded the 2014 Secretary of Defense memorandum, that directed the BCM/NRs and DRBs to give liberal consideration to veterans looking to upgrade their less-than-honorable discharges by expanding review of discharges involving diagnosed, undiagnosed, or misdiagnosed mental health conditions, including PTSD; traumatic brain injury; or who reported sexual assault or sexual harassment.

6. 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. 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.

7. 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.

//NOTHING FOLLOWS//