

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 24 May 2024

DOCKET NUMBER: AR20230011858

APPLICANT REQUESTS: an upgrade of his dishonorable discharge to a more favorable characterization of service.

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) in lieu of DD Form 149 (Application for Correction of Military Record), 31 July 2023
- Memorandum, Staff Judge Advocate (SJA), Headquarters (HQ), 4th Infantry Division (ID), 29 September 1987
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 28 December 1988

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, 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, in effect:

a. He was deliberately brought into an ongoing conspiracy without his knowledge. He received the harshest sentence. The chain of command recommended him for a court martial.

b. Had the investigation been conducted prior to his court-martial, it is highly likely that he would not have been court-martialed at all. It was later found that the chain of command was deeply involved.

c. Others received immunity from prosecution. All who were involved were at a deeper level than he was. He was the only African American involved in the conspiracy which is why he believes he received the harshest sentence.

d. His appeal went to the third level of appeals in Falls Church.

3. The applicant provides a copy of a memorandum from SJA, HQ, 4th ID, to the Commanding General, 4th ID, dated 29 September 1987, in which the SJA requests suspension of the unexecuted portion of the applicant's court-martial sentence. This memorandum notes, in part:

a. The applicant voluntarily cooperated fully with the case of another Soldier in U.S. v. S___, the applicant's executive officer. The government successfully prosecuted the case in U.S. v. S___. The evidence presented at trial of the executive officer showed that the applicant was deliberately brought into a conspiracy by the executive officer of his unit. The evidence further showed that the conspiracy included the company commander, the first sergeant, and the armorer. The investigation revealed that nine other Soldiers at Fort Carson were involved in some way in the weapons building scheme.

b. The applicant was the least culpable of the major characters in the conspiracy. He received, however, the stiffest sentence of the conspirators, although he alone admitted the full extent of his involvement.

4. A review of the applicant's service records shows:

a. On 19 September 1981, he enlisted in the U.S. Army Reserve for an unspecified period. His DD Form 4 (Enlistment/Reenlistment Document) is not contained in the available records.

b. On 16 April 1982, he was issued self-terminating orders for active duty training (ADT). On 26 August 1982, he was honorably released from ADT and transferred to his Reserve Component command. His DD Form 214 for this period shows he completed 3 months and 11 days.

c. On 5 December 1983, he requested discharge from the USAR in order to enlist in the Regular Army (RA). His DD Form 4 shows on 6 March 1984, he enlisted in the RA for a period of 2 years and 21 days beginning at grade/pay grade private first class/E-3. He was awarded military occupational specialty 11C (Indirect Fire Infantryman).

d. On 20 June 1986, he was promoted to sergeant/E-5 and on 11 July 1986, he was awarded the Army Good Conduct Medal (First Award).

e. On 26 September 1986, he accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice for being drunk and disorderly at Fort Carson on 16 September 1986. His punishment consisted of restriction and extra duty for 7 days. He did not appeal this punishment.

f. On 7 January 1987, his status was changed from present for duty (PDY) to confinement.

g. All of the applicant's separation documents are not located in his service record, to include, the findings of a U.S. Army Criminal Investigation Division, Report of Investigation, DA Form 458 (Charge Sheet) showing the charges and specifications, a notification of rights memorandum, his election of rights memorandum, and his chain of command approval memoranda in connection with a general courts-martial (GCM), are not contained in the available records.

h. GCM Order (GCMO) Number 15 issued by HQ and Fort Carson, 4th ID, shows he was arraigned and tried before a GCM at Fort Carson on 20 November 1986 with the following charges and findings:

(1) Charge I, Article 81; not guilty of conspiracy with another Soldier to sell an M-16A1 rifle, military property of the United States, and in order to effect the object of the conspiracy, the accused and co-conspirator did wrongfully obtain the M-16A1 rifle and did wrongfully conceal said M-16A1 on or about 3 June 1986, until a buyer was located.

(2) Charge II, Article 108; guilty of without proper authority, willfully dispose of by giving to PFC EJF___ an M-16A1 rifle, of some value, military property of the United States, on or about 3 June 1986.

(3) Charge III, Article 121; guilty of larceny of an M-16A1 rifle, a firearm of some value, military property of the United States, between 7 May 1986 to about 4 June 1986.

(4) He was sentenced to be discharged with a dishonorable discharge, to forfeit all pay and allowances, to be confined for 3 years, and to be reduced to private/E-1.

(5) The sentence was adjudged on 7 January 1987.

i. A memorandum from the SJA to the Commanding General, 4th ID, Fort Carson, dated 29 September 1987, recommended the suspension of the unexecuted portion of confinement of the sentence adjudged in United States v. (Applicant). In his memorandum, the SJA outlined the involvement and sentences of other Soldiers involved in the conspiracy, noting the applicant was the least culpable of the major characters in the conspiracy. He received, however, the stiffest sentence of the conspirators. He further noted, in part:

(1) The evidence further showed that the conspiracy included the company commander, CPT FL___; the first sergeant, 1SG RR___; and the armorer, CPL MB___.

(2) CPL MB____, pursuant to his pleas, was found guilty in December 1986 of larceny of government parts, false swearing, and dereliction of duty. He was sentenced to a bad conduct discharge, reduction to E-1, total forfeitures, and 18 months confinement. In accordance with a pretrial agreement, that sentence was approved with the exception of the confinement portion which exceeded 12 months.

(3) The company commander was able to resign his commission prior to the government determining his participation in this activity.

(4) The first sergeant was granted transactional immunity in order to obtain his cooperation.

(5) The investigation revealed that nine other Soldiers at Fort Carson were in some way involved in the weapons building scheme.

(6) The organizer of the conspiracy, CPT JJS____, was sentenced to a dismissal, four months confinement, and forfeiture of \$1,500.00 a month for four months.

j. On 29 September 1987, his status was changed from confinement to PDY.

k. On the same date, GCMO Number 61, issued by HQ and Fort Carson, 4th ID, suspended for 27 months the unexecuted portion of the sentence to confinement promulgated in GCOMO Number 15, adjudged on 7 January 1987, at which time, unless sooner vacated, the suspended portion of the sentence would be remitted without further action.

l. On 30 September 1987, the applicant was reassigned to Personnel Control Facility, Fort Carson.

m. On 30 November 1987, the United States Army Court of Military Review considered the issues raised by the appellant and, in finding them without merit, affirmed the sentence of the GCM.

n. On 25 July 1988, the Judge Advocate General, United States Army Judiciary, notified the Commanding General, 4th ID, Fort Carson, of the finalization of the conviction.

o. On 4 August 1988, the CG, 4th ID, Fort Carson ordered execution of the dishonorable discharge.

p. GCMO Number 58, issued by HQ, 4th ID, Fort Carson, 4 August 1988, executed the dishonorable discharge, as promulgated in GCMO Number 15, dated 24 February 1987. Pursuant to GCMO Number 61, dated 29 September 1987, the unexecuted

portion of the sentence to confinement was suspended for 27 months with provision for automatic remission. Article 71c having been complied with, the dishonorable discharge would be executed.

q. On 28 December 1988, he was discharged. His DD Form 214 shows he completed 4 years and 27 days of net active service with 9 months of time lost from 7 January 1987 to 5 March 1987 and from 6 March 1987 to 28 September 1987; and he had 452 days excess leave from 1 October 1987 to 28 December 1988. His DD Form 214 further shows in:

- block 4b (Grade, Rate, or Rank) – private, E-1
- block 13 (Decorations, Medals, Badges, Citations, and Campaign Ribbons Awarded or Authorized) – Army Service Ribbon, NCO Professional Development Ribbon, Army Good Conduct Medal, Marksman Marksmanship Qualification Badge with Rifle Bar (M-16), and Sharpshooter Marksmanship Qualification Badge with Hand Grenade Bar
- block 24 (Character of Service) – dishonorable
- block 25 (Separation Authority) – Army Regulation 635-200, Section IV
- block 26 (Separation Code): “JJD”
- block 27 (Reenlistment Code) – RE-4
- block 28 (Narrative Reason for Separation) – as the result of court-martial-other

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 court-martial that sentenced him to a dishonorable discharge. The applicant's trial by a court-martial was warranted by the gravity of the offenses charged (larceny of M-16 and disposing of weapon). 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 dishonorable discharge pursuant to an approved sentence of a court-martial. The appellate review was completed, and the affirmed sentence was ordered duly executed.

a. A majority of the Board determined there was no error or injustice in the separation processing. 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. Also, the applicant provided no evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination.

b. A member of the minority voted to upgrade the discharge to general based on the fact that the applicant owned up to his mistake and appears to have been punished longer than others involved in the same misconduct. In fact, others advocated on his behalf to reduce his confinement.

c. Based on a preponderance of evidence, the majority of the Board determined that the character of service the applicant received upon separation was not in error or unjust.

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.

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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(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 15-185 (Army Board for Correction of Military Records) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the Army Board for Correction of Military Records (ABCMR). Paragraph 2-9 states 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.

3. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), currently in effect, provides that an honorable discharge is a separation with honor. A general discharge is a separation under honorable conditions issued to a Soldier whose military record was satisfactory but not so meritorious as to warrant an honorable discharge.

a. An honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier'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. A characterization of under honorable conditions may be issued only when the reason for separation specifically allows such characterization. It will not be issued to Soldiers solely upon separation at expiration of their period of enlistment, military service obligation, or period for which called or ordered to active duty.

c. An under other than honorable conditions characterization was authorized when the reason for separation and was warranted by the circumstances of the case.

d. Paragraph 3-10, Section IV. A member will be given a dishonorable discharge pursuant only to an approved sentence of the GCM. The appellate review must be completed and the affirmed sentence ordered duty executed.

4. Army Regulation 635-5-1 (Personnel Separations – Separation Program Designators), in effect at the time, listed the specific authorities, regulatory, statutory, or other directive, and reasons for separation from active duty, active duty for training, or full time training duty. The separation program designator "JJD" corresponded to "As the Result of Court-Martial-Other," and the authority, Army Regulation 635-200, Section IV.

5. Army Regulation 601-210 (Active and Reserve Components Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment processing into the Regular Army, U.S. Army Reserve, and Army National Guard. Chapter 3 prescribes basic eligibility for prior-service applicants for enlistment and includes a list of Armed Forces reentry eligibility (RE) codes.

- RE-1 applies to persons completing an initial term of active service who are considered qualified to reenter the U.S. Army if all other criteria are met
- RE-3 applies persons who are not considered fully qualified for reentry or continuous service at the time of separation, but disqualification is waivable
- RE-4 applies to persons separated from their last period of service with a nonwaivable disqualification
- RE-4R applies to persons who retired for length of service with 15 or more years of active Federal service

6. 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.

a. 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.

b. 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//