

IN THE CASE OF: ██████████

BOARD DATE: 7 February 2024

DOCKET NUMBER: AR20230006638

APPLICANT REQUESTS:

- an upgrade of his bad conduct discharge to an under honorable conditions (general)
- a video/telephonic appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Basic Training Superior Performance Certificate
- DD Form 214 (Certificate of Release or Discharge from Active Duty), for the period ending 14 May 1985

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:

a. He was 24 years old and threatened with 20 years at Fort Leavenworth for what is considered a small amount of hash. He wonders if it was due to him not helping the Criminal Investigation Division (CID) to set up another Soldier. His commissioned officer said that he needed to make an example out of him for the other Soldiers. During his proceedings his noncommissioned officer told the judge that he would take him back into the unit immediately if the judge were to find him not guilty.

b. He served his debt to the Army by serving 4 months in the Fort Riley, KS retraining Brigade prior to his discharge. He loved the Army and wanted to stay in. His punishment was inequitable, 3 years prior to the court-martial he was an exceptionally good Soldier and did a great job maintaining the motor pool while insuring inspections were passed. Since his release he has not been in any trouble.

3. The applicant enlisted in the Regular Army on 23 October 1981.
4. Special Court-Martial Order Number 5, dated 18 January 1985, shows:
 - a. The applicant plead guilty to two specifications of wrongful possession (Marijuana and Acid), one specification of wrongful use of marijuana (1 August 1984 through 16 October 1984), two specifications of wrongful possession (Switchblade and Smoking Device), and one specification of wrongful use of marijuana (29 July 1983 through 1 August 1984)
 - b. His sentence, which was adjudged on 17 December 1984, included a reduction to the rank/grade of private (PVT)/E-1, forfeiture of \$397.00 pay per month for 6 months, confinement for 4 months, and to be discharged from the service with a bad conduct discharge.
 - c. The sentence was approved on 18 January 1985 and, only so much of the sentence as provides for a bad conduct discharge, confinement for 120 days, forfeiture of \$397.00 pay per month for 6 months, and reduction to PVT/E-1 is approved and, except for the bad conduct discharge, will be executed.
 - d. On 4 April 1985, the sentence as promulgated in Special Court-Martial Order Number 5, dated 18 January 1985, is approved. The bad conduct discharge will be executed.
5. The applicant underwent a mental status evaluation on or about 30 March 1985. The relevant DA Form 3822-R (Report of Mental Status Evaluation) shows he was psychiatrically cleared for any administrative action deemed appropriate by command.
6. On 14 May 1985, the applicant was discharged pursuant to his court-martial sentence under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 3, Section IV. His DD Form 214 shows:
 - he was discharged in the rank/grade of private/E-1
 - his service was characterized as bad conduct
 - he was credited with completing 3 years, 3 months, and 13 days of active service
 - he had 99 days of lost time from 17 December 1984 to 25 March 1985
 - he received a separation code of "JJD" and a reentry code of "4"
 - he was awarded or authorized the Army Service Ribbon, Mechanics Badge, and the Expert Marksmanship Qualification Badge with Rifle Bar (M-16)
7. The applicant provides a photocopy of his superior performance certificate he received while attending basic training at Fort Jackson, SC.

8. There is no indication the applicant applied to the Army Discharge Review Board within that Board's 15-Year statute of limitations.
9. 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.
10. 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.
11. 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:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. One potential outcome was to deny relief based on the applicant's misconduct. However, upon further review of the applicant's petition and available military record, the Board determined the applicant's case was harsh and warrants clemency based on the applicant's length of service and the facts and circumstances that led up to the discharge. ABCMR 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. The Board found that the applicant's case warrants clemency with an upgrade of his discharge to under honorable (general) conditions. Therefore, the Board granted relief.
2. The applicant's request for a personal appearance hearing was carefully considered. In this case, 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.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

█	:	█	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	█	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of Army records of the individual concerned be corrected by re-issuing the applicant's DD Form 214 for the period ending 14 May 1985 to show his characterization of service as under honorable (general) conditions.

2/22/2024

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 (AR) 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Chapter 3 provided that an enlisted person would be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial, after completion of appellate review, and after such affirmed sentence has been ordered duly executed.

b. 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.

c. 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.

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. AR 15-185 (ABCMR), paragraph 2-11, states applicant's 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//