

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 2 February 2024

DOCKET NUMBER: AR20230007175

APPLICANT REQUESTS: in effect, an upgrade of her bad conduct discharge (BCD) and a personal appearance hearing before the Board via video or telephone.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)

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 she would like her discharge upgraded to receive Department of Veterans Affairs benefits.
3. The applicant enlisted in the Regular Army (RA) on 15 June 2005. She served in Iraq from 29 October 2006 to 8 December 2007.
4. General Court-Martial (GCM) Order Number 4, Department of the Army, Headquarters, Fort Bliss, TX, 4 March 2010, show:
 - a. The applicant was found guilty/convicted of the below charges and specifications:
 - (1) Charge I, Article 78 (Accessory after the fact), Specification: The applicant, knowing that Private D.D.R. had committed an offense punishable by the Uniform Code of Military Justice (UCMJ), to wit: premeditated murder of Private (E-2) P.F., did, on or about 25 July 2008, in order to hinder the apprehension, trial, and punishment of the said Private D.D.R., assisted the said Private D.D.R. by disposing of the baseball bat that the said Private D.D.R. used to hit Private (E-2) P.F. with on or about 18 July 2008.

(a) Plea: Guilty, except the words, "premeditated murder" substituting therefore the words, "assault in which grievous bodily harm was intentionally inflicted". To the excepted words, Not Guilty. To the substituted words, Guilty.

(b) (On motion of Trial Counsel, the Specification of Charge I was amended to conform with the accused's plea of Guilty and made to read as follows: Knowing that Private D.D.R. had committed an offense punishable by the UCMJ, to wit: assault in which grievous bodily harm was intentionally inflicted on Private (E-2) P.F., did, on or about 25 July 2008, in order to hinder the apprehension, trial, and punishment of the said Private D.D.R., assisted the said Private D.D.R. by disposing of the baseball bat that the said Private D.D.R. used to hit Private (E-2) P.F. with on or about 18 July 2008.) Finding: Guilty.

(2) Charge II, Article 81 (Conspiracy), Specification: On or about 18 July 2008, did, conspire with the Private D.D.R. to commit an offense under the UCMJ, to wit: premeditated murder of Private (E-2) P.F., and in order to effect the object of the conspiracy the accused did purchase a baseball bat for use in the premeditated murder of Private (E-2) P.F.

(a) Plea: Not Guilty. (After entry of pleas, trial counsel moved to amend the Specification by excepting both instances of the word, "premeditated".)

(b) Finding: Not Guilty, but Guilty of conspiracy to commit assault consummated by a battery.

(3) Charge III, Article 107 (False Official Statement), Specification: On or about 22 July 2008, the applicant did, with intent to deceive, sign an official record, to wit: DA Form 2823, dated 20 July 2008, which record as false in that "[w]hen I finished cooking he came inside, and we started talking for a little bit, probably about twenty-five or about thirty minutes [a]nd around that time it was about ten-thirty ten-forty and that is when he asked for the car keys so he could go get his phone charger and put air in the back tire of my car," "Private R. does not own a baseball bat," "I have never seen Private R. with a baseball bat," "Private R. has not really talked to me about this incident," "Private R. was never gone for an extended period of time," and "Private R. has never made reference to wanting to find and beat up Private F.," or words to that effect, and was then known by the accused to be so false.

(a) Plea: Guilty, except the words, "Private R. has not really talked to me about this incident," "and Private R. has never made reference to wanting to find and beat up Private F". To the excepted words, Not Guilty.

(b) (On motion of Trial Counsel, the Specification of Charge III was amended to conform with the accused's plea of Guilty and made to read as follows: On or about

22 July 2008, the applicant did, with intent to deceive, sign an official record, to wit: DA Form 2823, dated 20 July 2008, which record was false in that "[w]hen I finished cooking he came inside, and we started talking for a little bit, probably about twenty-five or about thirty minutes [a]nd around that time it was about ten-thirty ten-forty and that is when he asked for the car keys so he could go get his phone charger and put air in the back tire of my car," "Private R. does not own a baseball bat," "I have never seen Private R. with a baseball bat," "Private R. was never gone for an extended period of time," or words to that effect, and was then known by the accused to be so false.)

Finding: Guilty.

(4) Additional Charge I, Article 81 (Conspiracy), Specification: Between on or about 24 November 2008 and on or about 10 December 2008, the applicant did, conspire with Private D.D.R. to commit an offense under the UCMJ, to wit: escape from confinement, and in order to effect the object of the conspiracy the accused did obtain civilian clothes on behalf of Private P.D.R. and did provide civilian clothes to the said Private D.D.R. Plea: Not Guilty. Finding: Guilty.

(5) Additional Charge II, Article 92 (Failure to Obey an Order), Specification: The applicant, having knowledge of a lawful order issued by First Lieutenant R.M. to not have any contact with Private D.R., an order which it was her duty to obey, did, between on or about 29 September 2008 and on or about 25 January 2009, on divers occasions, fail to obey the same communicating with the said Private D.R.

(a) Plea: Guilty, except the words, "on divers occasions". To the excepted words, Not Guilty.

(b) (On motion of Trial Counsel, the Specification of Additional Charge II was amended to conform with the accused's plea of Guilty and made to read as follows: Having knowledge of a lawful order issued by First Lieutenant R.M. to not have any contact with Private D.R., an order which it was her duty to obey, did, between on or about 29 September 2008 and on or about 25 January 2009, fail to obey the same by communicating with the said Private D.R.) Finding: Guilty.

b. The sentence, adjudged on 30 September 2009, included discharge from service with a Bad Conduct Discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to private (PVT)/E-1.

c. The sentence was approved, and except for the bad-conduct discharge, was ordered to be executed.

5. GCM Order 34, Department of the Army, Headquarters, U.S. Army Fires Center of Excellence and Fort Sill, Fort Sill, OK, 24 February 2012, the sentence of reduction to the grade of Private (E-1), forfeiture of all pay and allowances, confinement for

30 months, and a BCD, adjudged on 30 September 2009, as promulgated by GCM Order Number 4, Headquarters, Fort Bliss, Fort Bliss, TX 79916, dated 4 March 2010, as corrected by United States Army Court of Criminal Appeals Notice of Court-Martial Order Correction, dated 9 August 2011, has been finally affirmed. Article 71 (c) having been complied with; the BCD will be executed.

6. On 24 August 2012, the applicant was discharged accordingly. The DD Form 214 she was issued shows she was discharged as the result of court-martial and received a BCD and a Separation Program Designator (SPD) code of "JJD" with a corresponding Reentry (RE) code of "4." It also shows at the time of her discharge she completed 5 years, 6 months, and 4 days of creditable active military service with lost time for the period 30 September 2009 to 5 June 2011.

7. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. Under the provisions of 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.

8. The applicant provided argument or evidence that the Board should consider in accordance with the published equity, injustice, or clemency determination guidance.

BOARD DISCUSSION:

1. The Board reviewed the application, all supporting documents, all statements, the evidence in the applicant's service records, and the published Department of Defense guidance pertaining to the application of clemency.

2. The Board found insufficient evidence of in-service mitigating factors, in addition, the applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. Based on a preponderance of the evidence, the Board determined the character of service the applicant received upon separation was not in error or unjust.

3. 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 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.

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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. 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 (Personnel Separations - Active Duty Enlisted Administrative Separations) sets forth the basic authority for the separation of enlisted personnel.

a. Chapter 3 provides the policies and procedures for separating members with a dishonorable discharge or a BCD. It stipulates that a Soldier will be given a BCD pursuant only to an approved sentence of a general or special court-martial, and that the appellate review must be completed and affirmed before the BCD portion of the sentence is ordered duly executed.

b. Paragraph 3-7a provides that 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. Paragraph 3-7b provides that 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. Under the provisions of 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.

4. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and 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. Army Regulation 15-185 prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. 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. The ABCMR considers individual applications that are properly brought before it. The ABCMR will decide cases on the evidence of record. It is not an investigative body. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

//NOTHING FOLLOWS//