

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 14 May 2024

DOCKET NUMBER: AR20230011400

APPLICANT REQUESTS: an upgrade of his under honorable conditions (general) character of service and a personal appearance before the Board.

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

DD Form 149 (Application for Correction of Military Record)

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 that most of what happened to him while enlisted caused mental damage and was the cause for his separation. He notes post-traumatic stress disorder (PTSD), other mental health, and sexual assault/harassment as conditions related to his request.
3. The applicant enlisted in the Regular Army on 22 November 1995 for a 4-year period. Upon completion of initial entry training, he was awarded military occupational specialty 19K (M1 Armor Crewman). The highest rank he attained was private/E-2.
4. The applicant accepted non-judicial punishment, under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) on 3 March 1998, for orally communicating indecent language to a female and wrongfully committing an indecent act with a female, on or about 26 January 1998. His punishment consisted of reduction to private/E-2, forfeiture of \$519.00 pay per month for two months (suspended, to be automatically remitted if not sooner vacated before 3 June 1998), 45 days of extra duty, and 45 days of restriction.
5. A DA Form 268 (Report to Suspend Favorable Personnel Actions [FLAG]) was initiated by the applicant's immediate commander on 6 March 1998, by reason of adverse action.

6. The suspension of the punishment of forfeiture of \$519.00 pay per month for two months, imposed on 3 March 1998, was vacated, and ordered duly executed on 17 March 1998. The vacation of the suspension was based upon the applicant's failure to go at the time prescribed to his appointed place of duty, on or about 9 March 1998.

7. The applicant accepted non-judicial punishment, under the provisions of Article 15 of the UCMJ on 5 May 1998, for being absent without authority (AWOL), on or about 9 March 1998 until on or about 31 March 1998. His punishment consisted of reduction to private/E-1, 14 days of extra duty, and 14 days of restriction.

8. The applicant's immediate commander notified the applicant on 7 May 1998 of his intent to initiate separation action against him under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), paragraph 14-12b, for patterns of misconduct. As the reasons for the proposed separation action, the commander noted the applicant wrongfully committed an indecent act with a female not his wife, was AWOL, and failed to go at the time prescribed to his appointed place of duty. The applicant acknowledged receipt on that same date.

9. On 12 May 1998, the applicant consulted with legal counsel.

a. He acknowledged being advised of the basis for the contemplated separation action and its effects; of the rights available to him; and the effect of waiving those rights. He further acknowledged understanding that he may expect to encounter substantial prejudice in civilian life if an under honorable conditions (general) discharge were issued to him and that he may be ineligible for many or all benefits as a Veteran under Federal and State laws as a result of the issuance of an under other than honorable conditions discharge.

b. In an attached statement, the applicant stated, in effect, he did not want to end his career in the Army and would do everything possible to avoid termination of his service. The discharge he was receiving would not only end his military career, but his life after the Army. He would not be able to go to college, get a degree, and send his daughter to college in the future. His grandfather and uncle died, causing him to lose motivation and making it harder to cope. He apologized for his actions and further stated there was no excuse for what he did.

c. Two additional attached statements, from First Lieutenant R.R. and Sergeant H.W., attest to the applicant's potential to be a good Soldier. Both author's state his conduct was acceptable, he performed his duties to the best of his ability, and he was always "squared away."

10. On 13 May 1998, the applicant's immediate commander formally recommended his separation, prior to the expiration of his term of service, under the provisions of AR 635-

200, paragraph 14-12b, by reason of patterns of misconduct. He further recommended the issuance of an under honorable conditions (general) characterization of service. The intermediate commander concurred with the recommendation.

11. The separation authority approved the recommended separation on 20 May 1998, waived the rehabilitative requirements, and directed the issuance of a General Discharge Certificate.

12. The applicant was discharged on 8 June 1998, under the provisions of AR 635-200, paragraph 14-12b, by reason of misconduct. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms his character of service was under honorable conditions (general), with separation code JKA and reentry code RE-3. He was credited with 2 years, 5 months, and 25 days of net active service, with lost time from 9 March 1998 to 30 March 1998.

13. The Army Discharge Review Board considered the applicant's request for a discharge upgrade on 6 December 2000. After careful review, the Board determined the applicant was properly and equitably discharged. The Board denied his request.

14. Regulatory guidance provides when an individual is discharged under the provisions of AR 635-200, Chapter 14, the separation authority may direct a general discharge if such is merited by the Soldier's overall record. Characterization of service as honorable is not authorized unless the Soldier's record is otherwise so meritorious that any other characterization clearly would be inappropriate.

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

16. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade of his under honorable conditions (general) character of service. He contends he experienced an undiagnosed mental health condition, including PTSD, and MST that mitigates his 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 22 November 1995.
- On 7 May 1998 the applicant was notified of his commander's intent to initiate separation action against him under the provisions of Army Regulation (AR) 635-200, paragraph 14-12b, for patterns of misconduct. As the reasons for the proposed separation action, the commander noted the applicant wrongfully committed an indecent act with a female not his wife, was AWOL, and failed to

go at the time prescribed to his appointed place of duty. The applicant acknowledged receipt on that same date.

- The applicant was discharged on 8 June 1998 and was credited with 2 years, 5 months, and 25 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 events that occurred while he was enlisted caused "mental damage" and were the cause of his separation. He asserts being diagnosed with PTSD, depression, MST, and anxiety, but he did not provide any medical or mental health documentation. Notably, according to a Record of Proceedings dated 3 March 1998 the explanation of the "indecent act" was as follows: orally communicated certain indecent language, "baby did you come to see me play" and committing an indecent act by "rubbing (his) body against her back." There was insufficient evidence that the applicant was diagnosed with PTSD, MST, or another psychiatric condition while on active service.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed that the applicant initially engaged in mental health treatment following a call to the Veterans Crisis Line in May 2016, and he reported primarily work and relationship stressors during his intake in June 2016. His next follow up was in 2018 when he reported MST while on active service in 1996. Documentation discusses intrusive memories, nightmares, hyperarousal symptoms, and emotional lability, and he was started on medication for sleep and mood. Records from 2019 show medication titrations or different trials of medications by a psychiatrist and marital therapy through a psychologist. The primary diagnoses per his providers were: Unspecified Anxiety, Unspecified Depression, Major Depressive Disorder, and PTSD. From 2020 through 2024, the applicant was seen intermittently for medication management, marital problems/therapy, risk of homelessness, and job loss. A note dated 9 January 2024 by his psychologist indicated he presented related to job loss and marital problems, and he had not been awarded "a pension for MST." The remainder of the documentation to date includes services related to homelessness.

e. Two Disability Benefits Questionnaires (one specific to PTSD) by two separate psychologists dated in January 2023 were reviewed. Both showed evidence of symptoms of PTSD and Depression associated with a sexual assault by a superior and concluded that the claimed condition (MST) was as likely as not due to claimed in-service MST stressors.

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

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts he had experienced MST, resulting in PTSD, at the time of the misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing MST, resulting in PTSD, while on active service.

(3) Does the condition or experience actually excuse or mitigate the discharge? Partial. The applicant asserts a mitigating BH experience, PTSD as a result of MST and this is documented in his VA treatment records as well as two DBQs. There is no in-service documentation of his MST, mental health diagnosis, or treatment.

h. As there is an association between PTSD and avoidant behavior, there is a nexus between his experience of MST and resultant PTSD and his offense of being AWOL as well as not being at his appointed place of duty. However, there is no nexus between PTSD and his misconduct related to wrongfully committing an indecent act with a female: 1) these types of misconduct are not part of the natural history or sequelae of his mental health conditions; 2) his mental health conditions do not affect one's ability to distinguish right from wrong and act in accordance with the right.

i. Nonetheless, the applicant contends he developed PTSD as a result of MST that mitigates his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

1. The Board determined 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.

2. 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 request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, the applicant's record of service, the frequency and nature of the applicant's misconduct and the reason for separation.

a. The applicant served on active duty from 22 November 1995 to 8 June 1998, completing 2 years, 5 months, and 25 days of net active service, with lost time from 9 March 1998 to 30 March 1998. He was discharged from active duty due to a pattern of misconduct following wrongfully committing an indecent act with a female not his wife, being AWOL, and failing to go at the time prescribed to his appointed place of duty. He received a general discharge. The Board found no error or injustice in his separation processing.

b. The Board reviewed and agreed with the medical reviewer’s finding sufficient evidence to support that the applicant had a condition or experience that partially mitigates his misconduct. As there is an association between PTSD and avoidant behavior, there is a nexus between his PTSD and his offense of being AWOL as well as not being at his appointed place of duty. However, there is no nexus between PTSD and his misconduct related to wrongfully committing an indecent act with a female. Despite the partial mitigation, the Board determined that an honorable characterization of service is appropriate under published DoD guidance for liberal consideration of discharge upgrade requests. The Board determined that the applicant received an appropriate character of service and that there is neither an error nor an injustice.

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:

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

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

REFERENCES:

1. Title 10, USC, 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. 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.

3. 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 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.

4. AR 635-200, in effect at the time, 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.

5. 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 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 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. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

6. 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. 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. 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//