

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 February 2024

DOCKET NUMBER: AR20230007896

APPLICANT REQUESTS:

- reconsideration of his previous request for an upgrade of his bad conduct discharge (BCD)
- correction of DD Form 214 (Certificate of Release or Discharge from Active Duty), to show a different rank at the time of his discharge
- a complete review and possible appeal of his criminal case
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Brief in support of claim, dated 12 March 2023
  - Self-authored statement
  - Summary of Facts
  - Timeline of Events
  - Findings of Error
  - Questions for Consideration
- Service Records (54 pages), dated 2 November 1988 to 18 June 1993
- Bachelor of Science degree, Mount Olive College, 16 December 2000
- Army Board for Correction of Military Records (ABCMR) Docket Number AR20110014641, dated 24 January 2012, and associated documents
- letter, National Personnel Records Center (NPRC), dated 23 August 2017
- letter, U.S. Army Legal Services Agency, dated 10 March 2020
- letter, Department of Veterans Affairs (VA), dated 2 April 2020
- letter, NPRC, dated 4 November 2022

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 AR20110014641 on 24 January 2012.

2. The applicant states, in effect:

a. He joined the Army as a 19-year old, teenage father, who wanted to build a career that would allow him to provide a decent life for his son. He was a responsible father with no history of trouble with the police or authorities. He was stationed in Germany and served in the Gulf War. During that time, he received a Red Cross message notifying him of his uncle's death. He was given leave and allowed to return to the U.S. to be with his family. Upon his return to Germany, he met Specialist (SPC) T.B. for the first time. They talked and made plans to share a cab to go to a nightclub that evening.

b. Enroute to the nightclub, SPC T.B. robbed the cab driver. The applicant panicked and drove the car to flee the seen as SPC T.B. could not drive a manual transmission. As soon as they pulled off the highway, SPC T.B. jumped out of the vehicle and ran. When the applicant got out of the car someone tried to grab him. He got away and hid inside the nightclub until it closed. Enroute to his field assignment the next morning, the guard checked his identification, removed him from the bus, and questioned him about the incident from the previous night. He provided a written statement at the station. He was released to his unit, thinking he was merely the witness to a crime.

c. He was placed on restriction, given court-appointed representation, and court-martialed. His counsel recommended he plead guilty. If so, he would be sent for retraining, keep his G.I. Bill, and avoid a BCD. He thought that was the best thing to do. He did not understand much of the court-martial. He still does not understand what happened. The sentence he received was not what was discussed with his legal representative.

d. He was a model citizen and Soldier until he met SPC T.B. He has tried to rebuild his life. He can't help but feel he is a victim of an injustice that has impacted nearly every aspect of his life. He is of good moral character. He could never imagine doing what he was accused and convicted of at court-martial. It has taken him several years to request all of his records, but he feels he is better prepared this time than the last time he requested an upgrade.

3. A brief in support of the applicant's claim provides the following information:

a. A timeline of events provides a chronological record of notable dates from the applicant's enlistment in 1988 until he received his personnel records, minus his court-martial transcripts, in November 2022.

b. A "Findings of Error" which highlights the potential injustices as well as multiple errors regarding the charges, trial, conviction, confinement, and discharge of the applicant.

(1) He was charged and convicted of robbing two German nationals. He did not understand he was being convicted of two robberies. He admitted to being present for one of the robberies. He had no knowledge of SPC T.B.'s intent to rob the cab driver. After the first robbery, he and SPC T.B. parted ways. SPC T.B. committed another robbery later that night. The applicant was made to believe he would be on "probation." He also believed he was "guilty by association" and agreed to a plea deal to avoid serving time and a less than honorable discharge.

(2) The ABCMR did not previously consider all of the evidence when reviewing his records. The following records were not discussed in the previous Record of Proceedings:

- Report of Result of Trial, dated 25 October 1991
- General Court-Martial Order Number 6, dated 25 March 1992
- General Court-Martial Order Number 305, dated 26 August 1993

c. Three pages of "Questions for Consideration" provide questions regarding mitigating circumstances, prior disciplinary history, the whereabouts of the court-martial proceedings, evidence provided at court-martial, and the appointment and qualifications of the presiding judges.

4. The applicant enlisted in the Regular Army on 18 January 1989 for a 4-year period. He completed training and was awarded military occupational specialty 13B (Cannon Crewmember).

5. The highest rank he attained was specialist/E-4 (1 August 1990). His first duty assignment was in Germany from 15 May 1989 through 25 October 1991. His DA Form 2-1 (Personnel Qualification Record) shows he served in Saudi Arabia from 7 January 1991 to an unknown date.

5. Permanent Order Number 188-005, issued by Headquarters, 2nd Armored Division, on 31 October 1990, awarded him the Army Achievement Medal for meritorious achievement during the brigade command inspection from 27 August to 31 August 1990.

7. Permanent Order Number 026-054, issued by Headquarters, 2nd Armored Division (Forward), dated 28 May 1991, awarded him the Army Commendation Medal.

8. A Department of the Army, Report of Result of Trial, adjudged on 25 October 1991, shows that before a general court-martial on that same date, at Garlstedt, Federal Republic of Germany, the applicant pled guilty to and was found guilty

- Charge I, one specification of conspiring to commit a robbery
- Charge II, one specification of reckless driving
- Charge III, one specification of wrongfully appropriating a taxi
- Charge IV, one specification of robbery, value more than \$100
- Charge V, one specification of fleeing the scene of an accident

The court sentenced him to reduction to private/E-1, forfeiture of \$300.00 pay per month for 42 months, confinement for 42 months, and a bad conduct discharge (BCD).

9. The Report of Result of Trial also shows the contents of a pretrial agreement which states the convening authority will approve no sentence in excess of dishonorable discharge, total forfeiture of all pay and allowances for 24 months, confinement for 40 months, and reduction to private/E-1.

10. General Court-Martial Order Number 6, issued by Headquarters, 2nd Armored Division on 25 March 1992, confirms the applicant pled guilty to and was found guilty of the specifications listed in the Report of Result of Trial. It further shows his sentence consisted of reduction to private/E-1, forfeiture of \$300.00 pay per month for 42 months, confinement for 42 months, and to be discharged from service with a BCD.

11. The sentence was approved, except for the portion of the sentence extending to a BCD, was ordered executed, but the execution of the portion of the sentence adjudging confinement in excess of 40 months and forfeiture in excess of \$300.00 pay per month for 24 months was suspended for one year, unless the suspension was sooner vacated the suspended part of the sentence would be remitted without further action.

12. The record of trial was forwarded to the U.S. Army Court of Military Review for appellate review. The findings of guilty and the sentence were affirmed on 10 November 1992.

13. The applicant submitted a Petition for Grant of Review. The petition was granted, and the U.S. Court of Military Appeals affirmed the decision of the U.S. Army Court of Military Review on 18 February 1993.

14. General Court-Martial Order Number 247, issued by the U.S. Disciplinary Barracks, Combined Arms Command, Fort Leavenworth, KS, on 21 May 1993, noted that the

applicant's sentence to a BCD, forfeiture of \$300.00 per month for 42 months, confinement for 42 months (with confinement in excess of 40 months and forfeiture of pay in excess of 24 months suspended for one year, effective 25 March 1992, with provisions for automatic remission), and reduction to private/E-1, had been finally affirmed. The BCD was ordered executed, with confinement at the U.S. Disciplinary Barracks or elsewhere as competent authority may direct.

15. General Court-Martial Order Number 305, issued by the U.S. Disciplinary Barracks, Combined Arms Command, Fort Leavenworth, KS, dated 26 August 1993, shows that General Court-Martial Order Number 6, was rescinded, having been erroneously published.

16. In accordance with Army Regulation 27-10 (Legal Services – Military Justice), reduction to the lowest enlisted grade is automatic when an approved sentence includes a BCD. Consequently, the applicant was automatically reduced to the rank/grade of private/E-1.

17. The applicant was discharged on 18 June 1993, under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), paragraph 3-10, as the result of court-martial, in the rank/grade of private/E-1. His DD Form 214 confirms his service was characterized as bad conduct, with separation code JJD and reentry code RE-4. He was credited with 2 years, 9 months, and 7 days of net active service, with lost time from 25 October 1991 to 17 January 1993 and 18 January 1993 to 18 June 1993, after normal expiration term of service, due to confinement.

18. The ABCMR reviewed the applicant's petition for upgrade of his BCD on 24 January 2012. After careful consideration, the Board determined trial by court-martial was warranted due to the gravity of the offenses, conviction and discharge were in accordance with applicable laws and regulations, and the type of discharge appeared to be appropriate. The applicant's contentions were not sufficiently mitigating to warrant relief when compared to the seriousness of the offenses. Nor was his punishment disproportionate to the offenses. Any redress by the Board of the finality of a court-martial conviction was prohibited by law. The Board was only empowered to change a discharge if clemency was appropriate. In this case, the Board determined clemency was not warranted. The Board denied his request.

19. As new evidence, the applicant provides the following:

a. A brief in support of his claim, dated 12 March 2023, provides a self-authored statement, summary of facts, timeline of events, findings of error, and questions for consideration.

b. 53 pages of military service records, dated 2 November 1988 to 18 June 1993, are summarized above, in pertinent part.

c. He was awarded a Bachelor of Science in Recreation/Leisure Studies, from Mount Olive College, on 16 December 2000.

d. A copy of ABCMR Docket Number AR20110014641, dated 24 January 2012, and associated documents, are summarized, in pertinent part, in paragraph 12 above.

e. Two cover letters from NPRC, dated 23 August 2017 and 4 November 2022, show NPRC's response to the applicant's request for copies of his service records.

f. A letter from the U.S. Army Legal Services Agency, dated 10 March 2020, shows their acknowledgement to the applicant's request for the records pertaining to his court-martial from the U.S. Army Court of Criminal Appeals.

g. A letter from the VA, dated 2 April 2020, shows the VA's acknowledgement of the applicant's request for records.

20. 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.

21. The Board should consider the applicant's requests, 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 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 (conspiring to commit a robbery, reckless driving, wrongfully appropriating a taxi, robbery, and fleeing the scene of an accident). 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. The Board found no error or injustice in the separation processing. Additionally, the applicant does not provide sufficient 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 the character of service the applicant received upon separation was not in error or unjust.

b. 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 pay and confinement. The Board found no evidence and the applicant did not provide a convincing argument or evidence why his grade is in error or why it should be reinstated. The court clearly reduced him to E-1 and that is the grade he held at the time of separation.

c. The ABCMR corrects military records. It is not a court, and the review of his criminal charges is not within its purview. 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 empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate, to moderate the severity of the punishment imposed.

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 AR20110014641 on 24 January 2012.

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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.

a. The ABCMR may, in its discretion, hold a hearing. 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.

b. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. The ABCMR is not an investigative body.

2. Army Regulation 27-10 prescribes policies and procedures pertaining to the administration of military justice. Paragraph 5-38 states automatic reduction to the lowest enlisted pay grade will be automatic in a case in which the approved sentence includes, whether or not suspended, a dishonorable discharge or BCD.

3. Army Regulation 635-200 set forth the basic authority for the separation of enlisted personnel:

a. 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.

b. 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.

c. Paragraph 3, Section IV of the version in effect at the time provided that a Soldier would be given a BCD 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.

4. 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.

5. 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/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, 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.

//NOTHING FOLLOWS//