

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 7 June 2024

DOCKET NUMBER: AR20230012433

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

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- Enlisted Record Brief
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Department of Veterans Affairs (VA) Service Eligibility Decision
- VA Rating Decision

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 his initial enlistment was served honorably from 2 February 2000 through 1 February 2006. He received a dishonorable discharge for his period of extension from 2 February 2006 through 25 March 2009. After reviewing his records, the VA determined his initial period of enlistment was considered honorable for eligibility to receive VA benefits to include medical. He is currently 30 percent disabled and an upgrade will allow him to access additional benefits.
3. On 2 February 2000, the applicant enlisted in the Regular Army in the rank/grade of private (PV1)/E-1 for a period of 6 years. Upon completion of initial entry training, he was awarded military occupational specialty 25B (Information Technology Specialist). He served in units at Fort Gordon, GA; Kuwait; and at Carlisle Barracks, PA. He was promoted to the rank/grade of sergeant (SGT)/E-5 on 1 May 2004 the highest rank held.
4. On 23 June 2004, the applicant voluntarily extended his enlistment for a period of 20 months to meet service remaining requirements for a permanent change of station.

His expiration term of service date was established as 1 October 2007. He was subsequently reassigned to a unit at Fort Belvoir, VA.

5. A DA Form 4430 (Department of the Army Report of Result of Trial) shows the applicant was arraigned and tried before a Special Court-Martial on 6 September 2007 at Fort Belvoir, VA.

a. The applicant pled guilty and was found guilty of the following offenses in violation of the Uniform Code of Military Justice (UCMJ):

- absence without leave (AWOL) from 26 October 2006 to 7 November 2006
- AWOL from 20 December 2006 to 11 June 2007
- wrongful use of marijuana between on or about 11 May and 11 June 2007

b. His sentence included forfeiture of \$1,000.00 pay per month for 4 months; Reduction from SGT/E-5 to PV1/E-1; confinement for 4 months; and a BCD.

c. The sentence was adjudged on 6 September 2007.

6. The applicant was placed in confinement from 6 September 2007 to 13 December 2007.

7. A U.S. Army Court of Criminal Appeals (USACCA) Decision document shows the findings of guilty, and the sentence were affirmed on 22 July 2008.

8. A U.S. Court of Appeals for the Armed Forces Order, dated 23 January 2009, shows the decision of the USACCA was affirmed as to findings and only so much of the sentence as provides for forfeiture of \$867.00 pay per month for 4 months, confinement for 4 months, reduction to PV1/E-1, and a BCD. As a result, Special Court-Martial Order (SPCMO) Number 1 issued by Headquarters, U.S. Army Garrison, Fort Belvoir, Fort Belvoir, VA on 23 January 2008 was amended accordingly.

9. SPCMO Number 30, issued by Headquarters, U.S. Army Armor Center and Fort Knox, Fort Knox, KY on 11 February 2009, shows the sentence, had been finally affirmed. The sentence to confinement had been served. Article 71(c) having been complied with; the BCD was ordered to be executed.

10. The applicant was discharged in the grade of E-1 on 25 March 2009, under the provisions of Army Regulation 635-200 (Active Duty Enlisted Separations), Chapter 3, as a result of court-martial. He was assigned Separation code "JJD" and Reentry code "4." His service was characterized as "Bad Conduct." He was credited with completion of 8 years, 4 months, and 13 days of net active service this period. He had lost time due to AWOL and confinement from 26 October 2006 to 7 November 2006, from

20 December 2006 to 11 June 2007, and from 6 September 2007 to 12 December 2007. He was awarded or authorized:

- Army Commendation Medal (2nd Award)
- Army Achievement Medal
- Army Superior Unit Award
- Army Good Conduct Medal (2nd Award)
- National Defense Service Medal
- Armed Forces Expeditionary Medal
- Global War on Terrorism Expeditionary Medal
- Global War on Terrorism Service Medal
- Noncommissioned Officer Professional Development Ribbon
- Army Service Ribbon
- Overseas Service Ribbon

11. Additionally, his DD Form 214 shows in Block 18 (Remarks) the entries, "EXTENSION OF SERVICE WAS AT THE REQUEST AND FOR THE CONVENIENCE OF THE GOVERNMENT" and "MEMBER HAS NOT COMPLETED FIRST FULL TERM OF SERVICE" (see Administrative Notes).

12. The applicant provides:

a. A letter from the VA, dated 14 November 2019, shows the VA determined the applicant's military service from 2 February 2002 through 1 February 2006 was considered honorable for VA purposes. It was also determined that his service from 2 February 2006 through 25 March 2009 was dishonorable for VA purposes and did not entitle him to any benefits.

b. A VA Rating Decision, dated 23 January 2023, shows the VA granted the applicant a 30 percent disability rating for service connected insomnia disorder, effective 24 November 2020.

13. 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.

14. 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 and all supporting documents, 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 the applicant was found guilty by court-martial of being absent without leave (AWOL) from 26 October 2006 and 7 November 2006 as well as AWOL from 20 December 2006 to 11 June 2007 and wrongful use of marijuana. There was no evidence to support the processing of his discharge was in error or injustice. Based on a preponderance of the evidence, the Board 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 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.

ADMINISTRATIVE NOTES:

A review of the applicant's record shows his DD Form 214, for the period ending 25 March 2009, is missing an important entry that may affect his eligibility for post-service benefits. As a result, amend the DD Form 214 by:

- removing from item 18 (Remarks): MEMBER HAS NOT COMPLETED FIRST FULL TERM OF SERVICE
- adding in item 18: SOLDIER HAS COMPLETED FIRST FULL TERM OF SERVICE

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. Title 10, USC, Section 1552(b), provides, with respect to courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under the UCMJ, action to correct any military record of the Secretary's Department may extend only to actions taken by reviewing authorities under the UCMJ or action on the sentence of a court-martial for purposes of clemency. The Secretary of the Army shall make such corrections by acting through boards of civilians within the executive part of the Army.

3. 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.

4. Army Regulation 15-185 (ABCMR) 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.

5. Army Regulation 635-5 (Personnel Separations – Separation Documents), in effect at the time, prescribes the separation documents prepared for Soldiers upon retirement, discharge, or release from active military service or control of the Army. It establishes the standardized policy for preparing and distributing the DD Form 214. It states the DD Form 214 provides a brief, clear-cut record of active Army service at the time of release from active duty, retirement, or discharge.

a. Paragraph 1-4b(5) of the regulation in effect at the time stated that a DD Form 214 would not be prepared for enlisted Soldiers discharged for immediate reenlistment in the Regular Army.

b. Paragraph 5-6r(2) of the regulation currently in effect [Army Regulation 635-8 (Separation Processing and Documents)] states the following mandatory entry is

required: "SOLDIER (HAS) OR (HAS NOT) COMPLETED FIRST FULL TERM OF SERVICE." This information assists the State in determining eligibility for unemployment compensation entitlement. The following guidance will help determine which entry to use: (a) To determine if an enlisted Soldier has completed the first full term of enlistment, refer to the enlistment contract and any extensions to those initial enlistment documents and compare the term of enlistment to the net service in block 12c of the DD Form 214. If Soldier has completed or exceeded the initial enlistment, enter "HAS." If block 12c of the DD Form 214 is less than the Soldier's commitment, enter "HAS NOT." For Soldiers who have previously reenlisted without being issued a DD Form 214 and who are later separated with any characterization of service except "honorable," enter "CONTINUOUS HONORABLE ACTIVE SERVICE FROM" (first day of service which DD Form 214 was not issued) UNTIL (date before commencement of current enlistment)." Then, enter the specific periods of reenlistments as prescribed above.

6. 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. Where there were infractions of discipline, commanders were to consider the extent thereof, as well as the seriousness of the offense. Separation authorities could furnish an honorable discharge when subsequent honest and faithful service over a greater period outweighed disqualifying entries in the Soldier's military record. It was the pattern of behavior, and not the isolated instance, which commanders should consider as the governing factor.

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 (UOTHC) 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 bad conduct discharge 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.

e. A dishonorable discharge will be given to a Soldier pursuant only to an approved sentence of a general court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed. Questions concerning the finality of appellate review should be referred to the servicing staff judge advocate.

7. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Service 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//