

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 January 2024

DOCKET NUMBER: AR20230003358

APPLICANT REQUESTS: upgrade his bad conduct discharge to honorable.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Special Court-Martial Order Number 1, 29 March 2003
- U.S. Army Court of Criminal Appeals Decision, 4 April 2003
- Special Court-Martial Order Number 20, 5 February 2004

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 (1) he was sentenced for the same thing; (2) he was not given leave despite being stationed in South Korea and was given two jail sentences; and (3) he was not given the opportunity to correct or rectify the situation. He did not know he had rights. He just signed and pled guilty. The bad conduct discharge has limited his job opportunities and has caused him a hardship.

3. Review of the applicant's service records shows:

a. He enlisted in the Regular Army on 5 April 2000. He completed training for award of military occupational specialty 31C, Single Channel Radio Operator. He was assigned to 362nd Signal Company, Korea.

b. On 23 March 2002, the applicant was convicted by a special court-martial of Charge I, Article 96; Plea: Guilty, Finding: Guilty(Special Court-Martial Order 7):

- Specification 1: Absent from unit without authority from on or about 18 October 2001 until on or about 19 October 2001. Plea: Guilty. Finding: Guilty.

- Specification 2: Absent from unit without authority from on or about 21 October 2001 until on or about 23 October 2001. Plea: Guilty. Finding: Guilty.
- Specification 3: Absent from unit without authority from on or about 31 October 2001 until on or about 1 November 2001. Plea: Guilty. Finding: Guilty.
- Specification 4: Absent from unit without authority from on or about 3 November 2001 to until or about 10 December 2001. Plea: Not Guilty. Finding: Not Guilty.
- Specification 5: Absent from unit without authority from on or about 11 December 2001 until apprehended on or about 10 February 2002. Plea: Guilty. Finding: Guilty

c. The court sentenced him to forfeit \$737.00 pay per month for 3 months, to be confined for 3 months, and to be discharged from the service with a bad-conduct discharge.

d. On 30 May 2002, the convening authority approved the sentence extending, credited the applicant with 50 days of confinement against the sentence, and except for the portion of the sentence extending to a bad conduct discharge, ordered the sentence executed. The record of trial was forwarded to the appellate authority.

e. On 23 December 2002, he was again convicted by special court-martial of the following charges and their specifications (Special Court-Martial Order 1):

(1) Charge I. Article 85. Plea: Guilty. Finding: Guilty. Specification: On or about 22 April 2002, without authority and with intent to remain away therefrom permanently, absent himself from his unit, to: 362d Signal Company, 41st Signal Battalion, located at Yongsan Garrison, Republic of Korea, and did remain absent in desertion until apprehended on or about 8 November 2002. Plea: Not Guilty. Finding: Guilty. [The accused pled guilty to the lesser-included offense of AWOL terminated by apprehension in violation of Article 86, UCMJ. The military judge found the accused guilty of desertion]

(2) Charge II. Article 89. Plea: Not Guilty. Finding: (Dismissed by the Judge). Specification: On or about 8 November 2002, behave himself with disrespect toward Captain J.S., his superior commissioned officer, then known by the accused to be his superior commissioned officer, by saying to him "don't fu***ng close the door on me" or words to that effect. Plea: Not Guilty. Finding: Dismissed

(3) Charge III. Article 91. Plea: Guilty. Finding: Guilty.

(a) Specification 1: On or about 8 November 2002, was disrespectful in language toward Sergeant C.S., a superior non-commissioned officer, then known to the accused to be a superior non-commissioned officer, who was then in the execution

of his office, by saying to him, "take these cuffs off mother***er;" "shut up white guy;" "hit me, hit me, motherf***er;" "fu**ng racist white guy, you are nothing to me;" "f**k the police;" "I don't give a f**k if you are a Sergeant, I am not scared of white people;" "f**k you;" "don't look at me like I aint shit motherf***er;" "bull shit mother***er, I aint going with nobody, I'm done with this shit, f**k you;" or words to that effect. Plea: Guilty. Finding: Guilty.

(b) Specification 2: On or about 8 November 2002, was disrespectful in language toward First Sergeant S.P., a superior non-commissioned officer, who was then known to the accused to be a superior non-commissioned officer, who was then in the execution of his office by saying to him, "f**ck you, I don't know you and don't disrespect me;" "shut the f**k up;" "your just doing this because I'm a Mexican, white-boy;" "shut up mother***er;" "I'm not in the Army mother***er;" or words to that effect. Plea: Guilty. Finding: Guilty.

(4) Charge IV. Article 92. Plea: Guilty. Finding: Guilty. Specification: On or about 8 November 2002, fail to obey a lawful general order to wit: General Order Regarding Off-Installation Curfew dated 21 December 2001, by wrongfully being at an off-post bar in Itaewon, Republic of Korea, past 2400 hours prior to a duty day. Plea: Guilty. Finding: Guilty.

(4) Charge V Article 117 Plea- G11ilty finding- Dismissed by the Judge). Specification: On or about 8 November 2002, wrongfully use provoking words, to wit: "take these cuffs off mother***er;" "shut up, white guy;" "hit me, hit me, mother***er;" "fu**ing racist white guy, you are nothing to me;" "f**k the police;" "I don't give a f**k if you are a Sergeant, I am not scared of white people;" "f**k you;" "don't look at me like I aint shit mother***er;" "bullshit mother***er, I aint going with nobody, I'm done with this shit, f**k you;" towards Sergeant C.S., U.S. Army. Plea: Not Guilty. Finding: Dismissed.

e. The court sentenced him to forfeiture of \$737.00 pay per month for 12 months, confinement for 7 months, and to be discharged from the service with a bad conduct discharge.

f. On 29 January 2003, he convening authority approved the sentence extending, credited the applicant with 50 days of confinement against the sentence, and except for the portion of the sentence extending to a bad conduct discharge, ordered the sentence executed. The record of trial was forwarded to the appellate authority.

g. On 4 April 2003, the U.S. Army Court of Criminal Appeals amended the plea to Specification 4 of the Charge of Special Court-Martial Number 7, dated 30 May 2002, to reflect a plea and finding of guilty.

h. On 27 August 2003, the U.S. Army Court of Criminal Appeals amended the plea to Charge V of Special Court-Martial Number 1, dated 29 January 2003, to show a plea of Not Guilty.

i. Special Court-Martial Order Number 20, issued by Headquarters, U.S. Army Field Artillery Center, Fort Sill, OK on 5 February 2004, shows the appellate review had been completed, the sentence has been finally affirmed. Article 71(c) having been complied with, and the bad conduct discharge will be executed. The Special Court-Martial Order stated:

(1) In the special court-martial case of [Applicant], the sentence to forfeiture of \$737.00 pay per month for 12 months, confinement for 7 months, and a Bad-Conduct Discharge, adjudged on 23 December 2002, as promulgated in Special Court-Martial Order Number 1, Headquarters, Eighth United States Army, dated 29 January 2003, as corrected by U.S. Army Court of Appeals Notice of Court-Martial Order Correction, dated 27 August 2003, has been finally affirmed. The accused was credited with 50 days of confinement credit against the sentence to confinement. Article 71(c) has been complied with.

(2) However, the Bad-Conduct Discharge will not be issued as the Bad-Conduct Discharge promulgated in Special Court Martial Order Number 7, Headquarters, Eighth United States Army, dated 30 May 2002, has been executed pursuant to Special Court Martial Order Number 113.1, Headquarters, U.S. Army Field Artillery Center and Fort Sill, Fort Sill, OK, dated 24 October 2003. That portion of the sentence extending to confinement has been served.

j. The applicant was discharged on 12 October 2004. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged in the rank/grade of private/E-1 as a result of court-martial conviction in accordance with Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), chapter 3, with a bad conduct discharge (Separation Code JJD and Reentry Code 4). He completed 3 years, 1 month, and 17 days of active service, and he had 7 different periods of lost time (Remarks Block of the DD Form 214).

5. There is no evidence the applicant petitioned the Army Discharge Review Board for review of his discharge within that board's 15 year statute of limitation.

6. By regulation (AR 635-200), a Soldier will be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed.
7. 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:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, a medical review, and regulatory guidance were carefully considered. The applicant's trial by a court-martial was warranted by the gravity of the offense (desertion, disrespect, disobeying orders). His conviction and discharge were conducted in accordance with applicable laws and regulations and the discharge appropriately characterizes the misconduct for which he was convicted. He 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. The applicant provided insufficient evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination, and that outweigh the serious misconduct that led to his discharge. Based on a preponderance of evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	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.

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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. 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 (Active Duty Enlisted Administrative Separations) provides for the separation of enlisted personnel:
 - a. Paragraph 3-7a provides that 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. Paragraph 3-7b provides that 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.

c. Paragraph 3-7c states a discharge under other than honorable conditions is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, security reasons, or for the good of service in selected circumstances.

d. Paragraph 3-11 states a member will be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed.

3. Title 10, U.S. Code, section 1552, provides that the Secretary of a Military Department may correct any military record of the Secretary's Department when the Secretary considers it necessary to correct an error or remove an injustice. With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under the Uniform Code of Military Justice, action to correct any military record of the Secretary's Department may extend only to correction of a record to reflect actions taken by reviewing authorities under the Uniform Code of Military Justice or action on the sentence of a court-martial for purposes of clemency. Such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that Military Department.

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. 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//