

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 October 2023

DOCKET NUMBER: AR20230002277

APPLICANT REQUESTS: Reconsideration of his previous request for upgrade of his under other than honorable conditions (UOTHC) discharge. Additionally, he requests an appearance before the Board via video/telephone.

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

DD Form 149 (Application for Correction of Military Record)

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 AR20180009798 on 21 October 2021.
2. The applicant states he is no longer ashamed of the reasons he left. The issues/conditions related to his request are post-traumatic stress disorder (PTSD) and sexual assault/harassment. He was a proud and exceptional Soldier. The Army saved his life, and he upholds his discipline today. He joined the military at 17 years old, after graduating early. He was 19 years old when he got to Korea; had was promoted twice; was a squad leader and candidate for West Point. He received a superior achievement award. He was sent to compete for the expert field medical badge (EFMB) which he received on the first try. Staff Sergeant C\_\_ failed and became both sexually and physically harassing to him. His time off was spent doing extra duty and rubbing up against the applicant. The applicant went to therapy and did telehealth counseling. He was afraid to tell anyone. His roommate knew and tried to stay around him. He was upset about EFMB and poor treatment by his sergeant first class/E-7.
3. The applicant enlisted in the Regular Army on 1 October 1987 for two years. His military occupational specialty was 91A (Medical Specialist).
4. The applicant served in Korea from 2 March 1988 through 28 September 1989.
5. The applicant was reported absent without leave (AWOL) on 5 January 1989, and was dropped from the rolls on 4 February 1989.

6. He was apprehended by civilian authorities on 28 September 1989 and returned to military control on the same date.
7. On 30 September 1989, the Medical Examination for Separation Statement of Option shows the applicant did not desire a separation examination.
8. Court martial charges were preferred against the applicant on 5 October 1989, for violations of the Uniform Code of Military Justice (UCMJ). His DD Form 458 (Charge Sheet) shows he was charged with AWOL from on or about 5 January 1989 until 28 September 1989.
9. The applicant consulted with legal counsel on 5 October 1989 and was advised of the basis for the contemplated trial by court-martial; the maximum permissible punishment authorized under the UCMJ; the possible effects of a UOTHC discharge; the procedures and rights that were available to him.
  - a. After consulting with legal counsel, the applicant voluntarily requested discharge under the provision of Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Personnel), Chapter 10, for the good of the service-in lieu of trial by court-martial. He further acknowledged he understood that if his discharge request was approved, he could be deprived of many or all Army benefits, he could be ineligible for many or all benefits administered by the Veterans Administration, and he could be deprived of his rights and benefits as a veteran under both Federal and State laws and he may expect to encounter substantial prejudice in civilian life because of an UOTHC discharge.
  - b. He elected to submit a statement in his own behalf. In his statement he hoped his situation might be understood. He was having a very hard time dealing with the 2nd Infantry Division in Korea. After his unit came off the demilitarized zone he was under extreme stress, and he was very depressed. This very rigorous and serious conditions made him very edgy, and riots were happening in Seoul daily. Two soldiers in his unit were seriously injured, then he went home and his grandmother, who raised him, had her 5th bypass operation, she lived alone, and he felt she had little time left. She was not his legal guardian, but she was like his mother. He knew not returning was wrong but the person he loved most in the world was dying quickly so he took care of her. He had an excellent record previously and he asks that it be taken into consideration and give him a general discharge.
10. The applicant's commander and chain of command, recommended approval of his request for discharge on 10 October 1989, and an UOTHC discharge characterization.
11. The separation authority approved the applicant's request for discharge on 23 October 1989, for the good of the service. He further directed the applicant's reduction to the lowest enlisted grade with an UOTHC characterization of service.

12. The applicant was discharged on 15 December 1989. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of AR 635-200, Chapter 10, for the good of the service - in lieu of trial by court-martial. He was assigned Separation Code KFS and Reenlistment Code 3. His service was characterized as UOTHC. He completed 1 year, 5 months, and 22 days of net active service. He lost time from 5 January 1989 to 27 September 1989. His awards include the Army Service Ribbon and the Overseas Service Ribbon.

13. The applicant was charged due to the commission of an offense punishable under the UCMJ with a punitive discharge. Subsequent to being charged, he consulted with counsel and requested discharge under the provisions of Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.

14. On 21 October 2020, the ABCMR determined the evidence presented did not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case were insufficient as a basis for correction of the applicants' records. In the processing of this application the agency psychologist was asked to review the request. The military electronic medical record (AHLTA) was not reviewed as it was not in use during the applicant's time in service. No hard copy military medical records or civilian medical documentation was provided for review. The VA electronic medical record, Joint Legacy Viewer (JLV) also did not contain any medical or behavioral health records.

a. In the ABCMR Application, he identified some traumatic experiences in Korea. "More than a month in the freezing winter of Korea in the field. I was a 91 Alpha, LOVED it! But was not prepared for the version of duty I faced. All fears came back. All issues came back. I got frostbite. I felt like I almost died. I was close to reenlistment time and from that day was not going to enlist again. Freeze again, suffer all my nightmares again."

b. There are a number of documented visits to the medical clinic in Korea from March 1988 to November 1988. The predominant problems noted are chronic back pain and problems with his feet. On 12 August 1988, he was seen at 1/5th (M) Infantry, Battalion Aid Station, Camp Howze, Korea. The record indicates his complaint, "I can't walk uphill or downhill." The provider identified him as a "20-year-old with back pain T1-3." The readable portions of the notes through this eight-month period do not make mention of any difficulties with extreme exposure to the cold weather.

c. Based on the available information and in accordance with the Liberal Consideration guidance, it is the opinion of the agency psychologist there is insufficient evidence to support the applicant's contention that PTSD led to his UOTHC discharge. No medical records supporting the presence of psychological symptoms or diagnoses were provided for review. An upgrade was therefore not recommended at the time.

15. On 17 April 2023, in the processing of this application the U.S. Army Criminal Investigation Division, searched their criminal file indexes, which revealed no Criminal Investigative and/or Military Police Reports regarding Sexual Assault (Victim of an Investigation) pertaining to the applicant.

16. On 17 April 2023, an agency staff member requested the applicant provide medical documents that support his issue of PTSD. As of 19 May 2023, no response was provided.

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

18. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting reconsideration of his previous request for an upgrade of his under other than honorable conditions (UOTHC) discharge. He contends in this application that he experienced military sexual trauma (MST) and resultant PTSD that mitigates his misconduct.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following: 1) The applicant enlisted in the Regular Army on 1 October 1987; 2) The applicant served in Korea from 2 March 1988 till he went AWOL in January 1989; 3) The applicant was reported AWOL on 5 January 1989-28 September 1989; 4) The applicant was discharged on 15 December 1989, Chapter 10, for the good of the service - in lieu of trial by court-martial. His service was characterized as UOTHC; 4) On 21 October 2020, the ABCMR reviewed the applicant's request for upgrade of his discharge due to PTSD as the result of cold weather training exercises. The Board denied his request.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional civilian medical records were provided for review.

d. The applicant asserts in this application that he experienced MST and resultant PTSD while on active service, which mitigates his misconduct. He reported an NCO was "both sexually and physically harassing to him" Specifically, the applicant reported the NCO was "rubbing up against" him. There was no indication the applicant reported mental health symptoms or MST while on active service. A review of JLV was void of any medical documentation, and the applicant receives no service-connected disability. Lastly, the applicant did not provide any civilian medical documentation for review.

e. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence to support the applicant had condition or experience that mitigated his misconduct. However, the applicant contends he was experiencing MST and resultant PTSD that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

#### Kurta Questions

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends he experienced MST and resultant PTSD that contributed to his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant reports experiencing MST and resultant PTSD on active service.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is insufficient evidence beyond self-report the applicant was experiencing PTSD while on active service. While the applicant in this application reports being exposed to MST, there is inconsistency in his history of describing the events which precipitated his misconduct both while he was on active service and in his previous application. However, per Liberal Consideration his contention of MST alone is sufficient for the board's consideration. In addition, the applicant did go AWOL, which can be a sequela to MST and PTSD, but this is not sufficient to establish a history of a condition or experience during active service.

#### BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records and published DoD guidance for liberal consideration and clemency in determining discharge upgrade requests. The Board considered the severity of the misconduct and whether there was sufficient evidence of mitigating circumstances to weigh in favor of clemency determination. The Board agreed that although the applicant references a post-service diagnosis of PTSD, there is no nexus between PTSD and anxiety and the misconduct which led to his discharge. After due consideration of the request, the Board determined the evidence presented insufficient to warrant a recommendation for relief.

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 to amend the decision of the ABCMR set forth in Docket Number AR20180009798 on 21 October 2021.



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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 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of

the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

2. 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.

a. 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.

b. 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.

3. AR 635-200 sets forth the basic authority for the separation of enlisted personnel.

a. 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. A general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to Soldiers whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 10 provided that a member who had committed an offense or offenses, for which the authorized punishment included a punitive discharge, could submit a request for discharge for the good of the service in lieu of trial by court-martial. The request could be submitted at any time after charges had been preferred and must have included the individual's admission of guilt. Although an honorable or general discharge was authorized, a UOTHC discharge was normally considered appropriate.

4. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) to carefully consider the revised post-traumatic stress disorder (PTSD) criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged UOTHC and who have been diagnosed with PTSD by a competent mental health professional

representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

5. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to DRBs and BCM/NRs when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD; Traumatic Brain Injury; sexual assault; or sexual harassment. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part to those conditions or experiences. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

6. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and Service BCM/NRs on 25 July 2018 [Wilkie Memorandum], 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 court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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//