

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 March 2024

DOCKET NUMBER: AR20230008277

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions (UOTHC) character of service to honorable.

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

DD Form 149 (Application for Correction of Military Record), 2 May 2023

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 ashamed of the discharge he accepted. He experienced sexual assaults; however, never spoke up about these incidents due to shame of his sexual orientation. He states that at night men climbed into his bunk wanting to have sex with him. It was too dark to see any faces. He was too ashamed afterwards to say anything. When marijuana was claimed to have been found in his bunk he used this as a way to escape the sexual harassment. He was not strong or large, so he found he was an easy target. The shamefulness he felt was overwhelming and it destroyed his sense of safety and security. He accepted an undesirable discharge in order to leave the Army. On his application, he indicates post-traumatic stress disorder (PTSD) and sexual assault/harassment as conditions related to his request.
3. The applicant enlisted in the Regular Army on 10 February 1971, for a 3-year period. He was awarded the military occupational specialty of 62B (Engineer Equipment Maintenance). The highest rank he attained was private first class/E-3.
4. The applicant received company grade nonjudicial punishment (NJP) on 9 March 1972, under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for breaking restriction and absenting himself from on or about 4 March 1972 to on or about 6 March 1972; and leavening his appointed place of duty on or about 8 March

1972. His punishment imposed was 14 days of restriction, 14 days of extra duty, and a fine of \$60.00 for one month (suspended for 60 days).

5. He received NJP on 28 April 1972, under the provisions of Article 15 of the UCMJ for failing to obey a lawful order issued by a noncommissioned officer on or about 28 April 1972. His punishment imposed was 14 days extra duty and forfeiture of \$50.00 for one month.

6. The applicant's DA Form 20 (Enlisted Qualification Record) shows he was reported as absent without leave from on or about 5 May 1972 to on or about 9 May 1972.

7. On 2 May 1972, the applicant's immediate commander notified him of the intent to recommend him for separation under the provisions of Army Regulation (AR) 635-212 (Personnel Separations – Discharge – Unfitness and Unsuitability). He noted the initiation of elimination from the service was because of reasons of repeated infractions of military rules and regulations and frequent incidents of a discreditable nature with military authorities.

8. On 4 May 1972, the applicant acknowledged the notification of elimination being initiated against him. He consulted with counsel and was advised of the basis for the contemplated action to separate him and of the rights available to him.

a. He waived consideration, a personal appearance, and representing counsel by an administrative separation board and understood he may encounter prejudice in civilian life.

b. He elected to submit a statement in his behalf and additionally understood he may encounter substantial prejudice in his civilian life.

9. On 5 May 1972, the applicant's intermediate commander recommended the applicant's separation under the provisions of AR 635-212, and further recommended the applicant be furnished a DD Form 258A (Undesirable Discharge Certificate). The commander stated the applicant's performance was characterized by immaturity, non-conformance to military standards, and lack of motivation which renders him ineffectual and a liability.

10. The separation authority approved the recommended discharge on 12 May 1972 and further directed the applicant be furnished an Undesirable Discharge Certificate.

11. The applicant's DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows he was discharged on 19 May 1972, under the provisions of AR 635-212, in the grade of E-1. His service was characterized as UOTHC with

separation program number (SPN) of 28B (unfitness) and reentry code RE-4. He was credited with 1 year, 3 months, and 5 days of total active service with 5 days lost time.

12. The Army Discharge Review Board reviewed the applicant's request for discharge upgrade on 16 March 1986. After careful consideration, the Board determined the applicant was properly and equitably discharged. His request for a change in the characterization of his service was denied.

13. AR 635-212 states that an individual is subject to separation when it is clearly established that despite attempts to rehabilitate or develop him as a satisfactory Soldier further effort is unlikely to succeed.

14. In reaching its determination, the Board can consider the applicant's petition, service record, and statements in light of the published guidance on equity, injustice, or clemency.

15. MEDICAL REVIEW:

a. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents, integrated Personnel Electronic Records Management System (iPERMS), and the applicant's medical records in the Armed Forces Health Longitudinal Technology Application (AHLTA) and Joint Legacy Viewer (JLV) and made the following findings and recommendations: The applicant reports he was an ongoing victim of MST and accepted the discharge to escape the situation. Unfortunately, in-service records are unavailable, VA records are void of contact, and medical records were not submitted. However, the lack of records does not equate to a lack of experience or condition. Rather, aligns with his report of not seeking care due to shame. In reviewing the misconduct, it is quite possible the events related to the MST. Specifically, the March and May AWOLs occurred over weekends. Leaving during those times allowed the applicant to avoid nighttime sexual assaults, especially during a time of the week where there is less supervision. In terms of not reporting for extra duty and disobeying an order to report, it is as possible the applicant was avoiding a perpetrator or assault location. Based on liberal consideration, the applicant's assertion of MST alone is sufficient to determine a MST occurred. Given the association between MST and avoidance, the misconduct driving the discharge is mitigated. Accordingly, an upgrade to Honorable with Secretarial Authority is recommended.

b. The applicant was discharged on 19 May 1972 under AR 635-212, SPN 28B, Unsuitability, with an Under Other Than Honorable characterization. The applicant was separated for repeated infractions and "performance characterized by immaturity, non-conformance to military standards, and lack of motivation" which rendered him "ineffectual and a liability." Specific misconduct included breaking restriction and

absenting himself from 04 to 06 March 1972, leaving his appointed place of duty on 08 March 1972, failing to obey an order on 28 April 1972, and AWOL from 05 to 09 May 1972. The applicant requests a characterization upgrade to Honorable. The applicant indicates he was a repeated victim of sexual assault and accepted the discharge to escape the situation as he was not able to stop the MST.

c. Due to the period of service, active-duty electronic medical records are void. The applicant is not service connected and VA records are void. The applicant did not submit medical records for review. Kurta Questions:

(1) Does the applicant have a condition or experience that may excuse or mitigate the discharge? YES. The applicant experienced MST.

(2) Did the condition exist or experience occur during military service? YES. The applicant experienced MST.

(3) Does the condition or experience actually excuse or mitigate the discharge? YES. Based on liberal consideration and the nexus between trauma and avoidance, the basis for separation is mitigated.

(4) Does the condition or experience outweigh the discharge? YES. MST outweighs avoidance related misconduct.

#### BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was 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 applicant was discharged for unfitness due to repeated infractions and performance characterized by immaturity, non-conformance to military standards, and lack of motivation which rendered him ineffectual and a liability. He received an under other than honorable conditions discharge, which the Board determined to be too harsh/severe for the type of infractions that led to his separation. Additionally, the Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the reviewing medical official. The Board concurred with the medical reviewer's finding sufficient evidence the applicant may have had a behavioral health condition during military service that mitigates his discharge. As a result, the Board determined an upgrade to honorable characterization of service is not appropriate, however, a general, under honorable conditions characterization of service is appropriate under published DoD guidance for liberal consideration of discharge upgrade requests is appropriate. The Board also determined that such upgrade did not

change the underlying reason for his separation, and that there would be no change to the narrative reason for separation and/or corresponding codes.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:            :            :            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 amending the applicant's DD Form 214 for the period ending 19 May 1972, showing:

- Character of Service: Under Honorable Conditions (General)
- 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 upgrading the characterization of his discharge to honorable.



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. Section 1556 of Title 10, U.S. 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.

3. AR 635-200 (Personnel Separations – Enlisted Personnel), then in effect, provided the criteria governing the issuance of honorable, general, and undesirable discharge certificates.

a. An honorable discharge was a separation with honor and entitled the recipient to benefits provided by law. The honorable characterization was appropriate when the quality of the member's service generally met the standards of acceptable conduct and performance of duty for Army personnel or was otherwise so meritorious that any other characterization would be clearly inappropriate.

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

4. AR 635-212, then in effect, provided the policy and procedures for administrative separation of enlisted personnel for unfitness and unsuitability. It provided that individuals would be discharged by reason of unfitness when their records were characterized by one or more of the following: frequent incidents of a discreditable nature with civil or military authorities, sexual perversion, drug addiction, an established pattern of shirking, and/or an established pattern showing dishonorable failure to pay just debts. This regulation also prescribed that an undesirable discharge was normally issued.

5. 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 Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder; 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 sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences.

6. 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//