

AFBCMR

Discharge Review Board Authority Over Discharges from Special Courts-Martial

You requested an advisory opinion regarding a current issue pending before the Air Force Discharge Review Board (DRB). Specifically, you asked how the DRB's authority differs in reviewing discharges (or dismissal) resulting from administrative processes and the same resulting from conviction at court-martial.

**Background:** The facts that gave rise to your questions are as follows: A member convicted at special court-martial of an undisclosed offense and sentenced to a Bad Conduct Discharge (BCD) requests upgrade of the characterization of that discharge. The member does not provide any post-service information. But the member alleges that she was raped by a technical school instructor twice and the effect of that trauma led to the conduct that resulted in court-martial and a sentence that included an adjudged BCD. That instructor was tried and convicted of raping other technical school students in the general timeframe that the member attended technical school. The member was interviewed about her allegations, but the instructor's court-martial did not include charges related to raping this member and she did not testify at that court-martial. For purposes of this legal review, we presume that the member presented evidence in extenuation and mitigation at her court-martial, the convening authority did not grant clemency (hence the approved BCD), she appealed her conviction, that appeal was denied at all levels, and she has now exhausted her post-trial remedies.

**Law and Analysis:** Title 10, United States Code, Section 1553(a)-(b) gives the Secretary of the Air Force power to establish a board "to review [a] discharge or dismissal" and "change a discharge or dismissal, or issue a new discharge, to reflect its findings." The Air Force implements this power through AFI 36-3213, which is a supplement to the governing Department of Defense Instruction 1332.28, *Discharge Review Board (DRB) Procedures and Standards*, 4 Apr 04.

Both §1553 and AFI 36-3213 limit the DRB's review of discharges (or dismissals) resulting from court-martial convictions. Section 1553 prohibits the DRB from reviewing discharges or dismissals from general courts-martial and limits the review of others to only "clemency":

With respect to a discharge or dismissal adjudged by a court-martial case ... action under this subsection may extend only to a change in the discharge or dismissal or issuance of a new discharge **for purposes of clemency**.<sup>1</sup>

Because dismissals and dishonorable discharges may only be adjudged by a general court-martial, and discharge is not an approved sentence for a summary court-martial, §1553 limits DRB review to discharges from special courts-martial, and thus by definition only a BCD.<sup>2</sup>

Likewise, AFI 36-3213 limits DRB review of discharges resulting from court-martial convictions to matters in "clemency":

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<sup>1</sup> 10 U.S.C. §1553(a)(emphasis added).

<sup>2</sup> R.C.M. 1003(b)(8)(A)-(C).

E3.3.1. The DRB or the DRB panel, shall meet in plenary session to review discharges and exercise its discretion on a case-by-case basis in applying the standards set forth in enclosure 4.

E3.3.1.1. (Added)(AF) In appropriate cases, the DRB directs upgrade of and/or change of a reason for discharge, and if applicable, a change to the reenlistment code (RE Code). A change to the RE Code does not automatically follow from an upgrade in the character of the discharge, but is a separate consideration. The DRB may decide to upgrade the character of the discharge and leave the RE Code unchanged.

E3.3.1.2. (Added)(AF) The DRB normally decides cases based on the record. It is not an investigative body. Cases are decided based on equity and propriety. In the case of a Bad Conduct Discharge (BCD) it is **decided based solely on clemency**. (emphasis added).

AFI 36-3213 also notes that “[t]here is a presumption of regularity in the conduct of governmental affairs. This presumption shall be applied in any review unless there is substantial credible evidence to rebut the presumption.”<sup>3</sup> This “presumption of regularity” is important as the DRB has “propriety” authority to review the formal administrative discharge process that resulted in discharge:

A discharge shall be deemed proper unless, in the course of discharge review, it is determined that: An error of fact, law, procedure, or discretion exists associated with the discharge at the time of issuance; and that the rights of the applicant were prejudiced thereby (such error shall constitute prejudicial error if there is substantial doubt that the discharge would have remained the same if the error had not been made).<sup>4</sup>

In this sense, the DRB acts as an “appellate court” in determining whether the challenged administrative discharge process complied with the law or whether there were legal errors that render relief appropriate.

For court-martial convictions, however, administrative review boards (whether it be the Air Force Board of Correction of Military Records (BCMR), Clemency and Parole Board (C&PB), or the DRB), lack that power to render relief because of a perceived error in the underlying criminal conviction. In other words, the DRB does not have “propriety” authority to expunge (“undo”) a criminal court conviction. That power resides in the service Courts of Criminal Appeal, then the Court of Appeals for the Armed Forces, and potentially the United States Supreme Court.<sup>5</sup> At conclusion of that appellate process, the underlying conviction is “final and conclusive.”<sup>6</sup> In fact, while the President has the power to pardon or commute a military member’s sentence, this

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<sup>3</sup> E3.2.12.6.

<sup>4</sup> E4.2.1.1.

<sup>5</sup> R.C.M. 1201-05.

<sup>6</sup> R.C.M. 1209.

constitutional power does not allow the President to expunge (“undo”) the conviction itself.<sup>7</sup> To the extent there remains a perceived error in the underlying criminal conviction after “finality” (then existing or as a result of newly discovered evidence), there remain legal avenues to determine whether this “finality” should give way to further court review.<sup>8</sup>

But while the DRB cannot challenge the finality of a special court-martial conviction (*i.e.*, the DRB must accept as true and conclusive the findings of a court-martial that is “final”), the DRB does expressly have the authority to grant “clemency” as to the BCD.<sup>9</sup>

Essentially, in granting relief as to an approved discharge from a final court-martial conviction, the DRB is exercising the same “clemency” power reserved to the Secretary and the same power that the other administrative review boards (BCMR, C&PB) exercise. Federal law, Article 74(b), UCMJ, reserves the power to grant clemency on an approved discharge from an otherwise final court-martial conviction:

The Secretary concerned may, **for good cause**, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.”<sup>10</sup>

In this context, and in all contexts under the UCMJ and the Manual for Courts-Martial, “good cause” is not defined.<sup>11</sup> Rather, “[g]ood cause’ is an elusive term and its meaning should be determined not only by the language of the provisions in which it is employed but also by the purpose of the provision.”<sup>12</sup>

Given the DRB’s purpose, this good-cause standard is for all intents-and-purposes the same standard that the DRB would apply when exercising its “equity” authority. In this regard, the DRB should grant relief in equity (*i.e.*, for “good cause”) when the DRB finds that “relief is warranted based on consideration of the applicant’s service record and other evidence presented to the DRB ....”<sup>13</sup> Certainly that evidence will be more persuasive when it includes post-service (post-conviction) evidence in the form of character statements, completion of counseling and training programs, and demonstrated positive conduct in the community. But if that evidence is simply the

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<sup>7</sup> U.S. Const. art II, §2 (“The President shall ... have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.”). As the Supreme Court in *Knote v. United States*, 95 U.S. 149, 153, 24 L. Ed. 442 (1877), wrote, “[a pardon] releases the offender from all disabilities imposed by the offense, and restores him to all his civil rights.” See also Mem. Op. for the U.S. Pardon Att’y from Dep’t of Justice Office of Legal Counsel, *Whether a Presidential Pardon Expunges Judicial and Executive Branch Records of a Crime*, 2006 WL 6167045 (O.L.C.)(Aug. 11, 2006)(concluding that a presidential pardon does not automatically expunge judicial or executive branch records relating to the conviction or underlying offense).

<sup>8</sup> R.C.M. 1210 (new trial for newly discovered evidence or fraud); U.S. Const. art I, §9 (“Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety require it.”)

<sup>9</sup> 10 U.S.C. §1553(a); AFI 36-3213, para E3.3.1.2.

<sup>10</sup> 10 U.S.C. §874(b)(emphasis added); see also R.C.M. 1206(b).

<sup>11</sup> Though some Rules give examples of what it is or is not in their particular context, those are not relevant to the context under discussion herein. See, e.g., RCM 506(f).

<sup>12</sup> *United States v. Hairston*, 1993 CMR LEXIS 58 (per curiam); *In re Lucas*, 137 Cal. Rptr. 3d 595, 602 (2012)(“[t]he term ‘good cause’ is not susceptible of precise definition. In fact, its definition varies with the context in which it is used.”).

<sup>13</sup> AFI 36-3213, E4.3.3; see also E.4.3.1.

member's service record and sentencing package submitted at their court-martial and their clemency package, the DRB could still decide that that is sufficient "good cause" to grant relief. And if the member presents evidence that they suffer from a diagnosed case of military-connected post-traumatic stress disorder (PTSD), military sexual trauma (MST), or traumatic brain injury (TBI), there is nothing preventing the DRB from using that as a data point to determine whether there is "good cause" to grant relief.<sup>14</sup> In fact, even if the member sustained the PTSD or TBI from some cause unrelated to military service, the DRB could still use that data point in applying the "good cause" standard.

Thus, in the case presented, the DRB should consider whatever evidence the member presents, even if none is post-service or post-conviction, to determine whether there is "good cause" to grant relief changing the BCD to some higher characterization. If the member presents evidence that she suffers PTSD, MST, or TBI, whether fitting under the heightened scrutiny prerequisites of the "liberal consideration" provisions §1553 or not,<sup>15</sup> the DRB can consider that evidence as well. But the DRB should not consider that evidence to find that the member is not guilty or should not have been convicted of the underlying offense at court-martial as that conviction is final and conclusive for all purposes.

**Conclusion:** For purposes of clemency, the DRB should apply a "good cause" standard when reviewing requests for relief from an approved Bad Conduct Discharge at a special court-martial.

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<sup>14</sup> Not to contest the final conviction, as there is a mechanism for a member to challenge a conviction when they untimely discover and mental-health condition that could raise question of whether they had a legal defense to their court-martial charges. See R.C.M. 1210.

<sup>15</sup> See USD(P&R) Memorandum, *Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment*, 25 Aug 17 (Atch).