

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 30 January 2024

DOCKET NUMBER: AR20230007645

APPLICANT REQUESTS: in effect, an upgrade of his under other than honorable conditions discharge.

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

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- DA Form 5286 (Individual Training Record (Continuation Sheet) Basic Training (BT), Advanced Individual Training (AIT), One Station Unit Training (OSUT), 10 August 2002
- Diploma, Information Systems Operator Analyst, 23 November 2005
- Certificate for Award of the Army Achievement Medal, 1 November 2006, 2 July 2007, 14 December 2007
- Certificate of Training, Redcom/IGX, 2 March 2007
- Certificate of Training, Network Multiplexing, 9 March 2007
- DA Form 638 (Recommendation for Award), 1st page, 2 July 2007
- Certificate of Training, Base Band Note Operator-Maintainer Course, 25 September 2007
- Permanent Orders 057-024, Award, Driver-W Badge, 27 February 2008
- Certificate, Army Substance Abuse Program, Prime for Life, 11-March 2008
- Certificate of Completion, Defensive Driving Course, 24 November 2008
- DD Form 214, Certificate of Release or Discharge From Active Duty, 9 September 2009
- 15 pages of civilian certificates and certifications and letters pertaining to Civilian Information Technology (IT) training dated from 8 June 2001 to 8 May 2010

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 indicates his application is related to Post Traumatic Stress Disorder (PTSD) and other mental health conditions. He states he is looking to get mental help. His civilian therapist quit, and he does not know why. She(the therapist) just stopped coming to the online sessions.
3. The applicant enlisted in the Regular Army on 20 April 2005. He served in military occupational specialty 25B (IT Specialist).
4. A DD Form 458 (Charge Sheet) shows the below charges and specifications were preferred against the applicant, and he was informed of said charges, on 5 May 2008:
 - a. Charge 1, Violation of the Uniform Code of Military Justice (UCMJ) Article 120 (Rape and Sexual Assault Generally) -
 - (1) Specification 1: In that the applicant did, between on or about 1 October 2007 and 31 October 2007, engage in a sexual act, to wit: sexual intercourse with _____ who had attained the age of 12, but had not attained the age of 16 years.
 - (2) Specification 2: In that the applicant did, on divers occasions between on or about 1 October 2007 and 31 October 2007, engage in a lewd act, to wit: fellatio and digital vaginal masturbation with _____, a child who had not attained the age of 16 years.
 - b. Charge 2, Violation of UCMJ, Article 134 (General, Adultery), Specification: The applicant, a married man, did, between on or about 1 October 2007 and 31 October 2007, wrongfully have sexual intercourse with _____, a woman not his wife.
5. On 7 May 2008, the applicant's commander initiated and approved a non-transferrable (FLAG) Report to Suspend Favorable Personnel Action, for elimination.
6. The applicant completed a Report of Medical History on 7 May 2008 and underwent a medical examination; he was found qualified for service or separation.
7. A Report of Mental Status Evaluation, dated 13 May 2008, notes the applicant was found mentally responsible, there was no evidence of a psychiatric condition that would prevent him from participation in legal or administrative actions, he could distinguish between right and wrong, and he possessed sufficient mental capacity to understand and participate in any proceedings.
8. On 13 May 2008, the applicant's company commander informed the applicant he was initiating action to separate him for under the provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), chapter 14-12c, commission of a serious offense, with a characterization of service of under other than honorable conditions. His commander cited the applicant knowingly engaged in a sexual act

between on or about 1 October and 31 October 2007, engaged in a lewd act, to wit: fellatio and digital vaginal masturbation with a child under the age of 16 years old. He also between the dates listed above, engaged in a sexual act with a woman not his wife.

9. On 13 May 2008, the applicant's commander formally requested he be separated prior to expiration of his current term of service due to commission of a serious offense.

10. On 15 May 2008, the applicant acknowledged receipt of notification of separation under the provisions of AR 635-200, chapter 14-12c, Commission of a Serious Offense.

11. Evidence shows he was afforded and declined the opportunity to consult with counsel, he waived consideration of his case by an administrative separation board, elected not to submit statements in his own behalf and waived representation by counsel. He acknowledged he may expect to encounter substantial prejudice in civilian life if a general discharge under honorable conditions was issued to him. He further understood he may be ineligible for many or all benefits as a veteran under both Federal and State law.

12. The applicant's intermediate commanders concurred with the recommendation to separate him before his expiration term of service and recommended the applicant's service be characterized as under other than honorable conditions.

13. On 19 May 2008, in a trial by Summary Court-Martial, the applicant pled guilty and was found guilty of the charges of aggravated sexual assault of a child; aggravated sexual abuse of a child; and adultery. These charges are detailed in this charge sheet, in paragraph 4 of this Record of Proceedings. He was sentenced to confinement for 15 days and reduction to the grade of E1. The sentence was adjudged on 19 May 2008.

14. On 4 August 2008, the Headquarters, 516th Signal Brigade commander concurred with the recommendation to separate him before his expiration term of service and recommended the applicant's discharge be approved and his service be characterized as under other than honorable conditions.

15. On 19 August 2008, the separation authority directed the applicant be discharged under the provisions of AR 635-200, chapter 14-12c, with an under other than honorable conditions discharge. The reason for separation was misconduct – serious offense.

16. On 9 September 2008, he was discharged in accordance with the separation authority's decision. His DD Form 214 shows he completed 3 years, 4 months, and 8 days of net active service this period.

a. His DD Form 214 lists the following pertinent awards:

- Army Achievement Medal (2nd Award)
- National Defense Service Medal
- Global War on Terrorism Service Medal
- Korea Defense Service Medal
- Army Service Ribbon
- Overseas Service Ribbon
- Expert Marksmanship Qualification Badge with Rifle and Grenade Bars

b. His DD Form 214 contains the following entries or information:

- Item 4a (Grade, Rate or Rank) PV1
- Item 4b (Pay Grade) E01
- Item 24 (Character of Service), his service was characterized as under other than honorable conditions
- Item 26 (Separation Code) "JKQ"
- Item 27 (Reentry Code), the entry "3"
- Item 28 (Narrative Reason for Separation), the entry Misconduct (Serious Offense)
- he had lost time from 19 May 2008 to 30 May 2008.

17. On 15 March 2019, the Army Discharge Review Board denied his petition for an upgrade of his discharge.

18. The applicant provides numerous certificates and certifications recognizing him as an IT and Security+ professional as well as several awards and certificates from his military service.

19. The Board should consider the evidence and the applicant's statements in accordance with the 25 July 2018, Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NRs) regarding equity, injustice, or clemency determinations.

20. MEDICAL REVIEW:

a. Background: The applicant is requesting reconsideration of his request of an upgrade of his under other than honorable conditions (UOTHC) characterization of service. He contends PTSD and other mental health condition mitigates his discharge.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Below is a summary of information pertinent to this advisory:

- Applicant enlisted in the RA on 20 April 2005.
- A DD Form 458 (Charge Sheet) shows the below charges and specifications were preferred against the applicant, and he was informed of said charges, on 5 May 2008:
- Charge I, Violation of the Uniform Code of Military Justice (UCMJ) Article 120 (Rape and Sexual Assault Generally) -
- Specification 1: In that the applicant did, between on or about 1 October 2007 and 31 October 2007, engage in a sexual act, to wit: sexual intercourse with ___ who had attained the age of 12, but had not attained the age of 16 years.
- Specification 2: In that the applicant did, on diverse occasions between on or about 1 October 2007 and 31 October 2007, engage in a lewd act, to wit: fellatio and digital vaginal masturbation with ___ a child who had not attained the age of 16 years.
- Charge 2, Violation of UCMJ, Article 134 (General, Adultery), Specification: The applicant, a married man, did, between on or about 1 October 2007 and 31 October 2007, wrongfully have sexual intercourse with ___, a woman not his wife.
- On 13 May 2008, the applicant's company commander informed the applicant he was initiating action to separate him for under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), chapter 14-12c, commission of a serious offense, with a characterization of service of under other than honorable conditions. His commander cited the applicant knowingly engaged in a sexual act between on or about 1 October and 31 October 2007, engaged in a lewd act, to wit: fellatio and digital vaginal masturbation with a child under the age of 16 years old. He also between the dates listed above, engaged in a sexual act with a woman not his wife.
- On 19 May 2008, in a trial by Summary Court-Martial, the applicant pled guilty and was found guilty of the charges of aggravated sexual assault of a child; aggravated sexual abuse of a child; and adultery. These charges are detailed in this charge sheet, in paragraph 4 of this Record of Proceedings. He was sentenced to confinement for 15 days and reduction to the grade of E1. The sentence was adjudged on 19 May 2008.
- On 9 September 2008, he was discharged under the provisions of Army Regulation 635-200, chapter 14-12c, with an under other than honorable conditions (UOTHC) discharge. The reason for separation was misconduct – serious offense.
 - On 15 March 2019, the Army Discharge Review Board denied his petition for an upgrade of his discharge.

c. Review of Available Records Including Medical:

The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 293, ABCMR Record of Proceedings (ROP), DD Form 214, numerous certificates and certifications, and documents from his service record and separation packet. The VA

electronic medical record and DoD health record were reviewed through Joint Longitudinal View (JLV). Lack of citation or discussion in this section should not be interpreted as lack of consideration.

d. The applicant indicates his application is related to Post Traumatic Stress Disorder (PTSD) and other mental health conditions. He states he is looking to get mental health help. His civilian therapist quit, and he does not know why. She just stopped coming to the online sessions.

e. Active-duty electronic medical records available for review indicate he was command referred for a screening on 10 January 2008 due to an alcohol related incident. During the screening, he reported having two pending Article 15's and feeling stressed due to the nature of the investigation as well as possible jail time. He later participated in an in-depth ASAP diagnostic assessment, on 29 January 2008, and reported being separated from his wife and a pending divorce. He further reported receiving a DUI on 6 Jan 2008. He indicated no prior DUI and denied a history of alcohol or drug abuse problems. During that encounter, he denied experiencing any mental health symptoms. A follow-up encounter, on 04 February 2008, indicates the applicant did not meet criteria for enrollment in ASAP. On 13 May 2008, a Mental Status Evaluation was performed as part of the separation process. No diagnosis was evident, and the applicant was cleared for the separation process.

f. No VA electronic medical record was available for review and the applicant is not service connected. No medical documentation of any mental health condition/diagnosis was evidenced in the record and the applicant did not submit any hardcopy medical documentation indicating a BH condition or diagnosis.

g. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is no evidence the applicant had a BH condition during military service. Regardless, even if there were evidence of a BH condition, it is unlikely it would mitigate the reason for his discharge.

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 PTSD and other mental health mitigates his discharge.

(2) Did the condition exist or experience occur during military service? No. There is no medical documentation of any BH condition, and the applicant did not identify any traumatic stressor while in service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant was discharge from military service due to aggravated sexual assault of a child; aggravated sexual abuse of a child; and adultery. There is no nexus between any

BH conditions, including his self-asserted PTSD and other mental health condition, and sexual abuse of a minor and adultery. None of the applicant's self-asserted conditions have a natural sequela with sexual assault, aggravated sexual abuse of a child, and adultery, since none of his self-asserted conditions interfere with the capacity to distinguish right from wrong and act in accordance with the right.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The Board reviewed and concurred with the medical reviewer's determination that there is no evidence the applicant had a BH condition during military service and even if there were evidence of a BH condition, it is unlikely it would mitigate the reason for his discharge. The Board found no error or injustice in her separation processing.

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 for correction of the records of the individual concerned.

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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 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. Army Regulation 635-200, sets forth the basic authority for the separation of enlisted personnel.

a. Chapter 14 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions, a pattern of misconduct, and commission of a serious offense. Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impractical or unlikely to succeed. Commission of a serious military or civil offense is a basis for separation if the specific circumstances of the offense warrant separation and a punitive discharge is, or would be, authorized for the same or a closely related offense under the Manual of Court-Martial (MCM). Soldiers against whom charges will not be referred to a court-martial authorized to impose a punitive discharge will be processed for separation under paragraph 14-12c, as applicable. Army policy states that an under other than honorable conditions discharge is normally considered appropriate; however, a general, under honorable conditions or an honorable discharge may be granted.

b. 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.

c. 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.

3. 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.

4. Section 1556 of Title 10, United States Code, 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.

5. Army Regulation 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. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

//NOTHING FOLLOWS//