

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 June 2024

DOCKET NUMBER: AR20230010820

APPLICANT REQUESTS: reconsideration of her previous request for 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), 20 August 2023
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 11 June 2002
- Medical documentation, 22 December 2016

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20200003350 on 19 January 2021.

2. The applicant states, in effect, she is part of a protected class under the Don't Ask Don't Tell clause and was approached by a Noncommissioned Officer who blew the whistle on her sexual orientation.

3. On her DD Form 149, she notes other mental health, military assault/harassment, and reprisal/whistleblower are related to this request.

4. The applicant enlisted in the Regular Army on 10 January 2000, for a 5-year period. She was awarded the military occupational specialty 96B (Intelligence Analyst) and the highest rank she attained was private first class/E-3.

5. She was formally counseled on 12 occasions between 4 May 2001 and 20 March 2002. Areas of emphasis covered in the counseling include, but are not limited to:

- being late to formation(s)
- satisfactory performance counseling
- failing to be at her appointed place of duty

- disrespecting a noncommissioned and senior noncommissioned officer
- financial neglect
- losing her military identification card
- going absent without leave
- failing to obey a lawful order

6. The applicant accepted nonjudicial punishment (NJP), under the provisions of Article 15, of the Uniform Code of Military Justice (UCMJ), on:

a. 6 September 2001, for violating a lawful order by wrongfully consuming alcohol while under the age of 21 years old. Her punishment imposed was reduction to private/E-2 and 14 days of extra duty. She was subsequently enrolled in the Alcohol Drug Abuse Prevention and Control Program.

b. 1 February 2002, for failure to go to her prescribed place of duty. The continuation sheet is void in the applicant's official military personnel file. Her punishment imposed was reduction to private/E-1, forfeiture of \$521.00 for one month, and extra duty for 45 days.

7. The applicant was notified by her immediate commander of his intent to initiate separation action against her under the provisions of Army Regulation 635-200 (Personnel Separation – Enlisted Personnel), paragraph 14-12b, for a pattern of misconduct. Her commander noted the applicant's two Articles 15 as reasons for the proposed separation action. The commander further recommended an under honorable conditions (general) discharge.

8. On 10 May 2002, the applicant consulted with counsel and was advised of the basis for the contemplated action to separate her and of the rights available to her. She acknowledged understanding that she may expect to encounter substantial prejudice in civilian life if a general discharge was issued to her and that she may be ineligible for many or all benefits under both Federal and State laws. She elected to submit a statement in her own behalf, although this document is void from the official military personnel file.

9. The applicant's immediate commander formally recommended her separation from service, before the expiration of her term of service, under the provisions of Army Regulation 635-200, paragraph 14-12b, by reason of a pattern of misconduct. He further recommended rehabilitative requirements be waived and the issuance of an under honorable conditions (general) characterization of service. The intermediate commander concurred with the recommendation.

10. The separation authority approved the recommended separation action, waived further rehabilitative requirements and transfer to the Individual Ready Reserve, and directed the issuance of a general discharge.

11. The applicant was discharged on 11 June 2002, under the provisions of Army Regulation 635-200, paragraph 14-12b, by reason of misconduct, in the grade of E-1. Her DD Form 214 confirms her character of service was under honorable conditions (general) with separation code JKA and reentry code of 3. She was credited with 2 years, 2 months, and 6 days of net active service. She was awarded or authorized the National Defense Service Ribbon and Army Service Ribbon.

12. The applicant's record is void of evidence that substantiates her contentions regarding Don't Ask Don't Tell or her reported homosexuality, or that shows homosexuality was a factor in her separation proceedings.

13. The ABCMR reviewed the applicant's request for an upgrade of her under honorable conditions (general) characterization of service on 19 January 2021. The Board determined the evidence presented did not demonstrate the existence of a probable error or injustice and therefore the Board determined the overall merits of the case were insufficient as a basis for correction of the records pertaining to the applicant.

14. The applicant provides her final judgment of dissolution of marriage with dependent or minor child(ren) showing restoration of her name change and medical documentation showing she lives with her female partner, and she was diagnosed with alcohol dependency.

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 a 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. Background: The applicant is applying to the ABCMR requesting reconsideration of an upgrade to her characterization of service from under honorable conditions (general) to honorable. She contends she experienced an undiagnosed mental health condition and military sexual trauma/harassment (MST), as well as reprisal/whistleblower, that mitigates her misconduct.

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 into the Regular Army on 10 January 2000.
- The applicant was counseled on 12 occasions between May 2001 and March 2002, and she accepted NJP in September 2001 for wrongfully consuming alcohol while under the age of 21 years old and again in February 2002 for failure to go to her prescribed place of duty. Her commander initiated separation action against her under the provisions of Army Regulation 635-200, paragraph 14-12b, for a pattern of misconduct, and the separation authority approved the recommendation.
- The applicant was discharged on 11 June 2002, and she was credited with 2 years, 2 months, and 6 days of net active service.

c. Review of Available Records: The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts she is part of a protected class under "don't ask, don't tell" clause, and she was "approached by a NCO that blowed the whistle on my sexual orientation." She indicated a mental health condition, MST, and reprisal were involved with her discharge. She provided documentation from an inpatient hospital stay in December 2016, which indicated she made suicidal gestures while intoxicated, but she denied mental health symptoms while involuntarily hospitalized for one night. She was diagnosed with Alcohol Dependence and declined medication treatment. Documentation showed an alcohol abuse evaluation was conducted on 7 September 2001 as a result of the applicant's underaged drinking, and alcohol education was recommended. There was insufficient evidence that the applicant was diagnosed with a psychiatric condition while on active service.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed that the applicant engaged health care with the VA in 2020 and has been treated primarily through the ER for several physical health problems, but there is no documentation of any mental health related treatment or diagnoses. There is also no evidence of report of MST.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support that the applicant had a condition or experience that mitigates her misconduct.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts she had an undiagnosed mental health condition and MST experience at the time of the misconduct. There was evidence of an underaged drinking incident that occurred while on active service, and she provided

documentation of psychiatric hospitalization in 2016, which showed a diagnosis of Alcohol Dependence.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts she was experiencing a mental health condition and experienced MST while on active service.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. There are no medical or mental health records from her time in service that indicated mental health symptoms or diagnoses. The applicant provided only documentation of an inpatient stay in 2016 that showed a diagnosis of Alcohol Dependence. While there is insufficient evidence, beyond self-report, that the applicant was experiencing a mental health condition on active service, the applicant asserts a fully mitigating BH experience, MST. As there is an association between MST and avoidant behavior, disregard for authority, and alcohol use, there is a nexus between her experience of MST and her pattern of misconduct.

g. The applicant contends she a MST and was experiencing a mental health condition that mitigates her misconduct, and per Liberal Consideration her assertion of MST alone is sufficient for the board's consideration

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of her characterization of service. One potential outcome was to grant relief based on liberal consideration and the applicant's contentions of mental health. However, upon review of the applicant's petition, available military record and medical review, the Board concurred with the advising official finding insufficient evidence to support that the applicant had a condition or experience that mitigates her misconduct. The opine noted no medical or mental health records from the applicant's time in the service that indicated mental health symptoms or diagnoses.

2. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the pattern of misconduct during her 2-year period of active service. The applicant provided no post service achievements or character letters of support for the Board to weigh for consideration. The applicant was discharged for misconduct and was provided an under honorable conditions (general) characterization of service. Furthermore, the Board agreed the applicant's service does not meet the criteria for an

honorable discharge characterization. The Board found the applicant has not demonstrated by a preponderance of the evidence that any further discharge upgrade is warranted. Therefore, reversal of the previous Board determination is without merit and relief is denied.

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, 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.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

The Board found 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 to amend the decision of the ABCMR set forth in Docket Number AR20200003350 on 19 January 2021.

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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, USC, Section 1556, 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.

2. AR 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 by a preponderance of the evidence. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing. 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.

3. AR 635-200 sets forth the basic authority for the separation of enlisted personnel.

a. 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.

b. Paragraph 3-7b states a 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.

c. Chapter 14 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions (a pattern of misconduct consisting solely of minor military disciplinary infractions), a pattern of misconduct (consisting of discreditable involvement with civil or military authorities or conduct prejudicial to good order and discipline). Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter; however, the separation authority may direct a general discharge if merited by the Soldier's overall record.

4. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to 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.

5. 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//