

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 23 April 2024

DOCKET NUMBER: AR20230009762

APPLICANT REQUESTS: an upgrade of her characterization of service from under honorable conditions (general) to honorable, and a personal appearance before the Board via video/telephone.

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

DD Form 149 (Application for Correction of Military Record), 3 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, in effect, she is requesting a discharge upgrade due to the sexual assault/harassment and reprisal/whistleblower issues she experienced while serving.

a. She was sexually assaulted by an acquaintance from the motor pool where she worked at. She reported him and went to a pre-trial, where she was terrified while being in a court room full of high-ranking men, who she says dissected every detail in denial. Afterwards, she asked to move forward with the trial with no guaranteed outcome, her command said the male Soldier would receive an Article 45 [sic] if she did not move forward with the trial, this was a lie.

b. She was taunted by the male Soldier and his friends in the barracks hallway anytime she stepped out of her room or came into the barracks. She ended up seeking medical care from the debilitating panic attacks she was experiencing; however, the medication she was prescribed was going to take two weeks to work. She needed help immediately. She started drinking to help cope and was caught for underage drinking, she believed the male Soldier's friends reported her.

c. She had a hard time in therapy, and it failed her and led to her discharge. Since her discharge it has been difficult to be expressive of what happened. She has tried multiple times to obtain the records from the base where she was at, they have ignored her request on multiple occasions, and she has not received additional correspondence.

3. The applicant enlisted in the Regular Army on 18 August 2005. She was awarded the military occupational specialty of 63B (Wheeled Vehicle Mechanic); and the highest rank she attained was private/E-2.

4. An investigation conducted by the Criminal Investigation Division (CID) on or about 15 June 2006, found the following:

a. The investigation established probable cause to believe a male Soldier committed the offense of indecent assault against the applicant when the male Soldier groped her buttocks and ground his pelvic area against the applicant while he attempted to remove the applicant's pants.

b. Further, the investigation established probable cause to believe a male Soldier committed the offense of indecent assault against the applicant when the male Soldier forcibly kissed her and groped her breasts and vaginal area.

5. On 4 August 2006, the applicant accepted nonjudicial punishment (NJP) under the provisions of Article 15, of the Uniform Code of Military Justice (UCMJ), for unlawfully consuming alcoholic liquor while under 21 years of age on or about 23 June 2006. Her punishment imposed was reduction to private/E-1, forfeiture of \$297.00 pay per month for one-month, extra duty and restriction for 14 days.

6. On 11 October 2006, she accepted NJP, under the provisions of Article 15, UCMJ, for failing to return to the motor pool after her Army Substance Abuse Program appointment was canceled on or about 17 August 2006 and making an official statement with the intent to deceive on or about 18 August 2006, stating "I was at my appointed place of duty or words to that effect". Her punishment imposed was forfeiture of \$297.00, restriction, and extra duty for 14 days.

7. She received four developmental counseling's for the following:

- lost military identification card on or about 7 March 2007
- underage drinking, unauthorized possession of beer/liquor in barracks on or about 15 March 2007
- being absent without leave on or about 30 April 2007
- event-oriented counseling for separation on or about 21 November 2007

8. The applicant's immediate commander notified the applicant of the intent to recommend her for separation under the provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), Chapter 14-12c, (Acts or Patterns of Misconduct - Commission of a Serious Offense). The commander noted the specific reasons as the applicant's failure to report to her appointed place of duty on several occasions, her unlawful possession and drinking of alcoholic beverages while under 21 years of age, her lost government issued military identification card, and her false official statement. The commander recommended the applicant receive a under honorable conditions (general) discharge.
9. On 27 November 2007, the applicant acknowledged receipt of the immediate commander's intent to recommend her for separation. She consulted with counsel and was advised of the basis for the contemplated separation action, the rights available to her, and the effect of a waiver of her rights. She waived consulting counsel and elected to not submit a statement on her own behalf. She additionally understood she may encounter substantial prejudice in civilian life.
10. The applicant's immediate commander formally recommended the applicant be separated under AR 635-200, paragraph 14-12c, prior to the expiration of her term of service.
11. On 30 November 2007, the applicant's intermediate commander recommended approval of the separation action under AR 635-200, Chapter 14, paragraph 14-12c, with a under honorable conditions (general) characterization of service.
12. On the same date, the separation authority directed the applicant be separated under the provisions of AR 635-200, paragraph 14-12c, for commission of a serious offense and further directed she be discharged with a under honorable conditions (general) character of service.
13. She was discharged accordingly on 3 December 2007. Her DD Form 214 (Certificate of Release or Discharge from Active Duty) shows she was discharged under the provisions of AR 635-200, paragraph 14-12c, by reason of misconduct (serious offense), in the grade of E-1. Her service was characterized as under honorable conditions (general) with a separation code of JKQ and reentry code of 3. She completed 2 years, 3 months, and 16 days of net active service.
14. There is no indication the applicant applied to the Army Discharge Review Board within that board's 15-year statute of limitations.
15. Regulatory guidance states when an individual is discharged under the provisions of AR 635-200 Chapter 14, for misconduct, an under other than honorable conditions characterization of service is normally appropriate. However, the separation authority

may direct an under honorable conditions (general) discharge if such is merited by the Soldier's overall record.

16. 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.

17. MEDICAL REVIEW:

a. The applicant requests upgrade of her Under Honorable Conditions, General, discharge characterization to Honorable. She contends her misconduct was related to PTSD/MST MST.

b. 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 18 August 2005; 2) An investigation conducted by the Criminal Investigation Division (CID) on or about 15 June 2006, found probable cause to believe a male Soldier committed the offense of indecent assault against the applicant when the male Soldier groped her buttocks and ground his pelvic area against the applicant while he attempted to remove the applicant's pants. Further, the investigation established probable cause to believe a male Soldier committed the offense of indecent assault against the applicant when the male Soldier forcibly kissed her and groped her breasts and vaginal area; 3) On 4 August 2006, the applicant accepted nonjudicial punishment (NJP) under the provisions of Article 15, of the Uniform Code of Military Justice (UCMJ), for unlawfully consuming alcoholic liquor while under 21 years of age on or about 23 June 2006; 4) On 11 October 2006, she accepted NJP, under the provisions of Article 15, UCMJ, for failing to return to the motor pool after her Army Substance Abuse Program appointment was canceled on or about 17 August 2006 and making an official statement with the intent to deceive on or about 18 August 2006, stating "I was at my appointed placed of duty or words to that effect; 5) She received developmental counseling for losing her ID card (7 March 2007), underage drinking (15 March 2007), and being AWOL on or about 30 April 2007; 6) On 27 November 2007, the applicant acknowledged receipt of the immediate commander's intent to recommend her for separation. She consulted with counsel and was advised of the basis for the contemplated separation action, the rights available to her, and the effect of a waiver of her rights; 7) On 30 November 2007, the applicant's intermediate commander recommended approval of the separation action under AR 635-200, Chapter 14, paragraph 14-12c. On the same date, the separation authority directed the applicant be separated under the provisions of AR 635-200, paragraph 14-12c. She was discharged accordingly on 3 December 2007

c. The electronic military medical record (AHLTA), VA electronic medical record (JLV), ROP, and casefiles were reviewed. A review of AHLTA shows the applicant's initial BH engagement occurred on 10 May 2006. The applicant was seen at Social Work Services and was diagnosed with Adjustment Disorder with Depressed Mood. The encounter documentation is sparse on additional detail. The applicant was next seen on 20 June 2006 by psychiatry with chief complaints of depression, loneliness, and anger since joining the military. The provider noted that although the applicant reports a history of depression onset during the military, she also reported a history of poor school behavior, poor grades, dysfunctional friends growing up, and abusive use of marijuana and alcohol. The provider referenced a hardcopy encounter note outlining a previous session, but it was not available for this advisor to review. The applicant was diagnosed with Depression, Dysthymic Disorder, Adjustment Disorder with Depression, and Occupational Problems, prescribed psychotropic medication and scheduled for continued outpatient treatment.

d. Encounter note dated 12 July 2006 shows the applicant reported the medication was proving effective in improving her mood and lifting her spirits. She however, reported continually having to deal with a difficult platoon sergeant and that she was mandated to ASAP for an underage drinking incident that occurred approximately 3-weeks prior. She also endorsed continued difficulty dealing with being separated from her father since age 7, which continues to be a problem. Encounter note dated 25 July 2006 shows the applicant reported continued improvement in mood with continued medication compliance. She again referenced her referral to ASAP for becoming intoxicated. She reported that she had not gotten drunk in over two years and accepted responsibility for her actions. The provider noted her labs were WNL and that the applicant reported the intoxication as an isolated incident. On 8 September 2006 the applicant underwent a Chapter Evaluation. She reported a desire to leave the military, endorsed increased alcohol consumption and problems with command. The evaluator noted the applicant showed no disturbance in thought process, had intact cognition, and was psychiatrically cleared for administrative separation. The applicant final BH encounter occurred on 19 November 2007 whereby the applicant was seen for a second Chapter Evaluation and was again psychiatrically cleared for administrative separation.

e. A review of JLV shows the applicant is not receiving SC disability but does have a PTSD/MST diagnosis and treatment history with the VA. A VA Rating Decision Letter dated 7 October 2014 reflects that the VA received investigative information regarding the reported sexual assault, acknowledges a history of documented treatment in service, and current VA treatment for a qualifying disability; all which supported a VA examination. However, the applicant failed to make the scheduled examination appointment and thus the VA did not find a link between the claimed medical condition and military service. Records show the applicant was initially diagnosed with PTSD/MST on 12 June 2012. She reported being sexually assaulted during military

service, going through pre-trial, getting no resolution of the case, then forced to continue working in the same proximity as the perpetrator. She endorsed daily alcohol consumption and other self-destructive behavior after the assault. At the time of visit she reported nightmares, intrusive daytime recollection, avoidance, hyper-arousal, detachment, exaggerated startle response, anger, and vulnerability. She reported childhood history of ADHD, and BH treatment in the military for Adjustment Disorder. She was diagnosed with PTSD secondary to MST, ADHD by history, Eating Disorder by history, Alcohol Dependence, and Nicotine Dependence, started on psychotropic medication and scheduled for outpatient treatment. Records show the applicant engaged in individual and group therapy, routinely, through November 2013 with fair results. Subsequent the November 2013 encounter the applicant's records reflect the applicant with one additional BH treatment encounter on 23 May 2014 with symptoms of bereavement and depression secondary the lost of her grandmother. The provider also noted the applicant continued reporting PTSD symptoms of intrusive thoughts, avoidant behavior, and altered cognition. Her diagnostic problem list reflected PTSD/MST, MDD episode, moderated, Alcohol Use Disorder in partial remission, and Nicotine Use Disorder. No civilian BH records were provided for review.

f. The applicant requests upgrade of her Under Honorable Conditions, General, discharge characterization to Honorable. She contends her misconduct was related to PTSD/MST. A review of the records shows the applicant with in-service diagnoses of Adjustment Disorder with Depression, Depression, and Dysthymic Disorder. Post-service records show she was diagnosed by the VA with PTSD secondary to MST, but the condition was not determined to be service-connected due to the applicant missing her C&P examination. Given the documented evidence, it appears that the applicant misconduct characterized by under-age drinking, FTR, and AWOL began after the asserting MST. Given the association between self-medication and PTSD/MST, and avoidant behavior and PTSD/MST, the above misconduct would be mitigated by PTSD/MST. The applicant's misconduct characterized by making a false official statement is not mitigated given her ability to differentiate between right and wrong and adhere to the right, however, given the statement was made to justify her avoidance of going to the motor pool where the MST occurred, leniency may be considered.

g. Based on the available information, it is the opinion of the Agency BH Advisor that there is sufficient evidence that the applicant had an experience or condition during her time in service that partially mitigated her misconduct.

#### 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 has a diagnosis of PTSD secondary to MST.

(2) Did the condition exist or experience occur during military service? Yes.

(3) Does the condition or experience actually excuse or mitigate the discharge? Partially. A review of the records shows the applicant with in-service diagnoses of Adjustment Disorder with Depression, Depression, and Dysthymic Disorder. Post-service records show she was diagnosed by the VA with PTSD secondary to MST, but the condition was not determined to be service-connected due to the applicant missing her C&P examination. Given the documented evidence, it appears that the applicant misconduct characterized by under-age drinking, FTR, and AWOL began after the asserting MST. Given the association between self-medication and PTSD/MST, and avoidant behavior and PTSD/MST, the above misconduct would be mitigated by PTSD/MST. The applicant's misconduct characterized by making a false official statement is not mitigated given her ability to differentiate between right and wrong and adhere to the right, however, given the statement was made to justify her avoidance of going to the motor pool where the MST occurred, leniency may be considered.

#### 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 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 from active duty due to misconduct (failure to report to her appointed place of duty on several occasions, unlawful possession and drinking of alcoholic beverages while under 21 years of age, lost government issued military identification card, and her false official statement) and she received a general discharge. The Board found no error or injustice in her 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 official's finding sufficient evidence of in-service partial mitigation. The applicant misconduct characterized by under-age drinking, failure to report and being absent without leave d AWOL began after the asserting MST would be mitigated by PTSD/MST. Her misconduct characterized by making a false official statement is not mitigated given her ability to differentiate between right and wrong and adhere to the right. The Board determined an upgrade of her discharge to honorable is

appropriate 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 her separation and thus the narrative reason for separation and corresponding codes should not change.

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 3 December 2007 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. 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 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 15-185 (ABCMR), the regulation governing this Board, states applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

4. AR 635-200 sets policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons.

a. Chapter 3, section II (Type of Characterization or Description) provides a description of the states the following types of characterization of service or description of service are authorized: separation with characterization of service as Honorable, Under Honorable Conditions (General), or Under Other Than Honorable Conditions, and Uncharacterized (for entry level status) are authorized. These separation types will be used in appropriate circumstances unless limited by the reason for separation.

(1) Paragraph 3-7a states an honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier'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.

(2) Paragraph 3-7b states an under honorable conditions (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.

b. Chapter 14 (Separation for Misconduct) establishes policy and prescribes procedures for separating personnel for misconduct because of minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, and absence without leave.

(1) 14-12c(2) – Soldiers are subject to discharge for Commission of a serious offense. Commission of a serious military or civil offense, if the specific circumstances of the offense warrant separation and a punitive discharge is, or would be, authorized for the same or a closely related offense under the Manual for Court-Martial. Specific instances of serious offenses include abuse of illegal drugs or alcohol.

(2) A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter; however, the separation authority may direct an under honorable conditions (general) discharge if such is 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; 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. 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//