

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 February 2024

DOCKET NUMBER: AR20230006370

APPLICANT REQUESTS: an upgrade of her bad conduct discharge.

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 it has been over 10 years since her discharge.
3. The applicant enlisted in the Regular Army on 6 March 2002 for 4 years. She completed training with award of the military occupational specialty 92G (Food Service Operations). The highest grade she held was E-3.
4. General Court-Martial Orders Number 40, dated 22 September 2004 issued by Headquarters, Fort Hood, TX, shows:
  - a. She was found guilty of the following charge(s)/specification(s):
    - disobeying a lawful order
    - making a false official statement to a Criminal Investigative Division Agent
    - wrongful use of marijuana between 5 December 2003 and 5 January 2004
    - theft of U.S. currency (\$542.73) of a fellow Soldier (two specifications)
    - issuing a bad check in the amount of \$542.73
    - issuing a falsely made check drawn on the account of a fellow Soldier in the amount of \$542.73
  - b. The approved sentence was adjudged on 12 May 2004 and consisted of reduction to the grade of private (PVT)/E-1, confinement for 16 months, and to be discharged with a bad conduct discharge.

c. The action by the convening authority was approved and, except for the part of the sentence extending to a bad conduct discharge, will be executed.

5. General Court-Martial Orders Number 116, issued by Headquarters, U.S. Field Artillery Center and Fort Sill shows the sentence of reduction to the grade of private/E-1, confinement for 16 months, and a bad conduct discharge, as promulgated in Corrected General Court-Martial Order Number 40, Headquarters, Fort Hood, TX, dated 22 September 2004, had been finally affirmed. The portion of the sentence extending to confinement having been served and Article 71(c) having been complied with, the bad conduct discharge will be executed.

6. The applicant was discharged accordingly on 16 August 2006. Her DD Form 214 (Certificate of Release or Discharge from Active Duty) shows she was discharged under the provisions of Army Regulation 635-200, Chapter 3, due to a court-martial with a bad conduct characterization of service. She completed was credited with 3 years, 1 month, and 11 days of active service with two periods of lost time totaling 488 days. Her awards are listed as the National Defense Service Medal and the Global War on Terrorism Service Medal.

7. 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.

8. In determining whether to grant relief the Boards for Correction of Military/Navy Records (BCM/NR) can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance.

#### MEDICAL REVIEW:

a. Background: The applicant is requesting that her Bad Conduct discharge be upgraded due to being over ten years old.

b. The specific facts and circumstances of the case can be found in the service record. Below is a summary of information pertinent to this advisory.

- Applicant enlisted in the Regular Army on 06 Mar 2002
- A General Court-Martial, Fort Hood, TX (22 Sep 2004) found her guilty for disobeying an order from an NCO (30 Jan 2003), making a false statement to CID (17 Feb 2003) and using marijuana (05 Dec 2003).

- Applicant also was found guilty during this General Court-Martial for stealing a soldier's money (over \$500.00) by writing a check on the soldier's account, and repeating this a second time with the same soldier for the same amount (18 Feb 2003). She was sentenced to 16 months of incarceration.
- The applicant's separation packet is unavailable for review. However, the applicant's service record includes her DD Form 214 (Report of Separation from Active Duty), which shows that the Army issued a Bad Conduct discharge on 16 Aug 2006.

c. The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 149, her DD Form 214, as well as documents from her service record. However, her ABCMR Record of Proceedings (ROP) and service packet were unavailable for review. The VA electronic medical record and DOD health record were reviewed through Joint Longitudinal View (JLV).

d. This applicant did not contend that any behavioral health conditions or issues were mitigating factors in her discharge. Her service record and supporting documents did not provide any documentation of behavioral health related concerns. Based on this documentation in its entirety, there is a lack of evidence the applicant was diagnosed or treated for mitigating conditions that occurred during her time in service.

e. Per the applicant's VA EHR, she is not service connected for any medical or behavioral health concerns. There were a total of four outpatient encounter entries that were unrelated to behavioral health concerns.

f. In summary, she is not service connected for any behavioral health conditions. There was a lack of any documentation that she had been treated for any behavioral health conditions or issues by VA. She also did not claim any behavioral health conditions or concerns as mitigating factors for her misconduct. Consequently, after reviewing the application and all supporting documents, it is the opinion of this Agency Medical Advisor that there is insufficient evidence of any mitigating conditions that contributed to the specific misconduct of disobeying an order, using marijuana, making a false statement to CID and stealing money from a soldier's bank account by writing false checks.

#### Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge. No, she did not report experiencing any behavioral health symptoms contributing to her misconduct while still on active duty that was identified by VA behavioral health providers.

(2) Did the condition exist or experience(s) occur during military service? No, there is a lack of evidence she encountered any behavioral health related symptoms while on active duty.

(3) Does the condition or experience actually excuse or mitigate the discharge? No, there were no identified behavioral health conditions or symptoms that could potentially mitigate for her misconduct of disobeying an NCO order, using marijuana, giving false information to CID and stealing money from a soldier by writing checks from his/her bank account

#### 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 Board carefully considered the applicant's request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The Board concurred with the medical advisor's review lacking evidence of any documentation that she had been treated for any behavioral health conditions. The Board determined the characterization of service the applicant received upon discharge was not in error or unjust.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:            :            :            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.

[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, 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 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

a. 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. 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 the Soldier's separation specifically allows such characterization.

c. Chapter 3 provides that 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.

3. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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, Boards 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//