

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 June 2024

DOCKET NUMBER: AR20230012129

APPLICANT REQUESTS: reconsideration of his prior requests for:

- an upgrade of his under other than honorable conditions discharge
- a change in the narrative reason for separation with respective separation code
- a change in the reentry code
- as a new request, a separate DD Form 214 (Certificate of Release or Discharge from Active Duty) for his first enlistment period
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) Benefits Letter, 8 August 2023
- VA Rating Decision

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 AR20200000341 on 27 April 2021.

2. The applicant states he should possess a DD Form 214 for his first enlistment period from 1 June 1995 to 27 May 1998 with an honorable discharge and a separation code of "FHC," with reentry code 1. He would like the issuance of that discharge certificate to reflect his meritorious, good conduct, and honorable service from the first enlistment. Additionally, the second DD Form 214 for the period of service from 28 May 1998 to 26 January 2001 should be upgraded to general, under honorable conditions with a separation under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 5-13 or 5-17 with the corresponding separation code (DER or FJJ) and reentry code 3 with the narrative reason for separation displaying his disability due to post-traumatic stress disorder (PTSD).

a. The applicant cites the guidance for veterans diagnosed with PTSD who receive other than honorable discharges may petition and be granted an upgrade based off of

the evidence of PTSD, which the applicant states he provides. He believes his PTSD extended to his second period of service and resulted in his discharge. The prior decision did not thoroughly investigate the entirety of the psychological evidence required to make a proper and just decision. The applicant also marked PTSD, traumatic brain injury (TBI), other mental health, and sexual assault/harassment as conditions related to his request on the DD Form 149.

b. The VA investigated and found the facts which he believes exposed the whole truth about his disabilities. He suffered mental, emotional, and psychological pain on his own. It took him years of therapy to open up with the whole truth. He attempted to request an upgrade without providing details of the full trauma and failed. Without the medical evidence that he now has, he was unable to prove his case to the Board. Now he is opening up and providing the full details for review and decision. He deserves the correction for the 28 years of pain and suffering.

3. The applicant provides a VA benefits letter with accompanying rating decision which shows in part, the applicant received service connection for PTSD with alcohol abuse disorder with an evaluation of 50% effective 23 January 2023, and service connection for anxiety, depression, and head injury were denied. The applicant was also granted service connection for several physical conditions.

4. A review of the applicant's service record shows:

a. He enlisted in the Regular Army on 1 June 1995.

b. A DD Form 616 (Report of Return of Absentee) shows the applicant was apprehended on 2 November 1999, returned to military control and transferred to the Personnel Control Facility at Fort Knox, KY.

c. A DD Form 458 (Charge Sheet) shows on 8 November 1999, court-martial charges were preferred on the applicant for one specification of being absent without leave (AWOL) from on or about 14 July 1999 until on or about 2 November 1999.

d. On 8 November 1999, after consulting with legal counsel he requested a discharge in lieu of trial by courts-martial under the provisions of AR 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10. He acknowledged:

- maximum punishment
- he was guilty of the charges against him or of a lesser included offense
- he does not desire further rehabilitation or further military service
- if his request for discharge was accepted, he may be discharged under other than honorable conditions and furnished an Under Other Than Honorable Conditions Discharge Certificate

- he would be deprived of many or all Army benefits, he may be ineligible for many or all benefits administered by the Veterans Administration,
- he may be deprived of his rights and benefits as a Veteran under both Federal and State law
- he may apply to the Army Discharge Review Board or the ABCMR for upgrading
- he may expect to encounter substantial prejudice in civilian life
- he elected to submit matters

e. A personal statement from the applicant dated 8 November 1999 taking ownership for his AWOL from 14 July 1999 through 2 November 1999. He further noted he was requesting a general, under honorable conditions discharge because he had one honorable period of service and had received an Army Good Conduct Medal. He had hopes to serve in the U.S. Army Reserve to retain his military skills, and the reason he went AWOL was because he had knowledge of drug transactions, drug dealers names, and uneasy about the decision which led him to make a bad decision.

f. On 19 December 2000, consistent with the chain of command recommendations, the separation authority approved the applicant's request for discharge in lieu of trial by courts-martial under the provisions of AR 635-200, Chapter 10. He would be issued an under other than honorable conditions discharge and reduced to the lowest enlisted grade, private/E-1.

g. On 26 January 2001, he was discharged from active duty with an under other than honorable conditions characterization of service. His DD Form 214 shows he completed 5 years, 4 months, and 5 days of active service with 112 days of lost time. He was assigned separation code KFS and the narrative reason for separation listed as "In Lieu of Trial by Court-Martial," with reentry code 4. It also shows he was awarded or authorized:

- Army Good Conduct Medal
- National Defense Service Medal
- Army Service Ribbon
- Marksman Marksmanship Qualification Badge with Rifle Bar (M-16)

5. On 4 May 2005, the Army Discharge Review Board (ADRB) reviewed the applicant's discharge processing but found it proper and equitable. The ADRB denied his request for an upgrade of his discharge.

6. On 27 April 2021, the ABCMR rendered a decision in Docket Number AR2020000341. The Board found insufficient evidence if in-service mitigating factors for the misconduct. The Board considered the post-service documents provided by the applicant, but did not find them sufficient to support a determination of clemency.

Based on a preponderance of evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

7. By regulation (AR 15-185), an applicant is not entitled to a hearing before the ABCMR. Hearings may be authorized by a panel of the ABCMR or by the Director of the ABCMR.

8. By regulation (AR 635-5), the DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of release from active duty, retirement, or discharge. The information entered thereon reflects the conditions as they existed at the time of separation.

9. By regulation (AR 635-200), an individual who has committed an offense or offenses, the punishment for which, includes a bad conduct or dishonorable discharge, may submit a request for discharge in lieu of trial by court-martial. An Under Other than Honorable Discharge Certificate normally is appropriate for a member who is discharged in lieu of trial by court-martial.

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

11. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions discharge, a change to his narrative reason for separation, and other changes to his DD214. He also requests a separate DD214 for his second enlistment with a separation of a Chapter 5-13 or 5-17 with a narrative reason for separation displaying "due to PTSD." He contends he experienced traumatic brain injury (TBI), military sexual trauma (MST), and resultant mental health conditions including PTSD 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: 1) The applicant enlisted in Regular Army on 1 June 1995; 2) On 8 November 1999, court-martial charges were preferred on the applicant for being AWOL from 14 July- 2 November 1999; 3) The applicant was discharged on 26 January 2001, Chapter 10- In Lieu of Trial by Court-Martial." His characterization of service was under other than honorable conditions.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service records. The VA's Joint Legacy Viewer (JLV) was also examined.

d. On his application, the applicant noted TBI, MST, and resultant mental health conditions including PTSD were related to his request as contributing and mitigating factors in the circumstances that resulted in his separation. The applicant made a personal statement on 08 November 1999 that he went AWOL due to his knowledge of drug transactions and drug dealers' names. He hoped to have a general, under honorable discharge to continue his service in the U.S. Army Reserve.

e. A review of JLV provided evidence the applicant has engaged with the VA for care starting in 2023. In June 2023 during his Compensation and Pension Evaluation, he reported experiencing MST in 1995 and then later during his active service. The applicant was diagnosed with service-connected PTSD as a result of his report of MST, and he has been engaged with behavioral health treatment for Depression, substance abuse, Borderline Personality Disorder, TBI, and PTSD since 2023.

f. Based on the available information, it is the opinion of the Agency BH Advisor that there is sufficient evidence to support the applicant had 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 contends he experienced TBI, MST, and resultant mental health conditions including PTSD while on active service. The applicant was diagnosed with service-connected PTSD related to MST by the VA. He has also been diagnosed with a TBI and other mental health conditions along with a personality disorder.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he experienced MST and resultant mental health conditions including PTSD while on active service. The applicant was diagnosed with service-connected PTSD related to MST by the VA. He has also been diagnosed with a TBI and other mental health conditions along with a personality disorder.

(3) Does the condition experience actually excuse or mitigate the discharge? Yes, there is sufficient evidence the applicant reported in 2023 experiencing MST early in his military career (1995), and he has been diagnosed with service-connected PTSD related to this experience of MST. In addition, he has been diagnosed and currently being treated for other mental health conditions and at TBI within the VA system of care. The applicant did go AWOL, which is avoidant behavior. Avoidant behavior is a natural sequelae to PTSD. However, the applicant's request for a Chapter 5-17 or 5-13 discharge is not an appropriate for the applicant's situation, and there is insufficient evidence to warrant a referral to IDES. Therefore, there is sufficient evidence the applicant's misconduct is mitigatable in accordance with Liberal Consideration, and it recommended the narrative reason for his separation be amended to Secretarial Authority.

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. Upon review of the applicant's petition, available military record and medical review, the Board carefully considered the advising official opine finding sufficient evidence to support the applicant had condition or experience that mitigates his misconduct. Notwithstanding the opine that a discharge upgrade and change to his narrative reason based on a mental health condition and MST is warranted. In addition, the Board noted, the opine finding that PTSD is associated with avoidance behaviors. However, the Board determined there is insufficient evidence of in-service mitigating factors to overcome the misconduct of being AWOL 111 days and being apprehended by authorities.
2. Although the applicant accepts responsibility for his actions and was remorseful with his application, demonstrating he understands his actions were not that of all Soldiers. The Board found the applicant provided no post service achievements or character letters of support for the Board to consider in the determination for clemency. Furthermore, the Board understands many sexual assault victims do not sometimes report the incident. However, when prepondering evidence, there are sometimes symptoms of MST displayed by victims prior to their separation. Personal MST statements provided to the VA are not always corroborated.
3. The Board considered the applicant prior period of honorable service and all the opine factors, however, the Board determined that the character of service the applicant received upon separation was not in error or unjust and warrants an upgrade. The Board applied Department of Defense standards of liberal consideration to the complete evidentiary record and did not find any evidence of error, injustice, or inequity; the reentry code was correctly provided at his time of separation. The Board found the narrative reason and separation code was not in error or unjust based on the applicant's discharge. The Board agreed, the applicant's prior periods of continuous honorable service are reflected on his DD Form 214 in item 18 (Remarks), a copy can also be requested through the National Archives. Therefore, the Board found reversal of the previous Board determination is not warranted and denied relief.
4. 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:

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 AR20200000341 on 27 April 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. 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 ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. 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.

2. Army Regulation 635-5 (Separations Documents) in effect at the time, states the DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of release from active duty, retirement, or discharge. The information entered thereon reflects the conditions as they existed at the time of separation. Block 28 (Narrative Reason) is based on regulatory or other authority and can be checked against the cross reference in AR 635-5-1 (Separation Program Designator (SPD) Codes).

3. Army Regulation 635-5-1 (Separation Program Designator Codes), in effect at the time, provides separation program designator (SPD) codes are three-character alphabetic combinations that identify reasons for, and types of, separation from active duty. The narrative reason for the separation will be entered in Block 28 of the DD Form 214 exactly as listed in the regulation. The separation code KFS lists the narrative reason for separation as "In Lieu of Trial by Court-Martial," under the provisions of AR 635-200, chapter 10.

4. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a (Honorable Discharge) states an honorable discharge is a separation with honor. 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 (General Discharge) states a general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 5-13 of the regulation states a Soldier may be separated for personality disorder (not amounting to disability (see AR 635-40), that interferes with assignment or

with performance of duty. This condition is a deeply ingrained maladaptive pattern of behavior of long duration that interferes with the soldier's ability to perform duty.

d. Chapter 5-17 states Soldiers may be separated under this paragraph on the basis of other physical or mental conditions not amounting to disability (AR 635-40) and excluding conditions appropriate for separation processing under paragraph 5-11 or 5-13 that potentially interfere with assignment to or performance of duty.

e. Chapter 10 of this regulation states an individual who has committed an offense or offenses, the punishment for any of which includes a bad conduct discharge or dishonorable discharge, may submit a request for discharge in lieu of trial by court-martial. An Under Other than Honorable Discharge Certificate normally is appropriate for a member who is discharged in lieu of trial by court-martial.

5. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to carefully consider the revised PTSD criteria, detailed medical considerations, and mitigating factors, when taking action on applications from former service members administratively discharged under other than honorable conditions, 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. 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 DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole, or in part, to: mental health conditions, including PTSD; TBI; sexual assault; sexual harassment. Boards were directed to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part to 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 that misconduct which led to the discharge.

7. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (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 based on equity, injustice, or clemency grounds, BCM/NRs 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.

8. Section 1556 of Title 10, United States Code, 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.

//NOTHING FOLLOWS//