

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 30 September 2024

DOCKET NUMBER: AR20230010619

APPLICANT REQUESTS: correction of his military records to show –

- his service was characterized as honorable
- or in lieu of an honorable characterization of service, show he was discharged due to a disability

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:  
a DD Form 293, Application for the Review of Discharge.

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, the Department of Veterans Affairs (VA) awarded him service-connected disability compensation at the combined rate of 90% and at the rate of 50% for post-traumatic stress disorder (PTSD). As such, the characterization of his discharge should be upgraded to honorable, or his record should be corrected to show he was discharged due to a disability.
3. On 10 March 2007, the applicant enlisted in the Kentucky Army National Guard (KYARNG). He held military occupational specialty 74D, chemical, biological, radiological, and nuclear specialist.
4. His Enlisted Record Brief shows he served in Kuwait from 21 June 2009 to 14 March 2010.
5. The applicant's record contains a DA Form 2166-8, Noncommissioned Officer (NCO) Evaluation Report, for the period 5 June 2013 to 15 May 2014 which shows the applicant was relieved for cause from his position as the Chemical Operations NCO,

299th Chemical Company, KYARNG. This form shows the applicant's senior rater recommended relief for cause due to a second reported offense in violation of the Army's Sexual Harassment/Assault Prevention Program (SHARP).

6. On 27 June 2014, the Secretary of the Army published Army Directive 2014-19, Implementation of Section 1744 of the National Defense Authorization Act for Fiscal Year 2014-Review of Decisions Not to Refer Charges of Certain Sex-Related Offense for Trial by Courts-Martial, 27 June 2014 which implemented the requirement for the Secretaries of the military departments to provide for review of decisions not to refer charges for trial by court-martial in cases where a sex-related offense has been alleged by a victim of the alleged offense. This policy was effective immediately.

7. The Command Judge Advocate provided legal remedies relevant to the allegations of sexual assault pertaining to the applicant. He stated the applicant could be separated and discharged with a characterization of general, under honorable condition per Army Regulation (AR) 135-178, ARNG and Army Reserve-Enlisted Administrative Separations, section 2-10. He could also be reduced two grades pursuant to Kentucky Revised Statutes (KRS) 35.070 and KRS 35.730. Sufficient evidence was present to substantiate a meritorious case against the applicant. This document provided several different courses of actions available to the command.

8. On 15 August 2014, the Command Judge Advocate affirmed the prior legal guidance, and he confirmed the validity of the investigation and indicated the administrative proceeding were appropriate and warranted. The allegation of sexual assault by the applicant (a sergeant/E-5 at the time) against a junior enlisted female Soldier implicated a rude sexual advance that she stated embarrassed, humiliated, and shocked her. Absence of skin-on-skin contact does not diminish the seriousness of the applicant's actions but did reveal the alleged victim did not sustain physical injury which would otherwise justify criminal proceedings through civil or military tribunals.

9. On 22 September 2014, the KYARNG Adjutant General appointed an Administrative Board of Officer for Enlisted Reduction/Separation Actions pertaining to the applicant.

10. On 10 December 2014 –

a. The company commander informed the applicant he was initiating action to separate him service under the provisions of AR 135-178, paragraph 12-1c, for commission of a serious offense with a recommendation for an under other than honorable conditions characterization of service. The reason cited was the sexual assault of a female junior enlisted Soldier.

b. The applicant's brigade commander provided a memorandum, Subject: Required Medical Examination for [the applicant], 229th Chemical Company. This document

stated the applicant had not been deployed overseas in the last 24 months in support of a contingency operation and he had not been diagnosed with PTSD and/or traumatic brain injury (TBI).

c. The applicant's commander formally recommended the applicant for separation from the KYARNG.

11. On 10 January 2015, the applicant was notified to appear before an Administrative Board of Officers for Enlisted Reduction/Separation Actions scheduled to convene on 24 January 2015 at Frankfort, KY.

12. On 23 January 2015, he acknowledged receipt of notification of the basis for the contemplated action to separate him and of the rights available to him, including his right to consult with counsel prior to submitting his election of rights. He further acknowledged he may expect to encounter substantial prejudice in civilian life if his service was characterized as general, under honorable conditions or under other than honorable conditions (UOTHC). He further understood that an UOTHC discharge may make him ineligible for many or all benefits as a veteran under both Federal and State laws. The applicant elected to consult with counsel and consideration of his case by an administrative separation board. He also indicated he would submit statements on his own behalf.

13. A DA Form 1574, Report of Proceedings by Investigating Officer/Board of Officers shows the Administrative Board commenced and was complete on 21 February 2015. The Board recommended the applicant be discharged from the KYARNG with an UOTHC characterization of service.

14. On 3 March 2015, the separation authority approved the recommended discharge and directed the applicant's service be characterized as UOTHC.

15. He was reduced from SGT to private (E-1) effective 4 March 2015.

16. Orders 063-809, 4 March 2015, published by Department of Military Affairs, Boone National Guard Center, Frankfort, KY discharged the applicant from the ARNG and as a reserve of the Army, effective 4 March 2015.

17. The applicant was discharged from the KYARNG on 4 March 2015. His NGB Form 22, shows the applicant completed 7 years, 11 months, and 25 days of net service for the period. This form further confirms he was discharged under the provisions of National Guard Regulation (NGR) 600-200 chapter 6-35i(1), acts or patterns of misconduct. His service was characterized as UOTHC.

18. Regulatory guidance provides -

a. A Soldier of the National Guard or U.S. Army Reserve is entitled to hospital benefits, pensions, and other compensation similar to that for Soldiers of the active Army for injury, illness, or disease incurred in the line of duty (LOD), under the following conditions prescribed by law, Title 10, U.S. Code, section 1074a.

- while performing active duty for a period of 30 days or less
- while performing inactive duty training
- while traveling directly to or from the place at which that Soldier is to perform or has performed active duty for a period of 30 days or less
- inactive duty training

b. The mere presence of impairment does not of itself justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the member reasonably may be expected to perform because of their office, rank, grade, or rating.

19. The Board should consider the applicant's overall record and provided statement in accordance with the published equity, injustice, or clemency determination guidance.

20. 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.

21. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his characterization of service from under other than honorable condition (UOTHC) to honorable or in lieu of an honorable characterization of service a discharge due to a disability.

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:

- The applicant enlisted in the Kentucky Army National Guard (KYARNG) on 10 March 2007.
- His Enlisted Record Brief shows he served in Kuwait from 21 June 2009 to 14 March 2010.
- The applicant's record contains a DA Form 2166-8, Noncommissioned Officer (NCO) Evaluation Report, for the period 5 June 2013 to 15 May 2014 which shows the applicant was relieved for cause from his position as the Chemical Operations NCO, 299th Chemical Company, KYARNG. This form shows the applicant's senior rater recommended relief for cause due to a second reported

offense in violation of the Army's Sexual Harassment/Assault Prevention Program (SHARP).

- On 15 August 2014, the Command Judge Advocate affirmed the prior legal guidance, and he confirmed the validity of the investigation and indicated the administrative proceeding were appropriate and warranted. The allegation of sexual assault by the applicant (a sergeant/E-5 at the time) against a junior enlisted female Soldier implicated a rude sexual advance that she stated embarrassed, humiliated, and shocked her. Absence of skin-on-skin contact does not diminish the seriousness of the applicant's actions but did reveal the alleged victim did not sustain physical injury which would otherwise justify criminal proceedings through civil or military tribunals.
- On 10 December 2014, the company commander informed the applicant he was initiating action to separate him under the provisions of AR 135-178, paragraph 12-1c, for commission of a serious offense with a recommendation for an under other than honorable conditions characterization of service. The reason cited was the sexual assault of a female junior enlisted Soldier.
- A DA Form 1574, Report of Proceedings by Investigating Officer/Board of Officers shows the Administrative Board commenced and was complete on 21 February 2015. The Board recommended the applicant be discharged from the KYARNG with an UOTHC characterization of service.
- The applicant was discharged from the KYARNG on 4 March 2015. His NGB Form 22, shows the applicant completed 7 years, 11 months, and 25 days of net service for the period. This form further confirms he was discharged under the provisions of National Guard Regulation (NGR) 600-200 chapter 6-35i(1), acts or patterns of misconduct. His service was characterized as UOTHC.

c. Review of Available Records: The Army Review Board Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant states, the Department of Veterans Affairs (VA) awarded him service-connected disability compensation at the combined rate of 90% and at the rate of 50% for post-traumatic stress disorder (PTSD). As such, the characterization of his discharge should be upgraded to honorable, or his record should be corrected to show he was discharged due to a disability.

d. Active-duty electronic medical records available for review show the applicant received a post-deployment behavioral health screening on 16 March 2010. He reported no psychological symptoms, including no risk for TBI, PTSD, alcohol abuse, or any other mental health concerns. On 13 September 2012, the applicant participated in an initial behavioral health assessment and reported nervousness and feeling jittery as well as having recently gotten married. No diagnosis was provided but his self-reported issues with depression was noted, and he was recommended for behavioral health services. The applicant symptoms of depression and anxiety were monitored, and he was prescribed medication. On 10 December 2014 the applicant's brigade commander provided a memorandum, Subject: Required Medical Examination for [the applicant],

229th Chemical Company. This document stated the applicant had not been deployed overseas in the last 24 months in support of a contingency operation and he had not been diagnosed with PTSD and/or traumatic brain injury (TBI).

e. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is 100% service connected including 70% for PTSD. The applicant was eventually granted service connection and has participated intermittently in psychotherapy and medication management. However, a Disability Benefits Questionnaire (DBQ) was completed on 29 January 2013, and indicated the applicant did not present with clinically significant symptoms or a history that warranted a diagnosis. The clinician opined, "he is currently functioning well, denied any significant mental health complaints that would constellate a disorder. Symptoms reported appear to be mild and transient and expected reactions to situational life stress". The applicant reengaged with behavioral health services in June 2018, when he self-referred due to marital conflict. He reported "being involved and cleared of an incident at work; however, his wife found out about the allegations before he was able to tell her. This has led to conflict in the marriage and symptoms of depression". The applicant was diagnosed with Adjustment Disorder with Depressed Mood. A second DBQ, completed on 24 October 2018, diagnosed the applicant with Adjustment Disorder with Mixed Anxiety and Depressed Mood but did not find that he met criteria for PTSD. During that assessment, he shared additional details about the allegations against him that created issues in his marriage. A customer, "called the postal inspectors and said I assaulted her and had an affair and all she wanted was for me not to be her mailman anymore". Of note, the applicant was accused of engaging in assault post-military service, the same behavior that led to his discharge.

f. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is evidence the applicant had an experience and subsequent BH condition. However, his BH condition would not mitigate the reason for his discharge. In addition, although the applicant has been service connected for PTSD, two DBQ's initially did not support service connection for PTSD since the applicant did not meet criteria, at the time, and did not evidence any impairment. Overall, VA examinations are based on different standards and parameters; they do not address whether a medical condition met or failed Army retention criteria or if it was a ratable condition during the period of service. Therefore, a VA disability rating would not imply failure to meet Army retention standards at the time of service. A subsequent diagnosis of PTSD through the VA is not indicative of an injustice at the time of service. Furthermore, even an in-service diagnosis of PTSD is not automatically unfitting per AR 40-501 and would not automatically result in medical separation processing. Based on the documentation available for review, there is no indication that an omission or error occurred that would warrant a referral to the IDES process. In summary, his separation process appears proper, equitable and free of error, and insufficient new evidence has been provided to determine otherwise.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts a mitigating condition, PTSD.

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

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant was discharge from military service due to a second reported offense in violation of the Army's Sexual Harassment/Assault Prevention Program (SHARP), where he sexually assaulted a junior enlisted officer. PTSD would not mitigate sexual assault. Sexual assault is not a natural sequela of this BH condition and would not mitigate the reason for his discharge. In addition, PTSD does not impact the ability to distinguish right from wrong and act in accordance with the right.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the serious nature of the misconduct leading to the applicant's separation and the findings and recommendations of the medical review, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant's characterization of service and/or narrative reason for separation.

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.

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 Army Board for Correction of Military Records (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. NGR 600-200, Personnel-General-Enlisted Personnel Management, prescribes the following reasons, applicability, and board requirements for administrative separation or discharge from the Reserve of the Army, the State ARNG only or both.
  - a. All soldiers will be notified of a commander's recommendation for their involuntary discharge. Paragraph 6-35(l) states, in part, a Soldier found medically unfit for retention per AR 40-501, Medical Services-Standards of Medical Fitness, may be involuntarily separated. Commanders, who suspect that a Soldier may not be medically qualified for retention, will direct the Soldier to report for a complete medical examination per AR 40-501. Commanders who do not recommend retention will request the Soldier's discharge.
  - b. When medical condition was incurred in line of duty, the procedures of AR 600-8-4, Personnel-General-Line of Duty Policy, Procedures, and Investigation, will apply. Discharge will not be ordered while the case is pending final disposition. This paragraph also includes those Soldiers who refuse or ineligible to reclassify into a new military occupational specialty.
  - c. An 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.

d. A general, under honorable conditions characterization of service is awarded to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

e. Acts or patterns of misconduct under the Uniform Code of Military Justice (UCMJ), State Military Code or similar laws. Administrative separation board procedures are required. Commanders must initiate separation action within 45 days of the act or referral, regardless of the commander's recommendation.

3. Army Regulation (AR) 40-501, Medical Services-Standards of Medical Fitness, in effect at the time, provides information on medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures. Soldiers with conditions listed in chapter 3 who do not meet the required medical standards will be evaluated by an MEB and will be referred to a PEB as defined in AR 635-40 with the following caveats:

a. Normally, Reserve Component Soldiers who do not meet the fitness standards set by chapter 3 will be transferred to the Retired Reserve per Army Regulation 140-10, USAR Assignments, Attachments, Details, and Transfers, or discharged from the Reserve Component per Army Regulation 135-175, Separation of Officers, Army Regulation 135-178, ARNG and Reserve Enlisted Administrative Separations, or other applicable Reserve Component regulation. They will be transferred to the Retired Reserve only if eligible and if they apply for it.

b. National Guard Soldiers with nonduty related medical conditions who are pending separation for failing to meet the medical retention standards of chapter 3 are eligible to request referral to a PEB for a determination of fitness.

4. AR 600-8-4, Line of Duty (LD) Policy, Procedures, and Investigations, prescribes policies, procedures, and mandated tasks governing LD determinations of Soldiers who die or sustain certain injuries, diseases, or illnesses. It states –

a. A Soldier of the National Guard or USAR is entitled to hospital benefits, pensions, and other compensation similar to that for Soldiers of the active Army for injury, illness, or disease incurred in the LD, under the following conditions prescribed by law, Title 10, USC, section 1074a.

- while performing active duty for a period of 30 days or less
- while performing inactive duty training

- while traveling directly to or from the place at which that Soldier is to perform or has performed active duty for a period of 30 days or less
- inactive duty training

b. The LD determination is presumed to be "LD YES" without an investigation in the case of disease, except when (1) the disease or medical condition occurs under strange or doubtful circumstances or is apparently due to misconduct or willful negligence or (2) when a U.S. Army Reserve or Army National Guard Soldier is serving on an active duty tour of 30 days or less is disabled due to disease.

5. AR 635-40, Personnel Separations-Physical Evaluation for Retention, Retirement, or Separation, establishes the PDES and sets forth the policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of their office, grade, rank, or rating. It states that after establishing the fact that a Soldier is unfit because of a physical disability, and that the Soldier is entitled to benefits, the PEB must decide the percentage rating for each unfitting disability. The VASRD, as modified in the regulation, is used to establish this rating. This regulation states:

a. Disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in service.

b. The mere presence of impairment does not of itself justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the member reasonably may be expected to perform because of their office, rank, grade, or rating.

c. Rating disabilities which are neither unfitting nor contribute to the physical unfitness of a Soldier is prohibited.

d. A condition listed in the VASRD does not equate to a finding of physical unfitness. An unfitting, or ratable condition, is one which renders the Soldier unable to perform the duties of their office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of their employment on active duty.

e. There is no legal requirement in arriving at the rated degree of incapacity to rate a physical condition which is not in itself considered disqualifying for military service when a Soldier is found unfit because of another condition that is disqualifying.

f. Permits for permanent retirement when the disability is rated at 30 percent or more under VASRD, or the Soldier has at least 20 years of active Federal service.

6. 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.

7. 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.

8. 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.

9. 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.

10. AR 15-185, ABCMR, states 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.

//NOTHING FOLLOWS//