

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 July 2024

DOCKET NUMBER: AR20230012180

APPLICANT REQUESTS:

- an upgrade of her discharge under other than honorable conditions (UOTHC)
- to change her last name on her DD Form 214 (Certificate of Release or Discharge from Active Duty) to the name she is currently using
- to appear before the Board via video/telephone

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Self-authored statement
- Department of Veterans Affairs (VA) Form 21-4138 (Statement in Support of Claim)
- Social Security Administration card
- page from her U.S. Passport
- Eastern Oregon University Diploma
- Certificate of Recognition

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 provides a two-page self-authored statement that is available in its entirety for the Board's consideration. She states, in effect, she is requesting that her discharge be upgraded to honorable due to attempted sexual abuse and sexual harassment that she experienced from both officers and noncommissioned officers (NCOs) throughout her time in the Army. The majority of the harassment was from the men in charge and in positions of power. She was not harassed by other privates in her platoon. Other female Soldiers gave in and performed sexual acts, she did not.

a. The sexual harassment was so bad that she feared for her safety, had a panic attack, and decided to go absent without leave (AWOL) to escape the pressure. She turned herself in shortly thereafter and was sent to the holding unit where things were worse. She was sexually harassed by the male NCOs and verbally abused by the female NCOs. One of the male NCOs was particularly persistent and even tried to break into her room.

b. During the processing of her trial documents, she confided in an attorney and was essentially told that the only way for the abuse and harassment to stop would be to leave the Army. Her only options were to accept a general discharge or to be returned to her base in handcuffs and be yelled at and belittled in front of the entire unit (as she had previously witnessed).

c. She was told she was getting a "general" discharge and that it would be under honorable conditions. She only recently found out that her discharge was under other than honorable conditions.

d. Following her discharge, she immediately sought treatment for sexual harassment and was diagnosed and treated for post-traumatic stress disorder (PTSD), with counseling and medication. She went on to college and is currently working as a vocational counselor with a history in child welfare.

3. The applicant's enlistment documents are not available in her Official Military Personnel File. However, her DD Form 214 shows she enlisted in the Regular Army on 20 November 2001. She completed Basic Combat Training and was assigned to a unit at Fort Sam Houston, TX, to complete Advanced Individual Training.

4. The applicant's unit changed her duty status from:

- Present for Duty (PDY) to AWOL on 8 March 2002
- AWOL to Dropped from Rolls (DFR) on 7 April 2002

5. A DD Form 458 (Charge Sheet) shows on 22 May 2002, court-martial charges were preferred against the applicant for violation of Article 86 of the Uniform Code of Military Justice (UCMJ) for on or about 8 March 2002, without authority, absenting herself from her organization and remaining so absent until she was apprehended on or about 20 May 2002.

6. On 23 May 2002, the applicant voluntarily requested discharge under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), Chapter 10, for the good of the service in lieu of trial by court-martial. She consulted with legal counsel and was advised of the basis for the trial by court-martial; the maximum permissible punishment authorized under the UCMJ; the possible effects of a UOTHC

discharge; and the procedures and rights that were available to her. She elected not to submit statements in her own behalf and declined the opportunity to undergo a physical evaluation prior to separation.

7. On 3 July 2002, the applicant's immediate commander recommended approval of her request with the issuance of a discharge UOTHC.

8. The applicant's separation packet underwent a legal review by her defense counsel and there were no legal objections to further processing in accordance with her commander's recommendations.

9. On 9 July 2002, the separation authority approved the applicant's request for discharge in lieu of trial by court-martial, with her service characterized as UOTHC.

10. She was discharged on 24 July 2002 with an UOTHC discharge under the provisions of Army Regulation 635-200, Chapter 10, by reason of " In Lieu of Trial by Court-Martial." She completed 5 months and 22 days of active service.

11. The applicant's last name consistently appears as B_____Y on all of the documents in her record.

12. On 8 February 2024, in response to a written request, a member of the Army Criminal Investigation Division, informed a staff member of the Case Management Division of the Army Review Boards Agency (ARBA), that a search of the Army criminal file indexes revealed no Sexual Assault records pertaining to the applicant.

13. The applicant provides the following documents in support of her petition:

- a copy of her Social Security Administration card showing her last name as M_____r
- a copy of a page from her U.S. Passport showing her last name as M_____r
- an Eastern Oregon University Diploma showing she was awarded a Bachelor of Science degree in Integrative Studies with minors in Communication Studies and Anthropology Sociology on 19 March 2021
- an Eastern Oregon University Certificate recognizing the applicant as a 2021 Outstanding Student of Integrative Studies

14. Army Regulation 635-200 states a Chapter 10 is a voluntary discharge request in-lieu of trial by court-martial. In doing so, she would have waived her opportunity to appear before a court-martial and risk a felony conviction. A characterization of UOTHC is authorized and normally considered appropriate.

15. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition. By regulation, an applicant is not entitled to a hearing before the Board.

16. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to her characterization of service from under other than honorable conditions (UOTHC) to honorable. She contends she experienced sexual assault/harassment (MST) 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 20 November 2001.
- The applicant was AWOL from AIT on 8 March 2002 and was apprehended on 20 May 2002. She voluntarily requested discharge under Army Regulation 635-200, Chapter 10, for the good of the service in lieu of trial by court-martial, which was approved by her command then the separation authority.
- The applicant was discharged on 24 July 2002 and was credited with completing 5 months and 22 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 was sexually harassed and experienced attempted sexual assault while in basic training and AIT. She provided a two-page statement in regard to these events. The application did not include any medical or mental health records. There was insufficient evidence that the applicant was diagnosed with any psychiatric condition while on active service.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed no treatment through the VA or history of DoD medical or mental health treatment, but civilian documentation showed a history of prescriptions for an antidepressant medication and an antihistamine commonly used to treat anxiety.

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 was sexually harassed and experienced military sexual trauma leading up to the misconduct of being AWOL.

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

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. 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, such as being AWOL, there is a nexus between her experience of MST and her misconduct.

g. The applicant contends she experienced MST 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 and all supporting documents, the Board found that partial relief was warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive review based on law, policy and regulation. The governing regulation provides that a separation will be described as an entry-level separation, with service uncharacterized, if the separation action is initiated while a Soldier is in entry-level status. The Board found no error or injustice in the preparation of the separation document; however, as a matter of equity and the applicant's justification concerning her abuse and harassment, the Board determined an uncharacterized discharge was appropriate.

2. An uncharacterized discharge is not meant to be a negative reflection of a Soldier's military service. It merely means the Soldier has not been in the Army long enough for his or her character of service to be rated as honorable or otherwise.

3. As it relates to her request for a name change, the evidence presented does not demonstrate the existence of a probable error or injustice. The applicant used the contested name during her entire period of service. The Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned. Based on the service record and a preponderance of the evidence, the Board denied relief.

4. The Army has an interest in maintaining the integrity of its records for historical purposes. The information in those records must reflect the conditions and circumstances that existed at the time the records were created. In the absence of evidence that shows a material error or injustice, there is a reluctance to recommend that those records be changed.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

: : : 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 partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant's DD Form 214, for the period ending 24 July 2002, to show an uncharacterized discharge.

2. The Board further determined that 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 amending her name.

■

■ ■

■ ■

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 three 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 three-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 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.
4. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.
 - a. Chapter 10 stated a member who committed an offense or offenses for which the authorized punishment included a punitive discharge could, at any time after the charges have been preferred, submit a request for discharge for the good of the service in lieu of trial by court-martial. Although an honorable or general discharge was authorized, a discharge under other than honorable conditions was normally considered appropriate. At the time of the applicant's separation the regulation provided for the issuance of an UOTHC discharge.
 - b. 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.

c. 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.

d. When a Soldier was to be discharged UOTHC, the separation authority would direct an immediate reduction to the lowest enlisted grade.

5. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) 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. 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; 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. 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.

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, 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.

//NOTHING FOLLOWS//