

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 October 2023

DOCKET NUMBER: AR20230002279

APPLICANT REQUESTS: reconsideration of his previous request for upgrade of his characterization of service from dishonorable to general or honorable.

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

DD Form 149 (Application for Correction of Military Record), 17 December 2022

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 AC97-10347 on 1 April 1998.
2. The applicant states, in effect, due to his Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI) from the Gulf War, he has no memory of his actions, only what he has been told, and he takes full responsibility. While serving his time at Leavenworth he completed courses and classes, he became a hospice/care giver and a nurse's helper for people dying of cancer, aids, and other health issues. Since his release, he has been a successful citizen, also father and grandfather to his family. He has a solid relationship with his children and their families, including his ex-spouse.
3. The applicant enlisted in the Regular Army on 16 August 1978, for a period of 4 years in the grade of E-3.
4. A DA Form 2-1 (Personnel Qualification Record) shows the highest rank/grade he obtained was staff sergeant (SSG)/E-6, with a date of rank of 20 August 1983.
5. General Court-Martial Order (GCMO) Number 45, shows on 22 October 1993, the applicant was found guilty of the following charge(s) and specification(s):
 - a. Charge I, Article 120, plead not guilty, but guilty of a violation of Article 80. And found guilty of a violation of Article 80 with the following specification(s):

Specification 1: rape of R.L.W., on divers occasions between on or about 5 April 1990 and on or about 14 February 1993. Finding guilty, except of the word "rape", substituting therefore the words, "attempt to rape".

Specification 2: rape of C.L.T., on divers occasions between on or about 1 February 1992 and on or about 14 February 1993. Finding guilty, except of the word "rape", substituting therefore the words, "attempt to rape".

Specification 3: Dismissed by Military Judge.

Specification 4: Dismissed by Military Judge.

b. Charge II, Article 125, plead guilty and found guilty of the following, specification(s):

Specification 1: Dismissed by Military Judge.

Specification 2: commit sodomy with R.L.W., a child under the age of 16 years, on divers occasions between on or about 5 April 1990 and on or about 14 February 1993.

Specification 3: commit sodomy with C.L.T., a child under the age of 16 years, on divers occasions between on or about 1 February 1992 and on or about 14 February 1993.

c. Charge III, Article 134, plead guilty and found guilty with the following specification(s):

Specification 1: Dismissed by Military Judge.

Specification 2: commit an indecent act upon the body of R.L.W., a female under 16 years, on divers occasions between on or about 5 April 1990 and on or about 14 February 1993.

Specification 3: commit an indecent act upon the body of C.L.T., a female under 16 years, on divers occasions between on or about 1 February 1992 and on or about 14 February 1993.

Specification 4: take indecent liberties with R.L.W., a female under 16 years, on divers occasions between on or about 5 April 1990 and on or about 14 February 1993.

Specification 5: take indecent liberties with C.L.T., a female under 16 years, on divers occasions between on or 1 February 1992 and on or about 14 February 1993.

6. The court sentenced him to reduction to the grade of E-1, forfeiture of \$214.00 pay per month for 15 years, confinement for 15 years, and a dishonorable discharge. The sentence was approved on 15 December 1993.

7. The record of trial was forwarded for appellate review. The findings and sentence were affirmed; however, the appellate review is not available for review.

8. GCMO Number 311, 4 November 1994, published by Department of the Army, United States Disciplinary Barracks, U.S. Army Combined Arms Center and Fort Leavenworth, Fort Leavenworth, Kansas, affirmed GCMO Number 45 and ordered the dishonorable discharge to be duly executed.

9. Orders and the applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) show he was discharged on 30 December 1994, under the provisions of Army Regulation (AR) 635-200 (Personnel Separations Enlisted Personnel), by reason of court-martial, in the grade of E-1. His service was characterized as dishonorable. His DD Form 214 also shows in:

- item 12c (net active service this period) – 15 years, 2 months, and 6 days
- item 13 (decorations, medals, badges, citations and campaign ribbons awarded or authorized) – Good Conduct Medal (4th award), National Defense Service Medal, Army Achievement Medal (3rd oak leaf cluster), Army Commendation Medal (2nd oak leaf cluster), Southwest Asia Service Medal with 2 Bronze Service Stars, Non-Commissioned Officer Professional Development Ribbon (level 3), Army Service Ribbon, Overseas Service Ribbon (1)
- item 18 (remarks) – Continuous honorable active service from 16 August 1978 through 21 October 1993
- item 26 (separation code) – JJD
- item 27 (reentry code) – RE-4
- item 29 (dates of time lost during this period) – 22 October 1993 through 30 December 1994

10. On 1 April 1998, the ABCMR denied his request for discharge upgrade, stating the applicant failed to submit sufficient relevant evidence to demonstrate the existence of probable error or injustice.

11. Regulatory guidance in effect at the time provided discharges under the provision of AR 635-200, chapter 3, where a soldier will be given a dishonorable discharge pursuant only to an approved sentence of a general court martial. The appellate review must be completed and affirmed before the sentence is duly executed.

12. 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.

13. The Board should consider the applicant's overall military service and statement in accordance with the published equity, injustice, or clemency determination guidance.

14. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requests reconsideration of his request for an upgrade of his character of service. He asserts he was experiencing a traumatic brain injury (TBI) and PTSD during his active service, which contributed to 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 into the Regular Army on 16 August 1978; 2) He served in Southwest Asia during his military service; 3) On 22 October 1993, General Court-Martial Orders shows the applicant was found guilty of the attempted rape, committing sodomy, committing an indecent act/liberties with two children under the age of 16 years of age. The court sentenced him to reduction to the grade of E-1, forfeiture of \$214.00 pay per month for 15 years, confinement for 15 years, and a dishonorable discharge; 4) The applicant was discharged on 30 December 1994, by reason of court-martial. His characterization of service was dishonorable; 5) The applicant petitioned the Army Discharge Review Board requesting upgrade of his discharge. On 1 April 1998, his request was denied.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service records. The VA's Joint Legacy Viewer (JLV) was also examined.

d. The applicant noted TBI and PTSD as contributing and mitigating factors in the circumstances that resulted in his separation. There is insufficient evidence the applicant reported mental health symptoms while on active service. A review of JLV provided evidence the applicant been diagnosed with service-connected PTSD and migraines since 2009.

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.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes, the applicant contends he was experiencing PTSD and TBI that contributed to his misconduct, and he has been diagnosed with service-connected PTSD and migraines since 2009.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he was experiencing PTSD and TBI that contributed to his misconduct, and he has been diagnosed with service-connected PTSD and migraines since 2009.

(3) Does the condition or experience actually excuse or mitigate the discharge? No, there is sufficient evidence the applicant was experiencing PTSD while on active service. He has also been diagnosed with service-connected migraines, but there is insufficient evidence the applicant experienced a TBI while on active service of significant severity where he would be unable to recall his actions. Lastly, there is no nexus between PTSD and TBI and the applicant's misconduct of sexual assault of two minors given that: 1) this type of misconduct is not part of the natural history or sequelae of TBI or PTSD; 2) PTSD and TBI does not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing a mental health condition that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

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 or TBI 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 Board determined 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 Army Board for Correction of Military Records (ABCMR) in Docket Number AC97-10347 on 1 April 1998.

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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. Section 1556 of Title 10, USC, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to

Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

2. 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.
3. AR 635-200, in effect at the time, provides for the orderly administrative separation of Soldiers in a variety of circumstances.

- a. Chapter 3, provides guidance and information on the information as it relates to the character of service and the description of separation. Characterization at separation will be based upon the quality of the Soldier's service, including the reason for the separation and guidance, subject to the limitations under the various reasons for separation. Paragraph 3-7 addresses characterization of service as follows:

- (1) Honorable discharge is appropriate when the quality of the Soldier's service 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. An honorable discharge may be furnished when disqualifying entries in the Soldier's military record are outweighed by subsequent honest and faithful service over a greater period during the current term of service. It is a pattern of behavior and not the isolated incident that should be considered the governing factor in determination of character of service.

- (2) General discharge is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge. A characterization of under honorable conditions may be issued only when the reason for the member's separation specifically allows such characterization. It will not be issued to members upon separation at expiration of their period of enlistment, military service obligation, or period for which called or ordered to Active Duty.

- (3) Under other than honorable conditions discharge is an administrative separation from the Service. It may be issued for misconduct, fraudulent entry, homosexual conduct, security reasons, or for the good of service in the following circumstances when the reason for separation is based on a pattern of behavior that constitutes a significant departure from the conduct expected of Soldiers of the Army. In addition, 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 is another valid circumstance. Some examples provided by the regulation are

disregard by a superior or customary superior-subordinate relationships. An under other than honorable conditions discharge will be directed by a commander exercising general court-martial authority.

b. Paragraph 3-10, states a member will be given a dishonorable discharge pursuant only to an approved sentence of a general court-martial.

4. 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 Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences.

5. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and 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 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//