

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 February 2024

DOCKET NUMBER: AR20230008767

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions discharge to honorable.

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

- DD Form 149 (Application for Correction of Military Record)
- Two DA Forms 2166-8 (Noncommissioned Officer (NCO) Evaluation Report)
- Two DA Forms 1059 (Service School Academic Evaluation Report)
- Three Character Letters

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 would like his discharge upgraded to honorable in order to pursue help with his drinking and mental health problems. He would also like his children to know that he served honorably for 5 of his active service years. Since the date of his discharge, he has led the most normal life he possibly could have. He needs help to continue on the same path. The applicant also marked post-traumatic stress disorder (PTSD) and other mental health on his DD Form 149 as conditions related to his request.
3. The applicant provides:
  - a. Two DA Forms 2166-8 for the periods listed below, which show the applicant was rated "among the best," and senior rated 1/1.
    - August 2002 thru July 2003
    - August 2003 thru April 2004

b. Two DA Forms 1059, which show the applicant achieved course standards and completed the following courses:

- Primary Leadership Development Course, 14 February 2003
- Basic NCO Course, Phase I, 3 September 2004

c. Three character letters, submitted during the applicant's separation proceedings, which show the applicant was a "solid member of the team," "hardworking, dedicated, and honest.." Additionally, the letters show the applicant volunteered for missions and his ambition.

4. A review of the applicant's service records show:

a. He enlisted in the Regular Army on 26 February 1999.

b. A DD Form 4 (Enlistment/Reenlistment Document) shows the applicant's final reenlistment period was for 5 years on 8 July 2004.

c. His DA Form 2-1 (Personnel Qualification Record – Part II) and his DD Form 214 (Certificate of Release or Discharge from Active Duty) show his foreign service as follows:

- Kuwait from 1 May 2002 to 1 November 2002
- Iraq from 1 May 2003 to 3 April 2004

d. A DD Form 458 (Charge Sheet) shows on 22 March 2005, court-martial charges were preferred on the applicant for

- one specification of conspiracy to commit rape
- one specification of rape
- one specification of wrongfully having sexual intercourse with a woman not his wife
- one specification of wrongfully committing an indecent act by having sexual intercourse in a public parking lot.

e. On 11 July 2005, after consulting with legal counsel, he requested a discharge in lieu of trial by courts-martial under the provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), Chapter 10. He acknowledged:

- maximum punishment
- he was guilty of the charges against him or of a lesser included offense
- he does not desire further rehabilitation or further military service

- if his request for discharge was accepted, he may be discharged under other than honorable conditions and furnished an Under Other Than Honorable Conditions Discharge Certificate
- he would be deprived of many or all Army benefits, he may be ineligible for many or all benefits administered by the Veterans Administration
- he may be deprived of his rights and benefits as a Veteran under both Federal and State law
- he may apply to the Army Discharge Review Board (ADRB) or the ABCMR for upgrading
- he may expect to encounter substantial prejudice in civilian life
- he elected to submit matters

f. A letter from the applicant's defense counsel, dated 25 July 2005, indicated the applicant agreed to testify and fully cooperate with the Government in the case against United States v. Sergeant (SGT) R\_\_\_, with an accompanying request for a discharge in lieu of trial by court-martial. By cooperating with the government, the applicant was taking accountability for his actions and doing all within his power to rectify any past misconduct. Defense counsel also outlined the applicant's stellar service record, his deployments, and referenced character statements from the applicant's leadership. The character statements identified the applicant as hardworking, honest, dedicated, professional, level-headed, and displayed good judgment, placed the safety of his men above his own, talented, and gifted NCO. He had a lapse in judgment, but he was remorseful for his actions. The statements included:

- Major CMB, Battalion Operations Officer/Executive Officer, 15 July 2005
- Captain (CPT) IRD, Commander, 20 July 2005
- CPT SAH, Assistant Brigade Engineer, 20 July 2005

g. On 1 August 2005, following review of the chain of command recommendations, the Staff Judge Advocate recommended approval of the applicant's request for discharge in lieu of trial by court-martial with an other than honorable discharge.

h. On 1 August 2005, consistent with the chain of command recommendations, the separation authority approved the applicant's request for discharge in lieu of trial by courts-martial under the provisions of AR 635-200, Chapter 10. He would be issued an other than honorable discharge and reduced to the lowest enlisted rank of private (E-1). The applicant acknowledged receipt on 4 August 2005.

i. On 26 August 2005, he was discharged from active duty. His DD Form 214 shows he was discharged in lieu of trial by courts-martial under the provisions of AR 635-200, Chapter 10 with an under other than honorable conditions characterization of service. He completed 6 years, 6 months, and 1 day of active service. He was assigned

separation code KFS and the narrative reason for separation listed as "In Lieu of Trial by Court-Martial," with Reentry Code 4. It also shows in:

(1) Block 13 (Decorations, Medals, Badges, Citation and Campaign Ribbons Awarded or Authorized):

- Army Commendation Medal
- Army Achievement Medal (4th Award)
- Valorous Unit Award
- Army Good Conduct Medal
- National Defense Service Medal
- Armed Forces Expeditionary Medal
- Global War on Terrorism Service Medal
- Global War on Terrorism Expeditionary Medal
- Noncommissioned Officer Professional Development Ribbon
- Army Service Ribbon
- Driver and Mechanic Badge with Driver T Bar
- Driver and Mechanic Badge with Driver W Bar

(2) Block 18 (Remarks) listed his reenlistment but did not list his continuous honorable service.

5. There is no evidence the applicant has applied to the ADRB for review of his discharge within that board's 15-year statute of limitations.

6. By regulation (AR 635-200), an individual who has committed an offense or offenses, the punishment for which, includes a bad conduct or dishonorable discharge, may submit a request for discharge in lieu of trial by court-martial. An Under Other than Honorable Discharge Certificate normally is appropriate for a member who is discharged in lieu of trial by court-martial.

7. In reaching its determination, the Board can consider the applicant's petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

8. MEDICAL REVIEW:

a. Background: The applicant is requesting that his Under Other Than Honorable discharge be upgraded to Honorable due to experiencing PTSD and other mental health problems 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 26 Feb 1999. He subsequently reenlisted 08 Jul 2004. He was deployed to Kuwait from 01 May 2002 - 01 Nov 2002, as well as Iraq from 01 May 2003 - 03 Apr 2004. His awards included the Army Commendation Medal, Army Achievement Medal (4<sup>th</sup> award), Valorous Unit Award, Army Good Conduct Medal, National Defense Service Medal, Armed Forces Expeditionary Medal, Global War on Terrorism Service Medal, Global War on Terrorism Expeditionary Medal, NCO Development Ribbon and Army Service Ribbon
- On 22 March 2005, “court-martial charges were preferred on the applicant for one specification of conspiracy to commit rape, one specification of rape, one specification of wrongfully having sexual intercourse with a woman not his wife, and one specification of wrongfully committing an indecent act by having sexual intercourse in a public parking lot.”
- Applicant submitted a request for “discharge in lieu of trial by court-martial” (11 Jul 2005).
- The applicant’s separation packet is available for review. Additionally, 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 26 Aug 2005.

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), his DD Form, 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 PTSD and other mental health issues were mitigating factors in his discharge. He also contends his charge of rape and wrongful sexual intercourse were due to the impact of his behavioral health conditions. His service record and supporting documents did not provide any behavioral health documentation. Based on this documentation in its entirety, there is an absence of 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 were 15 outpatient encounter entries (17 Dec 2004 – 06 May 2005), most of which were group notes for his substance abuse treatment. A treatment session (31 Jan 2005) noted, “Met with SM and command for RTM. Discussed concerns regarding SM’s drinking and recommendation of residential treatment. Command agrees that residential treatment is appropriate, however SM has a court marital hearing pending next month. Command agrees to enroll SM in outpatient treatment until the decision to retain or discharge SM is made. SM will start group

therapy next week. No risk noted.” He was diagnosed with Alcohol Dependence during the course of his group sessions.

d. In summary, although applicant is not service connected for any behavioral health conditions (likely due to the character of his discharge), there is the applicant’s own assertion of PTSD and other mental health issues. After reviewing the application and all supporting documents, it is the opinion of this Agency Medical Advisor that there is insufficient evidence of mitigating conditions (PTSD) that significantly contributed to the specific misconduct of rape. There was an absence of documentation provided in the VA encounter notes (JLV) to support the contention that the applicant had experienced PTSD during his time in service. In addition, even if PTSD could be established during his time in service, such a behavioral health condition is not associated with rape. That said, per Liberal Consideration the applicant’s assertion of PTSD and other mental health issues warrants consideration by the board.

#### Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge. Yes, he self-reported PTSD and other mental health issue contributing to his misconduct while still on active duty.

(2) Did the condition exist or experience(s) occur during military service? Yes, per his own assertion, he initially encountered PTSD while on active duty.

(3) Does the condition or experience actually excuse or mitigate the discharge? No, there is insufficient evidence of a mitigating BH condition while in military service. There is no evidence of an in-service BH diagnoses, and there is no medical documentation indicating the VA has service-connected the applicant for any BH condition. And while the applicant self-asserted PTSD and other mental health issues, the applicant did not submit any medical documentation substantiating his claim. In addition, even if PTSD could be established during his time in service, such a behavioral health condition is not associated with rape. PTSD does not affect one’s ability to tell right from wrong and act in accordance with the right.

#### BOARD DISCUSSION:

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 commission of an offense punishable under the UCMJ with a punitive discharge (conspiracy to commit rape, rape, wrongfully having sexual intercourse with a woman not his wife and committing an indecent act by having sexual intercourse in a public parking lot). After being charged, he 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. 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 opinion finding insufficient evidence to support the applicant had condition or experience that mitigated his misconduct. Also, the applicant provided no evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination. Based on a preponderance of evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

b. The Board did note however that the applicant's service from first date of enlistment to the date before his last reenlistment was honorable. For enlisted Soldiers with more than one enlistment period during the time covered by this DD Form 214, in addition to listing immediate reenlistment(s), an entry is required for continuous honorable service from first day of service for which DD Form 214 was not issued until date before commencement of current enlistment.

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 adding to

the Remarks block of his DD Form 214: "Continuous Honorable Active Service from 19990226 to 20040707."

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.



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. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a (Honorable Discharge) states an honorable discharge is a separation with honor. 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 (General Discharge) states a general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 10 of this regulation states an individual who has committed an offense or offenses, the punishment for any of which includes a bad conduct discharge or



dishonorable discharge, may submit a request for discharge in lieu of trial by court-martial. An Under Other than Honorable Discharge Certificate normally is appropriate for a member who is discharged in lieu of trial by court-martial.

3. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to carefully consider the revised 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.

4. 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; TBI; sexual assault; sexual harassment. Boards were directed 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 that misconduct which led to the discharge.

5. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (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 based on 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.

6. Section 1556 of Title 10, United States 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.

//NOTHING FOLLOWS//