

IN THE CASE OF: ██████████

BOARD DATE: 6 March 2024

DOCKET NUMBER: AR20230008284

APPLICANT REQUESTS: reconsideration of his previous request to upgrade his dishonorable discharge to general, under honorable conditions.

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

DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)

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 AR20180002417 on 20 August 2019

2. The applicant states he had two tours in Iraq. Tour of service was not shown on the record that affected his incarceration and discharge from the military. He also wants an upgrade so he can receive mental health care from the Department of Veterans Affairs.

3. Review of the applicant's service records shows:

a. He enlisted in the Regular Army on 15 September 2009. He completed training for award of military occupational specialty 11B, Infantryman. He served in Afghanistan from 3 May 2010 to 4 May 2011.

b. On 19 June 2012, the applicant was arraigned at Fort Campbell, KY, on the following offenses at a general court-martial convened by Commander, 101st Airborne Division (Air Assault) and Fort Campbell. He was convicted of the following Charges and their Specifications:

(1) Charge I: Article 80. Plea: Not Guilty.* Finding: Not Guilty.* (but guilty of violating Article 128)

- Specification 1, Did at or near Fort Campbell, KY, between on or about 21 January 2012 and 22 January 2012, with premeditation, attempt to murder

- Specialist ██████ by means of shooting him with a rifle. Plea: Not Guilty. Finding: Dismissed on motion of trial counsel prior to announcement of findings
- Specification 2: Did, at or near Fort Campbell, KY, between on or about 21 January 2012 and 22 January 2012, with premeditation, attempt to murder Sergeant VAA by means of shooting him with a rifle. Plea: Not Guilty. Finding: Dismissed on motion of trial counsel prior to announcement of findings
 - Specification 3: Did, at or near Fort Campbell, KY, between on or about 21 January 2012 and 22 January 2012, attempt to murder Specialist ██████ by means of shooting him with a rifle. Plea: Not Guilty. Finding: Not Guilty but Guilty of one specification of Article 128, Aggravated Assault by Offer of Specialist ██████ with a dangerous weapon committed with a loaded firearm
 - Specification 4: Did, at or near Fort Campbell, KY, between on or about 21 January 2012 and 22 January 2012, attempt to murder Sergeant ██████ by means of shooting him with a rifle. Plea: Not Guilty. Finding: Not Guilty. but Guilty of one specification of Article 128, Aggravated Assault by Offer of Sergeant ██████ with a dangerous weapon committed with a loaded firearm.

(2) Charge II: Article 92. Plea: None Entered. Finding: Dismissed. Specification: Having knowledge of a lawful general regulation, to wit: paragraphs 9.3 and 9.4 Fort Campbell Regulation 190-1, dated 7 October 2011, an order which it was his duty to obey, did, at or near Fort Campbell, KY, between on or about 21 January 2012 and 22 January 2012 wrongfully possess a firearm that was not registered with the vehicle registration office. Plea: None Entered. Finding: Dismissed.

(3) Charge III: Article 128, Plea: Guilty, Finding Guilty

- Specification 1: Did, at or near Fort Campbell, KY, between on or about 21 January 2012 and 22 January 2012 unlawfully strike Specialist ██████ in the face with his fist. Plea: Guilty. Finding: Guilty.
- Specification 2: Did, at or near Fort Campbell, KY, between on or about 21 January 2012 and 22 January 2012 unlawfully push, shove, strike, and grab Specialist ██████ on the arms, chest, and upper body with his arms, upper body, and hands. Plea: Not Guilty. Finding: Dismissed.

c. The court sentenced him to forfeiture of all pay and allowances, reduction to the lowest enlisted grade of E-1, confinement for 9 years, and to be discharged from the service with a dishonorable discharge.

d. On 6 December 2012, the convening authority approved only so much of the sentence as provides for reduction to the grade of E-1, confinement for ninety (90) months, and a dishonorable discharge and, except for that part of the sentence

extending to a dishonorable discharge, will be executed. The automatic and adjudged forfeitures and adjudged, reduction in rank were deferred effective 19 June 2012 and the deferments are terminated effective today. The automatic forfeiture of all pay, and allowances required by Article 58b, UCMJ is waived effective today for a period of six months with direction that these funds be paid to the Soldier's children [Their Names] in care of his mother [Her Name], residing at [Address and Phone Number] The Soldier will be credited with one hundred forty-nine (149) days of confinement against the sentence to confinement.

e. On 9 June 2014, while in confinement in the custody and control of the armed forces serving a sentence to confinement imposed by the above general court-martial, the applicant was arraigned at Fort Leavenworth, KS, on the following offenses at a general court-martial convened by Commander, US Army Combined Arms Center, and Fort Leavenworth:

(1) Charge. Article 128. Plea: Guilty. Finding: Guilty.

(a) Specification 1: On or about 25 September 2013, assault Specialist [REDACTED] who then was and was then known by the accused to be a sentinel in the execution of this duty by striking him in the shoulder and left side of the head with his hand. (After arraignment but before entry of pleas, the specification was amended to read: On or about 25 September 2013, assault Specialist [REDACTED] who then was and was then known by the accused to be a sentinel in the execution of his duty in the United States Disciplinary Barracks with a Personal Alarm System attached to his pistol belt, by striking him in the shoulder and left side of the head with his hand. Plea: Guilty. Finding: Guilty.

(b) Specification 2: On or about 25 September 2013, assault Specialist [REDACTED], who then was and was then known by the accused to be a sentinel in the execution of this duty by striking him on the left ear with his hand. (After arraignment but before entry of pleas, the specification was amended to read: On or about 25 September 2013, assault Specialist [REDACTED], who then was and was then known by the accused to be a sentinel in the execution of his duty in the United States Disciplinary Barracks with a Personal Alarm System attached to his pistol belt, by striking him on the left ear with his hand. Plea: Guilty. Finding: Guilty.

(c) Specification 3: On or about 25 September 2013, assault Specialist [REDACTED], who then was and was then known by the accused to be a sentinel in the execution of this duty by striking him in the head and upper body with his hand and wrapping his legs behind Specialist [REDACTED] and sweeping his legs out from under him. (After arraignment but before entry of pleas, the specification was amended to read: On or about 25 September 2013, assault Specialist [REDACTED] who then was and was then known by the accused to be a sentinel in the execution of his duty in the United States Disciplinary

Barracks with a Personal Alarm System attached to his pistol belt, by striking him in the head and upper body with his hand. Plea: Guilty. Finding: Guilty.

(2) The court sentenced him to be confined for fourteen (14) months.

(3) On 4 March 2015, the convening authority approved only so much of the sentence as provides for confinement for ten (10) months and will be executed.

f. General Court-Martial Order Number 116, issued by Headquarters, U.S. Army Fires Center, Fort Sill, OK on 6 March 2014, shows the appellate review (of the general court-martial that sentenced him to a dishonorable discharge) had been completed, the sentence has been finally affirmed. Article 71(c) having been complied with, and the dishonorable discharge will be executed.

g. The applicant was discharged on 3 April 2014. His DD Form 214 (certificate of Release or Discharge from Active Duty) shows he was discharged in the rank/grade of private/E-1 as a result of court-martial conviction in accordance with Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), chapter 3, with a dishonorable discharge (Separation Code JJD and Reentry Code 4). He completed 2 years, 4 months, and 7 days of active service. He had 802 days of lost time (22 January 2012 to 3 April 2014).

4. The applicant did not qualify to have his discharge reviewed by the Army Discharge Review Board because his conviction was by a general court-martial.

5. On 20 August 2019, the ABCMR considered his request to upgrade his discharge and denied it. After reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined that relief was not warranted. Based upon the serious, criminal nature of the misconduct which led to the applicant's separation, the Board concluded that the characterization of service received at the time of discharge was appropriate.

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. 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. 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, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant's petition and available military records, the Board determined there is insufficient evidence of in-service mitigating factors to overcome the egregious misconduct. 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.

2. The Board noted, the applicant provided no post service achievements or character letters of support attesting to his honorable conduct for the Board to weigh a clemency determination. This board is not an investigative body. The Board determined despite the absence of the applicant's deployment records, they agreed the burden of proof rest on the applicant, however, he did not provide any supporting documentation and his service record has insufficient evidence to support the applicant's contention regarding his two (2) tours in Iraq. Based on the preponderance of evidence, the Board determined the reversal of the previous Board decision is without merit and denied relief.

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 Board found 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 AR20180002417 on 20 August 2019.

X [REDACTED]

CHAIRPERSON
[REDACTED]

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 (Active Duty Enlisted Administrative Separations) provides 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 3-7c states a discharge, under other than honorable conditions, is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, security reasons, or for the good of service in selected circumstances.

d. Paragraph 3-11 states a member 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.

2. Title 10, U.S. Code, section 1552, provides that the Secretary of a Military Department may correct any military record of the Secretary's Department when the Secretary considers it necessary to correct an error or remove an injustice. With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under the Uniform Code of Military Justice, action to correct any military record of the Secretary's Department may extend only to correction of a record to reflect actions taken by reviewing authorities under the Uniform Code of Military Justice or action on the sentence of a court-martial for purposes of clemency. Such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that Military Department.

3. 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/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. 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. 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//