

IN THE CASE OF: ██████████

BOARD DATE: 13 March 2024

DOCKET NUMBER: AR20230008039

APPLICANT REQUESTS: an upgrade of his bad conduct discharge (BCD).

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

- DD Form 149 (Application for Correction of Military Record)
- self-authored statement, 6 April 2023
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 9 December 1980
- Certificate of Training, 13-16 November 1979, and 13 August 1982
- Certificate of BCD, 9 December 1980
- General Educational Development Diploma, 24 December 1980
- Certificate of Recognition, 1 June 1987
- ██████████ Driver's License, 6 April 1989
- Social Security Card, undated
- Certificate of Appreciation, 4 February 1990
- Certificate of Birth, ██████████
- Certificates of Completion, 6 September 2011, 20 September 2011 (2), and 23 September 2012
- wage statement, 26 December 2014
- emergency room (ER) discharge instructions, 9 January 2019
- disabled person parking affidavit, 15 November 2019
- ██████████ Driver's License, 5 March 2021
- medication reconciliation report, 9 November 2022
- verification of employment, 21 March 2023
- buddy statement, 21 March 2023
- eligibility of federal bonding program, undated
- painter advertisement, undated
- employment history, undated
- resume, undated

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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 was falsely accused but was told at his hearing to admit to all questions. He never got into any trouble and his plan was to retire.
3. The applicant enlisted in the Regular Army on 29 May 1979, for 3 years. The highest rank/grade he held was private/E-2.
4. General Court Martial Order (GCMO) Number 49, issued by Headquarters, 8th Infantry Division (Mechanized), on 13 June 1980, shows:
 - a. The applicant was found guilty of the following charges:
 - on or about 19 January 1980, commit an assault likely to produce grievous bodily harm with a baseball bat
 - on or about 19 January 1980, commit an assault likely to produce grievous bodily harm with a pick mattock and thereby intentionally inflicted grievous bodily harm
 - on or about 19 January 1980, commit an assault likely to produce grievous bodily harm with a pick mattock
 - on or about 19 January 1980, disorderly in command
 - on or about 19 March 1980, attempt to steal property of the U.S. Government a value of about \$68.20
 - b. He was sentenced to be discharged from service with a dishonorable discharge, confinement at hard labor for 30 months, forfeiture of all pay and allowances, and reduction to private/E-1. The sentence was adjudged on 23 April 1980.
 - c. The convening authority approved only so much of the sentence as provides for a BCD, confinement at hard labor for 12 months, forfeiture of all pay and allowances, and reduction to E-1. The sentence was approved on 13 June 1980, and the record of trial was forwarded for appellate review.
5. A memorandum of opinion, U.S. Army Court of Military Review, before three Appellate Military Judges, dated 25 July 1980, states:

Counsel for the applicant declined to file pleadings. 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.

6. GCMO Number 670, issued by Headquarters, U.S. Disciplinary Barracks, Fort Leavenworth, KS on 3 November 1980, shows the sentence having been affirmed, was ordered to be duly executed.

7. The applicant was discharged accordingly on 9 December 1980, under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), paragraph 11-2, with a bad conduct characterization of service in the grade of E-1. He received Separation Code “JJD” and a Reenlistment Code of “RE-4.” His DD Form 214 contains the following entries:

a. He completed 10 months and 25 days of net active service with 6 months of foreign service during the period covered.

b. Block 18 (Remarks) the entry “Time lost under 10 USC, 972 (800423-801209).”

c. Block 28 (Narrative Reason for Separation) the entry “NA [Not Applicable].”

8. The applicant provides

a. Education and employment documents that show his training before his discharge, and educational and work history after his discharge.

b. Various medical documents that show a list of the applicants’ medications and his visit to an ER on 9 January 2019 for Seizure and Dyspnea and follow-up for high blood pressure.

c. His birth certificate, social security card, two driver’s licenses from the states of ██████████ and ██████████, disabled persons permanent parking permit application, and a buddy statement verifying the applicant was a resident of ██████████, and a member of the ██████████ Baptist church as of 21 March 2023.

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. The Board should consider the applicant’s argument and evidence, along with the overall 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 not 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. Upon review of the applicant's petition and available military record, the Board determined based on the preponderance of evidence there is insufficient evidence of in-service mitigating factors to overcome the misconduct of assault and stealing government property that supports the applicant's request for an upgrade of his characterization of service. The Board found the applicant's service record exhibits numerous instances of misconduct during his second enlistment period for 10 months and 25 days of net active service for this period.

2. The Board noted the applicant's post service educational work history and achievements, the applicant's provided no character letters of support to attest to his honorable conduct for the Board to weigh a clemency determination. 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. Based on the evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust. Therefore, relief was denied.

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.

3/19/2024

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, USC, 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, in effect at the time, sets forth the basic authority for the separation of enlisted personnel.
 - a. Chapter 11 states an enlisted person 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.

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/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.

//NOTHING FOLLOWS//