

IN THE CASE OF: ██████████

BOARD DATE: 25 January 2024

DOCKET NUMBER: AR20230006204

APPLICANT REQUESTS: an upgrade of his dishonorable character of service.

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 (USC), 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 in the re-training brigade in Fort Riley, KS, waiting on the next cycle when he had a family emergency, and he never returned to be reinstated back on active duty. Since his discharge from the Army, he has been involved with veteran groups; however, his discharge characterization limited his participation. He asks the Board to grant him relief so he can attend veteran functions and assist veterans in any way he can.
3. The applicant enlisted in the Regular Army on 31 July 1985 for 4 years. The highest rank/grade he held was private first class/E-3.
4. General Court-Martial Order (GCMO) Number 9, issued by Headquarters, 3d Infantry Division, APO NY, adjudged on 2 December 1987, shows the applicant pled guilty to and was found guilty of:
 - a. three specifications of stealing property of a value in excess of \$100.00, on or about 28 June and 10 July 1987.
 - b. one specification of unlawfully entering a dwelling, on or about 28 June 1987
 - c. one specification of unlawfully breaking and entering a dwelling with the intent to commit larceny, on or about 10 July 1987

d. The court sentenced him to forfeiture of all pay and allowances, reduction the grade of Private/E-1, to be discharged from the service with a dishonorable discharge, and to be confined for 18 months.

e. The convening authority approved the court's sentence on 27 January 1988, and except for the dishonorable discharge ordered the sentence executed. The record of trial was forwarded to the appellate authority for review.

5. A notice of court-martial order correction, U.S. Army Court of Military Review, before three Appellate Military Judges, dated 20 June 1988, states:

It is ordered that, to reflect the true proceedings at the trial of the above captioned case, corrected copy of GCMO number 9, Headquarters, 3d Infantry Division, APO, NY, dated 27 January 1988, is corrected as follows: by amending the last line of charge II, specification 1 to read "Charge: NG but G of a violation of article 134, unlawful entry."

6. A memorandum of Decision, U.S. Army Court of Military Review, before three Appellate Military Judges, dated 21 June 1988, states:

On consideration of the entire record, including consideration of the issues personally raised by the appellant, we hold the findings of guilty and sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are affirmed.

7. On 16 September 1988, the applicant underwent a complete mental status evaluation as part of his consideration for discharge due to his misconduct. His mental status evaluation noted, he met the retention requirements, was mentally responsible, and had the mental capacity to understand and participate in the proceedings.

8. Orders 178-5, issued by U.S. Army Correctional Activity, Fort Riley, KS, on 27 September 1988, shows the applicant was ordered to execute an administrative reassignment to the U.S. Army Disciplinary Barracks, Fort Leavenworth, KS, for the purpose of placing him on military parole effective 30 September 1988.

9. GCMO Number 119, issued by U.S. Disciplinary Barracks, U.S. Army Combined Arms Center and Fort Leavenworth, Fort Leavenworth, KS on 4 April 1989, shows the sentence having been affirmed, would be duly executed.

10. The applicant was discharged accordingly on 19 May 1989, under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), paragraph 3-10, as a result of court-martial - other, with a dishonorable characterization of service in the grade of E-1. He received a Separation Code of "JJD" and a reenlistment code "4."

His DD Form 214 (Certificate of Release or Discharge from Active Duty) contains the following entries:

- a. He completed 2 years, 4 months and 1 day of net active service with 8 months, and 17 days of foreign service during the period covered.
- b. Block 29 (Dates of Time Lost During this Period) the entry "871202 – 890519"

11. 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.

12. The Board should consider the applicant's argument and evidence, along with the overall record, in accordance with the published equity, injustice, or clemency determination guidance.

BOARD DISCUSSION:

The Board carefully considered the applicant's request, 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.

4/24/2024

X [REDACTED]

CHAIRPERSON
[REDACTED]

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, USC, 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, in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a provided 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 provided 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. Chapter 3, Section IV provided that a member would be given a dishonorable pursuant only to an approved sentence of a general court-martial, after completion of appellate review, and after such affirmed sentence has been ordered duly executed.

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/NR) 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.

//NOTHING FOLLOWS//