

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 March 2024

DOCKET NUMBER: AR20230008471

APPLICANT REQUESTS: an upgrade of his under honorable conditions (general) discharge to an honorable discharge.

APPLICANT'S SUPPORTING DOCUMENT CONSIDERED BY THE BOARD:

DD Form 149 (Application for Correction of Military Record)

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 was sexually harassed by a female sergeant (SGT)/E-5 who told lies to his corrupt first sergeant (1SG). His 1SG was later demoted and discharged by the Army for having inappropriate relationships with fellow Soldiers. The 1SG recommended his demotion from SGT and discharge from the Army to his commander based on lies committed by the female SGT, who was his supervisor at the time, because he did not want to continue a sexual relationship with her. She was his superior and was not punished, while he was demoted from SGT to specialist/E-4 and separated from the Army. He came forward at the time with the details of this sexual harassment situation and his complaint was dismissed by his 1SG. His leadership punished him based on no evidence but the word of the female SGT who was lying to protect herself. He was improperly demoted and dismissed with a general, under honorable conditions discharge. He is only asking that the honorable service he performed be properly recognized. He does not have evidence to support this situation as it was his word against another's.
3. Following a period of service in the U.S. Air Force, the applicant enlisted in the Regular Army on 20 May 2003 for 4 years. Upon completion of initial entry training, he was assigned to a unit at Fort Huachuca, AZ. He was promoted to SGT on 1 April 2006.

4. The applicant was formally counseled and repeatedly advised that continued misconduct could result in disciplinary action under the provisions of the Uniform Code of Military Justice (UCMJ) and/or initiation of involuntary separation. He was counseled on the following dates for the reasons shown:

- 25 May 2006 - failure to ensure his subordinates were in their proper place of duty at a meeting for two consecutive months
- 22 August 2006 - failure to repair; and demonstrating disrespect towards a noncommissioned officer (NCO)
- 23 August 2006 - disrespect toward an NCO; and failure to obey an order or regulation

5. On 23 August 2006, an administrative flag was imposed on the applicant to prevent him from receiving favorable actions because he was pending adverse action.

6. On 25 August 2006, the applicant was counseled for failing to obey an order or regulation; and for being disrespectful toward an NCO. He was advised again about the potential consequences if he continued conduct of this nature.

7. On 30 August 2006, the applicant, and SGT T___ each rendered DA Forms 2823 (Sworn Statement). They each provided their perspective on their personal and professional relationship. They each admitted to having consensual sex on one occasion right after SGT T arrived at the unit. At the time, the applicant held the rank/grade of corporal /E-4, but due to his position was considered to be SGT T's supervisor. Three weeks later, the applicant was promoted to SGT. Shortly thereafter, a position change was made, and SGT T was now the applicant's supervisor.

a. SGT T states that immediately after their consensual sexual encounter, she told the applicant that she could not continue having sex with him because he had a girlfriend, and it was also not appropriate because they worked together. She states they never had sex again.

b. The applicant states that he and SGT T flirted and discussed their sexual experiences on a frequent basis. He also states they engaged in consensual sex a second time at SGT T's birthday gift to him.

(1) He contends that everything was fine until he announced that he and his girlfriend were getting married. This angered SGT T, and she began treating him much differently and assigning him menial tasks that he felt the junior Soldiers should be performing. It got to a point where he refused to work for her or communicate with her.

(2) When his leadership told him he needed to follow SGT T's instructions, he informed them that he could not do that because his wife threatened to divorce him if he

spoke to SGT T again and did not care what the Army said to him. He was advised to consult with mental health professionals if the situation was affecting him as much as he claimed. He visited a mental health doctor and explained the situation. The doctor said he would fill out a form for the applicant's commander recommending that he and SGT T be kept separated for his mental health at work and at home. The commander chose to ignore the form due to inconsistencies and he continued to report to SGT T.

(3) He rendered this sworn statement after reporting to SGT T for 3 days. SGT T had been overly nice to him and saying very little. He had feelings of anxiety day and night because he promised his wife he would not speak to SGT T, and he had to report to her several times a day while keeping this from his wife to avoid problems at home. At this point, because of how this situation had been handled and the lack of integrity from the previous set of Soldiers that were at Fort Huachuca that was overlooked, he just wanted to keep his rank of SGT and receive an honorable discharge as soon as possible so. The Army helped him to mostly achieve his goal of receiving a master's in business administration degree, which he was still two classes short of. But now he had no desire to come into work on a daily basis and perform for the Army because he believed that the people who were supposed to take care of their Soldiers and look out for them were not doing that, by ignoring a document from a mental health professional and disregarding his well-being.

8. The applicant was counseled on the following dates for the reasons shown:

- 5 October 2006 – demonstrating insubordinate conduct and disrespect towards a Commissioned officer; and demonstrating insubordinate conduct and disrespect towards an NCO
- 18 October 2006 – failure to repair; and substandard performance

9. On 23 October 2006, field grade nonjudicial punishment was imposed upon the applicant under the provisions of Article 15, UCMJ for,

- two instances of dereliction in the performance of his duties
- failing to go at the time prescribed to his appointed place of duty
- two instances of being disrespectful in language towards a superior NCO
- two instances of being disrespectful in deportment towards a superior NCO
- failing to obey a lawful general regulation by compromising or appearing to compromise the integrity of the supervisory or authority chain of command by fraternizing with SGT T.

His punishment consisted of reduction from E-5 to E-4; forfeiture of \$504.00 pay per month for two months (suspended, to be remitted automatically if not vacated before 25 April 2007). The applicant appealed the punishment on 27 October 2006; his appeal was denied on 30 November 2006.

10. The applicant's DA Form 2166-8 (NCO Evaluation Report (NCOER)) rendered for the period 1 April 2006 through 27 October 2006 shows his rater and senior rater indicated that he failed to uphold two of the Army Values; needed improvement in two areas of values and NCO responsibilities; and his potential for increased responsibility was marginal.

11. On 30 October 2006, the applicant was counseled for violation good order and discipline by stating during a mandatory urinalysis, "If I would have known there was going to be a urinalysis then I would have smoked some weed." Once again, advised that continued behavior of this kind could result disciplinary action under the UCMJ and/or initiation his involuntary separation from the service and the potential consequences of such a separation.

12. On 8 November 2006, the applicant underwent a behavioral health evaluation and was determined, in part, to meet psychiatric criteria for separation in accordance with Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 5, paragraph 5-13. The examining clinical psychologist opined that the applicant was depressed and anxious about his current situation; however, he was not currently a risk to himself or others. Counseling and ways to adapt/cope had been offered; however, he is non-trusting and does not want services. It was recommended that he be discharged as soon as possible. The applicant was required to follow-up with behavioral health services to provide ongoing assessment.

13. The applicant underwent a separation medical examination on 11 December 2006 and was found to be qualified for separation.

14. On 17 January 2007, the applicant's immediate commander notified the applicant of his intent to initiate actions to separate him under the provisions of Army Regulation 635-200, Chapter 14, paragraph 14-12b, for a pattern of misconduct. The specific reasons for this action were the applicant's disrespecting a NCO on multiple occasions, being derelict in his duties on multiple occasions, failing to obey a lawful regulation, failing to go to his appointed place of duty on multiple occasions, and failure to obey a lawful order from and NCO on multiple occasions. He was advised that he was being recommended for a general, under honorable conditions discharge. The applicant acknowledged receipt of the proposed separation notification on the same date.

15. On 30 January 2007, the applicant's immediate commander formally recommended his separation prior to the expiration of his term of service under the provisions of Army Regulation 635-200, paragraph 14-12b by reason of a pattern of misconduct. The interim command concurred.

16. On 14 February 2007, the applicant acknowledged that he was advised of the reasons for separation and of the rights available to him. He consulted with counsel and submitted a conditional election of rights wherein he elected:

- to waive consideration of his case by an administrative separation board (ASB) conditioned upon his receipt of a general discharge
- to waive personal appearance before an ASB conditioned upon his receipt of a general discharge
- not to submit statements in his own behalf.
- to request consulting counsel and representation by military counsel and/or civilian counsel at no expense to the Government

17. The applicant rendered a statement wherein he contended, in part, the only regrettable mistake that he made in his military career was sleeping with another SGT in his chain of command. For this, he had apologized and learned his lesson. However, this did not warrant a stain on his military career such as a general discharge. He joined the Army in May 2003 because he wanted to obtain a master's degree and become an officer. He did not join predetermining to make the Army a career, but rather he wanted to see how his first 4 years went prior to making a final decision. The disciplinary actions brought against him stemmed from an Article 15 in which most of the charges on the Article 15 were false allegations. The SGT that he had relations with was bitter that he married someone else, and she was trying to make him pay by messing up his military career. Fortunately for her, she was able to accomplish this mission. Unfortunately for him, his command was unable to see that this was taking place and decided he was an unfit soldier. He took full responsibility for sleeping with another SGT who had retained her rank for this same action while he lost his. He was upset with the Army and his command for not being able to handle this situation more appropriately and allowing things to happen the way they did, but he continued to come to work and do his job every day without any problems.

18. On 14 February 2007, the separation authority approved the recommended separation, and directed the applicant be issued a under honorable conditions (general) discharge.

19. The applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged on 8 March 2007, under the provisions of Army Regulation 635-200, paragraph 14-12b, by reason of Pattern of Misconduct, with separation code JKA and reentry code 3. His service was characterized as Under Honorable Conditions (General). He was credited with completion of 3 years, 9 months, and 19 days of net active service this period and had no lost time.

20. On 14 December 2023, in the processing of this case the U.S. Army Criminal Investigation Division, searched their criminal file indexes, which revealed no Criminal Investigative and/or Sexual Harassment Military Reports pertaining to the applicant.

21. 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.

22. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under honorable conditions (general) discharge to an honorable discharge. 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 May 2003, following a period of service in the U.S. Air Force.
- The applicant was formally counseled on the following dates for the reasons shown:
- 25 May 2006 - failure to ensure his subordinates were in their proper place of duty at a meeting for two consecutive months
- 22 August 2006 - failure to repair; and demonstrating disrespect towards an NCO
- 23 August 2006 - disrespect toward an NCO; and failure to obey an order or regulation
- 25 August 2006 - failing to obey an order or regulation; and for being disrespectful toward an NCO.
- 5 October 2006 – demonstrating insubordinate conduct and disrespect towards a Commissioned officer; and demonstrating insubordinate conduct and disrespect towards an NCO
- 18 October 2006 – failure to repair; and substandard performance
- 30 October 2006 - violation of good order and discipline by stating during a mandatory urinalysis, "If I would have known there was going to be a urinalysis then I would have smoked some weed"
- On 30 August 2006, the applicant, and SGT T___ each rendered DA Forms 2823 (Sworn Statement). They each provided their perspective on their personal and professional relationship. They each admitted to having consensual sex on one occasion right after SGT T arrived at the unit. At the time, the applicant held the rank/grade of corporal /E-4, but due to his position was considered to be SGT T's supervisor. Three weeks later, the applicant was promoted to SGT. Shortly thereafter, a position change was made, and SGT T was now the applicant's supervisor.
- On 17 January 2007, the applicant's immediate commander notified the applicant of his intent to initiate actions to separate him under the provisions of Army

Regulation 635-200, Chapter 14, paragraph 14-12b, for a pattern of misconduct. The specific reasons for this action were the applicant's disrespecting a NCO on multiple occasions, being derelict in his duties on multiple occasions, failing to obey a lawful regulation, failing to go to his appointed place of duty on multiple occasions, and failure to obey a lawful order from and NCO on multiple occasions. He was advised that he was being recommended for a general, under honorable conditions discharge. The applicant acknowledged receipt of the proposed separation notification on the same date.

- Applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged on 8 March 2007, under the provisions of Army Regulation 635-200, paragraph 14-12b, by reason of Pattern of Misconduct, with separation code JKA and reentry code 3. His service was characterized as Under Honorable Conditions (General).

b. 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 149, ABCMR Record of Proceedings (ROP), DD Form 214, 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.

c. The applicant states he was sexually harassed by a female sergeant (SGT)/E-5 who told lies to his corrupt first sergeant (1SG). His 1SG was later demoted and discharged by the Army for having inappropriate relationships with fellow Soldiers. The 1SG recommended his demotion from SGT and discharge from the Army to his commander based on lies committed by the female SGT, who was his supervisor at the time, because he did not want to continue a sexual relationship with her. She was his superior and was not punished, while he was demoted from SGT to specialist/E-4 and separated from the Army. He came forward at the time with the details of this sexual harassment situation and his complaint was dismissed by his 1SG. His leadership punished him based on no evidence but the word of the female SGT who was lying to protect herself. He was improperly demoted and dismissed with a general, under honorable conditions discharge. He is only asking that the honorable service he performed be properly recognized. He does not have evidence to support this situation as it was his word against another's. The applicant's sworn statement at the time of service indicates had a consensual sexual relationship with his subordinate when she arrived to the unit but she was later placed in the position of his supervisor.

d. Active-duty electronic medical records available for review indicate the applicant intermittently received mental health services while in service. He initially sought BH services related to experiencing stress due to conflict with his supervisor. A BH

encounter dated 25 August 2006 diagnosed him with Adjustment Disorder with Anxiety And Depressed Mood. The clinician recommended to command a change in the applicant's supervisor. A BH note dated 19 Oct 2006 summarized the results of psychological testing indicating the applicant's hostile qualities, difficulty with interpersonal relationships, and propensity to blame and accuse others of any problems that may arise. On 8 November 2006, the applicant underwent a behavioral health evaluation for separation. The examining clinical psychologist opined that the applicant was depressed and anxious about his current situation; however, he was not currently a risk to himself or others. The applicant stated wanting to be transferred out of his assignment or to get out of the Army. During this assessment he was diagnosed with Adjustment Disorder with Anxious and Depressed Mood as well as Personality Disorder, NOS, with paranoid and narcissistic features. The applicant was psychiatrically hospitalized on 05 February 2007 to 15 February 2007 due to suicidal ideation, after being discharged from the hospital he was stable and reported feeling much better.

e. The applicant is 90% service connected, including 70% for Major Depressive Disorder. The applicant has been treated intermittently by the VA due to his symptoms of depression. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence the applicant had a behavioral health condition during military service that mitigates 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 a mitigating experience.

(2) Did the condition exist or experience occur during military service? Yes. The applicant is 70% service connected for Major Depressive Disorder

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. The applicant is 90% service connected, including 70% for Major Depressive Disorder and has been treated by the VA for his symptoms of depression. Given the nexus between depression and avoidance as well as difficulty with authority, the applicant's disrespecting an NCO on multiple occasions, being derelict in his duties on multiple occasions, failing to obey a lawful regulation, failing to go to his appointed place of duty on multiple occasions, and failure to obey a lawful order from an NCO on multiple occasions are mitigated by his BH condition.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that 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.

a. The applicant was discharged for a pattern of misconduct following a history of negative counseling for disrespecting an NCO on multiple occasions, being derelict in his duties on multiple occasions, failing to obey a lawful regulation, failing to go to his appointed place of duty on multiple occasions, and failure to obey a lawful order from and NCO on multiple occasions, and his NJP. He received a general discharge after completing 3 years and 9 months of active service. 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 reviewing medical official. The Board concurred with the medical reviewer's finding sufficient evidence the applicant had a behavioral health condition during military service that mitigates his discharge. As a result, the Board determined an upgrade to a fully honorable characterization of service 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:

The Board determined the evidence presented is sufficient to warrant a recommendation for 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 8 March 2007, showing:

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

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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 three 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 three-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. Title 10, U.S. Code, 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. 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 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.
4. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel.
 - a. Paragraph 3-7a provides that 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. Paragraph 3-7b states 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. Paragraph 5-13 provides, in part, a Soldier may be separated for personality disorder (not amounting to disability that interferes with assignment or with performance of duty when this condition is a deeply ingrained maladaptive pattern of behavior of long duration that interferes with the Soldier's ability to perform duty. The diagnosis of personality disorder must have been established by a psychiatrist or doctoral-level clinical psychologist with necessary and appropriate professional credentials who is privileged to conduct mental health evaluations for the Department of Defense components. Separation for personality disorder is not appropriate when separation is warranted under Chapters 4,5,7, 9, 10, 11, 13, 14, 15, or 18 of this regulation.

d. Chapter 14 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions (a pattern of misconduct consisting solely of minor military disciplinary infractions), a pattern of misconduct (consisting of discreditable involvement with civil or military authorities or conduct prejudicial to good order and discipline). Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter; however, the separation authority may direct a general discharge if merited by the Soldier's overall record.

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 (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. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

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//