

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 February 2024

DOCKET NUMBER: AR20230008164

APPLICANT REQUESTS:

- To appear before the Board via video/telephone
- His under other than honorable conditions (UOTHC) discharge be upgraded
- In effect, that the negative documentation related to the sexual assault be purged

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

- DD Form 149 (Application for Correction of Military Record)
- Separation orders
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- General Court-Martial Order Number 9

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 states he is requesting an upgrade, due to inaccurate description of his time in service. He was coerced into accepting separation from service with the UOTHC by his unit. The general court-martial held after his separation from service lists no pleas or findings. It also states "The Charges and Specifications are dismissed. All rights, privileges, and property of which the accused has been deprived by virtue of these proceedings will be restored." It is signed COL Jxxxx H. Bxxxx.
3. 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. However, the applicant has not provided any evidence to support that he himself was sexually assaulted or suffered from any sexually related harassment.
4. A review of the applicant's service record shows he enlisted in the Regular Army on 4 October 2000 for 4 years. He completed training with award of the military

occupational specialty 31L (Wire Systems Installer. The highest grade he held is not clear, as documents during that period of time refers to him as both a private (PVT) and a private first class (PFC).

5. On 2 November 2002 Specialist (SPC) Exxxx-Kxxxx Gxxxx and the applicant were drinking at the applicant's birthday party. At time documented as on the evening of 2 November or the morning of 3 November 2002 they engaged in consensual sex in the applicant's barracks room. PFC Txxxx Sxxxx entered the room and engaged in forcible sexual acts with SPC Gxxxx.

6. SPC Gxxxx reported the attack, was taken to the hospital, where a rape protocol examination was performed.

7. Court-martial charges were preferred against the applicant on 16 January 2003, for violations of the Uniform Code of Military Justice (UCMJ). The relevant DD Form 458 (Charge Sheet) shows he was charged with:

- Conspire with PFC Sxxxx to commit offenses: to wit rape and indecent acts by getting up from his bed and letting PFC Sxxxx get into his bed in his place so that PFC Sxxxx could engage in sexual intercourse with SPC Gxxxx without her consent and against her will.
- The applicant did rape SPC Gxxxx.
- The applicant did, commit sodomy with SPC Gxxxx, by force and without the consent of SPC Gxxxx.
- The applicant committed indecent acts with SPC Gxxxx.

8. An investigation was initiated 18 February 2003 and the investigating officer rendered the following findings and recommendation:

a. Charge 1: Article 81 (Conspiracy): I do believe the evidence substantiates that the accused (PFC Mxxxx) and PFC Sxxxx, after watching pornographic videos for several months with the victim (SPC Gxxxx), engaged in a conspiracy to commit Indecent Acts with her.

b. Charge II: Article 120 (Rape): I do not believe the evidence substantiates that the accused (PFC Mxxxx) and alleged victim (SPC Gxxxx) engaged in sex by force and without consent. The alleged victim consented to the act of sexual intercourse and the Rape charge should be dropped against him.

c. Charge III: Article 125 (Forcible Sodomy): I do not believe the evidence substantiates that the accused forced the alleged victim to participate in "unnatural carnal copulation". The alleged victim stated in her statement and testimony that the accused never forced her and she didn't feel threatened around him. In her sworn

statement page 2 question 19, when asked, "Did you have oral or anal sex with PFC Mxxxx?" her answer was "No." Therefore, the Sodomy charged should be dismissed.

d. Charge IV: Article 134 (Indecent Acts with Another): I do believe the evidence substantiates that the accused (PFC Mxxxx) committed indecent acts with the alleged victim (SPC Gxxxx).

e. Recommendations: As investigating officer, I have thoroughly and impartially investigated the charges against PFC Mxxxx. I recommend the rape charge be withdrawn due to evidence of consent of victim, and the sodomy charge be dropped due to evidence that it didn't happen. I recommend remaining charges should go forward.

9. On 2 April 2003, the Staff Judge Advocate reviewed the case and recommend that all charged offenses be tried by General Court-Martial as a non-capital case, and the case be referred to trial.

10. The applicant consulted with legal counsel on 5 May 2003 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 (AR) 635-200 (Personnel Separations – Enlisted), 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. The specified charges to which he admitted were Article 81-Conspiracy, 120-Rape, 125 Forcible Sodomy, and 134 Indecent Acts.

c. He was advised he could submit any statements he desired in his own behalf; however, the applicant waived this right.

11. On 8 May 2003, the Court-Martial Convening Authority dismissed the charges of rape and conspiracy.

12. The Court-martial convening authority approved the Chapter 10 discharge on 28 May 2003 and directed he be reduced to the lowest enlisted grade and separated with a UOTHC.

13. The applicant was discharged on 16 May 2003 in the grade of E-1. His DD Form 214 shows he was discharged under the provisions of AR 635-200, Chapter 10, for the good of the service – in lieu of court martial and his service was characterized as UOTHC (Separation Code KFS, Reentry Code 4). He was credited with 2 years, 7 months, and 13 days of net active service. His awards are listed as the National Defense Service Medal and the Army Service Medal.

14. Headquarters U.S. Army Signal Center and Fort Gordon General Court-Martial Order Number 9, dated 27 August 2003, states the accused having been arraigned, the proceedings were terminated on 17 April 2003 because the accused's request for discharge pursuant to the provisions of Chapter 10, AR 635-200, was approved on 8 May 2003, for issuance of a discharge under other than honorable conditions. The Charges and Specifications are dismissed. All rights, privileges, and property of which the accused has been deprived by virtue of these proceedings will be restored.

15. On 21 November 2023, in the processing of this case the U.S. Army Criminal Investigation Division provided a copy of its records related to the 2 November 2002 charges.

16. Copies of the reports were forwarded to the applicant in accordance with regulations for his review and option to rebut or make an additional comment. There is no evidence that the applicant responded to the exarte notification.

17. The Board 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. Background: The applicant is requesting that his Under Other Than Honorable discharge be upgraded to Honorable due to experiencing sexual assault and harassment during his time in service. 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 Regular Army on 04 Oct 2000. His military occupational specialty was Wire Systems Installer. He was awarded the National Defense Service Medal and Army Service Ribbon.
- On 16 Jan 2003, "court-martial charges were preferred against the applicant... The relevant DD Form 458 (Charge Sheet) shows he was charged with:

Conspire with PFC Sxxxx to commit offenses: to wit rape and indecent acts by getting up from his bed and letting PFC Sxxxx get into his bed in his place so that PFC Sxxxx could engage in sexual intercourse with SPC Gxxxx without her consent and against her will....The applicant did rape SPC Gxxxx....The applicant did, commit sodomy with SPC Gxxxx, by force and without the consent of SPC Gxxxx....The applicant committed indecent acts with SPC Gxxxx.”

- Applicant submitted a request for discharge in lieu of trial by court-martial (05 May 2003) which resulted in the Commanding BG dismissing the criminal charges against him (08 May 2024).
- The applicant’s service record includes his DD Form 214 (Report of Separation from Active Duty), which shows that the Army discharged the applicant “Under Other Than Honorable Conditions” on 16 May 2003 with narrative reason for separation, “In Lieu of Trial by Court-Martial.”

b. The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant’s completed DD Form 149, his ABCMR Record of Proceedings (ROP), Personal Statement, his DD Form 214, as well as documents from his service record. The VA electronic medical record and DOD health record were reviewed through Joint Longitudinal View (JLV).

c. This applicant asserted that sexual assault and harassment were mitigating factors in his discharge. His service record and supporting documents did not provide any indicators of behavioral health issues to include sexual assault or harassment toward his person. Based on this documentation in its entirety, there is a stark absence of any evidence the applicant was diagnosed or treated for mitigating conditions that occurred during his time in service. Per the applicant’s VA EHR, he is not service connected for any medical or behavioral health concerns. There was no available data in JLV. In summary, although he is not service connected for any behavioral health conditions (likely due to the character of his discharge) and lacking documented evidence in JLV, under liberal consideration, applicant’s self-assertion of MST is sufficient to establish occurrence of MST. Consequently, after reviewing the application and all supporting documents, it is the opinion of this Agency Medical Advisor that there is self-reported indication of a potentially mitigating condition (MST) that may have contributed to his misconduct. However, sexual assault and harassment is not associated with rape, and therefore does not mitigate for such misconduct.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge. Yes, per his self-assertion, he experienced MST and sexual harassment while on active duty.

(2) Did the condition exist or experience(s) occur during military service? Yes, there is applicant's self-reported evidence he encountered sexual assault and harassment while on active duty. As per liberal consideration, applicant's self-assertion of an MST alone merits consideration by the board.

(3) Does the condition or experience actually excuse or mitigate the discharge? No, it does not mitigate for his misconduct of rape. An MST and sexual harassment, even if accompanied by PTSD, does not affect one's ability to tell right from wrong and act in accordance with the right.

BOARD DISCUSSION:

1. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.
2. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was partially 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. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation.
 - a. The applicant was charged with and was pending a general court-martial for commission of offenses (conspiracy to commit rape and indecent acts, rape, sodomy, and commission of indecent acts) punishable under the UCMJ with a punitive discharge. An investigation led the general court-martial convening authority to dismiss the charges of rape and conspiracy. However, the other charges/specifications remained. After being charged, the applicant consulted with counsel and requested discharge under the provisions of AR 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial and carry an under other than honorable conditions discharge. The Board found no error or injustice in his separation processing.
 - b. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the advising official. The Board concurred with the medical advisory official's finding his service record and supporting documents did not provide any indicators of behavioral health issues to include sexual assault or harassment toward his person. Based on this documentation in its entirety, there is an absence of any evidence the applicant was diagnosed or treated for mitigating conditions that occurred during his time in service. Also, the applicant provided no evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination.

c. However, the Board noted that although the applicant was charged with rape, sodomy, and conspiracy to commit an indecent act, the record shows he was having consensual sex, until the other person was acting “rough.” It was not the applicant; it was the other person. After the two charges (rape and sodomy) were dropped, the only charges remaining included conspiracy to commit an indecent act which led to the chapter 10 voluntary discharge. The Board believed although a chapter 10 carries an under other than honorable conditions characterization of service, such characterization is too harsh and should be upgraded to general. As such, the Board determined a general, under honorable conditions characterization of service is appropriate under published DoD guidance for liberal consideration of discharge upgrade requests.

d. The applicant’s Charge Sheet and General Court-Martial Order are part of the Chapter 10 separation packet that the applicant voluntarily requested. The Army has an interest in maintaining the integrity of its records for historical purposes. The information in those records must reflect the conditions and circumstances that existed at the time the records were created, unless there is sufficient evidence that shows a material error or injustice. The Board found no error or injustice.

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:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by reissuing the applicant a DD Form 214 for the period ending 16 May 2003:

- Character of Service: Honorable
- Separation Authority: No Change
- Separation Code: No Change
- Reentry Code: No Change
- Narrative Reason for Separation: No Change

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to any relief in excess of that described above.



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. 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. Army Regulation 600-8-104 (Army Military Human Resource Records Management (AMHRR)) prescribes Army policy for the creation, utilization, administration, maintenance, and disposition of the AMHRR. The AMHRR includes, but is not limited to the OMPF, finance related documents, and non-service documents. The AMHRR is the historical and authoritative sources for authentication of veteran or service-related

benefits. Permanent (OMPF) documents are a collection of information that document a Soldier's career in the military. Currently the documents are retained in iPERMS for 62 years after separating, retiring from military service, or dying. After the 62-year period, OMPF documents are archived at the National Archives and Records Administration.

5. Army Regulation 600-37 (Unfavorable Information) policies regarding unfavorable information considered for inclusion in official personnel files. It provides for:

- placement of unfavorable information about Army members in individual official personnel files
- ensures that unfavorable information that is unsubstantiated, irrelevant, untimely, or incomplete is not filed in individual official personnel files
- ensures that the best interests of both the Army and the Soldiers are served by authorizing unfavorable information to be placed in and, when appropriate, removed from official personnel files

6. This regulation also states once an official document has been properly filed in the OMPF, it is presumed to be administratively correct and to have been filed pursuant to an objective decision by competent authority. Thereafter, the burden of proof rests with the individual concerned to provide evidence of a clear and convincing nature that the document is untrue or unjust, in whole or in part, thereby warranting its alteration or removal from the OMPF. Appeals that merely allege an injustice or error without supporting evidence are not acceptable and will not be considered.

7. The Under Secretary of Defense for Personnel and Readiness issued guidance to DRBs and BCM/NR on 25 July 2018, 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//