

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 13 February 2024

DOCKET NUMBER: AR20230006796

APPLICANT REQUESTS:

- an upgrade of his bad conduct discharge to honorable
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Statement

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 he served in South Korea during the early 1980s and feels that he was discriminated against because he was a black man. He was constantly harassed by his sergeants during his time in service. The situation that resulted in a special court-martial was racially motivated with no merit. He thought he could put it behind him and not tell anyone, but it always stayed in the back of his mind. He has been diagnosed with a terminal illness and would like his record corrected before he dies.

3. Through a separate personal statement the applicant states:

a. There was a pattern of discrimination from his sergeant who was from Guam, this discrimination was directed at him and other African American lower enlisted servicemen. They were treated differently than their white counterparts. He had to endure criticism and verbal abuse daily and sometimes he was singled out.

b. He and another African American Soldier had to test yearly for their jobs and this sergeant told them that they would not pass because they were stupid. They passed on

the first try and a white Soldier had to retest five times, and nothing was said to him. He and other African American Soldier endured punishment that others did not for the same thing. He was walking back to the barracks after shopping and saw a girl he knew he ran up to talk to her, but when he got close to her his hand touched her and she screamed. He ran and the military police started to chase him. They took him to the police station for interrogation and he was questioned for 2 hours. He signed a document but did not know what it was.

c. He later found out that he was being court-martialed. He felt that he did nothing wrong. The only people that spoke up for him was his roommate and a sergeant he worked with, both were African American. His sergeant from Guam did not show up for his court-martial. When it was over, they sent him to California to serve his sentence. The punishment does not align with crime. He was young, playing around, and probably could have acted differently when he ran off and hid. Again, however, he does not think this is representative of his years in service to my country and the U.S. Army.

d. It has been 40 years since the event. While he cannot remember the specific names and dates, the feeling and emotions of this time have been hard to relive. He has not told anyone about this embarrassing period of his life including his wife of almost 30 years out of shame. He wishes he could go back to change his behavior; no one would listen to him or believe him at the time. It was hard for outsiders to understand the racial culture in the Army at the time.

4. The applicant enlisted in the Regular Army on 9 July 1980.

5. The applicant accepted nonjudicial punishment on two occasions:

a. On 15 September 1981 for being derelict in the performance of his duty. His punishment included reduction to private (PVT/E-2).

b. On 21 April 1982 for absenting himself from his place of duty.

6. Special Court-Martial Order Number 19, dated 1 February 1983, shows:

a. The applicant was found guilty of one specification of at or near Camp Casey, Korea on or about 16 October 1982, commit an indecent assault upon another Soldier by grabbing her buttocks with his hand, putting his arm around her neck, and pulling her towards him, with intent to gratify his sexual desires.

b. His sentence, which was adjudged on 26 November 1982, included a reduction to the rank/grade of private (PVT)/E-1, forfeiture of \$367.00 pay per month for 3 months, confinement at hard labor for 3 months, and to be discharged from the service with a bad conduct discharge.

c. On 1 February 1983, the sentence was approved and ordered duly executed. The record of trial was forwarded for appellate review.

d. Special Court-Martial Order Number 469, issued by the U.S. Army Correctional Activity, Fort Riley, KS on 12 August 1983, remitted the unexecuted portion of the approved sentence to confinement at hard labor for 3 months.

e. On 27 October 1983, the court having found the approved findings of guilty and the sentence correct in law and fact, and having determined on the basis of the entire record that they should be approved, such findings of guilty and the sentence are affirmed.

f. Special Court-Martial Order Number 205, dated 25 May 1984, affirmed the sentence pursuant to Article 66. The unexecuted portion of the approved sentence to confinement at hard labor for 3 months was remitted. Article 71(c) having been complied with, the sentence will be duly executed.

7. On 5 June 1984, 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 completed 3 years, 8 months, and 27 days of active service
- he had 60 days of lost time from 26 November 1982 to 24 January 1983
- he received a separation code of "JJD" and a reentry code of "4"
- he was awarded or authorized the Marksman Marksmanship Qualification Badge with Rifle Bar (M-16), Hand Grenade Bar, and the Army Service Ribbon

8. The ABCMR on 9 August 2023 requested a redacted criminal investigation division (CID) and military police report regarding sexual assault from CID. The CID provided DA Form 2800 (CID Report of Investigation) which shows the applicant approached SPC MI P from the rear and indecently assaulted her grabbing her buttocks with his left hand while at the same time choking her with his right arm. She escaped by shoving the applicant and screaming for help. The applicant fled the scene on foot and was subsequently apprehended by the military police and provided a sworn statement admitting the indecent assault.

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. 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 military record, the Board found that relief was not warranted. The applicant's contentions, the military record, a medical review, and regulatory guidance were carefully considered. The applicant's trial by a court-martial was warranted by the gravity of the offense (indecent assault). 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 court-martial. The appellate review was completed, and the affirmed sentence was ordered duly executed. The Board found no error or injustice in his separation processing. While the Board understands and agrees there may have been discrimination or harassment during his time in service, the Board determined this does not mitigate or excuse his indecent assault. Additionally, the applicant provided no 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.

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.

█

█ █

---

█

█

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 (Personnel Separations – Enlisted Personnel), 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. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Service 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.

4. 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//