

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 June 2024

DOCKET NUMBER: AR20230012970

APPLICANT REQUESTS: reconsideration of his previous request for an upgrade of his dishonorable discharge.

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

- DD Form 293 (Application for the Review of Discharge)
- Self-Authored Statement
- DD Form 214 (Certificate of Release or Discharge from Active Duty), for the period ending 9 May 1991

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 AR20120020380 on 30 May 2013.

2. In a new argument, the applicant states:

a. He was initially charged with forcible sodomy, dereliction of duty, fraternization, distribution of .4 grams and usage. He initially appealed the court-martial, and he was retried for dereliction of duty, fraternization, distribution of .4 grams and usage. At the second court-martial he was found guilty of all the charges and received 10 months of confinement and a dishonorable discharge.

b. He has since been to numerous rehabilitation programs and in 2015 he started his journey of living life clean and sober. He is no longer in that lifestyle. He is on three to four different medications that help with his mood. He is a changed person and has not been in trouble with the law since his court-martial with the Army. He has held down numerous jobs, and he is presently volunteering twice a week at the Veterans Administration.

3. A review of the applicant service record shows:

- a. He enlisted in the Regular Army on 30 September 1975.

b. A DD Form 214 (Report of Separation from Active Duty) shows he was honorably discharged on 13 July 1977. He completed 1 year, 9 months, and 14 days of active service. He was authorized or awarded the Marksman Marksmanship Qualification Badge with Rifle Bar (M-16), and Expert Marksmanship Qualification Badge with Hand Grenade Bar.

c. He had three immediate reenlistments on 14 July 1977, 14 April 1981, and 16 January 1987.

d. His DA Form 2-1 (Personnel Qualification Record – Part II) shows in item 5 (Overseas Service):

- Hawaii from 1 December 1977 to 26 November 1979
- Germany from 23 October 1982 to 12 June 1985

e. The applicant accepted nonjudicial punishment on 3 March 1988 for:

- between 28 January 1988 and 23 February 1988, fail to obey a lawful general regulation by wrongfully attempting to enter into a personal and social relationship with an advanced individual training (AIT) Soldier
- on 23 February 1988, wrongfully attempting to enter into a personal and social relationship with an AIT Soldier, by saying “You have pretty eyes and that your eyes would make a man do anything for you” or words to that effect
- on 20 February 1988, wrongfully attempting to enter into a personal and social relationship with an AIT Soldier, by saying “I could put you in a hot tub of water, rub honey all over your body and lick it off of you” or words to that effect

4. General Court-Martial Order Number 2, issued by Headquarters, U.S. Army Quartermaster Center and School, Fort Lee, Virginia, dated 25 July 1989, shows:

a. The applicant was found guilty of the following charges/specifications:

(1) Charge I: Violation of Uniform Code of Military Justice (UCMJ), Article 125 (Sodomy), one specification of between 27 November 1988 and 13 December 1988, commit forcible sodomy with another Soldier.

(2) Charge II: Violation of the UCMJ, Article 92, (Failure to Obey an Order), two specifications of between 27 November 1988 and 13 December 1988, violate a general order, to wit USAQMCENFL Regulation 600-27 and between 27 November 1988 and 13 December 1988, derelict in the performance of his duties by socializing and engaging in sexual acts with an AIT Soldier.

(3) Charge III: Violation of the UCMJ, Article 112 (Drunk on Duty) three specifications of on 25 January 1989 wrongfully distribute .4 grams of cocaine and wrongfully possessed .1 gram of cocaine and on or between 15 January 1989 to 7 February 1989 wrongfully used cocaine.

b. The sentence, which was adjudged on 18 May 1989, included the reduction to private/E-1, forfeiture of all pay and allowances, confinement for 1 year and a dishonorable discharge.

c. The sentence was approved on 25 July 1989.

5. General Court-Martial Order Number 822, issued by United States Correctional Activity, Fort Riley, KS on 13 October 1989, the unexecuted portion of the approved sentence to forfeiture of all pay and allowances, as in excess of \$699.00 pay per month, will be remitted without further action.

6. DA Form 3081-R (Periodic Medical Examination) dated 6 February 1990 shows the applicant noted that he had taken a medical examination in conjunction with his separation on or about January 1990.

7. General Court-Martial Order Number 20, issued by Headquarters, 1st Infantry Division (MECH) Fort Riley, KS, on 20 August 1990, United States Correctional Activity, Fort Riley, KS on 7 February 1984, confirmed the U.S. Army Court of Military Review (USACMR) determined the military judge had erred by failing to discharge his duty to remain and to appear impartial. Accordingly, the USACMR set aside and dismissed charge one and its specification (sodomy) and affirmed the remaining findings. The USACMR set aside the sentence and authorized a rehearing on the sentence.

8. General Court-Martial Order Number 676 issued by United States Army Correctional Brigade, Fort Riley, KS on 23 October 1990, shows a rehearing was conducted and the General Court-Martial Convening Authority (GCMCA) approved only so much of the sentence as provided for confinement for 10 months, forfeiture of all pay and allowances, reduction to PVT/E-1, and a dishonorable discharge.

9. On 21 December 1990, the USACMR affirmed the findings and sentence as approved by the GCMCA after the rehearing.

10. A DA Form 4466 (Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) Client Progress Report), dated 5 April 1991, shows the applicant was released from the Track II group counseling program due to his separation.

11. On 21 February 1984, the applicant was discharged pursuant to his court-martial sentence under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 3, Sec IV. His DD Form 214 shows -

- he was discharged in the rank/grade of private/E-1
- his service was characterized as dishonorable
- he was credited with completing 14 years, 11 months, and 19 of active service
- he had 234 days of lost time from 15 May 1989 to 3 January 199 and 458 days of excess leave from 6 February 1990 to 9 May 1991
- he was awarded or authorized, Army Service Ribbon, Overseas Service Ribbon (2), NCO Professional Development Ribbon (2), Army Achievement Medal (3), Army Good Conduct Medal (4th Award), Driver and Mechanic Badge, Expert Marksmanship Rifle M-16 Qualification Badge, Expert Hand Grenade Badge
- he received a separation code of "JJD" and a reentry code of "4"

12. The applicant petitioned the ABCMR for an upgrade to his service characterization. The ABCMR considered his request on 30 May 2013, determined the applicant's contentions and supporting documents did not provide sufficient evidence to warrant an upgrade of his discharge.

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. A Soldier will be given a dishonorable discharge pursuant only to an approved sentence of a general court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed.

14. In reaching its determination, the Board can consider the applicants petition and his service record in accordance with the published equity, injustice, or clemency determination 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 record, the Board determined there was insufficient evidence of in-service mitigating factors to overcome the serious misconduct and drug use. 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.

2. The Board finds the applicant’s post service accomplished of getting his life in order, being sober and volunteering twice a week at the Veterans Administration. However, the applicant provided no character letter of support for the Board to weigh a clemency determination. The Board determined because the applicant was a senior non-commissioned officer at the time, he had adequate training and experience necessary to avoid conducting such egregious misconduct while being entrusted to set the example for subordinate Soldiers to emulate, and therefore, the discharge characterization was proper and fitting for the misconduct. Furthermore, the Board agreed the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief. Therefore, the Board agreed reversal of the previous Board determination is without merit and relief is denied.

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 Board found 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 to amend the decision of the ABCMR set forth in Docket Number AR20120020380 on 30 May 2013.

[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, 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 (Active Duty Enlisted Administrative Separations), Section III (Dishonorable and Bad Conduct Discharge)-
  - a. Paragraph 3-10 provided a Soldier will be given a dishonorable discharge pursuant only to an approved sentence of a general court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed.
  - b. Paragraph 3-11 provided a Soldier will be given a bad conduct discharge pursuant only to an approved sentence of a general or special 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.
3. 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.

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/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.

5. Section 1556 of Title 10, United States Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (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.

//NOTHING FOLLOWS//