

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 August 2024

DOCKET NUMBER: AR20240000095

APPLICANT REQUESTS: reconsideration of his prior request for an upgrade of his bad conduct discharge.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
Self-Authored Statement.

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous considerations of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Numbers AR20110000551 on 12 July 2011 and AR20220006505 on 17 January 2023.

2. The applicant states, in effect, he is requesting "a high level review," of the prior ABCMR decisions. He is looking to refile his claim with the Board of Veterans Appeal since he was previously denied.

3. A review of the applicant's service record shows:

a. He enlisted in the Regular army on 3 October 1979. His DA Form 2-1 (Personnel Qualification Record) shows he served in Germany from 20 September 1981 through 9 September 1983. His record shows he accepted nonjudicial punishment for the below listed actions:

- 29 May 1980 – leaving his appointed place of duty
- 20 June 1984 – violation of a lawful order, possession of unauthorized items in the barracks room
- 19 November 1984 – failure to go to his appointed place of duty; his punishment included reduction to private first class (PFC), E-3
- 27 November 1984 – disrespectful in language toward a noncommissioned officer (continuation sheet not available); his punishment included reduction to private (PVT), E-1
- 18 January 1985 – breaking restriction

b. On 29 April 1985, he was convicted by a special court-martial of one specification of larceny of a video cassette, a value of \$280.00 on 12 March 1985. His sentence included forfeiture of \$350.00 pay per month for 4 months, confinement for 100 days, and a bad conduct discharge.

c. On 7 August 1985, the convening authority approved so much of the sentence as provides for forfeiture of \$350.00 pay per month for 4 months and confinement for 100 days; and except for that part of the sentence extending to bad conduct discharge, ordered it executed. The record of trial was forwarded to the Judge Advocate General of the Army for appellate review.

d. Special Court-Martial Order Number 50 dated 30 April 1986, after Article 71(c) was complied with and the sentence was affirmed, ordered the bad conduct discharge executed.

e. On 3 July 1986, he was discharged from active duty with a bad conduct characterization of service. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 6 years, 6 months, and 10 days of active service with 81 days of lost time. He was assigned separation code JJD and the narrative reason for separation listed as "As a Result of Court-Martial, Other," with reentry code 3 (B&C). It also shows he was awarded or authorized: Marksman Marksmanship Qualification Badge with Rifle Bar (M-16), Sharpshooter Marksmanship Qualification Badge with Hand Grenade Bar, Army Service Ribbon, Army Good Conduct Medal, and Overseas Service Ribbon.

4. On 12 July 2011, the ABCMR rendered a decision in Docket Number AR20110000551. The Board found the applicant's punishment was not disproportionate to the offenses for which he was convicted, and he failed to show sufficient evidence or reasons to warrant an upgrade of his discharge based on clemency. In order to justify correction of a military record, the applicant must show to the satisfaction of the Board, or it must otherwise satisfactorily appear that the record is in error or unjust. The applicant failed to submit evidence that would satisfy this requirement.

5. On 17 January 2023, the ABCMR rendered a decision in Docket Number AR20220006505. The Board found the applicant's trial by a court-martial was warranted by the gravity of the offense charged. The appellate review was completed, and the affirmed sentence was ordered duly executed. The applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. Based on a preponderance of evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust. An administrative correction to his record was made and a DD Form 215 (Correction to DD Form 214) issued on 26 January 2023 adding the following to Block 18 (Remarks) of his DD Form 214 for the service period ending 3 July 1986:

- Member has completed first full term of service
- Continuous Honorable Active Service From 19791003 - 19820920

6. By regulation (AR 635-200), a member 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.

7. By law, court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, U.S. Code (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.

8. In reaching its determination, the Board can consider the applicant's petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was 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.

a. The applicant's trial by a court-martial was warranted by the gravity of the offense charged (larceny). The applicant's 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 bad conduct discharge pursuant to an approved sentence of a 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 found no error or injustice in his separation processing. 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.

b. However, the Board also noted that despite his multiple incidents of misconduct, the offense for which he was convicted, seems less serious, and the resultant punishment seems harsh and severe. Given the severity of his sentence, and given his

length of service (6 years and 6 months) and passage of time, the Board determined that while his service clearly did not rise to the level required for an honorable characterization; a general, under honorable conditions characterization of service is appropriate under published DoD guidance for liberal consideration of discharge upgrade requests. The Board further determined that such upgrade did not change the underlying reason for separation and thus the narrative reason for separation and corresponding codes should not change.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

■	■	■	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant amendment of the ABCMR's decision in Docket Number AR20110000551 on 12 July 2011 and AR20220006505 on 17 January 2023. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant a DD Form 214 for the period ending 3 July 1986, as follows:

- Character of Service: Under Honorable Conditions (General)
- Separation Authority: No Change
- Separation Code: No Change
- Reentry Code: No Change
- Narrative Reason for Separation: No Change

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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.

REFERENCES:

1. 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 ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

2. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a (Honorable discharge) states an honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of the 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 (General discharge) states a general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Paragraph 3-7c (Under Other Than Honorable Conditions) states a discharge under other than honorable conditions is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, homosexuality, security reasons, or for the good of the service.

d. Paragraph 3-11 (DD Form 259A (Bad Conduct Discharge Certificate) states a member 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.

3. Title 10, U.S. Code, section 1552, provides that the Secretary of a Military Department may correct any military record of the Secretary's Department when the Secretary considers it necessary to correct an error or remove an injustice. With respect to records of 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 correction of a record to reflect actions taken by reviewing authorities under the UCMJ or action on the sentence of a court-martial for purposes of clemency. Such corrections shall be made by the

Secretary acting through boards of civilians of the executive part of that Military Department.

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 based on 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//