

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 February 2025

DOCKET NUMBER: AR20240008165

APPLICANT REQUESTS: an upgrade of his bad conduct discharge (BCD) to under honorable conditions (general), and an appearance before the Board via video or telephone.

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 (USC), 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 given his performance as a Soldier, prior to the offense which resulted in his discharge, his punishment was excessive. He did not have any other disciplinary issues. He has only been arrested once since his discharge. He has had no other legal issues.
3. The applicant enlisted in the Regular Army on 18 July 1985, for a 4-year period. Upon completion of initial entry training, he was awarded military occupational specialty 11C (Indirect Fire Infantryman). The highest rank he attained was sergeant/E-5.
4. Before a general court-martial, at Bamberg, Germany, on 20 July 1988, the applicant was found guilty of the wrongful disposal of government property (M-16 rifle upper receiver) and larceny of government property (M60 machine gun parts), between on or about February 1987 to 11 March 1988, and for making a false official statement, on or about 10 March 1988.
  - a. He was sentenced to separation from service with a BCD, confinement for nine months, and forfeiture of all pay and allowances.

b. The convening authority approved the sentence on 21 November 1988, and except for the portion of the sentence pertaining to the BCD, ordered the sentence executed.

c. The record of trial was forwarded to the U.S. Court of Military Review for appellate review. The U.S. Court of Military Review found the findings and sentence correct in law and fact, and subsequently affirmed the findings and the sentence on 31 January 1989.

5. General Court-Martial Order Number 553, issued by the U.S. Army Correctional Activity, Fort Riley, KS, on 14 June 1989, shows the sentence was finally affirmed, the provisions of Article 71(c) had been complied with, and the bad conduct discharge was ordered to be duly executed.

6. The applicant was discharged on 23 June 1989, under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 3, as a result of court-martial. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows his service was characterized as bad conduct, with separation code JJD and reentry code RE-4. He completed 3 years, 3 months, and 27 days of net active service, with lost time from 20 July 1988 to 23 February 1989. He was awarded or authorized the following:

- Army Achievement Medal (3rd award)
- Army Service Ribbon
- Overseas Service Ribbon
- Noncommissioned Officer Professional Development Ribbon
- Expert Marksmanship Qualification Badge with Grenade bar
- Expert Marksmanship Qualification Badge with Pistol bar
- Sharpshooter Marksmanship Qualification Badge with Rifle bar (M-16)
- Expert Infantryman Badge

7. 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.

8. The Board should consider the applicant's argument and/or evidence 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 records, the Board noted the applicant's contentions that his punishment was excessive in light of his prior honorable service, lack of previous disciplinary infractions, and post-service conduct. The Board determined there was insufficient evidence of in-service mitigating factors to overcome the serious misconduct.
2. The Board acknowledge the applicant's prior achievements, including attaining the rank of sergeant and receiving multiple awards, it found that these factors do not outweigh the seriousness of the offenses for which he was convicted by a general court-martial. Evidence in the record show the applicant was found guilty of the wrongful disposal and larceny of government property, including sensitive weapons components, and of making a false official statement offenses that represent a significant breach of trust and military discipline. 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. Therefore, the Board determined that the character of service was appropriate based on the gravity of the offenses, and relief is denied.
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:

| <u>Mbr 1</u> | <u>Mbr 2</u> | <u>Mbr 3</u> |                      |
|--------------|--------------|--------------|----------------------|
| :            | :            | :            | GRANT FULL RELIEF    |
| :            | :            | :            | GRANT PARTIAL RELIEF |
| :            | :            | :            | GRANT FORMAL HEARING |
| XXX          | XXX          | XXX          | 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.

X //SIGNED//

CHAIRPERSON

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 (USC), 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 Army Board for Correction of Military Records (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 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation states the ABCMR has the discretion to hold a hearing; applicants do not

have a right to appear personally before the Board. The Director or the ABCMR may grant formal hearings whenever justice requires.

3. Army Regulation 635-200 (Personnel Separations-Enlisted Personnel), 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 3 provided that an enlisted person would 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.

4. 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.

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/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, 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//