

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 March 2024

DOCKET NUMBER: AR20230008675

APPLICANT REQUESTS: reconsideration of his previous request for an upgrade of his under honorable conditions (general) characterization of service to honorable

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) summary of benefits letter, 1 May 2023
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 19 June 1989

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20160010373 on 3 October 2018.

2. As a new argument, the applicant states the 27th Engineer Battalion and the 82nd Airborne Division, 307th Medical Battalion's, handling of his sexual assault and treatment of him as a Soldier was unjust. During Operation Golden, he was sexually assaulted. When he reported it to his chain of command at the 27th Engineer Battalion, they swept it under the rug and transferred him to the 82nd Airborne Division, 307th Medical Battalion. When he tried to explain the situation to his new chain of command, they labeled him with a pattern of misconduct and unjustly discharged him. It has taken him years to try to cope. The applicant notes post-traumatic stress disorder (PTSD), sexual assault/harassment, and reprisal/whistleblower as conditions related to his request. On his DD Form 149, the applicant indicates disability is related to his request; however, he provides no further details on this issue.

3. The applicant enlisted in the Regular Army on 7 July 1987, for 3 years. The highest rank/grade he held was private first class/E-3.

4. The applicant received formal counseling on five occasions from 30 March 1989 to 26 April 1989 for:

- summons to appear in civil courts
- multiple civil court appearances and behavior
- disobeying a lawful order
- misconduct and bad attitude
- failure to appear in civil court, financial debts, and elimination from service

5. A letter from the North Carolina Department of Crime Control and Public Safety to the applicant's battalion commander, dated 9 May 1989, shows the applicant was required to perform 24 hours of community service as a result of a civil conviction for indecent exposure.

6. A community service work program contact form addressed to the applicant and forwarded to his battalion commander, dated 25 May 1989, shows the applicant received a final notice to complete his community service or face possible jail time.

7. On 30 May 1989:

a. The applicant's immediate commander:

(1) Notified the applicant of his intent to initiate action to separate him from service under the provisions of Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Personnel), Chapter 14 (Separation for Misconduct), paragraph 14-12b, for a pattern of misconduct.

(2) On the same day, the commander formally recommended the applicant's separation from service with an under honorable conditions (general) discharge. As reasons for the proposed action, the commander cited the applicant's pattern of misconduct over the last several months specifically his continuous indebtedness and reluctance to repay his debts, and a conviction of indecent exposure in civilian court.

b. The applicant acknowledged receipt of his commander's notification. He consulted with counsel and was advised of the reason for separation and the rights available to him. He understood if he was issued a general discharge, he may encounter substantial prejudice in civilian life. He elected to submit a statement on his own behalf.

c. In his statement, the applicant stated the four allegations against him were incorrect. It was hard to stay motivated and positive when he gave 100 percent (%) and received nothing in return. His case in small claims court for default payment to Tire City Inc. was dismissed. He paid the insufficient funds to Hochheimer's and has a receipt from the clerk of the Superior Court. He was never convicted of indecent exposure or confined to jail because the judge dropped the charges and fined him with accessory to driving while impaired and 24 hours of community service. He never disobeyed a lawful

order and had a witness to prove it. He admitted to his mistakes only to correct them. He was trying to correct and better himself not just as a person but also as a Soldier.

8. On 5 June 1989, his intermediate commander recommended the applicant's separation from service, under the provisions of Army Regulation 635-200, paragraph 14-12b, and the issuance of a General Discharge Certificate.

9. On 6 June 1989, the separation authority approved the recommended discharge and directed the issuance of a General Discharge Certificate.

10. The applicant was discharge accordingly on 19 June 1989, under the provisions or AR 635-200, paragraph 14-12b, by reason of misconduct - pattern of misconduct, with a under honorable conditions (general) characterization of service in the grade of E-3. He received a separation code of "JKM" and reenlistment code "3C." He completed 1 year, 11 months, and 13 days of net active service during the period covered.

11. The applicant provides a VA summary of benefits letter that shows he has one or more service-connected disabilities and has a combined service-connected evaluation of 70%.

12. The applicant petitioned the Army Discharge Review Board for upgrade of his service characterization. On 12 December 1996, after careful consideration the Board determined he was properly and equitably discharged.

13. The ABCMR considered the applicant's request for an upgrade of his under honorable conditions (general) discharge on 3 October 2018. After reviewing the application and all supporting documents, the Board determined relief was not warranted. The Board found the evidence presented did not demonstrate the existence of a probable error or injustice as a basis for correction of the applicant's records.

14. Regulatory guidance in effect at the time provided a discharge under other than honorable conditions was normally considered appropriate for Soldier's discharged under the provisions of AR 635-200, Chapter 14. However, the separation authority could direct a general discharge if such were merited by the Soldier's overall record.

15. The Board should consider the applicant's argument and evidence, along with the overall record, in accordance with the published equity, injustice, or clemency determination guidance.

16. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting reconsideration of his previous request for an upgrade of his under honorable conditions (general) characterization of

service to honorable. He contends he experienced military sexual trauma (MST), mental health conditions including PTSD, and the impact reprisal/whistleblower that mitigates his misconduct. 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 7 July 1987; 2) The applicant received formal counseling on five occasions from 30 March 1989 to 26 April 1989 for disobeying a lawful order, misconduct, financial debts, and failures to appear in civil courts; 3) In May 1989, the applicant was issued a civil conviction for indecent exposure and failure to attend his required his community service; 4) The applicant was discharged on 19 June 1989, Chapter 14-12b, by reason of misconduct - pattern of misconduct, with a under honorable conditions (general) characterization of service.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional hardcopy medical documentation was provided. On his application, the applicant noted MST, mental health conditions including PTSD, and the effects of reprisal/whistleblowing are related to his request as contributing and mitigating factors in the circumstances that resulted in his separation. There is insufficient evidence the applicant reported any mental health symptoms, MST, or reprisal while on active service. A review of JLV provided evidence the applicant began engaging in care at the VA in 2018. He underwent a Compensation and Pension for his reported mental health symptoms in 2018. The applicant reported being deployed overseas, which is inconsistent with his military record, and he reported experiencing MST during that deployment. He was diagnosed with service-connected PTSD as a result (70%). The applicant has also been diagnosed and treated for Major Depression, Anxiety Disorder, Nightmare Disorder, and Alcohol abuse.

c. Based on the available information, it is the opinion of the Agency BH Advisor that there is sufficient evidence to support the applicant had condition or experience that partially mitigates his misconduct. The applicant does contend he was experienced MST that mitigates his misconduct, and per Liberal Consideration his contention alone is sufficient for the board's consideration.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends he was experiencing MST, mental health conditions including PTSD, and the effects of reprisal/whistleblowing that contributed to his misconduct. The VA has diagnosed the applicant with service-connected PTSD due to his report of MST.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he was experiencing MST, mental health conditions including PTSD,

and the effects of reprisal/whistleblowing that contributed to his misconduct while on active service. The VA has diagnosed the applicant with service-connected PTSD due to his report of MST.

(3) Does the condition experience actually excuse or mitigate the discharge? Partially, there is evidence the applicant reported MST to the VA during his Compensation and Pension evaluation in 2018, and he has been diagnosed with service-connected PTSD related to his report of MST. Some of the applicant's misconduct can be natural sequelae to MST and resultant PTSD, such as disobeying a lawful order and bad attitude. MST and PTSD can be associated with avoidant and erratic behaviors similar to these types of misconduct. However, there is no nexus between MST and PTSD and indecent exposure, failure to appear in civil courts, and financial debts: 1) these types of misconduct are not part of the natural history or sequelae of MST and PTSD; 2) MST and PTSD do not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he experienced MST, reprisal, and PTSD that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

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. 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. The applicant was discharged for a pattern of misconduct due to his what his commander noted as continuous indebtedness and reluctance to repay his debts, and a conviction of indecent exposure in civilian court, in addition to his repeated counseling (summons to appear in civil courts, multiple civil court appearances and behavior, disobeying a lawful order, bad attitude, failure to appear in civil court, financial debts). He received a general discharge after completing 1 year, 11 months, and 13 days of active service. The Board found no error or injustice in his separation processing. 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 reviewer's finding, despite the lack of diagnosis and/or evidence, the applicant's self-assertion of PTSD and MST is sufficient to upgrade his discharge to a fully honorable characterization of service under published DoD guidance for liberal consideration of discharge upgrade requests. 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

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:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant amendment of the ABCMR's decision in Docket Number AR20160010373 on 3 October 2018. 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 June 1989, to show:

- 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. 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.
2. Title 10, U.S. Code, Section 1556, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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.
3. The Army rates only conditions determined to be physically unfitting at the time of discharge, which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career. The VA does not have authority or responsibility for determining physical fitness for military service. The VA may compensate the individual for loss of civilian employability.
4. Army Regulation 635-200, sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:
 - a. 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.
 - b. An honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.
 - c. A general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

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. 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.

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, 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//