

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 23 April 2024

DOCKET NUMBER: AR20230009784

APPLICANT REQUESTS: an upgrade of his bad conduct discharge (BCD) to an under honorable conditions (general) discharge.

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

DD Form 149 (Application for Correction of Military Record)

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 in his early twenties, immature, short-tempered, anti-social, and self-centered at the time of his separation. He was a private/E-2 just out of school when he arrived in Germany. His roommate, who was a foreign national, stole his checkbook and wrote several checks that were returned for insufficient funds. He was not the one who wrote the bad checks.
3. On 9 May 2000, the applicant enlisted in the Regular Army for a period of 4 years.
4. The applicant's service record is void of the complete facts and circumstances surrounding his trial by General Court-Martial, to include the DD Form 458 (Charge Sheet) depicting the offenses he committed in violation of the Uniform Code of Military Justice.
5. A Memorandum for Record rendered by the Facility Noncommissioned Officer in Charge of Headquarters, U.S. Army Personnel Control Facility (PCF), U.S. Armor Center and Fort Knox, Fort Knox, KY on 27 October 2004 shows reassignment orders were never received at the PCF for the applicant, who was court-martialed on 13 December 2002 at Bamberg, Germany. The applicant was sentenced to a BCD. Personnel who are court-martial and sentenced to a punitive discharge are assigned to the PCF, Fort Knox, KY, pending appellate review of their case. A representative of the

PCF was informed that the applicant was placed on voluntary excess leave from Germany on 8 May 2003. The PCF was in the process of establishing a Military Personnel Record assigning the applicant to the PCF effective 9 May 2003, and placing him on excess leave from the PCF effective 9 May 03, for the purpose of discharging him upon completion of his appellate review.

6. General Court-Martial (GCM) Order Number 18, issued by Headquarters, U.S. Army Personnel Control Facility (PCF), U.S. Armor Center and Fort Knox, Fort Knox, KY on 27 January 2005 shows the applicant's GCM sentence was a BCD, confinement for 6 months, and reduction to E-1, adjudged on 13 December 2002, as promulgated in GCM Order Number 87, issued by Headquarters, 1st Infantry Division on 9 October 2003, had been finally affirmed. That portion of the sentence pertaining to confinement had been served. Article 71(c) having been complied with; the BCD discharge was ordered to be duly executed.

7. Orders and the applicant's DD Form 214 show he was discharged on 18 March 2005 under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 3, as a result of court-martial. His service was characterized as bad conduct. His Separation Program Designator code was "JJD," and his Reentry code was "4." He was credited with 4 years, 5 months, and 13 days of net active service. He had lost time due to confinement from 13 December 2002 to 8 May 2003.

8. 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.

9. Army Regulation 635-200 provides that a Soldier would 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 the affirmed sentence ordered duly executed.

10. In reaching its determination, the Board can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance.

BOARD DISCUSSION:

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 request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The

applicant was convicted by a general court-martial of violating the UCMJ and sentenced to a bad conduct discharge. His original court-martial order is not available for review. However, his record contains a final court-martial order that shows his sentence a bad conduct discharge, confinement for 6 months, and reduction to E-1, adjudged on 13 December 2002, had been affirmed, and the bad conduct discharge was ordered duly executed. The ABCMR will decide cases on the evidence of record. It is not an investigative body. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. Also, 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 available evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

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.

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[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. Title 10, USC, Section 1552(b), provides that applications for correction of military records must be filed within three 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 three-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. Title 10, USC, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Court-martial convictions stand as adjudged or modified by appeal through the judicial process, 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.
3. Army Regulation 15-185 prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR, prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation provides that 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. It is not an investigative body.
4. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.
 - a. An honorable discharge was separation with honor. Issuance of an honorable discharge certificate was appropriate when the quality of the Soldier's service generally met the standards of acceptable conduct and performance of duty or was otherwise so meritorious that any other characterization would clearly be inappropriate.
 - b. A general discharge was a separation from the Army under honorable conditions. When authorized, separation authorities could issue a general discharge to Soldiers whose military record was satisfactory but not sufficiently meritorious to warrant an honorable discharge.
 - c. 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, homosexual conduct, security reasons, or in lieu of trial by court martial in the following circumstances.
 - (1) An under other than honorable conditions discharge will be directed only by a commander exercising general court-martial authority, a general officer in command

who has a judge advocate or legal advisor available to his/her command, higher authority, or the commander exercising special court-martial convening authority over the Soldier who submitted a request for discharge in lieu of court-martial (see chapter 10) when delegated authority to approve such requests.

(2) When the reason for separation is based upon one or more acts or omissions that constitutes a significant departure from the conduct expected of Soldiers of the Army. Examples of factors that may be considered include the following:

- Use of force or violence to produce bodily injury or death
- Abuse of a position of trust
- Disregard by a superior of customary superior-subordinate relationships
- Acts or omissions that endanger the security of the United States or the health and welfare of other Soldiers of the Army
- Deliberate acts or omissions that seriously endanger the health and safety of other persons

d. A BCD will be given to a Soldier pursuant only to an approved sentence of a general or special court-martial. The appellate review had to have been completed and the affirmed sentence then ordered duly executed. Questions concerning the finality of appellate review should be referred to the servicing staff judge advocate.

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//