

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 July 2024

DOCKET NUMBER: AR20230012170

APPLICANT REQUESTS:

- an upgrade of his under other than honorable conditions discharge
- a video/telephonic appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- E-mail from Applicant
- Psychological Report, 4 November 2022
- Medical Document Screenshot of Post-Traumatic Stress Disorder (PTSD)

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 since 2017 his life has been at a standstill. He cannot get a good job or even his old job at the back due to this coming up and not being able to get a security clearance. He has to deal with rejection over and over due to this issue. He tried to apply when he first got out and was denied, so he is hoping as times change, and people are exposed for the very thing that happened to him. But because he was active, gay, and black no justice was given. The applicant annotates PTSD and sexual assault/harassment as an issue/condition related to his request.
3. The applicant enlisted in the Regular Army on 6 May 2014.
4. A Criminal Investigation Division (CID) report shows the applicant was investigated for the offenses of sexual assault, obstructing justice, and false official statement. The offenses occurred between 18 November 2016 to 19 November 2016 and between 3 February 2017 to 6 February 2017.

a. A Sexual assault was reported regarding a Soldier who stated he attended an off post gathering at the applicant's residence and after he consumed numerous alcoholic beverages before and during the gathering, he fell asleep and awoke as the applicant performed sexual acts on him. The applicant admitted he performed sexual acts on him; however, denied the Soldier was asleep and stated he gestured towards his genital area as if to infer he wanted the applicant to perform sexual acts on him.

b. Further investigation consisted of an interview with the applicant who received a Facebook message from another Soldier stating sorry for what is going on but could not let what really happened that night get out was not trying to ruin his career.

5. Court martial charges were preferred against the applicant on 27 January 2017, for violation of the Uniform Code of Military Justice (UCMJ). His DD Form 458 (Charge Sheet) shows he was charged with:

- committing a sexual act upon PV2 GB\_\_ who was incapable of consenting to the sexual act due to impairment by a drug, intoxicant, or other similar substance and that condition was known or reasonably should have been known by the applicant on or about 18 November 2016
- committing a sexual act upon PV2 GB\_\_ when the applicant knew or reasonably should have known PV2 GB\_\_ was unconscious on or about 18 November 2016
- committing a sexual act upon PV2 GB\_\_ by causing bodily harm to him on or about 18 November 2016

6. The applicant consulted with legal counsel on 9 May 2017, and was advised of the basis for the contemplated trial by court-martial; the maximum permissible punishment authorized under the UCMJ; the possible effects of an under other than honorable conditions discharge and the procedures and rights that were available to him.

a. After consulting with legal counsel, he voluntarily requested discharge under the provision of Army Regulation (AR) 635-200 (Active-Duty Enlisted Administrative Separations), Chapter 10, in for the good of the service, lieu of trial by court-martial. He further acknowledged he understood that if his discharge request was approved, he could be deprived of many or all Army benefits, he could be ineligible for many or all benefits administered by the Veterans Administration (VA), and he could be deprived of his rights and benefits as a veteran under both Federal and State laws and he may expect to encounter substantial prejudice in civilian life because of an under other than honorable conditions discharge.

b. He elected to submit statements in his own behalf. He stated he became a Soldier to carry on the tradition in his family and help provide for his mother. He was selected to work for the battalion command group above his peers by his Command Sergeant Major. He worked successfully for three lieutenant colonels during his time at

Fort Stewart, GA. Once he was relieved from his duty at battalion he was selected to work at Headquarters and Headquarters Company as the sole orderly room clerk, where he was trusted to handle all issues dealing with the company's Soldiers. He has always handled any responsibility entrusted to him. He requested that his Chapter 10 be accepted as a under honorable conditions (General) discharge so he might be able to continue his employment with his previous employer and provide for his family and himself after the military. If he was given an under other than honorable conditions discharge, he would not be able to continue working with them.

7. The separation authority approved the applicant's request for discharge in lieu of trial by court-martial. He directed the applicant's reduction to the lowest enlisted grade with the issuance of a under other than honorable conditions discharge. The applicant would not be transferred to the Individual Ready Reserve (IRR).

8. The applicant was discharged on 6 July 2017. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of Army Regulation 635-200, Chapter 10, in lieu of trial by court-martial with Separation Code KFS and Reentry Code 4. His service was characterized as under other than honorable conditions. He completed 3 years, 2 months, and 1 day of active service. He was awarded the Army Achievement Medal, Global War on Terrorism Service Medal, Army Service Ribbon, and a Certificate of Achievement.

9. The applicant was charged due to the commission of an offense punishable under the UCMJ with a punitive discharge. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.

10. The applicant provides:

a. An email that shows he provided medical documents.

b. Psychological Report, dated 4 November 2022, shows the applicant experienced traumatic events while doing contracted work as an ammunition supply specialist overseas as part of his post military job in Iraq. The applicant denies having been exposed to any traumatic event in the Army. Post Army he was exposed while in Iraq and Afghanistan. The applicant developed symptoms consistent with PTSD due to his work-related overseas experiences that appears to have a clear onset during the second part of the Iraq deployment. No presence or previous history of mental health illness prior to being deployed overseas. He started to experience symptoms of depression, anxiety, and PTSD due to work experiences while overseas and employed in Iraq during 2020-2022.

11. On 10 March 2020, the Army Discharge Review Board (ADRB) determined he was properly and equitable discharged and the applicant's request for a change in the characterization of service and/or narrative reason of his discharge was denied.

12. On 29 July 2022, the ADRB determined he was properly and equitable discharged and the applicant's request for a change in the characterization of service and/or narrative reason of his discharge was denied.

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

14. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) discharge. He contends he experienced PTSD and sexual assault/harassment. 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 the Regular Army on 6 May 2014; 2) Court martial charges were preferred against the applicant on 27 January 2017 for committing a sexual act upon another Soldier, who could not consent due to being unconscious and resulted in causing bodily harm to that Soldier; 3) The applicant was discharged on 6 July 2017, Chapter 10, in lieu of trial by court-martial. His service was characterized as UOTHC; 6) The applicant's request for an upgrade was reviewed and denied by the Army Discharge Review Board (ADRB) on 10 March 2020 and on 29 July 2022.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's available military service records. The VA's Joint Legacy Viewer (JLV) and civilian medical documentation were also examined.

c. The applicant asserts he was experiencing sexual assault/harassment and PTSD while on active service, which mitigates his misconduct. There is insufficient evidence the applicant reported or was exposed to sexual assault beyond his charges of being a perpetrator of sexual assault. Early in March 2017, the applicant started to engage in behavioral health treatment due to the legal and occupational stressors and resultant mental health symptoms. The applicant was seen consistently up his discharge and was predominately diagnosed with a reaction to stress. The applicant was also prescribed psychiatric medication. He was not diagnosed with PTSD or was reported to be exposed to a potentially traumatic event including sexual assault while on active service.

d. A review of JLV provided evidence the applicant reported symptoms of anxiety and depression following his active service discharge related to the stress of his sexual assault charges. However, he has not continued in behavioral health treatment at the

VA, and he has not been diagnosed with service-connected PTSD or any other mental health condition. The applicant provided civilian medical documentation, dated 4 November 2022, that states he meets criteria for PTSD due to his exposure to potentially traumatic events after his discharge, but the applicant did not report being exposed to trauma during his active service.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support 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 misconduct? Yes, the applicant asserts he experienced PTSD and sexual assault/harassment, which mitigates his misconduct. The applicant provided civilian medical documentation that he was diagnosed with PTSD as a result of experiences after his discharge.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced PTSD and sexual assault/harassment which mitigates his misconduct while on active service.

(3) Does the condition experience actually excuse or mitigate the misconduct? No, there is insufficient evidence beyond self-report the applicant was experiencing PTSD while on active service. In addition, the applicant was charged with being the perpetrator of sexual assault, and there is no nexus between PTSD and sexual assault/harassment and his sexual assault of another Soldier in that: 1) this type of misconduct is not a part of the natural history or sequelae of PTSD or sexual assault/harassment; 2) PTSD and sexual assault/harassment does not affect one's ability to distinguish right from wrong and act in accordance with the right. Yet, the applicant contends he was experiencing a mental health condition or an experience that mitigates his misconduct, and per Liberal Consideration his contention 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 request, supporting documents, evidence in the records, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was charged with committing sexual acts without consent, punishable under the Uniform Code of Military Justice with a punitive discharge. After being charged, he consulted with counsel and voluntarily requested

discharge in lieu of trial by court-martial. The Board found no error or injustice in the separation proceedings and designated characterization of service. The Board noted the applicant's contention that he suffered from post-traumatic stress disorder; however, was not convinced by a preponderance of the evidence, including the medical advisor's review finding no evidence to support a condition existed at the time of service, that mitigated the misconduct.

2. 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 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, 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 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.
4. AR 635-200 (Personnel Separations), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.
  - a. An honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier'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. When a Soldier is discharged before ETS for a reason for which an honorable discharge is discretionary, the following considerations apply. Where there have been infractions of discipline, the extent thereof should be considered, as well as the seriousness of the offense(s).

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 of that regulation provides that a Soldier who has committed an offense or offenses, the punishment for which includes a bad conduct or dishonorable discharge, may submit a request for discharge for the good of the service. The discharge request may be submitted after court-martial charges are preferred against the Soldier or where required, after referral, until final action by the court-martial convening authority.

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 Service 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. Boards are 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.

6. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and BCM/NRs on 25 July 2018, 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//