

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 21 May 2024

DOCKET NUMBER: AR20230010158

APPLICANT REQUESTS: in effect, correction of his DD Form 214, Certificate of Release or Discharge from Active Duty to show he was retired due to disability.

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

- DD Form 293, Application for the Review of Discharge
- DD Form 214
- Department of Veterans Affairs (VA) medical records
- VA summary of benefits information

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 indicates that his request is related to post-traumatic stress disorder (PTSD). He states that the majority of his service was honorable. During his first deployment he suffered a traumatic event and after returning from combat his PTSD went undiagnosed.
3. He accepted an appointment as a Reserve Commissioned Officer on 2 August 2007 as an infantry second lieutenant (2LT/O-1). The highest grade he held was captain (CPT/O-3).
4. The record shows the applicant served in –
 - Afghanistan from 15 November 2012 to 15 August 2013
 - Iraq from 1 September 2009 to 31 August 2010
5. The applicant became the subject of an Army Regulation (AR) 15-6, Boards, commissions and Committees-Procedures for Administrative Investigations and Boards of Officers, investigation on 5 February 2016. An investigating officer (IO) was

appointed to investigate the facts and circumstances surrounding the applicant's alleged adultery. The IO was directed, at a minimum, to address the following:

- a. Whether the applicant committed any acts of adultery and the timeframe in which they occurred, and with whom they occurred.
- b. Whether the applicant obstructed justice pursuant to Article 134, Uniform Code of Military Justice (UCMJ).
- c. Whether the applicant's conduct and demeanor toward subordinates, both male and female, was professional. Were there any acts of sexual harassment?
- d. What was the overall Command Climate of Headquarters and Headquarters Company, 1st Battalion? What was the overall treatment of leaders and subordinates under the applicant's command?
- e. The facts and details of any other implications of misbehavior or negative leadership trends.

6. The IO informed the Commander, 3d U.S. Infantry Regiment, Joint Base Myer-Henderson Hall, Virginia, 26 February 2016, of the following:

- a. Findings regarding whether the applicant committed any acts of adultery:

(1) The preponderance of evidence supports the conclusion that the applicant did commit adultery pursuant to Article 134 of the UCMJ. The evidence shows that the applicant had a romantic relationship with the complainant that was sexual in nature. During the IO's initial conversation with the complainant she said she had sexual intercourse with the applicant six or seven times. She also talked about having sex with the applicant and committing adultery within text messages sent from her cell phone to the applicant's government cell phone. The IO did not find the claims that the complainant made this all up credible. The phone records and testimony from the first sergeant show that the applicant had the phone on him in January and was making calls from his place of duty to the complainant. Further, the complainant initially said she was telling the truth when pressured by the applicant's spouse to say she made it all up. This would not have occurred if they were colluding to set up the applicant.

(2) The applicant was married in January 2016 and later separated. The IO found his conduct to be both prejudicial to good order and discipline, and brought discredit upon the Armed Forces. The adultery had a negative impact on the applicant's unit. His senior leaders noticed the absence of his leadership as a result, and it likely impacted their morale. Also, if any junior Soldiers found out, they would be more likely to not follow direction or listen to their leaders. If the public found out about a company

commander doing this while having the ability to punish his subordinates for the same thing, they would think less of the U.S. Army. Further, the complainant likely thinks less of the U.S. Army because a Soldier deceived and misled her. This evidence fulfills the elements of Adultery as outlined in Article 134 of the UCMJ (62.b).

b. Findings regarding whether the applicant obstructed justice pursuant to Article 134, UCMJ: The preponderance of evidence supports the conclusion that the applicant did not commit obstruction of justice. No specific evidence points to the applicant committing an act with the intent to influence, impede, or obstruct this investigation. The IO considered the applicant's lies under a different section of the UCMJ, false official statement.

c. Findings regarding whether the applicant's conduct and demeanor toward subordinates, both male and female, was professional and if there were any acts of sexual harassment: The evidence supports no inappropriate conduct or demeanor by the applicant towards his junior subordinates. There is also no evidence supporting any acts of sexual harassment surrounding the applicant. However, a preponderance of the evidence supports inappropriate conduct by the applicant around senior subordinates. The applicant talked freely around his company first sergeant and executive officer in a degrading manner toward women that made them uncomfortable and question the applicant's moral standing.

e. Findings regarding the overall command climate of HHC, 1st Battalion, 3d U.S. Infantry Regiment and the overall treatment of leaders and subordinates under the applicant's command: The IO found the rank and file of the unit perceived the command climate under the applicant in a positive manner while the leaders have a more negative perception. The applicant's marital problems have impacted his dedication to, and performance in, his command responsibilities. Consequently, his first sergeant and executive officer have assumed a greater burden of responsibility and done a good job of insulating the rest of the company from the applicant's struggles.

f. Findings regarding any implications of other misbehavior or negative leadership trends:

(1) The preponderance of evidence supports the conclusion that the applicant provided a false official statement during the two occasions he met with the IO (both the oral statements and the signed sworn statement). Specifically, his statements about his relationship with the complainant which he claims was only to discuss rental properties and that he never had sexual intercourse with her. The IO believed the applicant provided a false official statement knowingly and to deceive in order to cover up his adulterous relationship with the complainant. In doing so, he provided a false official statement and is subject to punishment under Article I 07 the UCMJ.

(2) The applicant's relationship with the complainant, his actions around senior subordinate leaders, and providing false official statements were not in keeping with the high standard of actions and morals required of a company commander in U.S. Army. As such, the applicant's actions fulfill the elements of Article 133 of the UCMJ (59.b), Conduct unbecoming an officer and gentlemen.

7. The IO made the following recommendations:

a. The Commanding General, Military District Washington, relieve the applicant from company command.

b. Administrative and/or criminal (UCMJ) discipline. Pursuant to the Commanding General Policy Letter on Withholding, officer misconduct is withheld to his level.

c. A formal command climate survey given to HHC, 1st Battalion, 3d Infantry Regiment to assess the current climate of the unit, identify any issues or problem areas that may be present, and address any identified problems and issues as quickly as possible.

8. The applicant received a General Officer Memorandum of Reprimand (GOMOR) on 17 March 2016 from the Commander, U.S. Army Military District of Washington, Fort Lesley McNair, DC for engaging in an adulterous relationship and lying to the IO about that relationship. The applicant acknowledged receipt of the GOMOR and indicated he would submit matters in rebuttal.

9. On 31 March 2016, the Regimental Judge Advocate drafted a memorandum for record wherein he stated that he had been notified by the applicant that he did not want to submit any rebuttal matters. The applicant had spoken to counsel and simply wanted to complete the action as soon as possible to consider potential civilian employment.

10. On 26 April 2016, the GOMOR issuing authority directed the GOMOR be permanently filed in the applicant's AMHRR.

11. The applicant received an Officer Evaluation Report for the period 2 July 2015 through 14 December 2016. The reason for submission was relief for cause. His senior rater commented, in effect, that the applicant's adulterous relationship demonstrated a serious error in judgement and the applicant had no future for further service.

12. On 17 June 2016, the applicant submitted a request for resignation. He indicated that having been informed that he is being considered for elimination, he voluntarily tendered his resignation from the Army under the provisions of Army Regulation (AR) 600-8-24 (Officer Separations) chapter 4, in lieu of further elimination proceedings. His chain of command recommended approval.

13. On 16 December 2016, the Deputy Assistant Secretary of the Army (DASA) (Review Boards (RB) stated that, on 28 November 2016, the Department of the Army Ad Hoc Review Board has reviewed the Resignation in Lieu of Elimination tendered by the applicant. The DASA (RB) accepted his resignation and directed he be discharged from the United States Army with a General (Under Honorable Conditions) characterization of service. This elimination is based on both misconduct and moral or professional dereliction (AR 600-8-24, paragraph 4-2b), and derogatory information (AR 600-8-24, paragraph 4-2c).

14. The applicant was discharged on 14 December 2016 by reason of unacceptable conduct in accordance with AR 600-8-24, Officer Transfers and Discharges, paragraph 4-2b and paragraph 4-24a(1), for Unacceptable Conduct (Separation Code BNC). His service was characterized as under honorable conditions, general. He completed 9 years, 2 months, and 28 days of net active service for the period.

13. The applicant provided:

a. His VA Health Record with Problem List which shows the applicant attempted suicide by overdose of a sleep aid, alcohol dependence, chronic PTSD, depression, atopic dermatitis, and left knee pain.

b. A VA summary of benefits, 10 March 2023, which show he receives disability compensation for a service-connected disabilities with a combined rating of 100 percent, effective 19 January 2022.

15. 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.

16. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his discharge and a referral to IDES. He contends he experienced PTSD that mitigates his misconduct and warrants a medical discharge. 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 accepted an appointment as a Reserve Commissioned Officer on 2 August 2007; 2) The applicant deployed to Afghanistan from 15 November 2012-15 August 2013 and to Iraq from 1 September 2009-31 August 2010; 3) On 26 February 2016, the applicant was the subject of an investigation and was found to have committed adultery that had a negative impact on his unit; he engaged in inappropriate conduct around senior subordinates; and he provided false official statements on two occasions; 4) The applicant received an Officer Evaluation Report for the period 2 July 2015 -14 December 2016. The reason for submission was relief for cause; 5) The applicant was discharged on 14 December 2016 by reason of

unacceptable conduct in accordance with AR 600-8-24, Officer Transfers and Discharges, paragraph 4-2b and paragraph 4-24a(1). His service was characterized as under honorable conditions, general.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's available military service and medical records. The VA's Joint Legacy Viewer (JLV) and hardcopy VA medical documentation provided by the applicant were also examined. The applicant asserts he experienced PTSD while on active service, which mitigates his misconduct. There is insufficient evidence the applicant reported or was diagnosed with a mental health disorder including PTSD while on active service.

c. A review of JLV provided evidence the applicant been diagnosed with service-connected PTSD in 2021, and he was found to be 100% disabled for PTSD in 2022. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a condition or experience that mitigates his misconduct or warrants a referral to IDES.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant asserts he experienced PTSD which mitigates his misconduct and warrants a referral to IDES. There is sufficient evidence the applicant has been diagnosed with service-connected PTSD. However, there is insufficient evidence the applicant's case warrants a referral to IDES.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced PTSD that mitigates his misconduct while on active service, and he has been diagnosed with service-connected PTSD.

(3) Does the condition experience actually excuse or mitigate the misconduct? No, there is sufficient evidence beyond self-report the applicant was diagnosed with service-connected PTSD. However, there is no nexus between PTSD and the applicant's misconduct in that: 1) these types of misconduct are not a part of the natural history or sequelae of PTSD; 2) PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right. In addition, there is insufficient evidence the applicant was ever found to not meet retention standards from a psychiatric perspective while on active service. Therefore, there is insufficient evidence his case warrants a referral to IDES at this time. However, the applicant contends he was experiencing a mental health condition or an experience that mitigates 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 not warranted. The applicant's

contentions, the military record, and regulatory guidance were carefully considered. Following an AR 15-6 investigation, the applicant received a GOMOR and relief for cause OER. This triggered initiation of elimination action. The applicant voluntarily elected to resign his commission in lieu of elimination action. The DASA (RB) approved his resignation and ordered him discharged. He was accordingly discharged for unacceptable conduct. The Board found no error or injustice in his separation processing. The applicant asserts he experienced PTSD while on active service, which mitigates his misconduct. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the reviewing medical official's finding insufficient evidence the applicant reported or was diagnosed with a mental health disorder including PTSD while on active service. Based on a preponderance of evidence, the Board determined that the reason for separation the applicant received upon separation was not in error or unjust.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

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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. Army Regulation 600-8-24, Officer Transfers and Discharges, chapter 4, establishes policy and prescribes procedures for eliminating officers in the Active Army for substandard performance of duty, misconduct, moral or professional dereliction, and in the interests of national security. It states, in part, that an officer identified for elimination may at any time during or prior to the final action in the elimination case, elect to submit a resignation in lieu of elimination.

a. Paragraph 4-2b states misconduct, moral or professional dereliction, or in the interests of national security are reasons for elimination which include acts of personal misconduct and conduct unbecoming an officer.

b. Paragraph 4-24a(1) states an officer identified for elimination may, at any time during or prior to the final action in the elimination case submit a resignation in lieu of elimination.

3. Title 38, U.S. Code, section 1110, General - Basic Entitlement: For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

4. Title 38, U.S. Code, section 1131, Peacetime Disability Compensation - Basic Entitlement: For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

5. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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.

6. Title 10, U.S. Code, section 1556, 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.

7. AR 15-185 prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. 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. The ABCMR will decide cases on the evidence of record. It is not an investigative body.

//NOTHING FOLLOWS//