

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 8 March 2024

DOCKET NUMBER: AR20230008092

APPLICANT'S REQUEST: an upgrade of her bad conduct discharge (BCD) and a personal appearance before the Board.

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- Self-authored Statement
- Documents showing changes of her last name (8 pages)
- Documents extracted from her military medical record (11 pages)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Four Character Letters
- Transcripts
- Medical insurance document
- Screenshot of her request for military medical records

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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 states she was sexually assaulted by her section sergeant, Sergeant (SGT) P, on multiple occasions. She reported these incidents to the Sexual Harassment/Assault Response and Prevention officer and was referred to the Fort Irwin Army Community Hospital Behavioral Health service team for mental health counseling and treatment. During this time, SGT P remained her section sergeant and her chain of command remained unchanged. This caused her to develop depression and anxiety and she chose to self-medicate with drugs and alcohol. Prior to experiencing Military Sexual Trauma (MST), she never had any issues with substandard performance or disciplinary actions. The decline in her mental health along with her coping addictions to drugs and alcohol led to her Special Court-Martial (SPCM). Prior to her court appearance, she completed the Army Substance Abuse Program and continued to

receive treatment for alcohol/drug addiction and mental health once sentenced. Following her discharge, she continued her journey toward sobriety and a healthy lifestyle. She earned a master's degree in education and is currently enrolled in a post-graduate program for Educational Specialist in Leadership. She also volunteers to support numerous community activities. She indicated on her application that post-traumatic stress disorder (PTSD), other mental health conditions, and sexual assault/harassment are related to her request.

3. On 8 September 2004, the applicant enlisted into the Regular Army for a period of 3 years. Upon completion of initial entry training, she was assigned to a unit at Fort Riley, KS. Her highest rank/grade held was private first class/E-3.

4. SPCM Order (SPCMO) Number 3 issued by Headquarters, 1st Infantry Division and Fort Riley, KS on 8 November 2006, shows the applicant was arraigned at a SPCM empowered to adjudge a BCD.

a. The applicant was found guilty of:

- one specification of conspiring with another Soldier on or about 25 February 2006
- one specification of wrongfully using a Schedule 1 controlled substance, commonly known as ecstasy on or about 10 March 2006
- one specification of unlawfully striking another Soldier on the face with a fist
- one specification of, on diverse occasions, failing to go at the time prescribed to her appointed place of duty

b. Her sentence consisted of reduction to the rank/pay grade of private/E-1, confinement for 60 days, and a BCD. The sentence was adjudged on 28 July 2006.

c. The sentence was approved and except for the BCD, ordered to be executed.

5. The applicant was confined by military authorities from 28 July 2006 until 15 September 2006.

6. Although the decision of the appellate review is not present in the available record, SPCMO Number 38 issued by Headquarters, U.S. Army Field Artillery Center and Fort Sill, Fort Sill, OK on 29 February 2008, noted the sentence was finally affirmed and the BCD was ordered to be duly executed.

7. The applicant was discharged on 15 May 2008. Her DD Form 214 shows she was discharged under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 3, as a result of court-martial. Her service was characterized as bad conduct. She was credited with completion of 3 years, 9 months,

and 26 days of active service. She had lost time due to confinement from 28 July 2006 until 15 September 2006 and was on Excess Leave from 22 September 2006 until 15 May 2008. She did not complete her first full term of service.

8. The applicant petitioned the Army Discharge Review Board (ADRB) for an upgrade of her discharge. On 19 August 2010, the applicant was informed that after careful review of her application, military records, and all other available evidence, the ADRB had determined that she was properly and equitably discharged and denied her request.

9. On 9 November 2023, in the processing of this case the U.S. Army Criminal Investigation Division, searched their criminal file indexes, which revealed no sexual assault records pertaining to the applicant.

10. The applicant provides the following documents which are available in their entirety for the Board's consideration:

a. Documents extracted from her military medical record which show she received medical treatment in:

- July 2005 until September 2005, when she was treated for injuries sustained to her right flank, back, ribs, thigh, neck, left eye, mandible, and kidneys as the result of a beating
- September 2005, for an anxiety attack, that resulted in her being referred for mental health treatment and counseling
- January 2006, when she requested a "Day after pill" following an unplanned sexual encounter

b. Character reference letters from two coworkers, a fellow member of Alcoholics Anonymous, and her former husband, who all made favorable comments about the applicant's leadership, work ethic, duty performance, and community involvement.

c. Transcripts from Grand Union University which show she earned a Master of Arts degree in Curriculum and Instruction and a Bachelor of Science degree in Elementary Education.

d. A medical insurance document, dated 7 May 2023, indicates the applicant has a diagnosis of PTSD.

e. A screenshot which shows she requested a copy of her military medical records from the National Personnel Records Center and her request was awaiting processing.

11. 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.

12. Army Regulation 635-200 provides that a Soldier would be given a BCD pursuant only to an approved sentence of a general or special court-martial and that the appellate review must be completed, and the affirmed sentence ordered duly executed.

13. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition. By regulation, an applicant is not entitled to a hearing before the Board. Hearings may be authorized by a panel of the Board or by the Director of the ABCMR.

14. MEDICAL REVIEW:

a. The applicant requests upgrade of her BCD. She contends her misconduct was related to MST.

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 8 September 2004; 2) SPCM Order (SPCMO) Number 3 issued by Headquarters, 1st Infantry Division and Fort Riley, Fort Riley, KS on 8 November 2006, shows the applicant was arraigned at a SPCM empowered to adjudge a BCD. She was found guilty of one specification each of conspiring with another Soldier, wrongful use of ecstasy, unlawful striking another Soldier with the fist and failing to go to her place of duty on diverse occasions; 3) Her sentence consisted of reduction to the rank/pay grade of private/E-1, confinement for 60 days, and a BCD; 4) Orders and her DD Form 214 show the applicant was discharged on 15 May 2008.

c. The military electronic medical record (AHLTA), VA electronic medical record (JLV), ROP, and casefiles were reviewed. A review of AHLTA shows the only BH-related encounter, for the applicant, captured in the EMR occurred on 24 May 2006, whereby she underwent a Chapter 14 MSE. The encounter was void of additional detail. Included in the case file were medical records from Irwin Army Hospital that shows the applicant was seen in the general medical clinic 11 July 2005, reporting she was beaten the night before. She reported pain to her right flank from bra line to lower buttock, right thigh, right side of the neck and bilateral arm pain with movement. The provider also noted bruising to the left eye and right mandible. The provider noted his intent to call police to report battery and was referring the applicant to social service. No mention of sexual assault was mentioned, and the providers referencing a referral to social service, may be indicative a domestic violence incident. The applicant was seen for a follow-up on 26 July 2005. The provider noted the applicant was a recent victim of physical assault and that her injuries had resolved or were in the process of resolving.

No mention of sexual assault was documented. Also included in the casefile was medical document apparently from the Irwin Army Hospital ED, dated 28 September 2005. The writing is nearly illegible but appears to show the applicant presented with acute distress and shortness of breath at 0735 and was discharged the same day at 0930. The provider noted anxiety that had improved at discharge from the ED. The applicant also provided medical documentation dated 30 January 2006 showing she presented and requested a Plan B pill secondary to an unplanned sexual encounter that occurred two days prior. It should be noted that this encounter occurred on 30 January 2006 and the asserted sexual assault, according to the applicant, occurred in 2005. Additionally, there was no mention of sexual assault during the encounter. The applicant also provided a medical insurance document showing a diagnosis of PTSD. The document is void of any reference associating the diagnosis with military service. A U.S. CID Report dated 9 November 2023 was also included in the casefile. The report states that a review of the Army Criminal File Indexes revealed no sexual assault records pertaining to the applicant.

d. A review of JLV shows the applicant does not have a service-connected disability but does have brief BH-related treatment history at the VA. The applicant's initial BH-related engagement with the VA appears to have occurred on 8 October 2015 whereby she presented for care giver support. The applicant reported stress in the context of caring for her husband who was diagnosed with PTSD and TBI, caring for their multiple children with medical issues, and learning that she had a tumor that turned out to be benign. She reported guilt associated with haven worked outside of the home before becoming a full-time caregiver, and fear of neglecting her family. She was diagnosed with Problems in Relationship with Spouse or Partner and scheduled for follow-up. Records were void of any proximal follow-up. The applicant next BH encounter appears to have occurred on 27 January 2020, whereby she was enrolled into the Caregiver Support Program. Records shows she remained engaged in the program through 7 March 2022. Encounter note dated 7 March 2022 shows the applicant was informed she no longer met requirements to be the veteran's caregiver as they were no longer married and she did not reside with the applicant. JLV was void of any additional BH-related encounters.

e. The applicant requests upgrade of her BCD. She contends her misconduct was related to MST. A review of records shows the applicant presented to the Irwin Army Hospital on 11 July 2005 after being beaten the night before. The provider documented multiple injuries, but the records did not mention sexual assault. The follow-up records show the provider specifically referred to the incident as a physical assault. Records also show the applicant presented to the ED on 28 September 2005 in acute distress; she was noted to have presented with anxiety symptoms that improved during the two hours spent in the ED. Documents also show the applicant present to the clinic on 30 January 2006 requesting the "morning after pill" after having unplanned sex two days prior. There is nothing in the record relating the unplanned sex to sexual assault and

given the applicant's self-statement that the sexual assault occurred in 2005, the encounter does not appear directly related. Also included in the casefile was a CID report dated 9 November 2023 that shows a review of the Army Criminal File Indexes revealed no sexual assault records pertaining to the applicant. Post-service records show the applicant engaged in the VA Caregiver Support Program from 2020 – 2022, while providing care for her husband, who was a disabled veteran. The her diagnosis of record was Problem in Relationship with Spouse or Partner. The applicant also provided a medical insurance document that shows a diagnosis of PTSD. The document does not show symptoms onset, criteria met, encounter documentation, or any other information that would associate the diagnosis of military service.

f. Given the available information, it is unclear to this provider if the applicant experienced MST during service or if she meets for PTSD secondary to MST. However, if the applicant's assertion is taken as fact, her misconduct would only be partially mitigated. Given the association between PTSD/MST and substance abuse to treat symptoms and PTSD/MST and avoidance, her misconduct characterized by wrongful use of a controlled substance, and FTR would be mitigated. However, her misconduct characterized conspiring to assault another Soldier, and unlawful striking of a Soldier on the face with her fist is not mitigated, given that neither is natural sequela of PTSD. Such misconduct could potential mitigated if the target was the assailant, however, her self-statement lists the perpetrator as a SGT, and records show the victim of the applicant's assault was a PFC.

g. Based on the available information, it is the opinion of the Agency BH Advisor that it is unclear if the applicant had a condition during service that mitigated her misconduct. However, she contends her misconduct was related to PTSD/MST, and per liberal guidance her assertion is sufficient to warrant the Board's consideration.

#### 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 asserts MST and presented an insurance document showing a diagnosis of PTSD.

(2) Did the condition exist or experience occur during military service? Yes.

(3) Does the condition or experience actually excuse or mitigate the discharge? Unclear. Given the available information, it is unclear to this provider if the applicant experienced MST during service or if she meets for PTSD secondary to MST. However, if the applicant's assertion is taken as fact, her misconduct would only be partially mitigated. Given the association between PTSD/MST and substance abuse to treat symptoms and PTSD/MST and avoidance, her misconduct characterized by wrongful

use of a controlled substance, and FTR would be mitigated. However, her misconduct characterized conspiring to assault another Soldier, and unlawful striking of a Soldier on the face with her fist is not mitigated, given that neither is natural sequela of PTSD. Such misconduct could potential mitigated if the target was the assailant, however, her self-statement lists the perpetrator as a SGT, and records show the victim of the applicant's assault was a PFC.

#### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that 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 of discharge upgrade requests.
2. The Board considered the medical advisor's review; however, determined the applicant's overall conduct is not mitigated by the applicant's assertion. Therefore, the characterization of service the applicant received upon separation was not in error or unjust.
3. The applicant's request for a personal appearance was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance is not necessary to serve the interest of equity and justice in this case.

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, USC, 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 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. Title 10, USC, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Court-martial convictions stand as adjudged or modified by appeal through the judicial process, 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.
4. Army Regulation 15-185 prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation provides that 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. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing. 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.
5. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.
  - a. An honorable discharge was separation with honor. Issuance of an honorable discharge certificate was appropriate when the quality of the Soldier's service generally met the standards of acceptable conduct and performance of duty or was otherwise so meritorious that any other characterization would clearly be inappropriate. Where there were infractions of discipline, commanders were to consider the extent thereof, as well as the seriousness of the offense. Separation authorities could furnish an honorable discharge when subsequent honest and faithful service over a greater period outweighed disqualifying entries in the Soldier's military record. It was the pattern of

behavior, and not the isolated instance, which commanders should consider as the governing factor.

b. A general discharge was a separation from the Army under honorable conditions. When authorized, separation authorities could issue a general discharge to Soldiers whose military record was satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. A discharge under other than honorable conditions (UOTHC) is an administrative separation from the Service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, homosexual conduct, security reasons, or in lieu of trial by court martial.

d. A BCD will be given to a Soldier pursuant only to an approved sentence of a general or special court-martial. The appellate review had to have been completed and the affirmed sentence then ordered duly executed. Questions concerning the finality of appellate review should be referred to the servicing staff judge advocate.

6. 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 under other than honorable conditions 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.

7. 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.

8. 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, 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//