

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 October 2023

DOCKET NUMBER: AR20230003364

APPLICANT REQUESTS: Reconsideration of his request for upgrade of his under honorable conditions (general) discharge.

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 AR20150010020 on 8 November 2016.
2. The applicant states relief is warranted because his actions followed military sexual trauma, which was reported to his company commander but never acted upon or investigated.
3. On his DD Form 149, the applicant notes sexual assault/harassment as a contributing and mitigating factor in the circumstances that resulted in his separation.
4. On 6 October 1970, the applicant enlisted in the Regular Army, for 3 years.
5. On 20 January 1971, the applicant received non-judicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ), for failing to go at the time prescribed to his appointed place of duty from 15 January 1971 through 19 January 1971. His punishment included forfeiture of \$32.00 pay for one month, and 14 days restriction and extra duty.
6. On 12 February 1971, the applicant received NJP under Article 15 of the UCMJ, for going absent without leave (AWOL) on or about 9 February 1971. His punishment included forfeiture of \$25.00 pay for one month, and 10 days restriction and extra duty.
7. On 5 April 1971, the applicant underwent a mental status evaluation. He was psychiatrically cleared to participate in any administrative action deemed appropriate by

the command. However, he was diagnosed with a passive-dependent personality, manifested by immaturity and impulsive behavior.

8. On 20 April 1971, the applicant's commander notified him of his intent to initiate separation actions against him under the provisions of Army Regulation 635-212 (Personnel Separations – Discharge – Unfitness and Unsuitability), by reason of unfitness for military service. As the specific reasons, the commander cited an evaluation by competent medical personnel making him unsuitable for active duty.

9. On 22 April 1971, the applicant consulted with legal counsel and affirmed he had been advised of the basis for the contemplated separation action. Following his consultation, he waived his right to personally appear before, and to have his case considered by a board of officers. He declined to submit a statement in his own behalf and waived his right to further representation by military counsel.

10. On 27 April 1971, the applicant's commander formally recommended the applicant's discharge, under the provisions of Army Regulation 635-212, by reason of unsuitability.

11. On 4 May 1971, the applicant again consulted with legal counsel and affirmed he had been advised of the basis for the contemplated separation action. Following his consultation, he waived his right to personally appear before, and to have his case considered by a board of officers. He declined to submit a statement in his own behalf and waived his right to further representation by military counsel. He acknowledged he could expect to encounter substantial prejudice in civilian life, if given a general discharge (under honorable conditions).

12. The available record is void of the separation authority's memorandum that approved the recommended discharge.

13. The applicant was discharged on 1 June 1971. His DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows he was discharged under the provisions of Army Regulation 635-212, with Separation Program Number 264 (unsuitability, character, and behavioral disorders) and Reentry Code 3. His service was characterized as under honorable conditions (general). He completed 7 months and 26 days of net active service this period.

14. Having had prior service in the Regular Army, the applicant reenlisted in the Regular Army on 27 July 1972, for 4 years.

15. A verification of prior service letter, dated 11 August 1972, states the applicant reenlisted without claiming his prior service.

16. On 11 August 1972, the applicant underwent a mental status evaluation. He was psychiatrically cleared to participate in any administrative action deemed appropriate by the command. However, he was diagnosed with an inadequate personality.

17. On 14 August 1972, the applicant's commander notified him of his intent to initiate separation actions against him under the provisions of Army Regulation 635-212, paragraph 6b(2) (character and behavior disorders), by reason of unsuitability for military service.

18. On 16 August 1972, the applicant consulted with legal counsel and affirmed he had been advised of the basis for the contemplated separation action. Following his consultation, he waived his right to personally appear before, and to have his case considered by a board of officers. He declined to submit a statement in his own behalf and waived his right to further representation by military counsel. He acknowledged he could expect to encounter substantial prejudice in civilian life, if given either a general discharge (under honorable conditions) or an undesirable discharge.

19. On 19 August 1972, the applicant's commander formally recommended the applicant's discharge, under the provisions of Army Regulation 635-212, paragraph 6b(2). As the specific reasons, the commander cited the applicant's sustained character and behavior disorders and his history of behavior problems throughout his life.

20. The separation authority approved the recommended discharge on 19 September 1972, and directed the issuance of an honorable discharge certificate.

21. The applicant was discharged on 2 October 1972. His DD Form 214 shows he was discharged under the provisions of Army Regulation 635-212, with Separation Program Number 264 and Reentry Code 3. His service was characterized as honorable conditions. He completed 2 months and 6 days of net active service this period.

22. Having had prior service in the Regular Army, the applicant reenlisted in the Regular Army on 11 October 1972, for 3 years.

23. On 31 October 1972, the applicant received NJP under Article 15 of the UCMJ, for going AWOL from on or about 23 October 1972 until on or about 30 October 1972. His punishment included forfeiture of \$60.00 pay for one month, and 14 days restriction and extra duty.

24. On 8 November 1972, the applicant received NJP under Article 15 of the UCMJ, for wrongfully and without authority wear upon his uniform the rank of specialist four, on or about 5 November 1972. His punishment included forfeiture of \$50.00 pay for one month.

25. On 27 November 1972, the applicant underwent a mental status evaluation. He was psychiatrically cleared to participate in any administrative action deemed appropriate by the command.
26. On 27 November 1972, the applicant's commander notified him of his intent to initiate separation actions against him under the provisions of Army Regulation 635-200 (Personnel Separation – Enlisted Personnel), paragraph 14, for fraudulent entry.
27. On 5 December 1972, the applicant consulted with legal counsel and acknowledged he had been advised of the basis for the contemplated separation action. Following his consultation, he waived the right to personally appear before, and to have his case considered by a board of officers. He declined to submit a statement in his own behalf. He waived representation by counsel. He acknowledged he understood that, as the result of issuance of an undesirable discharge under other than honorable conditions (UOTHC), he may be ineligible for many or all benefits as a veteran under both Federal and State laws.
28. On 6 December 1972, the applicant received NJP under Article 15 of the UCMJ, for willfully disobeying a lawful order, from his superior noncommissioned officer (NCO), on or about 2 December 1972; and for assaulting his superior NCO, on or about 2 December 1972. His punishment included forfeiture of \$67.00 for one month.
29. The separation authority approved the recommended discharge on 21 December 1972, and directed the issuance of an Undesirable Discharge Certificate.
30. The applicant was discharged on 22 January 1973. His DD Form 214 confirms he was discharged under the provisions of Army Regulation 635-200, Chapter 14, with Separation Program Number 280 (misconduct/fraudulent entry into the Army) and Reentry Code 3B. His service was characterized as UOTHC. He completed 3 months of net active service this period.
31. The applicant was honorably discharged from the Regular Air Force on 17 July 1973. His DD Form 214 confirms he completed 13 days of net active service. The available record is void of documents containing the specific facts and circumstances surrounding his Air Force enlistment and subsequent discharge.
32. Having had prior service in the Regular Army and the Regular Air Force, the applicant again reenlisted in the Regular Army on 4 February 1974, for 3 years.
33. Court-martial charges were preferred against the applicant on 19 February 1974, for violations of the UCMJ. His DD Form 458 (Charge Sheet) shows he was charged with assaulting his superior NCO, on or about 16 February 1974; being disrespectful in language towards his superior NCO by calling him a racial epithet, on or about

16 February 1974; and with assaulting another superior NCO, on or about 16 February 1974.

34. The applicant consulted with legal counsel on or about 26 February 1974, 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 bad conduct discharge; and the procedures and rights that were available to him.

a. Subsequent to receiving legal counsel, the applicant voluntarily requested discharge under the provisions of Army Regulation 635-200, 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 Veterans Administration, and he could be deprived of his rights and benefits as a Veteran under both Federal and State laws.

b. He declined to submit a statement in his own behalf.

35. On 6 March 1974, the applicant's commander recommended approval of his request for discharge, and further recommended the issuance of an undesirable discharge certificate.

36. By legal review on 18 March 1974, the applicant's Chapter 10 separation action was found to be legally sufficient for further processing.

37. Consistent with the chain of command recommendations, the separation authority approved the applicant's request on 18 March 1974, and directed the issuance of a DD Form 258A (Undesirable Discharge Certificate).

38. The applicant was discharged accordingly on 21 March 1974. His DD Form 214 confirms he was discharged under the provisions of Army Regulation 635-200, paragraph 10-1, with Separation Program Designator 246 (discharge for the good of the service) and Reentry Codes 3, 3B, and 3C. His service was characterized as UOTHC. He completed 1 month and 15 days of net active service this period.

39. Having had prior service in the Regular Army and the Regular Air Force, the applicant reenlisted in the Regular Army again on 16 May 1974, for 3 years.

40. A DD Form 261 (Report of Investigation – Line of Duty and Misconduct Status), shows the applicant was admitted to the hospital on Fort Leonard Wood, MO on 21 May

1974, for overdose of a prescription item. He was diagnosed with a character behavior disorder.

41. On 29 July 1974, the applicant was reported as AWOL and remained absent until his apprehension by civil authorities on 12 August 1974.

42. The applicant consulted with legal counsel on or about 3 September 1974, 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 bad conduct discharge; and the procedures and rights that were available to him.

a. Subsequent to receiving legal counsel, the applicant voluntarily requested discharge under the provisions of Army Regulation 635-200, 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 Veterans Administration, and he could be deprived of his rights and benefits as a Veteran under both Federal and State laws.

b. He declined to submit a statement in his own behalf.

43. On 11 September 1974, the applicant's commander recommended approval of his request for discharge, and further recommended the issuance of an under honorable conditions (general) discharge.

44. Consistent with the chain of command recommendations, the separation authority approved the applicant's request for discharge on 18 September 1974, and directed the issuance of an under honorable conditions (general) discharge.

45. The applicant was discharged on 20 September 1974. His DD Form 214 confirms he was discharged under the provisions of Army Regulation 635-200, Chapter 10, with Separation Program Designator code KFS (conduct triable by court-martial) and Reentry Code 4. His service was characterized as under honorable conditions (general). He completed 3 months and 16 days of net active service with 20 days of lost time.

46. The applicant petitioned the ABCMR requesting upgrade of his UOTHC discharge. On 8 November 2016, the Board voted to deny relief and determined that the overall merits of the case were insufficient as a basis for correction of his record.

47. In the processing of the applicant's previous case, a search of the U.S. Army Criminal Investigation Division database was requested for a Report of Investigation and/or Military Police Report pertaining to the applicant. The search revealed no records pertaining to the applicant.

48. The issuance of a discharge under the provisions of Army Regulation 635-200, chapter 10, required the applicant to have requested from the Army – voluntarily, willingly, and in writing – discharge in lieu of trial by court-martial. It is presumed that all requirements of law and regulation were met, and the rights of the applicant were fully protected throughout the separation process. The applicant has provided no evidence that would indicate the contrary.

49. 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.

50. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting reconsideration of his request for an upgrade of his under honorable conditions (general) discharge. He contends he experienced military sexual trauma (MST) 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 6 October 1970. The applicant was discharged on 1 June 1971 for unsuitability, character, and behavioral disorders. His service was characterized as under honorable conditions (general); 2) The applicant reenlisted in the Regular Army on 27 July 1972 without claiming his prior service. The applicant was discharged on 2 October 1972 for unsuitability, character, and behavioral disorders. His service was characterized as honorable conditions; 3) The applicant reenlisted again in the Regular Army on 11 October 1972. The applicant was again discharged on 22 January 1973, Chapter 14, (misconduct/fraudulent entry into the Army). His service was characterized as UOTHC; 4) The applicant was honorably discharged from the Regular Air Force on 17 July 1973. His DD Form 214 confirms he completed 13 days of net active service. The available record is void of documents containing the specific facts and circumstances surrounding his Air Force enlistment and subsequent discharge; 5) The applicant again reenlisted in the Regular Army on 4 February 1974. The applicant was discharged 21 March 1974, Chapter 10-1, (discharge for the good of the service). His service was characterized as UOTHC; 6) The applicant reenlisted in the Regular Army again on 16 May 1974. The applicant was discharged on 20 September 1974, Chapter 10, (conduct triable by court-martial). His service was characterized as under honorable conditions (general); 7) In total, in the available records, the applicant received non-judicial punishment three times for going AWOL. He also was found wearing a rank without authority on one occasion. In addition, he was

charged with disobeying a direct order and assaulting NCOs twice; 8) The applicant petitioned the ABCMR requesting upgrade of his UOTHC discharge. On 8 November 2016, the Board reviewed and to denied relief.

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

d. On his application, the applicant noted MST is related to his request, as a contributing and mitigating factor in the circumstances that resulted in his general under honorable separation. He did not describe or report which discharge he was referring to in his application. The applicant enlisted and was discharged from the Regular Army or Air Force six times between October 1970-September 1974. He had multiple DD214s with various types of discharge and character of service.

e. The applicant underwent multiple psychiatric evaluations. He was first seen on 05 April 1971 during his first enlistment. He was diagnosed with passive-dependent personality disorder, but he was psychiatrically cleared to participate in any administrative action deemed appropriate by command. After this evaluation, he was discharged for unsuitability, character, and behavioral disorders. His service was characterized as under honorable conditions (general). During his second enlistment, he again underwent another mental status evaluation on 11 August 1972. He was psychiatrically cleared to participate in any administrative action deemed appropriate by command. However, he was again diagnosed with an inadequate personality. Again, he was discharged for unsuitability, character, and behavioral disorders, and his service was characterized as honorable.

f. The applicant was seen again for a mental status evaluation on 27 November 1972, and he again was psychiatrically cleared to participate in any administrative action. The applicant did engage in the misconduct of assault, disobeying an order, wrongfully wearing the rank of specialist for, and going AWOL during this enlistment. He was discharged due to misconduct/fraudulent entry, and his service was characterized as UOTHC. Later after again enlisting and being discharged from the Regular Army and then the Air Force, the applicant again enlisted in the Army. There was evidence the applicant was admitted to the hospital on 21 May 1974 for an overdose of a prescribed medication. He was diagnosed with a character disorder. He then went AWOL after this and was discharged due to conduct triable by court marital.

g. A review of JLV provided evidence the applicant has a length history of behavioral health treatment at the VA since 2001. He underwent a Compensation and Pension evaluation in 2015. The applicant described a military history very inconsistent with his military service records. He reported experiencing MST in 1971, and he left the military

because of the assault. He also reported a history of civilian behavioral health treatment and significant criminal behavior, which resulted in multiple periods of incarceration with the longest for sexual abuse of a child (10 years incarcerated). The applicant receives 70% service-connected disability for PTSD related to his report of MST since 2015.

h. 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. The applicant does contend he was experienced MST that mitigates his misconduct, and per Liberal Consideration his contention alone is sufficient for the board's consideration. However, the applicant repeatedly reenlisted in the Army and Air Force despite his report of MST during his first enlistment. The applicant underwent multiple psychiatric evaluations, which found he was experiencing a personality disorder or likely a pre-existing mental health condition. This pre-existing mental health condition likely resulted in the applicant being psychiatrically unsuitable for military enlistment. However due to the time of his enlistment, he was able to repeatedly re-enlist due to delays as the result of hard copy military service documentation.

Kurta Questions

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends he was experiencing MST that contributed to his misconduct. The VA has diagnosed the applicant with service-connected PTSD due to his report of MST.

(2) Did the condition exist or experience occur during military service? Yes, the applicant reports experiencing MST while on active service. The VA has also diagnosed the applicant with service-connected PTSD due to his report of MST

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is evidence the applicant reported MST to the VA, but there are notable inconsistencies with the applicant's description of his military service to the examiner and his military service records. Also, he reported experiencing MST in 1971 and then reenlisted five more times despite continued misconduct and difficulty adjusting to the military. The applicant was found AWOL repeatedly during his repeated enlistments, but he consistently re-enlisted after being returned to duty. Lastly, there is no nexus between MST and assault, fraudulent enlistment, and wearing the wrong rank given that: 1) these types of misconduct are not part of the natural history or sequelae of MST; 2) MST does not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he experienced MST 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 determined that relief was not warranted. The Board carefully considered the applicant’s request, supporting documents, evidence in the records and published DoD guidance for consideration of discharge upgrade requests. The Board considered the applicant’s statement, his record of service, the frequency and nature of his misconduct, the reason for his separation and whether to apply clemency. The Board found insufficient evidence of in-service mitigating factors for the misconduct. The applicant provided one letter of support, and a list of post-service achievements; however, evidence does not reflect post-service achievements to weigh a clemency determination. After due consideration of the case, given the severity of the misconduct and, in the absence of mitigating circumstances, post-service achievements or letters of reference to weigh in support of a clemency determination, the Board determined the character of service the applicant received upon separation was not in error or unjust.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	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 Army Board for Correction of Military Records set forth in Docket Number AR20150010020 on 8 November 2016.

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

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, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the 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. Army Regulation 15-185 (ABCMR) sets forth procedures for processing requests for the correction of military records. Paragraph 2-15a governs requests for reconsideration. This provision of the regulation allows an applicant to request reconsideration of an earlier decision of the ABCMR. The applicant must provide new relevant evidence or argument that was not considered at the time of the ABCMR's prior consideration.

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

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. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Navy Records (BCM/NR) on 25 August 2017. 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 post-traumatic stress disorder (PTSD), traumatic brain injury, 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 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 DRBs 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, 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//