

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 23 July 2024

DOCKET NUMBER: AR20230012546

APPLICANT REQUESTS:

- an upgrade of his characterization of service from dishonorable to honorable
- personal appearance before the Board.

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, in effect, he is requesting his discharge from dishonorable to honorable because he was wrongly and unjustly convicted of a charge he did not commit and has new evidence to prove his wrongful conviction.
3. On his DD Form 149, he notes post-traumatic stress disorder (PTSD) is related to this request.
4. The applicant enlisted in the Regular Army on 11 August 1982, for a 4-year period and subsequently extended for an additional 9 months. He was awarded the military occupational specialty of 63B (Light Wheel Vehicle Mechanic) and the highest rank he attained was specialist four/E-4.
5. He accepted nonjudicial punishments (NJP), under the provisions of Article 15, of the Uniform Code of Military Justice (UCMJ) for the following:
 - a. On 22 April 1985, for disobeying a lawful command on or about 30 January 1985. His punishment imposed was reduction to the grade of E-3, forfeiture of \$200.00 pay, 14 days of restriction, and extra duty for 14 days.

b. On 16 May 1985, for wrongfully using marijuana on or between 16 February 1985 and on or about 25 February 1985. His punishment imposed was reduction to the grade of E-3, forfeiture of \$177.00, and extra duty for 14 days.

6. General Court Martial Order Number 65, issued by Headquarters, Fort Carson, Colorado, shows:

a. The applicant was arraigned and tried for the charge and its one specification of rape on 6 December 1984.

b. He pled not guilty and was found guilty. He was sentenced to reduction to private/E-1, forfeiture of all pay and allowances, confinement for 20 years, and to be discharged from the Army with a dishonorable discharge. The sentence was adjudged on 5 June 1985.

c. The sentence was approved on 20 September 1985 and the record of trial was forwarded to the Judge Advocate General of the Army for appellate review.

7. On 30 September 1988, the U.S. Army Court of Military Review affirmed the findings of guilty and the sentence.

8. General Court-Martial Order Number 638, issued by the U.S. Disciplinary Barracks, U.S. Army Combined Arms Center, Fort Leavenworth, KS on 14 December 1988, noted the applicant's sentence had been affirmed, and ordered the dishonorable discharge duly executed.

9. The applicant was discharged on 27 January 1989 under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), paragraph 3-10, as a result of court-martial, in the grade of E-1. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms his characterization of service was dishonorable, with separation code JJD and reenlistment code RE-4. He was credited with 2 years, 9 months, and 24 days of net active service. He had two periods of lost time from 5 June 1985 to 10 August 1986 and from 11 August 1986 to 27 January 1989. He was retained in service for 901 days for the convenience of the government.

10. 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.

11. The Board should consider the applicant's argument and/or evidence in accordance with the published equity, injustice, or clemency determination guidance.

12. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his characterization of service from dishonorable to honorable. He checked PTSD on his application as related to his request.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following:

- The applicant enlisted into the Regular Army on 11 August 1982.
- Applicant accepted nonjudicial punishment (NJP), under the provisions of Article 15, of the Uniform Code of Military Justice (UCMJ) on 22 April 1985, for disobeying a lawful command on or about 30 January 1985 by not being at the sleeping tent for a sensitive items check.
- Applicant accepted nonjudicial punishment (NJP), under the provisions of Article 15, of the Uniform Code of Military Justice (UCMJ) on 16 May 1985, for wrongfully using marijuana on or between 16 February 1985 to on or about 25 February 1985.
- General Court Martial Order Number 65, issued by Headquarters, Fort Carson, Colorado, shows the applicant was arraigned and tried for the charge of rape on 6 December 1984.
- He pled not guilty and was found guilty. He was sentenced to reduction to private/E-1, forfeiture of all pay and allowances, confinement for 20 years, and to be discharged from the Army with a dishonorable discharge. The sentence was adjudged on 5 June 1985.
- General Court-Martial Order Number 638, issued by the U.S. Disciplinary Barracks, U.S. Army Combined Arms Center, Fort Leavenworth, KS on 14 December 1988, noted the applicant's sentence had been affirmed, and ordered the dishonorable discharge duly executed.
- The applicant was discharged on 27 January 1989 under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), paragraph 3-10, as a result of court-martial – other, in the grade of E-1. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms his characterization of service was dishonorable, with separation code JJD and reenlistment code RE-4. He was credited with 2 years, 9 months, and 24 days of net active service. He had two periods of lost time from 5 June 1985 to 10 August 1986 to 11 August 1986 to 27 January 1989. He was retained in service for 901 days for the convenience of the government.

c. Review of Available Records: The Army Review Board Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant states, he is requesting his discharge upgraded from dishonorable to honorable because he was wrongly and unjustly convicted of a charge he did not commit and has new evidence to prove his wrongful conviction. However, in the applicant's supporting documentation he provided no new evidence, nor did he submit any documentation indicating he was wrongfully convicted.

Due to the period of service no active-duty electronic medical records were available for review.

d. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is not service connected and he has not participated in any mental health services via the VA. The applicant was treated by the VA in 2006 for medically related issues. However, no medical documentation of any mental health condition/diagnosis was evidenced in the record and the applicant did not submit any hardcopy medical documentation indicating a BH condition or diagnosis.

e. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is no evidence the applicant had a BH condition during military service. Regardless, even if there were evidence of a BH condition, it is unlikely it would mitigate the reason for his discharge.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts a mitigating condition, PTSD. However, he provides no rationale, index trauma, or indication for his contention of PTSD.

(2) Did the condition exist or experience occur during military service? No. There is no medical documentation of any BH condition, and the applicant did not identify any condition existed or experience occurred during military service other than the charges preferred against him.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant was discharge from military service due to one specification of rape. There is no nexus between any BH conditions and rape. In addition, there is no evidence the applicant had any BH condition that would impair his ability to distinguish right from wrong and act in accordance with the right.

BOARD DISCUSSION:

1. The Board determined the evidence of record 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.

2. 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 (rape). 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 general court-martial. The appellate review was completed, and the affirmed sentence was ordered duly executed. 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. The Board also considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewing official. The Board concurred with the medical official's determination finding insufficient evidence to support the applicant had a condition or experience that mitigates his discharge. 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 were 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]

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 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. Section 1556 of Title 10, USC, requires the Secretary of the Army to ensure that an applicant seeking corrective action by ARBA be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical

advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

3. 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. 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. The ABCMR may, in its discretion, hold a hearing. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

4. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Chapter 3 provided that an enlisted person would be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial, after completion of appellate review, and after such affirmed sentence has been ordered duly executed.

b. Paragraph 3-7a provided 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.

c. Paragraph 3-7b provided 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.

5. 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.

6. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records

(BCM/NR) when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD; traumatic brain injury; sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences.

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

//NOTHING FOLLOWS//