

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 24 July 2024

DOCKET NUMBER: AR20230012739

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

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

DD Form 293 (Application for the Review of Discharge)

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 his discharge was inequitable because it was an isolated incident in his 28 months of service.
3. On 27 September 1978, the applicant enlisted in the Regular Army for 3 years. Upon completion of training, he was awarded Military occupational specialty 19D (Cavalry Scout). The highest grade he attained was E-3.
4. On 15 December 1978, the applicant accepted non-judicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ), for disobeying a lawful order from his superior noncommissioned officer on or about 29 November 1978; and being disrespectful in language towards his superior noncommissioned officer, on or about 29 November 1978. His punishment included forfeiture of \$150.00 pay for two months and 30 days restriction and extra duty.
5. On 26 November 1979, the applicant was reported as absent without leave (AWOL) and remained absent until he returned to military authorities on 27 November 1979.
6. On 25 January 1980, the applicant accepted NJP under Article 15 of the UCMJ, for disobeying a lawful command from his superior commissioned officer, on or about 23 January 1980; and disobeying a lawful order from his superior noncommissioned

officer on or about 11 January 1980; and being disrespectful in language towards his superior noncommissioned officer, on or about 15 January 1980. His punishment included reduction to E-1, forfeiture of \$224.00 pay for two months and 30 days confinement.

7. On 25 February 1980, the applicant voluntarily declined a separation medical examination.

8. Before a special court-martial on 13 March 1980, at Hanau, Germany, the applicant was found guilty of two specifications of failing to go at the time prescribed to his appointed place of duty; one specification of going AWOL; and one specification of possessing marijuana; and two specifications of introducing marijuana into a military post.

9. The court sentenced him to a BCD, forfeiture of \$200.00 pay per month for three months, and confinement at hard labor for 90 days. The sentence was approved on 25 April 1980, and the record of trial was forwarded for appellate review.

10. On 2 May 1980, the applicant was placed on excess leave.

11. The U.S. Army Court of Military Review affirmed the findings and sentence on 29 July 1980.

12. Special Court-Martial Order 370, issued by Headquarters, U.S. Disciplinary Barracks, Fort Leavenworth, KS on 26 November 1980, noted the applicant's sentence had been affirmed and ordered the BCD to be duly executed.

13. The applicant was discharged on 7 January 1981. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms he was discharged under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), paragraph 11-2. His service was characterized as bad conduct. He was assigned Separation Code JJD and Reentry Code 4. He was credited with 2 years, 2 months, and 25 days of net active service this period with 47 days of time lost.

14. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, U.S. Code, 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.

15. 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:

1. 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 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 there is insufficient evidence of in-service mitigating factors to overcome the misconduct of multiple incidents of AWOL and drug use. The Board noted the applicant provided no post service accomplishment or character letters of support for the Board to weigh a clemency determination.

2. The Board found the applicant did not demonstrate by a preponderance of evidence an error or injustice warranting the requested relief, specifically an upgrade of his bad conduct discharge to a general under honorable conditions characterization of service. The Board agreed, the ABCMR 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. Therefore, 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.

[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, 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 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:
 - 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 11, paragraph 11-2, provided that a member would be given a BCD pursuant only to an approved sentence of a general court-martial or special court-martial, after completion of appellate review, and after such affirmed sentence has been ordered duly executed.

3. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, U.S. Code, 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.

4. 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.

//NOTHING FOLLOWS//