

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 17 July 2024

DOCKET NUMBER: AR20230013095

APPLICANT REQUESTS: an upgrade of his characterization of service from under other than honorable conditions to honorable

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

- DD Form 149 (Application for Correction of Military Record), 16 September 2023
- DD Form 214 (Report of Separation from Active Duty), 6 March 1979
- memorandum, from S.R.S., 6 September 2023

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 AR20160018669 on 30 January 2020.

2. The applicant states, in effect, he is requesting the ABCMR grant him relief due to injustice. He refers to a memorandum from S.R.S, which states:

a. She requests the applicant's discharge be upgrade due to errors in evidence, referencing his nonjudicial punishment for falling asleep on security guard post, failing to go to his appointed place of duty, and questions his punishment on 31 March 1978, then states he was promoted on 1 April 1978. Stating he, the applicant, was portrayed as a bad Soldier one moment and then promoted on another occasion.

b. She questions the applicant's being convicted by a special court-martial for assault and a quick spiral of the applicant's behavior. She states that from the applicant's promotion to conviction, was a total time of 11 months wherein she believes he had the potential to achieve accolades. When the applicant was convicted, he served three months out of his six-month sentence for good behavior. There is no concrete evidence that the applicant had any leadership in his moments of distress. This request for upgrade is based on injustice and the lack of support he received from his leadership.

3. The applicant enlisted in the Regular Army on 30 November 1976, for a 3-year period. He was awarded military occupational specialty 94B (Food Service Specialist) and the highest rank he attained was specialist four/E-4.

4. Four DA Forms 2627 (Record of Proceedings under Article 15, of the Uniform Code of Military Justice (UCMJ)), shows he accepted nonjudicial punishment (NJP):

a. On 11 March 1977, for sleeping on his post on or about 11 March 1977. His punishment imposed was forfeiture of \$85.00 for one month, restriction for 14 days, and extra duty for 14 days.

b. On 8 December 1977, for failing to go to his prescribed appointed place of duty, the Motor Pool on or about 19 November 1977. His punishment imposed was confinement for 7 days.

c. On 31 March 1978, for failing to go to his prescribed appointed place of duty, the Food Service Course, on or about 20 March 1978. His punishment imposed was forfeiture of \$25.00 for one month.

d. On 6 June 1978, for failing to go to his prescribed appointed places of duty on or about 6 May 1978, 7 May 1978, 9 May 1978, and on or about 29 May 1978. His punishment imposed was forfeiture of \$80.00 for one month.

5. Before a Special Court-Martial, at Fort Hood, Texas, on 8 August 1978, the applicant was found guilty of committing an assault on another Soldier, by cutting him on the left palm with a dangerous weapon, to wit: a knife on or about 12 July 1978. The court sentenced him to discharge from the service with a bad conduct discharge, reduction to the grade of E-1, confinement at hard labor for six months, and forfeiture of \$200.00 per month for five months. The sentence was amended to forfeiture of \$200.00 pay per month for four months, confinement at hard labor for three months, a bad conduct discharge, and reduction to the grade of E-1. The sentence was approved on 31 August 1978.

6. The record of trial was forwarded for appellate review, the findings of guilty and sentence were affirmed on 7 November 1978.

7. On 17 November 1978, he was notified of the decision of the Court of Military Review, he requested that the court direct the Judge Advocate General to designate a lawyer to represent him.

8. Special Court-Martial Order Number 13, issued by Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina on 13 February 1978, noted that the

applicant's sentence had finally been affirmed and ordered the bad conduct discharge duly executed.

9. The applicant was discharged accordingly on 6 March 1979, under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted personnel), Chapter 11, as a result of court-martial. His DD Form 214 (Report of Separation from Active Duty) shows his service was characterized as under other than honorable conditions, with separation program designator code JJD and reenlistment code RE-3B. He was credited with 2 years and 22 days of net active service with 75 days of lost time.

10. On 19 July 2001, the ABCMR considered the applicant's request for an upgrade of his characterization of service and rank restoration to specialist/E-4. The Board determined the applicant did not present and the records did not contain sufficient justification to conclude that it would be in the interest of injustice to grant the relief requested or to excuse the failure to file within the time prescribed by law.

11. On 30 January 2020, the ABCMR considered his request for an upgrade of his characterization of service. The evidence presented did not demonstrate the existence of a probable error or injustice and the Board determined the overall merits of the case were insufficient as a basis to amend the decision of the case AR2001051440.

12. 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.

13. In reaching its determination, the Board can consider the applicant's petition, service record, and statements in light of the published guidance on equity, injustice, or clemency.

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 committing an assault on another Soldier, by cutting him on the left palm with a dangerous weapon, to wit: a knife.

2. The Board found the applicant provided no post service achievements or character letters of support for the Board to weigh a clemency determination. The Board noted, the applicant's service record exhibits numerous instances of misconduct during his enlistment period for 2 years and 22 days of net active service with 75 days of lost time. 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. Furthermore, the Board agreed the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief, specifically an upgrade of the under other than honorable conditions (UOTHC) discharge to a honorable. Therefore, the Board denied relief.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	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 AR20160018669 on 30 January 2020.



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

a. 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.

b. 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.

c. Chapter 11 provided that an enlisted person would be given a dishonorable 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.

d. Paragraph 11-2 provided a member will 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.

2. 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.

3. 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.

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, Boards 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//