

IN THE CASE OF: ██████████

BOARD DATE: 21 December 2023

DOCKET NUMBER: AR20230004415

APPLICANT REQUESTS: an upgrade of his bad conduct characterization of service and a personal appearance hearing before the Board

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), 27 June 2008
- U.S. Department of Justice, Firearm denial letter, 24 December 2022
- criminal background check printout, 6 January 2023

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 in 2019 the Bureau of Alcohol, Tobacco, Firearms and Explosive pushed for the Department of Defense to expand its coverage of personnel that received a bad conduct discharge. His discharge was for being absent without leave (AWOL), which was of a non-violent, non-sexual nature. He would like his discharge upgraded so he may exercise his rights under the 2nd Amendment.
3. The applicant enlisted in the Regular Army on 13 April 1998.
4. Two DA Forms 4187 (Personnel Action) dated 10 December 1999 and 10 January 2000 show the applicant went from being present for duty to AWOL from his unit on 10 December 1999 and was dropped from the rolls on 10 January 2000.
5. His DD Form 616 (Report of Return of Absentee) dated 21 September 2006 shows the applicant was apprehended in ██████████, by civil authorities on 21 September 2006 and returned to military authorities.

6. Two DA Forms 4187, dated 16 March 2007 and 7 September 2007, show the applicant's status went from present for duty to confined by military and confined by military authorities to present for duty.
7. General Court-Martial Order Number 35, dated 25 September 2007, shows:
  - a. The applicant was arraigned and was convicted of Charge I, Article 86 (Absent without Leave), Specification: The applicant did, on or about 12 December 1999, without authority and with intent to remain away therefrom permanently went AWOL from his unit located at or near Fort Stewart, GA, and did remain so absent until 21 September 2006.
  - b. His sentence, which was adjudged on 22 March 2007, included a reduction to the rank/grade of private (PVT)/E-1, confinement for 8-months, and to be discharged from the service with a bad-conduct discharge.
  - c. Action - The sentence was approved on 25 September 2007 and, except for the part of the sentence extending to a bad conduct discharge, will be executed. The record of trial was forwarded to the U.S. Army Court of Military Review for appellate review.
8. The U.S. Court of Military Review (USACMR) on 27 December 2007 affirmed the findings of guilty and the sentence.
9. General Court-Martial Order Number 38, dated 6 February 2008, shows, the sentence to reduction to the grade of PVT/E-1, confinement for 8-months, and a dishonorable discharge, adjudged on 22 March 2007, as promulgated in General Court-Martial Order Number 35, dated 25 September 2007, had finally been affirmed. The automatic forfeiture of pay and allowances were waived effective 4 April 2007 until 4 October 2007 and directed to be paid to the spouse of the accused in support of the accused's family members. The accused was credited with 35 days of confinement against the sentence to confinement. The sentence to confinement has been served. Article 71(c) having been complied with; the bad-conduct discharge was to be executed.
10. The applicant's DD Form 214 shows he was discharge on 27 June 2008, in the rank/grade of PVT/E-1 (5 April 2007), under the provisions Army Regulation 635-200, chapter 3, by reason of court-martial, other, with a bad conduct character of service. This form also contains the following entries and information:
11. The applicant provides a letter from the U.S Department of Justice dated 24 December 2022, which show he was denied his application to possess a firearm due to prohibiting information found in a record containing a similar name and descriptive

information and a printout of a criminal background check ordered on 6 January 2023 which indicated he did not have a criminal record.

12. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, USC, Section 1552, the authority under which this Board acts, the ABCMR 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.

13. Regulatory guidance provides a Soldier will receive 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.

14. The applicant provided argument or evidence that the Board should consider in accordance with the published equity, injustice, or clemency determination guidance.

#### BOARD DISCUSSION:

1. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.

2. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published Department of Defense guidance for consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, the frequency and nature of his misconduct, the reason for his separation, and whether to apply clemency. The Board found insufficient evidence of in-service mitigating factors and the applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. Based on a preponderance of the evidence, the Board determined 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.

2/27/2024

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 635-200 (Active Duty Enlisted Administrative Separations), Section III (Dishonorable and Bad Conduct Discharge)-

a. Paragraph 3-10 provided a Soldier will be given a dishonorable discharge pursuant only to an approved sentence of a general court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed.

b. Paragraph 3-11 provided 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. Questions concerning the finality of appellate review should be referred to the servicing staff judge advocate

3. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, USC, Section 1552, the authority under which this Board acts, the ABCMR 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.

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 on the basis of 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.

5. Army Regulation 15-185 states 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.

//NOTHING FOLLOWS//