

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 March 2024

DOCKET NUMBER: AR20230003053

APPLICANT REQUESTS: His under other than honorable conditions (UOTHC) discharged be upgraded to an honorable discharge.

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

- DD Form 149 (Application for Correction of Military Record)
- Personal statement
- Counsel brief
 - Clinical Psychologist statement, dated 16 January 1992
 - BA graduation verification letter
 - MA graduation verification letter
 - Two 3rd party letters of support
 - Copies of the Kurta, Carson, and Wilkie Memorandums

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 outlines his military service history including his service in Saudi Arabia during Operation Desert Storm. It was at this location that he was repeatedly harassed by a sergeant asking for "favors" that later turned to demands. When he did not provide those favors, he ended up doing extra duty around the fire pits. On returning to the States, he did not have any support for the feelings and torment he felt. While the return to the States allowed him to have space away from the sergeant, he was still the brunt of harassment, and he was sexually assaulted on 10 December 1990. During a hospitalization following the assault, he did not receive any help but rather was told of the trouble he would get into if he reported it and that he would be considered gay and possibly punished. Due to the harassment and assault, he went absent without leave (AWOL), later turning himself in at Fort Sam Houston on 13 September 1995. Following his discharge, he obtained both a Bachelor's and a Master's degree and has been working for labor unions for 20 years.

3. The applicant provided the following:

a. Copies of two verification letters that show he had completed his Bachelor's and Master's Degrees.

b. In the 3rd party letters of support that describe the applicant as maintaining a high respect for Soldiers and Veterans as well as that of our nation's military. He has volunteered to help others time and again. He had been recognized nationally as being an honorary member of various state chapters of the Kansas Phi Theta Kappa as well by the State Board of Education. His drive and determination pushed him to succeed where many others might have failed. He went on to finish his master's degree in 2022. He continued to work full time all while furthering his studies. In demonstrating further as to how he has given back to his community even more. It is pointed out that the applicant has volunteered for various projects and organizations to include serving as a judge for the National Coca-Cola Leaders of Promise Scholarship Committee, the Center for Muslim-Christian Understanding based in Washington, D.C., the Clinton Foundation, and has worked for over 17 years for the International Union of Police Associations, an AFL-CIO not-for-profit entity. He currently volunteers as an interviewer for the Georgetown University Alumni Admissions Program which interviews students applying to be an undergraduate at the University. He has worked hard to accomplish himself and become someone that his family, his community, and his military can be proud of.

4. Counsel states since the applicant's separation, the military's views concerning post-traumatic stress disorder (PTSD), physical, sexual, and mental abuse and attitudes and treatment of men and women based on their sexual orientation and beliefs have changed significantly. The applicant has taken many steps to address his discharge and counsel states his discharge should be reviewed based on the laterization provisions of the 24 February 2016 "Carson Memo", 25 August 2017 "Kurta Memo", and 25 July 2018 "Wilkie Memo".

5. On the applicant's DD Form 149, he indicates sexual assault/harassment as contributing and mitigating factors in the circumstances that resulted in his separation.

6. A review of the applicant's service record shows he enlisted in the Regular Army for 3 years on 20 February 1990. He completed training with award of military occupational specialty 77F (H7 Petroleum Supply Specialist). He served in Southwest Asia from 29 September 1990 until 13 March 1991. The highest grade he held was E-4.

7. In a psychological clearance for leave statement, dated 16 January 1992. a clinical psychologist stated he had been seeing the applicant since 10 December 1991 and in his opinion, the applicant presented no current threat of harm to himself or others. It was

his opinion that he could benefit from taking leave to help him rest and pull his life together.

8. On 15 February 1992, the applicant went AWOL, was dropped from his unit rolls on 16 March 1992, and was declared a deserter on 8 January 1993. The applicant voluntarily returned to military control on or about 13 September 1995 and was placed on excess leave on 21 September 1995.

9. Court-martial charges were preferred against the applicant on 15 September 1995 for violations of the Uniform Code of Military Justice (UCMJ). The relevant DD Form 458 (Charge Sheet) shows he was charged with being AWOL from on or about 15 February 1992 until on or about 13 September 1995.

10. The applicant consulted with legal counsel on 20 September 1995 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 an under other than honorable conditions discharge; and the procedures and rights that were available to him.

a. Subsequent to receiving legal counsel, the applicant voluntarily requested discharge under the provision of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10, for the good of the service – in lieu of trial by court-martial. In his request for discharge, he acknowledged his understanding that by requesting discharge, he was admitting guilt to the charge against him, or of a lesser included offense that also authorized the imposition of a bad conduct or dishonorable discharge. 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 Department of Veterans Affairs (VA), and he could be deprived of his rights and benefits as a Veteran under both Federal and State laws.

b. He was advised he could submit any statements he desired in his own behalf and to be afforded a physical evaluation prior to separation; however, the applicant waived both of these rights.

11. On 4 December 1995, the applicant's immediate commander recommended the applicant receive a special court-martial empowered to adjudge a bad conduct discharge.

12. The separation authority approved the applicant's request for discharge on 11 December 1995 under the provisions of Army Regulation 635-200, Chapter 10, in lieu of trial by court-martial, and directed that the applicant be reduced to the lowest enlisted grade and receive a UOTHC.

13. The applicant was discharged on 8 January 1996 in the grade of E-1. His DD Form 214 shows he was discharged under the provisions of Army Regulation 635-200, Chapter 10, for the good of the service – in lieu of court martial and his service was characterized as UOTHC. He was credited with 5 years, 10 months, and 19 days of net active service with 107 days of excess leave.

14. The applicant's DA Form 2-1 (Personnel Qualification Record) shows his service in Saudi Arabia as from 29 September 1990 through 18 March 1991, with award of the Southwest Asia Service Medal with 3 bronze service stars, National Defense Service Medal, Army Service Ribbon, Kuwait Liberation Medal- Saudi Arabia, and the Marksman Qualification Badge with Rifle Bar.

15. The DD Form 214 incorrectly states his lost time as none, when in fact he had an extended period of AWOL of 1,307 days. This omission resulted in crediting him net active service as 5 years, 10 months, and 19 days that does not account for the period of lost time. While these are significant factors, this Board does not make any correction to a Soldier's records that could conceivably operate to the applicant's disadvantage.

16. 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 Army Regulation 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.

17. In determining whether to grant relief the Boards for Correction of Military/Navy Records (BCM/NR) 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 his under other than honorable conditions (UOTHC) discharged be upgraded. He contends he experienced military sexual trauma (MST) that mitigates his discharge.

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 20 February 1990; 2) The applicant served Saudi Arabia from 29 September 1990 -13 March 1991; 3) Court-martial charges were preferred against the applicant on 15 September 1995 for being AWOL from 15 February 1992 -13 September 1995; 4) The applicant was discharged on 8 January 1996, Chapter 10- lieu of trial by court-martial. His service was characterized as UOTHC.

c. The Army Review Board Agency (ARBA) Behavioral Health (BH) 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. The applicant provided a hardcopy of military mental health documentation.

d. The applicant reported he experienced MST, which was a contributing and mitigating factor in the circumstances that resulted in his separation. The applicant stated he was engaged in behavioral health care prior to going AWOL. He provided hardcopy military documentation that he was evaluated on 16 January 1992 by a clinical military psychologist. He was reported to have contact with the applicant since 10 December 1992, and the psychologist felt the applicant was not a threat to himself or others. The applicant was cleared to go on leave. There was no diagnosis provided or a reported history of MST. A review of JLV was void of any mental health documentation related to the applicant, and he does not receive any service-connected disability.

e. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence to support the applicant has been diagnosed with a mental health condition related to his report of MST on active service. However, he reports experiencing MST during his active service. In accordance with the liberal consideration memo, the applicant's contention of MST alone is sufficient to be considered by the board in reaching its final determination.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends he was experienced MST that mitigates his misconduct in active service.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he was experienced MST while on active service that mitigates his misconduct.

(3) Does the condition experience actually excuse or mitigate the discharge? Yes, the applicant reports experiencing MST during his active service. Avoidant behavior such as going AWOL can be natural sequelae to MST. Also, in accordance with the liberal consideration memo, the applicant's contention of MST alone is sufficient to be considered by the board in reaching its final determination.

BOARD DISCUSSION:

The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense

guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service to include deployment, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the applicant's MST claim and the review and conclusions of the ARBA BH Advisor. Although the Board concurred with the ARBA BH Advisor's conclusion that the applicant's MST claim would mitigate his misconduct, the Board also noted the extraordinary length of his period of AWOL and found the degree of misconduct in this case outweighs any potentially mitigating factors. Based on a preponderance of the evidence, the Board determined the character of service the applicant received upon separation was not in error or unjust. The Board concurred with the corrections described in Administrative Note(s) below.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

Other than the corrections addressed in Administrative Note(s) below, 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 otherwise insufficient as a basis for correction of the records of the individual concerned.

7/23/2024

X Donna Bush

CHAIRPERSON
Signed by: BUSH.DONNA.MARIE.1035646074

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.

ADMINISTRATIVE NOTE(S):

A review of the applicant's record shows his DD Form 214, for the period ending 8 January 1996 is missing entries that does not require Board action. As a result, amend the DD Form 214 by adding the following awards:

- National Defense Service Medal
- Army Service Ribbon
- Southwest Asia Service Medal with 3 bronze service stars
- Kuwait Liberation Medal- Saudi Arabia
- Kuwait Liberation Medal- Kuwait
- Marksman Marksmanship Qualification Badge with Rifle Bar.

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. Title 10, USC, section 1556 provides the Secretary of the Army shall ensure that an applicant seeking corrective action by the Army Review Boards Agency (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.

3. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at that time provided that:

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 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 Soldier's separation specifically allows such characterization.

c. Chapter 10 of that regulation provided, in pertinent part, 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, an under other than honorable conditions discharge was normally considered appropriate.

4. The Acting Principle Deputy Under Secretary of Defense (Personnel and Readiness) provided clarifying guidance to Service DRBs and Service BCM/NRs on 24 February 2016 [Carson Memorandum]. The memorandum directed the BCM/NRs to waive the statute of limitations. Fairness and equity demand, in cases of such magnitude that a Veteran's petition receives full and fair review, even if brought outside of the time limit. Similarly, cases considered previously, either by DRBs or BCM/NRs, but without benefit of the application of the Supplemental Guidance, shall be, upon petition, granted de novo review utilizing the Supplemental Guidance.

5. The Under Secretary of Defense (Personnel and Readiness) provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017 [Kurta Memorandum]. The memorandum directed them to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD, traumatic brain injury (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. 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.

a. Guidance documents are not limited to UOTHC discharge characterizations but rather apply to any petition seeking discharge relief including requests to change the narrative reason, re-enlistment codes, and upgrades from general to honorable characterizations.

b. An honorable discharge characterization does not require flawless military service. Many veterans are separated with an honorable characterization despite some relatively minor or infrequent misconduct.

c. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with mental health conditions,

including PTSD; TBI; or behaviors commonly associated with sexual assault or sexual harassment; and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.

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//