

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: Tay [REDACTED]

BOARD DATE: 26 April 2024

DOCKET NUMBER: AR20230010754

APPLICANT REQUESTS: correction of her DD Form 214 (Certificate of Release or Discharge from Active Duty) to show her:

- characterization of service as "Honorable" rather than "Uncharacterized"
- narrative reason for separation as "Medical/Military Sexual Trauma (MST)" rather than "Entry Level Performance and Conduct"

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Self-authored statement (4 pages)
- Department of Veterans Affairs (VA) Rating Decision notification
- VA Explanation of Benefits letter
- VA Summary of Benefits letter

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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 was sexually assaulted in the barracks after sustaining an injury during Basic Combat Training (BCT). Her company commander at the time, would not listen to the voices of three women who were being sexually harassed and assaulted. During a one-on-one meeting, the commander told her that if she continued pursuing charges for the assault, she would either be recycled through training or sent home. She would have requested these corrections sooner, but she wanted to make sure she had enough proof for her case that she submitted to the VA in support of her claim for benefits. Now that the VA has acknowledged her medical condition as a result of MST, she has the proof she needs to request correction of her DD Form 214. She would have continued serving in the Army if these things had never happened to her. The applicant provides a four-page statement that is available in its entirety for the Board's consideration.

a. In her statement she provides a detailed account of the MST she suffered at the hands of a drill sergeant and resulted in her being hospitalized for two days. Even though her drill sergeants and company commander questioned why she appeared to have been in a fight, she could not bear to tell them the truth so, she told them her face was swollen because she had some teeth removed.

b. She states the drill sergeant raped her on a second occasion just days later. She was alone, afraid, and her commander just spoke to her like he did not care. Her commander pulled her aside again and as she tried to tell him what had happened, he stopped her and told her that she needed to go home to her family if she could not handle her emotions and adapt. She tried to explain that she had been harassed and raped, but he did not listen to her and told her to submit a request to be discharged.

c. She was told that receiving an uncharacterized discharge would make it so she would not have to explain why she left the Army, but it has haunted her ever since because she has had to explain that she was raped during job interviews, at the Department of Motor Vehicles, and during the loan process for purchasing her home.

3. On 25 May 2007, the applicant enlisted in the U.S. Army Reserve (USAR) in the rank/grade of private first class (PFC)/E-3 for a period of 8 years. On 2 August 2007, she was ordered to Initial Active Duty for Training for the purpose of completing BCT at Fort Jackson, SC.

4. On 9 August 2007, the applicant was counseled regarding the tasks, conditions, and standards for successful completion of BCT. She was advised the standards required were high and training would be demanding physically, mentally, and emotionally. She was further advised that if she had any problems during the cycle, she could bring them to the attention of any Drill Sergeant in the Platoon for help with resolving them.

5. A DA Form 2173 (Statement of Medical Examination and Duty Status) shows the applicant accidentally tripped over a tree root, fell to the ground, and injured her back and knees during marksmanship training on 6 September 2007. A bone scan was conducted and showed no abnormality. The injuries were determined to be in the line of duty.

6. On 7 September 2007, the applicant sought medical treatment for cold symptoms with sinus pressure and low back pain. She was prescribed some medications and released for duty without limitations.

7. The applicant was counseled on 28 September 2007 for failing the Army Physical Fitness Test (APFT) and was advised that failure to meet the standards set by the Army

could and would result in administrative action being taken against her that could result in her being discharged from the Army.

8. The applicant was counseled on 28 September 2007 for failing the APFT despite the Drill Sergeants trying to work with her and being given plenty of time to work out on her own. She was advised the reason she had failed was because she did not push herself to the limits of her capabilities. She continued to show a lack of motivation and to give up. She was advised that if that was the kind of motivation she wanted to show, she should request separation from the Army for failure to adapt. She was advised that failure to meet the standards set by the Army could and would result in administrative action being taken against her that could result in her being discharged from the Army.

9. The applicant was counseled on 8 October 2007 for failing the APFT for the third time. She was informed that if she could not pass the APFT she would not graduate the phase and move forward with the rest of her class. At that time, her options would be to be recycled through training with another unit or to get out of the Army due to failure to adapt.

10. On 12 October 2007, the applicant rendered a written statement wherein she stated she should be administratively separated from the Army. She believed she had given it her all but was unable to adapt to the military physically and medically. She had been very depressed for the past nine weeks during which she had been a heat casualty and injured her back. She also had to see doctors on a weekly basis to receive volume depletion checks to determine whether she needed to have blood drawn or to receive intravenous treatments. She was told she was a waste of military time and money. She had repeatedly asked to be separated because it was indeed a waste of money to keep her there when she was unhealthy and injured to a point where she could not train. How was she supposed to train when she was continually prescribed medications that made her drowsy and weak. She had been picked on since she arrived and no longer desired to be in the Army. She just wanted to get out of the Army, finish her senior year of college, and get back to good health.

11. On 16 October 2007, the applicant had a follow-up appointment for pain in her lower back and right knee. She was released with work/duty limitations prohibiting running, jumping, marching, or carrying a rucksack from 16 October to 23 October 2007.

12. On 17 October 2007, the applicant was counseled by both her first sergeant and company commander regarding her being recommended for "New Start" (recycling through training) by her drill sergeants for APFT failure. It was noted she had failed the APFT three times and showed little if any improvement. Her drill sergeants opined that New Start would further motivate and discipline her into becoming a Soldier. She was

reminded that failure to meet the standards set by the Army could and would result in administrative action being taken against her that could result in her being discharged from the Army.

13. On 18 October 2007, the applicant was counseled by the Reserve Component Liaison who concurred with the recommendation for New Start. The applicant non-concurred with the recommendation and reiterated her desire to be discharged from the Army.

14. On 18 October 2007, the applicant was once again counseled regarding the tasks, conditions, and standards for successful completion of BCT. She was advised the standards required were high and training would be demanding physically, mentally, and emotionally. She was reminded that failure to meet the standards set by the Army could and would result in administrative action being taken against her that could result in her being discharged.

15. On 6 December 2007, the applicant underwent a mental status evaluation which shows, in part, that she was diagnosed with Adjustment Disorder with Depressed Mood and an Occupational Problem. It was noted she had overdosed on Naproxin at Fort Jackson, SC, due to her distress and pain. She had lost motivation long ago to be in the Army and her retention potential continued to be poor. Community Mental Health Services recommended discharge under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 11, on 2 November 2007 and her condition continued to worsen over time. The evaluator strongly recommended that the unit proceed with Chapter 11 discharge without delay.

16. The applicant was counseled by her platoon sergeant, company commander, and Reserve Component Liaison regarding the intent to recommend her administrative separation.

17. The applicant's immediate commander notified her that he was initiating actions to separate her under the provisions of Army Regulation 635-200, Chapter 11, for entry level status performance and conduct. As the specific reasons, the commander cited the applicant's failure to adapt to military life, failure to meet minimum standards for successful completion of BCT, and failure to pass the APFT. He further advised the applicant that if her separation was approved, she would receive an entry level separation with an uncharacterized discharge.

18. The applicant acknowledged receipt of the separation notification and rendered her election of rights, wherein she stated she had been advised of the basis for the contemplated action to separate her for the Entry Level Status Performance and Conduct under the provisions of Army Regulation 635-200, Chapter 11, and its effects;

of the rights available to her; and the effect of any action taken by her in waiving her rights. She declined her rights to co and to provide statements in her own behalf.

19. The applicant's immediate commander formally recommended her separation under the provisions of Army Regulation 635-200, Chapter 11, with an uncharacterized discharge. The interim commander concurred with the recommendation.

20. On 11 January 2008, the separation authority approved the recommended separation with the issuance of an uncharacterized discharge.

21. Orders and the applicant's DD Form 214 show she was discharged from the USAR in the rank grade of PFC on 18 January 2008 under the provisions of Army Regulation 635-200, Chapter 11, with Separation code "JGA" and Reentry code "3." Her narrative reason for separation was "Entry Level Performance and Conduct." She was credited with completion of 5 months and 17 days of net active service this period. She was not awarded a military occupational specialty.

22. On 8 February 2024, in response to a written request, a member of the Army Criminal Investigation Division, Quantico, VA informed a staff member of the Case Management Division of the Army Review Boards Agency (ARBA), Arlington, VA that a search of the Army criminal file indexes revealed no MST records pertaining to the applicant.

23. Soldiers are considered to be in an entry-level status when they are within their first 180 days of active-duty service. The evidence of record shows the applicant was in an entry-level status at the time of her separation. An uncharacterized discharge is not meant to be a negative reflection of a Soldier's military service. It merely means the Soldier did not serve on active duty long enough for her or her character of service to be rated.

24. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition.

MEDICAL REVIEW:

1. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, an ABCMR denial (28 January 1998, AC96-10784A), the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History

and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

2. The applicant is applying to the ABCMR requesting an upgrade of her 18 January 2008 uncharacterized discharge. On her DD Form 149, she indicates that PTSD, other mental health conditions, and Sexual assault/ harassment are related to her request. In her self-authored letter, she states she was assaulted/sodomized while still groggy after having her wisdom teeth extracted.
3. The Record of Proceedings details the applicant's military service and the circumstances of the case. Her DD 214 for the period of Service under consideration shows the former USAR Soldier entered active duty for initial entry training on 2 August 2007 and was discharged 18 January 2008 under provisions provided in chapter 11 of AR 635-200, Personnel Separations – Enlisted Personnel (6 June 2005), for falling below entry level performance and conduct standards.
4. On 8 October 2007, her platoon sergeant counseled for failing her final end of cycle (EOC) Army Physical Fitness Test. The applicant agreed with the counseling and stated "I also believe I should be chaptered out. I am unable to adapt to military standard."
5. The applicant underwent a mental status evaluation on 6 December 2007 after which her diagnoses were adjustment disorder with depressed mood and occupational problem. The provider opined the applicant was mentally responsible, she would not respond to Command efforts at rehabilitation nor to any treatment methods currently available in any military mental health facility, and recommended she be administratively separated.
6. On 12 December 2007, her company commander recommended she be separated under provisions in Chapter 11 of AR 635-200:

This decision to recommend separation of PFC [Applicant] is based on the following: unsatisfactory performance, cannot adapt to military life, cannot meet minimum standards for successful completion, has failed to respond to counseling and retraining efforts, and hasn't passed an APFT in the two cycles that she has been at Fort Jackson.

7. His recommendation for her separation was approved by the brigade commander on 11 January 2008.

8. JLV records show she receives care at Veterans Hospital Administration facilities and has a service-connected disability rating for PTSD related to military sexual trauma (MST).

9. Kurta Questions:

a. Did the applicant have a condition or experience that may excuse or mitigate the discharge? PTSD due to MST.

b. Did the condition exist or experience occur during military service? VA service-connected PTSD due to MST.

c. Does the condition or experience actually excuse or mitigate the discharge? Yes: As PTSD, particularly that due to MST, is associated with avoidant behaviors and loss of motivation, the condition fully mitigates her APFT failures.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered.

2. The evidence of record shows the VA diagnosed and service connected the applicant with PTSD due to MST. The ARBA Medical Advisor stated, "As PTSD, particularly that due to MST, is associated with avoidant behaviors and loss of motivation, the condition fully mitigates her APFT failures." The Board concurs with the opinion of the ARBA Medical Advisor.

3. The Board determined her characterization of service should be upgraded to honorable, and her reason for separation should be corrected to reflect the separation code, reentry code, and narrative reason for separation based on Army Regulation 635-200, paragraph 5-3 (Secretarial plenary authority), as this provision of the regulation is authorized when other provision of Army Regulation 635-200 regulation applies.

Mr 1	Mr 2	Mr 3
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<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	GRANT FULL RELIEF
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	GRANT PARTIAL RELIEF
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	GRANT FORMAL HEARING
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	DENY APPLICATION

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:

- a. voiding her DD Form 214 (Certificate of Release or Discharge from Active Duty) ending 18 January 2008.
- b. reissuing her a new DD Form 214, which includes the below entries:
 - block 24 (Character of Service) - Honorable
 - block 25 (Separation Authority) - Army Regulation 635-200, paragraph 5-3
 - block 26 (Separation Code) - KFF
 - block 27 (Reentry Code) - 1
 - block 28 (Narrative Reason for Separation) - Secretarial Authority

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REFERENCES:

1. Title 10, USC, Section 1552(b), provides that applications for correction of military records must be filed within three 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 three-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Title 10, USC, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

3. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation provides that the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice has occurred by a preponderance of the evidence. It is not an investigative body.

4. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel.

a. Chapter 3 provides that a separation will be described as entry level with uncharacterized service if the Soldier has less than 180 days of continuous active duty service at the time separation action is initiated.

b. Paragraph 3-7a provides that an honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

c. Paragraph 3-9, in effect at the time of the applicant's separation, provided that a separation would be described as entry level with uncharacterized service if processing was initiated while a Soldier was in an entry-level status, except when:

(1) a discharge under other than honorable conditions was authorized, due to the reason for separation and was warranted by the circumstances of the case; or

(2) the Secretary of the Army, on a case-by-case basis, determined a characterization of service as honorable was clearly warranted by the presence of unusual circumstances involving personal conduct and performance of duty. This characterization was authorized when the Soldier was separated by reason of selected changes in service obligation, for convenience of the government, and under Secretarial plenary authority.

d. Chapter 5 (Separation for Convenience of the Government), paragraph 5-3 (Secretarial plenary authority) states, separation under this paragraph is the prerogative of the Secretary of the Army. Secretarial plenary separation authority is exercised sparingly and seldom delegated. Ordinarily, it is used when no other provision of this regulation applies, and early separation is clearly in the best interest of the Army. Separations under this paragraph are effective only if approved in writing by the Secretary of the Army or the Secretary's approved designee as announced in updated memorandums. Secretarial separation authority is normally exercised on a case-by-case basis but may be used for a specific class or category of Soldiers.

e. Chapter 11 provides for the separation of personnel because of unsatisfactory performance or conduct (or both) while in an entry-level status. When separation of a Soldier in an entry-level status is warranted by unsatisfactory performance or minor disciplinary infractions (or both) as evidenced by inability, lack of reasonable effort, or failure to adapt to the military environment, he or she will normally be separated per this chapter. Service will be uncharacterized for entry-level separation under the provisions of this chapter.

f. The character of service for Soldiers separated under this provision would normally be honorable but would be uncharacterized if the Soldier was in an entry-level status. An uncharacterized discharge is neither favorable nor unfavorable; in the case of Soldiers issued this characterization of service, an insufficient amount of time would have passed to evaluate the Soldier's conduct and performance.

5. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the separation codes to be entered on the DD Form 214. At the time, this regulation prescribed:

a. The separation code "JGA" as the appropriate code to assign to Soldiers separated under the provisions of Army Regulation 635-200, based on entry level performance and conduct.

b. The separation code "KFF" as the appropriate code to assign to Soldiers separated under the provisions of Army Regulation 635-200, based on Secretarial Authority.

6. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) on 25 August 2017 [Kurta Memorandum]. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including post-traumatic stress disorder (PTSD), 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 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.

7. The Under Secretary of Defense for Personnel and Readiness issued guidance to Service DRBs and Service BCM/NRs on 25 July 2018 [Wilkie Memorandum], 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 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.

//NOTHING FOLLOWS//