

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 April 2024

DOCKET NUMBER: AR20230010192

APPLICANT REQUESTS:

- reconsideration of his prior request for upgrade of his bad conduct discharge
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- partial court-order, undated
- lease agreement, dated 29 October 2022
- Cardiology Progress Note, dated 11 May 2023
- Nurse Practitioner's letter, undated
- applicant's Department of Veterans Affairs (VA) Form 21-4138 (Statement in Support of Claim), dated 16 May 2023
- 3 witness completed VA Forms 21-4138, dated between 18 -28 May 2023
- letter of support, dated 24 May 2023

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 AR20080018652 on 19 March 2009.

2. The applicant states:

a. He is humbly seeking to have his character of service upgraded to honorable. As it shows in his attached evidence, he has been and continues to be a good citizen and with the Board's help, that will continue to be the case.

b. A discharge upgrade will help him in continuing to raise his grandson. He is in the middle of a divorce and dealing with the adoption of his grandson. He has had to move a lot, as his grandson's father, a violent person, was looking for him in an attempt to get his son back.

c. Coming from the Bronx, NY, he did not have much in the way of mentors or family members to mold him and teach him about life. He learned everything on his own. His parents were on drugs and did not really tend to him. He was immature, irresponsible, and foolish, but when he grew up, he got his life together. He learned a trade, started his own company, and has been working ever since, staying out of trouble. He has been an electrician contractor for over 20 years. He hopes God puts it in the Board's heart to have an open mind and give him a second chance.

d. He adopted his 9-year old grandson in his early years and they are still together, just the two of them as roommates. He is divorced and in the last 6 months has been informed by the doctors that he has degenerative heart disease, high blood pressure, type II diabetes, neuropathy of the feet, shortness of breath, and kidney failure. He can no longer really work and has a letter from his heart doctors explaining he has no insurance and is really doing poorly. Not to mention, his rent and utilities are in the red. Thank you for considering helping him and upgrading his discharge.

3. The applicant enlisted in the Regular Army on 8 October 1985.

4. The complete facts and circumstances surrounding the applicant's discharge are not in his available records for review.

5. Headquarters, 3rd Armored Division Special Court-Martial Order Number 82, dated 13 November 1986, shows:

a. The applicant was arraigned and tried pursuant to Court-Martial Convening Order Number 37, this headquarters, dated 21 May 1986.

b. He was charged with, pled guilty to, and found guilty of:

- without authority, failing to go at the time prescribed to his appointed place of duty on 14 May 1986
- willfully disobeying a lawful order from a superior non-commissioned officer on 9 May 1986
- stealing 1,100 Deutsch Mark (DM) and \$60.00 from M\_\_\_\_\_ H\_\_\_\_\_ on 9 May 1986
- stealing two dumbbells, part of a set of weights of a value of \$330.00 on 15 May 1986

c. On 22 May 1986, he was sentenced to:

- forfeiture of \$426.00 pay per month for 3 months
- confinement for 3 months
- discharge from the service with a bad conduct discharge

6. Headquarters, U.S. Army Training Center and Fort Dix Special Court-Martial Order Number 34, dated 30 April 1987, the applicant's sentence to forfeiture of \$426.00 pay per month for 3 months; confinement for 3 months; and discharge from the service with a bad conduct discharge, adjudged on 8 October 1986, as promulgated in Special Court-Martial Order Number 82, Headquarters, 3rd Armored Division, dated 13 November 1986, as corrected by a U.S. Army Court of Military Review Notice of Court-Martial Order Correction, dated 30 January 1987, was finally affirmed. All other requirements having been complied with; the bad conduct discharge would be executed. That portion of the sentence pertaining to confinement was served.
7. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was given a bad conduct discharge as a result of court-martial, with a corresponding separation code of JJD on 8 June 1987. He was credited with 1 year, 5 months, and 15 days of net active service.
8. The applicant previously applied to the ABCMR in 2008, requesting an upgrade of his bad conduct discharge to honorable. On 19 March 2009, the Board denied the applicant's request, determining the evidence presented does not demonstrate the existence of a probable error or injustice and that the overall merits of his case are insufficient as a basis for correction of his records.
9. The applicant provided a partial court-order, which shows on an unspecified date he and an individual, presumed to be his wife, were awarded custody and permanent guardianship of J\_\_\_\_ L\_\_\_\_, his grandson.
10. The applicant provided a lease agreement effective 29 October 2022, which shows the amount of his security deposit, additional fees/charges, and monthly rent.
11. A Cardiology Progress Note, dated 11 May 2023, shows the applicant was seen on the date of the progress note for a follow-up to a hospitalization due to hypertension and edema with complaints of chest pain. It shows he works in construction and has difficulty keep with his work due to his medical conditions.
12. An undated letter from a Nurse Practitioner and CEO of Ross and Associates Medical Partners, shows the applicant is not capable of standing for long periods of time due to peripheral neuropathy and should not overexert himself due to frequent bouts of shortness of breath. His additional medical conditions include congestive heart failure, diabetes, hypertension, and kidney disease.
13. The applicant provided four additional documents of support, including one letter and three VA Forms 21-4138, all dated in May 2023, which have been provided in full to the Board for review. They attest, in pertinent part, to the fact that the applicant is a productive, responsible, well-respected individual of great character.

14. The applicant provided an argument or evidence the Board should consider in accordance with the published Department of Defense guidance regarding liberal consideration, equity, injustice, or clemency determinations.

BOARD DISCUSSION:

1. The applicant's contentions, the military record, and regulatory guidance were carefully considered. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was warranted.

2. The applicant's request for a personal appearance hearing was carefully considered. However, in this case, the evidence of record and independent evidence provided by the applicant 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.

3. The evidence of record shows -

a. the applicant enlisted and entered active duty when he was 17 years old. He was convicted pursuant to his pleas of guilty, of the following offenses, which he committed at the age of 18 years old and sentenced to a BCD.

(1) The charge of willfully disobeying a lawful order from a superior non-commissioned officer and stealing 1,100 Deutsch Mark (DM) and \$60.00, both occurred on 9 May 1986

(2) The charge of failing to go at the time prescribed to his appointed place of duty and the charge of stealing two dumbbells, part of a set of weights of a value of \$330.00 both occurred on 14 May 1986.

b. The applicant pled guilty, and based on the nature of his infractions, it would not be appropriate to grant him an honorable characterization of service. However, given the applicant's age and background, and the fact that we are dealing with, in effect, things that occurred in a very short period, the Board determined clemency is warranted in this case. The punishment he received was too severe given the nature of his indiscipline. The Board recommends upgrading the applicant's characterization of service to under honorable conditions (general).

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:                :                :                GRANT FULL RELIEF

█                █                █                GRANT PARTIAL RELIEF

:                :                :                GRANT FORMAL HEARING

:                :                :                DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by:

- voiding his DD Form 214 for the period ending on 8 June 1986
- issuing him a new DD Form 214 showing his characterization of service as under honorable conditions (general)

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to upgrading his characterization of service to honorable.

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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, 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. The Secretary acting through boards of civilians of the executive part of that Military Department shall make such corrections.

2. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel.

a. 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. 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. Chapter 3, paragraph 3-11, provides that an enlisted person would be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial. The appellate review is required to be completed and the affirmed sentence ordered duly executed.

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.

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.

4. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR.

a. Paragraph 2-11 states applicants do not have a right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

b. 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//