

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 23 August 2024

DOCKET NUMBER: AR20240000151

APPLICANT REQUESTS:

- an upgrade of his under other than honorable conditions discharge
- a video/telephonic 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, 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 that nearly 50 years have passed.
3. A review of the applicant's service record shows:
 - a. He enlisted in the Regular Army on 1 December 1975.
 - b. Four DA Forms 4187 (Personnel Action) dated between 13 October 1976 and 25 April 1977 show the applicant's duty status changed from:
 - present for duty to civilian confinement, effective 13 October 1976
 - civilian confinement to present for duty, effective 15 October 1976
 - present for duty to absent without leave (AWOL), effective 14 April 1977
 - absent without leave to present for duty, effective 25 April 1977
 - c. Special Court-Martial Order Number 19 issued by Headquarters, 82nd Airborne Division on 7 July 1977 shows the applicant was found guilty of violating the Uniform Code of Military Justice (UCMJ) by:

(1) willfully and wrongfully damage, by pushing over a wall locker, an eight track stereo tape player, the amount of said damage being in the sum of about \$30.00 and destroy, by pushing over the said wall locker, a record turntable, a picture frame and 10 record albums of a value of some amount, the property of Private First Class J__ E__.

(2) striking Sergeant J__ K__, his superior noncommissioned officer, who was then in the execution of his office by hitting him in the face with his fist.

(3) striking Sergeant J__ K__, his superior noncommissioned officer, who was then in the execution of his office by kicking him in the stomach with his foot.

(4) on or about 0650 hours 14 April 1977, without authority, absent himself from his unit' to wit: Battery B, 3rd Battalion (Airborne) Vulcan/ Redeye, 4th Air Defense Artillery, 82nd Airborne Division, located at Fort Bragg, North Carolina, and did remain so absent until on or about 0650 hours 25 April 1977.

(5) on or about 2330 hours 13 April 1977, resist being lawfully apprehended by Private First Class D__ E__, Private First Class R__ P__, Private First Class J__ L__, Private First Class G__ C__, 82d Military Police Company, 82nd Airborne Division' all armed force policemen.

(6) on or about 2330 hours 13 April 1977, assault Private K__ A__, U.S. Army Battery B, 3rd Battalion (Airborne) Vulcan/Redeye, 4th Air Defense Artillery, 82nd Airborne Division by picking him up and throwing him across a desk onto the floor.

His sentence included discharge from the service with a bad conduct discharge, to be confined at hard labor for a period of 75 days, to forfeit the sum of \$150.00 per month for a period of 5 months, and to be reduced to the grade of private/E-1.

d. The applicant's duty status changed from confined [by] military authorities to present for duty, effective 3 August 1977.

e. Special Court-Martial Order Number 551 issued by the U.S. Army Retraining Brigade vacated the portion of the sentence that pertained to the bad conduct discharge, effective 31 August 1977.

f. Three DA Forms 4187 dated between 6 September 1977 and 7 October 1977 show the applicant's duty status changed from:

- present for duty to AWOL, effective 4 September 1977
- AWOL to confined [by] civil authorities, effective 15 September 1977
- present for duty to military confinement, effective 6 October 1977

g. Special Court-Martial Order Number 11 issued by Headquarters, 3rd Battalion, United States Army Retraining Brigade, dated 7 October 1977 shows the applicant was found guilty of violating the UCMJ by:

(1) on or about 4 September 1977, without authority absent himself from his unit, to wit: 6th Unit, 3d Battalion, US Army Retraining Brigade, located at Fort Riley, Kansas, and did remain so absent until on or about 20 September 1977.

(2) on or about 23 September 1977, without authority absent himself from his unit, to wit: 6th Unit, 3d Battalion, US Army Retraining Brigade, located at Fort Riley, Kansas, and did remain so absent until on or about 27 September 1977.

His sentence included confinement at hard labor for 20 days.

h. His duty status changed from confined [by] military authorities to present for duty, effective 21 October 1977.

i. Special Court-Martial Order Number 852 issued by Headquarters, United States Army Retraining Brigade, dated 27 December 1977 states the finding and the approved sentence to bad conduct discharge (suspended on 7 July 1977 for 6 months with provision for automatic remission), confinement at hard labor for a period of 75 days, forfeiture of \$150.00 pay per month for a period of 5 months and to be reduced to the grade of private/E-1, adjudged on 2 June 1977, as promulgated in Special Court-Martial Order Number 19, Headquarters, 82nd Airborne Division, Fort Bragg, North Carolina, dated 7 July 1977, has been affirmed pursuant to Article 66. Pursuant to Special Court-Martial Order Number 551, this command, dated 31 August 1977, the suspended portion of the sentence to bad conduct discharge was vacated pursuant to Article 72, UCMJ. The service of the decision of the United States Court of Military Review having been accomplished on 28 September 1977 and the right to petition the Court of Military Appeals for a grant of review within thirty days having been expired and the provisions of Article 71(c) having been complied with, the sentence to bad conduct discharge will be carried into execution. That portion of the sentence pertaining to confinement at hard labor has been served.

j. On 4 January 1978, he was discharged in the rank/grade of private/E1, under the provisions of Army Regulation 635-200, Chapter 11, with an under other than honorable conditions characterization of service. He completed 1 year, 7 months, and 13 days of active service. He was awarded or authorized:

- Sharpshooter Marksmanship Qualification Badge with Rifle Bar (M-16)
- Parachutist Badge

4. 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.

5. By regulation, AR 635-200, in effect at the time, states 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.

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 request, supporting documents, evidence in the records, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was separated for conviction by court-martial for damaging property, striking a noncommissioned officer in the face with his fist and kicking him in the stomach with his foot, being absent without leave from 14 April 1977 to 25 April 1977, resisting apprehension, and assaulting another Soldier by throwing him across a desk onto the floor. The Board found no error or injustice in the separation proceedings. The Board concluded that the characterization of service the applicant received upon separation was appropriate.

2. The applicant was given a bad conduct 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.

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, 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.

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.

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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. 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 (AR) 635-200 (Personnel Separations – Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel.

a. Chapter 11 states a Soldier will be given a bad conduct discharge pursuant only to an approved sentence of a general or a special court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed.

b. 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. 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.

d. 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, homosexual conduct, security reasons, or in lieu of trial by court martial in the following circumstances:

(1) When the reason for separation is based upon a pattern of behavior that constitutes a significant departure from the conduct expected of soldiers of the Army.

(2) When the reason for separation is based upon one or more acts or omissions that constitutes a significant departure from the conduct expected of soldiers of the Army. Examples of factors that may be considered include the following:

- (a) Use of force or violence to produce serious bodily injury or death.
- (b) Abuse of a position of trust.
- (c) Disregard by a superior of customary superior-subordinate relationships.
- (d) Acts or omissions that endanger the security of the United States or the health and welfare of other soldiers of the Army.

(e) Deliberate acts or omissions that seriously endanger the health and safety of other persons.

3. AR 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 may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that 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. 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.

5. 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//