

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 February 2024

DOCKET NUMBER: AR20230006439

APPLICANT REQUESTS: A personal appearance before the Board via video/telephone, reconsideration of his prior denial of an upgrade of his bad conduct discharge (BCD) to an honorable discharge and the following new issues:

- restoration of his rank
- restoration of pay and allowances
- decorations and awards (unspecified)
- deletion of derogatory information (unspecified)

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

DD Form 149 (Application for Correction of Military Record)

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20210007257 on 18 January 2022.
2. The applicant states, he served his first term of service honorably but while in that enlistment he had mental health issues that he discussed with the base mental health counselor at Fort Campbell, KY. It was these issues that led to him being court-martialed. He is working with a VA Mental Health Counselor to identify the recurring issues that are the cause of his currently undiagnosed post-traumatic stress disorder (PTSD).
3. On the applicant's DD Form 149, he indicates PTSD as a contributing and mitigating factor in the circumstances that resulted in his separation. However, the applicant has not provided any evidence to support his PTSD diagnosis.
4. A review of the applicant's service record shows he enlisted in the Regular Army for 3 years on 7 September 1997 and completed advanced individual training, and was awarded military occupational specialty 92Y (Unit Supply Specialist). He served in Korea from March 1995 to March 1996, and he reenlisted on 19 February 1997.

5. As modified, General Court-Martial Order Number 33, issued by Headquarters, 101st Airborne Division (Air Assault) Fort Campbell, KY on 19 August 1998 shows the applicant was found guilty of the following charges and specifications:

- Charge I, one specification of wrongfully using marijuana
- Charge II, one specification of assaulting another Soldier with a dangerous weapon or means likely to produce death or grievous bodily harm
- Charge III, one specification of wrongfully using provoking and reproachful words
- Charge IV, one specification of communicating a threat
- Charge V, three specifications of disrespect toward a commissioned officer
- Charge VI Disobedience of a Superior Commissioned Officer
- Charge VII, seven specifications of disrespecting a noncommissioned officer and three specifications of disobeying a lawful order of a superior noncommissioned officer (NCO)
- Charge VIII, two specifications of failing to go at the time prescribed to his appointed place of duty

6. The court sentenced him to reduction to the lowest enlisted grade of private/E-1, forfeiture of all pay and allowances, confinement for 24 months, and to be discharged from the service with a bad conduct discharge.

7. On 19 August 1998, the convening authority approved the sentence as provided and except for the bad conduct discharge, ordered the sentence executed. The Record of Trial was forwarded to The Judge Advocate General of the Army for appellate review.

8. On 5 June 2001, the United States Army Court of Criminal Appeals affirmed the findings of guilty and the sentence.

9. The United States Court of Appeals for the Armed Forces denied consideration of the petition for grant of review of the decision of the United States Army Court of Criminal Appeals.

10. General Court-Martial Order Number 10, issued by Headquarters, 101st Airborne Division, Fort Campbell, on 8 March 2002 shows the appellate review had been completed, affirmed, and the sentence would be executed.

11. The applicant was discharged on 22 January 2003. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged in the grade of E-1 as a result of court-martial conviction in accordance with Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3, with a bad conduct discharge (Separation Code JJD, Reentry Code 4). He completed 3 years, 9 months, and 18 days of active service with 1392 days of excess leave and 568 days of lost time. His awards and decorations are listed as:

- National Defense Service Medal
- Army Service Ribbon
- Air Assault Badge
- Sharpshooter Qualification Badge with Rifle Bar
- Marksman Qualification Badge with Grenade Bar.

12. On 18 January 2022, the ABCMR denied the applicant's request for an upgrade of his BCD wherein he contended he had been sexually assaulted and was sexually harassed, although he never reported it or told anyone of it. In the development of the prior review, the Agency psychologist was asked by the ABCMR to review this request.

a. The VA electronic medical record, Joint Legacy Viewer (JLV) was also reviewed. The military electronic medical record (AHL TA) was not reviewed, as it was not in use during his time in service. No hard copy military medical records or civilian medical documentation was provided for review.

b. Review of the applicant's military documentation indicates that he enlisted in the Army Reserve (Delayed Entry Program) on 06 Jun 1994 and subsequently transferred to the Regular Army on 07 Sep 1994. He immediately reenlisted on 19 Feb 1997. During his military career, he was assigned overseas to Korea from 28 Mar 1995 - 27 Mar 1996. While on active duty, his awards included the National Defense Service Medal, Army Service Medal, and Army Service Ribbon. His job position was as a Unit Supply Specialist. A Court Martial Order, Fort Campbell, KY, dated 19 Aug 1998, found him guilty of marijuana use, assault on SPC with a dangerous weapon or means likely to produce death or grievous bodily harm, disrespect to NCO, disobeying a lawful order, and failure to go to extra duty and physical training. He was sentenced to 24 months of confinement. He received a Bad Conduct discharge on 22 Jan 2003 with narrative reason for separation, Court-Martial, Other.

c. The VA electronic medical record, Joint Legacy Viewer (JLV) did not indicate any service connected disability(s). A Social Work Counseling Note, dated 30 Jan 2020, indicated "Veteran informed the social worker that he is currently residing in his home. Veteran states he was not making enough money to pay his mortgage and his home went into foreclosure. Veteran states he's gone to court and was given until April 1st to vacate the home. Veteran states he is working to get his discharge upgraded due to a bad conduct discharge ... Veteran was calm and cooperative." There was no available data on the problem list.

d. Based on the information in the applicant's medical record, it is the opinion of the Agency psychologist that there are no mitigating Behavioral Health conditions. Problems arising from trauma and stressor related symptoms/MST often contribute to self-isolation, anger outbursts, aggressive behavior, intrusive memories, nightmares, interpersonal difficulties, poor sleep, and self-medication with drugs/alcohol. Assault

with a dangerous weapon with the means to seriously harm or cause death is not part of the natural history or sequelae of trauma and stressor related symptoms/MST, or other behavior health conditions, and, as such, is not mitigated under the Liberal Consideration Policy.

13. The applicant has not provided any new evidence or arguments for upgrading his BCD. Further he has not provided and supporting documentation of his alleged sexual assault or harassment, a diagnosis of PTSD, or rationale to rescind the punishment rendered as a result of the court-martial sentence of a reduction in rank, forfeiture of pay and allowances, and the derogatory information.

14. 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.

#### BOARD DISCUSSION:

1. The applicant's request for a personal appearance hearing was carefully considered. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

2. After reviewing the application, all supporting documents, and the evidence found within the applicant's military records, 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 considered the applicant's statement, the applicant's record of service, the frequency and nature of the applicant's misconduct and the reason for separation.

a. The applicant's trial by a general court-martial was warranted by the gravity of the offenses charged (wrongfully using marijuana, assaulting another Soldier with a dangerous weapon, wrongfully using provoking and reproachful words, communicating a threat, disrespect toward commissioned/non-commissioned officers, disobeying orders, and failing to go at the time prescribed to his appointed place of duty). 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 general court-martial. The appellate review was completed, and the affirmed sentence was ordered duly executed. All requirements of law and regulation

were met with respect to the conduct of the court-martial and the appellate review process, and the rights of the applicant were fully protected.

b. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the advising official. The Board concurred with the medical advisory opinion finding insufficient evidence of in-service mitigating factors to overcome the misconduct. Additionally, the applicant does not provide evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination. 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.

c. The applicant violated the UCMJ, and he was tried and convicted by a general court-martial of his violations. The resultant punishment included, in addition to a bad conduct discharge, reduction to the lowest enlisted grade of E-1, forfeiture of all pay and allowances, and confinement for 24 months. The Board found no evidence and the applicant did not provide a convincing argument or evidence why his pay or grade are in error or why they should be reinstated.

d. The applicant's DD Form 214 already reflects the applicant's awards and decorations. The applicant does not specify which service award is missing and there is no evidence in his records that shows he was recommended for or awarded any personal decorations.

e. The Army has an interest in maintaining the integrity of its records for historical purposes. The information in those records must reflect the conditions and circumstances that existed at the time the records were created, unless there is sufficient evidence that shows a material error or injustice. The Board determined his court-martial conviction is properly filed in his records, in accordance with governing regulations. There is neither an error nor an injustice.

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 to amend the decision of the ABCMR set forth in Docket Number AR20210007257 on 18 January 2022.

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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. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. It states :

a. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

b. This regulation allows an applicant to request reconsideration of an earlier decision of the ABCMR if the decision has not previously been reconsidered. The applicant must provide new evidence or argument that was not considered at the time of the ABCMR's prior consideration.

c. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, 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.

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.

//NOTHING FOLLOWS//