

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 May 2024

DOCKET NUMBER: AR20230011041

APPLICANT REQUESTS: Upgrade of his under other than honorable conditions (UOTHC) discharge to honorable. Additionally, he requests personal appearance before the Board.

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Self-authored letter
- Character reference letter

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:

a. During a night out in Germany, he went out with several guys from his unit to drink some beer. He reached his limit, so he walked back to his barracks room and went to sleep. Later in the night, he was awakened. He felt a beard or stubble on his belly. He was startled, he jumped out of the bed and realized his roommate had just sexually assaulted him. He jumped up and immediately put his pants on. He then kicked the crap out of the Soldier. There was so much commotion that the duty Soldier came running up three flights of steps to see what was going on. At this point the Criminal Investigation Division (CID) was brought in. He was taken into CID headquarters and interrogated like he was the assailant. CID took his underwear from him for testing. When he reported back to work the next day, he was told he was "screwing up." They accused him of just trying to get discharged. This was not at all the case. Admittedly he had suffered from some growing pains while in the Army but this time he was the victim of a sexual assault. He was forced to continue to work beside the man that attacked him in his sleep. The Army covered up this crime.

b. He made a decision at the time he felt was best for him and his mental health. He was going to take leave one way or another, so he left and never returned. He still carries the weight of these events with him to this day. Looking back, he regrets the way that he left. He was desperate to free himself from the constant reliving of the events that took place. He has spent his life since then raising a family with his wife of more than 30 years. He has worked for his company for over 30 years.

3. On his DD Form 149, the applicant notes issues from sexual assault/harassment are related to his request.

4. On 23 June 1981, the applicant enlisted in the Regular Army for a period of 3 years. Upon completion of training, he was awarded military occupational specialty 45K (Tank Turret Repairer).

5. On 15 October 1981, the applicant was reported as absent without leave (AWOL) and remained absent until he returned to military control on 20 October 1981.

6. On 20 October 1981, the applicant received non-judicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ), for going AWOL. His punishment included forfeiture of \$128.00, suspended for 60 days; and 14 days restriction and extra duty.

7. On 2 April 1983, the applicant was reported as AWOL a second time, and remained absent until he returned to military control on 29 April 1983.

8. A CID Report of Investigation established that on 2 August 1983 while the applicant slept, another Soldier performed fellatio on him without his knowledge or consent.

9. On 20 November 1983, the applicant was reported as AWOL a third time.

10. On 10 December 1983, the applicant was reported as AWOL a fourth time, and remained absent until he returned to military authorities on 17 January 1984.

11. On 17 January 1984, the applicant voluntarily declined a separation medical examination.

12. Court-martial charges were preferred against the applicant for violations of the UCMJ; however, the relevant DD Form 458 (Charge Sheet) is not available for review.

13. The applicant's record is void of a separation packet containing the specific facts and circumstances surrounding his discharge processing. However, in a statement dated 20 January 1984, the applicant admitted to going AWOL from 10 December 1983

to 17 January 1984. He made the admission for administrative purpose only so he could process out of the Army and realized in doing so, he may receive an UOTHC discharge.

14. On 20 January 1984, the applicant was placed on excess leave for an indefinite period of time.

15. The applicant was discharged on 19 March 1984. His DD Form 214 confirms he was discharged under the provisions of Army Regulation 635-200, Chapter 10, for the good of the service – in lieu of court-martial. He was discharged in the lowest enlisted grade and his service was characterized as UOTHC. He was assigned Separation Code KFS and Reentry Codes 3B and 3. He completed 2 years, 6 months, and 20 days of net active service this period with 68 days of lost time.

16. The applicant provides a character reference letter from his stepdaughter, an Air Force Veteran, attesting to that applicant's recollection of the military sexual trauma (MST) incident. She affirms the applicant is an incredible provider, a dedicated employee, and an amazing husband, father and son. This letter is provided in its entirety for the Board's review within the supporting documents.

17. The applicant was charged due to the commission of an offense punishable under the UCMJ with a punitive discharge. Subsequent to being charged, he consulted with counsel and requested discharge under the provisions of Army Regulation 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.

18. In reaching its determination, the Board can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance.

19. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) discharge. On his DD Form 149, the applicant notes sexual assault/harassment as related to his request.

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 23 June 1981.
- On 15 October 1981, the applicant was reported as absent without leave (AWOL) and remained absent until he returned to military control on 20 October 1981.
- On 20 October 1981, the applicant received non-judicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ), for going AWOL.

- On 2 April 1983, the applicant was reported as AWOL a second time, and remained absent until he returned to military control on 29 April 1983.
- On 20 November 1983, the applicant was reported as AWOL a third time.
- On 10 December 1983, the applicant was reported as AWOL a fourth time, and remained absent until he returned to military authorities on 17 January 1984.
- The applicant's record is void of a separation packet containing the specific facts and circumstances surrounding his discharge processing. However, in a statement dated 20 January 1984, the applicant admitted to going AWOL from 10 December 1983 to 17 January 1984. He made the admission for administrative purposes only so he could process out of the Army and realized in doing so, he may receive an UOTHC discharge.
- Applicant was discharged on 19 March 1984. His DD Form 214 confirms he was discharged under the provisions of Army Regulation 635-200, Chapter 10, for the good of the service – in lieu of court-martial. He was discharged in the lowest enlisted grade and his service was characterized as UOTHC. He was assigned Separation Code KFS and Reentry Codes 3B and 3.

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 via his self-authored statement: "I was awakened. I felt a beard or stubble on my belly. I was startled, I jumped out of the bed and realized my roommate had just Sexually Assaulted me.... I was then taken into CID Headquarters where I was interrogated like I was the assailant. The CID even went as far as to take my underwear from me for testing. When I reported back to work the next day I was told "Busch you're screwing up". They accused me of just trying to get discharged." Due to the period of service no active-duty electronic medical records were available for review. However, a CID Report of Investigation, dated 11 October 1983, states on 2 August 1983 while the applicant was asleep another soldier performed "fellatio" without his "knowledge or consent".

d. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is not service connected and has not participated in services via the VA, likely due to the characterization of his discharge.

e. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to support the applicant had an experience of MST that mitigates his misconduct.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts he experienced MST.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced an incident of MST while in military service.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. The applicant asserts a mitigating experience of MST, and this is documented in a CID Report of Investigation dated 11 October 1983.

g. As there is an association between MST and avoidant behavior, there is a nexus between his experience of MST and his offense of being AWOL.

h. Per Liberal Consideration, the applicant's assertion of MST is sufficient to warrant consideration by the Board.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was/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 his characterization of service. Upon review of the applicant's petition, available military records and the medical review, the Board concurred with the advising official finding sufficient evidence to support the applicant had an experience of MST that mitigates his misconduct.

2. The Board determined there is sufficient evidence of in-service mitigating factors to overcome the applicant discharge characterization. The Board found the applicant discharge as harsh and warrants clemency with an upgrade to under honorable (general) conditions characterization of service and amending his narrative reason for separation as secretarial authority. Based on the preponderance of evidence and the advising official opine, the Board granted relief.

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:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
█	█	█	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by re-issuing the applicant a DD Form 214 showing his characterization of service as under honorable (general) conditions and the narrative reason as secretarial authority.
2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to an upgrade of his under other than honorable conditions (UOTHC) discharge to honorable.

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I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to

timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the ARBA be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

3. 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.

a. Paragraph 2-9 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.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

4. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

a. 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. 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 10 provided that a member who had committed an offense or offenses, for which the authorized punishment included a punitive discharge, could submit a request for discharge for the good of the service in lieu of trial by court-martial. The request could be submitted at any time after charges had been preferred and must have

included the individual's admission of guilt. Although an honorable or general discharge was authorized, a UOTHC discharge was normally considered appropriate.

5. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Navy Records (BCM/NR), on 3 September 2014, to carefully consider the revised post-traumatic stress disorder (PTSD) criteria, detailed medical considerations, and mitigating factors when taking action on applications from former service members administratively discharged UOTHC and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

6. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. 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 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. 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. 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//