

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 11 February 2025

DOCKET NUMBER: AR20240007914

APPLICANT REQUESTS:

- an upgrade of his under other than honorable conditions discharge to under honorable conditions (General)
- a video/telephonic appearance before the Board

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

DD Form 149 (Application for Correction of Military Record)

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 he was 17 years old when he enlisted in the Army and never consumed alcohol prior to enlisting. Since enlisting, he has had a lifetime of alcohol and drug addiction, resulting in multiple felonies post discharge and multiple records of nonjudicial punishment while in the Army. He was arrested for .45 grams of marijuana 3 weeks before his expiration of term of service in November 1981. His commander ordered a court-martial and he was advised to accept a Chapter 10 discharge for the good of the Army or he was going to a military prison at Fort Leavenworth for at least 2 years, so that is what he did, following the recommendation of the attorney. The applicant annotates "other mental health" and "sexual assault/harassment" as issues/conditions related to his request.
3. A review of the applicant's service record shows:
 - a. He enlisted in the Regular Army on 10 January 1978.
 - b. He accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) on the following dates and for the following offenses:

(1) On 7 February 1979 for violating a lawful general regulation by driving an Army vehicle without an Army operator's license. His punishment consisted of forfeiture of \$100 for the period of one month (\$50 suspended for 30 days) and to perform 7 days of extra duty.

(2) On 9 November 1979 for unlawfully concealing a Winter Hood OG 107, of a value of about \$5.20, the property of another Soldier, he said to have been stolen. His punishment consisted of reduction to the grade of private/E-2, forfeiture of \$100 for one month, and to perform extra duty for 7 days.

(3) On 23 November 1979 for failing to go at the time prescribed to his appointed place of duty, to wit: company quarters for extra duty. His punishment consisted of reduction to the grade of private/E-1 (suspended for 30 days), forfeiture of \$100 for one month, and to perform extra duty for 14 days.

(4) On 2 July 1980 for stealing \$8.00 in change, the property of another Soldier. His punishment consisted of reduction to the grade of private/E-1, restriction for 14 days, and extra duty for 14 days.

(5) On 29 August 1980 for willfully disobeying a lawful order to help empty the trash. His punishment consisted of forfeiture of \$100 for one month, extra duty for 14 days, and restriction for 14 days.

c. On 13 October 1981, he received a letter of reprimand from his commanding officer.

(1) It has been reported that on or about 6 September 1981, you were involved in a marijuana possession and use incident.

(2) Your involvement with marijuana indicates a disregard for the UCMJ. Use or possession of marijuana is in violation of Article 134 and carries a maximum punishment of 5 years confinement at hard labor and a dishonorable discharge. This punishment should indicate to him that the offense is a serious one. He was reprimanded for his misconduct.

d. On 13 October 1981, he accepted nonjudicial punishment under the provisions of Article 15 of the UCMJ for on or about 4 September 1981, wrongfully have in his possession .53 grams, more or less, of marijuana and on or about 4 September 1981, wrongfully use marijuana. His punishment consisted of reduction to the grade of private/E-1 (suspended for 120 days), forfeiture of \$100, 14 days extra duty, and 14 days restriction.

e. On 25 November 1981, court-martial charges were preferred against the applicant. The relevant DD Form 458 (Charge Sheet) shows he was charged with two specifications of violating the UCMJ:

(1) In that [Applicant] did, on or about 6 November 1981, wrongfully have in his possession .45 grams, more or less, of marijuana;

(2) In that [Applicant] did, on or about 6 November 1981, wrongfully use marijuana.

f. On 3 December 1981, after consultation with counsel, the applicant voluntarily requested discharge for the good of the service under the provisions of Chapter 10, Army Regulation 635-200 (Personnel Separations – Enlisted Personnel). He understood he may request discharge before of the following charge which has been preferred against him under the UCMJ, which authorizes the imposition of a bad conduct or dishonorable discharge: possession of marijuana.

(1) He acknowledged he was guilty of the charge against him or of a lesser included offense therein contained which also authorizes the imposition of a bad conduct or dishonorable discharge.

(2) He understood if his request for discharge was accepted, he may be discharged under conditions other than honorable and furnished an Under Other Than Honorable Discharge Certificate.

(3) He understood as a result of the issuance of such a discharge, he would be deprived of many or all Army benefits, he may be ineligible for many or all benefits administered by the Veterans Administration and that he may be deprived of his rights and benefits as a veteran under both Federal and State law.

(4) He understood he may expect to encounter substantial prejudice in civilian life because of an under other than honorable discharge.

g. On 10 December 1981, the separation authority approved the applicant's request for discharge for the good of the service. A DD Form 794A (Under Other Than Honorable Conditions Discharge Certificate) would be furnished.

h. On 16 December 1981, he was discharged under the provisions of Chapter 10, Army Regulation 635-200 with an other than honorable conditions characterization of service. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 3 years, 11 months, and 7 days of active service. It also shows he was awarded or authorized the Army Service Ribbon, Overseas Service Ribbon, and Marksman Marksmanship Qualification Badge with Rifle Bar (M-16).

4. 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.

5. A Soldier who has committed an offense or offenses, the punishment for which under the Uniform Code of Military Justice, includes a bad conduct or dishonorable discharge, may submit a request for discharge in lieu of trial by court-martial. A discharge under other than honorable conditions normally is appropriate for a Soldier who is discharged in lieu of trial by court-martial.

6. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions discharge. He contends he experienced mental health conditions that mitigate his misconduct. 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 on 10 January 1978; 2) The applicant accepted nonjudicial punishments (NJPs) on: A) 7 February 1979 for driving an Army vehicle without an Army license; B) 09 November 1979 for concealing property of another Soldier; C) on 23 November 1979 for failing to be on time at his place of duty; D) on 2 July 1980 stealing money from another Soldier; and E) on 29 August 1980 not following an order to empty the trash; 3) On 13 October 1981, the applicant accepted NJP for possession and use of marijuana; 4) On 16 December 1981, the was discharged, Chapter 10, with an other than honorable conditions characterization of service.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the available supporting documents and the applicant's available military service records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical records were provided for review.

c. The applicant asserts he was experiencing mental health conditions while on active service, which mitigates his misconduct. There is insufficient evidence the applicant reported or was diagnosed with a mental health disorder, while on active service.

d. A review of JLV provided insufficient evidence the applicant has ever been diagnosed with a mental health condition, and he does not receive any service-connected disability. No additional medical documentation was provided for review.

e. Based on the available information, it is the opinion of the Agency Medical Advisor that there is insufficient evidence to support 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 misconduct? Yes, the applicant asserts he experienced mental health conditions which mitigates his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced mental health conditions that mitigates his misconduct while on active service.

(3) Does the condition or experience actually excuse or mitigate the misconduct? No, there is insufficient evidence beyond self-report the applicant was experiencing a mental health condition, while he was on active service. The applicant did repeatedly engage in misconduct to include theft of other Soldiers' property. The applicant did also engage in substance use, which can be a natural sequelae to some mental health conditions. However, the presence of misconduct is not sufficient evidence of the presence of a mental health condition. Yet, the applicant contends he was experiencing a mental health condition or an experience that mitigates his misconduct, and per Liberal Consideration his contention alone is sufficient for the board's consideration.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the lengthy pattern of misconduct leading to the applicant's separation and the following findings outlined in the medical review:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes

(2) Did the condition exist or experience occur during military service? Yes

(3) Does the condition or experience actually excuse or mitigate the misconduct? No

the Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant's characterization of service.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:XXX	:XXX	:XXX	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.

X //SIGNED//

 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 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.
 - a. Paragraph 1-13a (Honorable Discharge) states an honorable discharge is a separation with honor. Issuance of an honorable discharge certificate is predicated upon proper military behavior and proficient performance of duty during the member's current

enlistment or period of obligated service with due consideration for the member's age, length of service, grade, and general aptitude.

b. Paragraph 1-13b (General Discharge) states a general discharge is a separation from the Army under honorable conditions. It is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 10 (Discharge for the Good of the Service) states a member who has committed an offense or offenses, the punishment for any of which includes a bad conduct or dishonorable discharge, may submit a request for discharge for the good of the service.

3. 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 DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD, traumatic brain injury, sexual assault, or sexual harassment. 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. The guidance further describes evidence sources and criteria and requires boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

4. 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 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.

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//