

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 August 2024

DOCKET NUMBER: AR20230006767

APPLICANT REQUESTS:

- an upgrade of her bad conduct discharge
- a personal appearance before the Board

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 AC88-08166 on 16 August 1989.

2. The applicant states she believes she was harassed for being a woman. On the way to prison, a Soldier hollered out that he had to clean her weapon. She did not even know she had a weapon, and she could have cleaned her own weapon. She believes she was harassed for being black. The black Soldiers gathered the night she arrived in Germany to complain about the treatment of black Soldiers on the Army base in Germany. The Army in Germany was its own separate Army. She took Psychology 101 in college, and she was able to understand what happened to her in Germany. Her environment caused her to act the way that she did. It took her a while to realize that her environment caused her actions, and no one made her do anything. She did everything on her own, as a result of the hostile environment in the Army.

3. A review of the applicant's service record shows:

a. She enlisted in the Regular Army on 23 January 1973.

b. She accepted NJP under the provisions of Article 15, UCMJ on 5 December 1973 for on or about 29 November 1973:

- failing to go at the time prescribed to her appointed place of duty
- altering an official record, with the intent to deceive

- making an official false statement to the first sergeant, with intent to deceive
- c. Her punishment included reduction to the rank/grade of private (PV2)/E-2 and forfeiture of \$75.00. The reduction part of the punishment was suspended for a period of 60 days.
- d. On 31 October 1974, she accepted NJP under the provisions of Article 15, UCMJ for on or about 24 October 1974, failing to go to morning formation and the annual CBR exercise. Her punishment included reduction to the rank/grade of private (PV2)/E-2.
- e. Special Court-Martial Number 3, issued by Headquarters, 11th Aviation Battalion, APO New York on 18 February 1975, shows the applicant was found guilty on 7 February 1975 of disrespect to a superior commissioned officer. The court sentenced her to be reduced to the grade of private (PVT)/E-1, 60 days restriction, and 30 days of hard labor without confinement.
- f. On 24 March 1975, she received a bar to reenlistment. Her commander stated that she had practically no initiative or drive; she had to be told everything to do and be closely supervised. She had a constant discipline problem, was caught with drugs several times, once with an illegal weapon, and violated restrictions imposed by a court-martial. She showed no evidence of trying to improve her work or attitude, and she was pending a bad conduct discharge.
- g. The applicant was read the bar to reenlistment and counseled by the commander in front of sergeant first class [REDACTED]. She verbally stated that she did not desire to submit a statement in her own behalf, she refused to sign the form, and refused to accept her copy. The commander stated that a copy would be sent to her by registered mail.
- h. Special Court-Martial Number 52, issued by Headquarters, 3rd Armored Division, APO New York on 25 August 1975, shows she was found guilty on 14 July 1975 of:
- Charge II, one specification of disobeying a lawful order on or about 7 April 1975
 - Charge II, one specification of wrongfully communicating a threat to injure [REDACTED] by saying "You're a__ is dead," on or about 23 April 1975
 - Charge IV, specification two: wrongfully having in her possession residue of marijuana on or about 7 April 1975
 - Charge IV, specification three: on or about 22 April 1975, wrongfully communicating a threat to kill [REDACTED] by saying "If you keep messing with me, I will kill you."
- i. The court sentenced the applicant to be confined at hard labor for one month and to be discharged from the service with a bad conduct discharge. The convening

authority approved the sentence, and the record of trial was forwarded to the Judge Advocate General of the Army for appellate review. The accused was credited with service of confinement from 14 July 1975 to 31 July 1975.

j. Special Court-Martial Order Number 61, issued by Headquarters, U.S. Army Armor Center and Fort Knox, Fort Knox, KY on 24 September 1976, shows the sentence to bad-conduct discharge and confinement at hard labor for one month of which confinement at hard labor in excess of 18 days was suspended, was affirmed pursuant to Article 66. The provisions of Article 71(c) had been complied with and the sentence would be duly executed.

k. The applicant was discharged on 7 October 1976. Her DD Form 214 (Report of Separation from Active Duty) shows she was discharged under the provisions of Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel), by reason of court-martial, other and her service was characterized as under other than honorable conditions. She completed 3 years, 7 months, and 28 days of active service during the covered period. Her DD Form 214 shows in:

- Item 21 (Time Lost) – 17 days
- Item 26 (Decorations, Medals, Badges, Commendations, Citations and Campaign Ribbons Awarded or Authorized) – National Defense Service Medal and the M-16 Rifle Qualification Badge

l. DD Form 259A (Bad Conduct Discharge) shows the applicant was discharged from the Army of the United States on 7 October 1976, by reason of sentence of a Special Court-Martial.

4. On 29 August 1985, the Army Discharge Review Board (ARBA) denied the applicant's request to change her discharge to honorable.

5. On 16 August 1989, the ABCMR denied the applicant's request for an upgrade of her discharge and stated that the applicant had not presented, and the records did not contain sufficient justification to conclude that it would be in the interest of justice to grant the relief requested.

6. By regulation AR 635-200, 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.

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 reaching its determination, the Board can consider the applicants petition and her service record in accordance with the published equity, injustice, or clemency determination guidance.

9. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of her under other than honorable conditions discharge. She contends she experienced a mental health condition and harassment that mitigates her misconduct. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following: 1) The applicant enlisted in the Regular Army on 23 January 1973; 2) A Special Court-Martial hearing on 7 February 1975 found the applicant guilty of disrespect to a superior commissioned officer; 3) On 24 March 1975, she received a bar to reenlistment. Her commander stated that she had practically no initiative or drive. She had to be told everything to do and be closely supervised. She had a constant discipline problem, was caught with drugs several times, once with an illegal weapon, and violated restrictions imposed by a court-martial. She showed no evidence of trying to improve her work or attitude; 4) Special Court-Martial hearing on 14 July 1975 found the applicant guilty of: A) disobeying a lawful order; B) communicating a threat to injure someone; C) having in her possession residue of marijuana; and D) communicating a threat to kill someone; 5) The applicant was discharged on 7 October 1976, by reason of court-martial, other. Her service was characterized as under other than honorable conditions; 6) The applicant's request for an upgrade was reviewed and denied by ARBA on 29 August 1985 and ABCMR on 16 August 1989.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the available supporting documents and the applicant's available military service records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical records were provided for review.

c. The applicant asserts she was experiencing mental health conditions and harassment while on active service, which mitigates her misconduct. There is insufficient evidence the applicant reported or was diagnosed with a mental health disorder while on active service.

d. A review of JLV was void of medical documentation and the applicant does not receive any service-connected disability.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a condition or experience that mitigates her misconduct.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant asserts she experienced a mental health condition and harassment which mitigates her misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts she experienced a mental health condition and harassment that mitigates her misconduct while on active service.

(3) Does the condition experience actually excuse or mitigate the misconduct? No, there is insufficient evidence beyond self-report the applicant was experiencing a mental health condition or harassment, while she was on active service. The applicant did engage in some avoidant and erratic behavior, which could be natural sequelae to some mental health conditions or harassment. However, the presence of misconduct is not sufficient evidence of the presence of a mental health condition or harassment. In addition, there is no nexus between her reported mental health condition or harassment and her verbal threats of violence or to kill someone in that: 1) this types of misconduct is not a part of the natural history or sequelae of her reported mental health condition or harassment; 2) the applicant's reported mental health condition or harassment do not affect one's ability to distinguish right from wrong and act in accordance with the right Yet, the applicant contends she was experiencing a mental health condition or an experience that mitigates her misconduct, and per Liberal Consideration her contention is sufficient for the board's consideration. 1.

BOARD DISCUSSION:

1. 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 Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was separated for conviction by court-martial for failure to obey an order, possession of marijuana, communicating a threat, and wrongfully using marijuana. The Board found no error or injustice in the separation proceedings. The Board reviewed and concurred with the medical advisor's review finding insufficient evidence to support the applicant had a condition or experience that mitigated her misconduct. Based on a preponderance of the evidence, the Board

concluded that the characterization of service the applicant received upon separation was appropriate.

2. The applicant was given a bad conduct discharge pursuant to an approved sentence of a 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.

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.

10/28/2024

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. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel.

a. Chapter 3 states a Soldier will be given a bad conduct discharge pursuant only to an approved sentence of a general or a special court-martial. The appellate review must be completed, and the affirmed sentence 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.

2. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, U.S. Code, 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.

3. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole, or in part, to: mental health conditions, including PTSD; TBI; sexual assault; sexual harassment. Boards were directed to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part to those conditions or experiences. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for that misconduct which led to the discharge.

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 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. This guidance does not mandate relief but provides standards and principles to guide Boards in application of their equitable relief authority.

a. 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.

5. Section 1556 of Title 10, United States Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

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

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that 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//