

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 17 July 2024

DOCKET NUMBER: AR20230012867

APPLICANT REQUESTS: correction of his Army National Guard (ARNG) records to show:

- his ARNG character of service should be honorable instead of under other than honorable conditions
- his reason from separation from the ARNG should be medical instead of misconduct

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

- Online DD Form 149 (Application for Correction of Military Record)
- NGB Form 22 (Report of Separation and Record of Service)
- [Name of] County Attorney's Office, Memorandum, 16 July 2020, State of [Name] versus [Applicant]
- [Name of] County Sheriff's Office, Incident Report (sexual assault)

FACTS:

1. The applicant states his incident was all investigated by civilian authorities who declined any charges. They said it was all hearsay and there was no corroborating evidence. None of the witnesses who testified during the court-martial said they saw anything during civilian investigation. During the court-martial they all changed their stories. None of the witnesses he requested to be present were there. His counsel refused to question how their stories changed. One admitted they talked, and one stated they didn't. Their stories were not consistent at all. He did not know there was a board of appeals such as this to go through. He was told that the court-martial was final and the (TAG) The Adjutant General) decided to do multiple investigations was completely legal.

2. Review of the applicant's service records shows:

a. The applicant enlisted in the MNARNG on 5 June 2003 and held military occupational specialty 63B, Light Vehicle Mechanic.

b. He served through multiple extensions in a variety of assignments, including active duty from September 2005 to August 2007 (service in Iraq 30 March 2006 to 9 July 2007) and March 2009 to May 2010 (service in Iraq 22 April 2009 to 24 January 2010).

c. He was promoted to master sergeant (MSG)/E-8 in April 2017 and laterally appointed to first sergeant (1SG) on 1 March 2020. He served as the 1SG, Company B, 134th Support Battalion, MNARNG.

d. The applicant's last NCO Evaluation Report on file is for the rating period 15 September 2020 through 14 September 2021 does not list a physical profile or any duty restrictions. It shows in Part IV (Performance Evaluation, Professionalism, Attributes and Competencies):

- Block c (Character), the rating official marked an X in the "Did Not Meet Standards" and made the comment "does not support SHARP, EO, and EEO"
- Block d (Presence), the rating official marked an X in the "Did Not Meet Standards" and made the comment "was only present for 5 of the 12 scheduled training assemblies and did not participate in annual training"
- Block f (Lead) the rating official marked an X in the "Did Not Meet Standards" and made the comment "was not present enough to lead Soldiers"
- The rater placed an X in the Did Not Meet Standards in the Overall Performance and made the comment "he was not present enough to make an impact during this rating period"
- The senior rater states "NCO refuses to sign. [Applicant] is not qualified for potential and continued service due to substantiated sexual assault findings during OCI investigation. Not recommended for promotion."

e. The complete facts and circumstances surrounding his court-martial and/or subsequent separation processing are not available for review. The following documents are available:

(1) Memorandum, 16 July 2020, from the [County] Attorney's Office, Subject: The State pf [Name] versus [Applicant]. The State Attorney stated: "After review of this case there is insufficient evidence to prove beyond a reasonable doubt that this suspect committed a criminal sexual conduct. Because there is not a reasonable likelihood of obtaining a conviction in this case, I am declining prosecution. The specific reason(s) for declination of this matter are: The allegations are from 2017. It was not reported to the military or MCSO until 2019. The allegations involve inappropriate and illegal sexual touching by a First Sergeant against a lower ranking female soldier. There is no physical evidence available. The victim listed several witnesses. Sergeant Re__ (Police Officer) interviewed all of them, and none were willing to provide any cooperating

information. While I see no reason to disbelieve the alleged victim in this case, the lack of evidence makes it impossible to achieve a conviction.

(2) [County] Sheriff's Office Incident Report, 29 October 2019, in which Sergeant Re__ (Police Officer) details his investigation of the alleged sexual misconduct. He stated: On 13 December 2019, he (the Police Sergeant) "was able to make contact with XXXXXXX XXXXXX (female victim) who agreed to meet with me at Camp Ripley so that I could obtain a recorded statement from her. XXXXXX said that for annual training in 2017 while at Camp Ripley they had returned from an NCO event and [Applicant] had come up and got between her and XXXXXX XXXXXXXXXXXXXXX and he eventually put his hand down the back of her pants. XXXXXX said that she grabbed [Applicant's] hand and told him not to do that. XXXXXX said that [Applicant] was intoxicated at the time." Additionally, on 21 April 2020, he obtained a recorded statement from the suspect in this case, [Applicant]. The [Applicant] agreed to speak to me after being read the Miranda Warning. I asked [Applicant] specific questions about sexually touching XXXXXXX XXXXXX XXX XXXXXX XXXXXXX and he denied touching, or attempting to touch, either lady sexually."

f. A Memorandum, dated 9 May 2022, signed by The Adjutant General, Subject: Separation of [Applicant] under Paragraph 11-1c, Commission of a Serious Offense, states: "I have reviewed the findings and recommendations in the separation board proceedings relating to [Applicant]. I direct the adverse administrative action to proceed and the DES 9(disability evaluation system) process be abated. I approve the recommendation of the board that [Applicant] be separated from the Minnesota Army National Guard and as a reserve of the Army and that the Soldier's type of service be characterized as: Under Other than Honorable Conditions.

g. The applicant's NGB Form 22, shows the applicant was discharged from the ARNG on 9 May 2022 under the provisions of Army Regulation (AR) 135-178 (Enlisted Administrative Separations) with an under other than Honorable Condition discharge. He completed 17 years of ARNG service. His NGB Form 23A (ARNG Current Annual Statement) that shows he completed 17 years of qualifying service towards non-regular retirement.

3. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, the Army Aeromedical Resource Office (AERO), and the Interactive

Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions discharge and, in essence, a referral to the Disability Evaluation System (DES) and a medical retirement. He states:

“The character of discharge should be honorable and a medical discharge should have been completed prior to any of the proceedings.

This was all investigated by civilian authorities who declined any charges. They said it was all hearsay and there was no corroborating evidence. None of the witnesses who testified during the court martial said they saw anything during civilian investigation. During the court martial they all changed their stories. None of the witnesses I requested to be present were there. My council refused to question how their stories changed. One admitted they talked and one stated they didn't. Their stories were not consistent at all.”

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's Report of Separation and Record of Service (NGB Form 22) for the period of Service under consideration shows the former Guardsman enlisted in the Army National Guard on 5 June 2003 and was discharged from the Minnesota Army National Guard (MNARNG) on 9 May 2022 under the provisions of AR 135-178, Separation of Enlisted Personnel: Misconduct.

d. No medical documentation was submitted with the application and the applicant did not identify the condition(s) which should have been referred to the DES.

e. The applicant's full separation packet is not available for review. The senior rater for his final NCO Evaluation Report marked him “NOT QUALIFIED” and stated:

“NCO Refuses to sign. MSG [Applicant] is not qualified for potential and continued service due to substantiated sexual assault findings during an OCI investigation. MSG [Applicant] is 5 of 5 compared to peers; not recommended for promotion.”

f. His final permanent physical profile in MEDCHART shows that on 30 June 3021 the applicant was placed on a duty limiting permanent profile for “Low Back/Tailbone Injury/Pain and Bilateral Lower Extremity Pain, with non-duty limiting profiles for Neck Injury/Pain and Bilateral Shoulder Injury/Pain. The profile states “SM is currently in the MEB process.”

g. The applicant's misconduct made him ineligible for referral to the DES without the approval of the General who had approved his chapter 10 request. From paragraph 4-3f(2) of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017):

"Approval and suspension of an AR 635-200 separation action is not authorized when the Soldier is pending both an AR 635-200 and AR 635-40 action. The GCMCA must decide which action to pursue (as described in AR 635-200). Soldiers continue to be eligible for these administrative separation actions up until the day of their separation or retirement for disability even though their PEB findings have been previously completed and approved by USAPDA for the SECARMY. In no case will a Soldier, being processed for an administrative separation for fraudulent enlistment or misconduct be discharged through the DES process without the approval of the GCMCA."

h. Paragraph 4-9a of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017) states "Disenrollment from DES, or termination of the case for any other reason, will occur no earlier than prescribed below:

"Enlisted Soldiers with an initiated or approved administrative separation for misconduct or fraudulent enlistment will be disenrolled when the MEB is completed, the Soldier's GCMCA has reviewed the MEB, and the GCMCA has directed in writing to proceed with the administrative separation. If the separation action was initiated after the Soldier's MEB was forwarded to the PEB, the last level of approved PEB findings prior to initiation of separation will be provided to the GCMCA for consideration in their decision."

i. JLV show he has been awarded a VA service-connected disability rating for PTSD.

j. It is the opinion of the Agency Medical Advisor that a referral of his case to the DES is unwarranted.

k. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? YES: PTSD

(2) Did the condition exist or experience occur during military service? YES, the condition has been service connected by the VA.

(3) Does the condition or experience actually excuse or mitigate the discharge? NO: PTSD does not interfere with one's abilities to differentiate right from wrong and adhere

to the right and so cannot mitigate the sexual assault(s) for which he was involuntarily separated.

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. Upon review of the applicant's petition, available military records and the medical review, the Board concurred with the advising official finding that a referral of his case to the DES is unwarranted. The opine noted that the applicant's PTSD does not interfere with one's abilities to differentiate right from wrong and adhere to the right and so cannot mitigate the sexual assault(s) for which he was involuntarily separated.

2. The Board determined because the applicant was a senior non-commissioned officer at the time, he had adequate training and experience necessary to avoid conducting misconduct and was entrusted to set the example for subordinate Soldiers to emulate, and therefore, the discharge characterization was proper and fitting for the misconduct. Furthermore, the Board found insufficient evidence of in-service mitigating factors to overcome the misconduct of sexual assault that would warrant the applicant's ARNG character of service being amended to honorable instead of his current characterization of service of an under other than honorable conditions. The applicant provided no post service achievements or character letters of support for the Board to weigh a clemency determination. Based on the preponderance of evidence, and the advising official opine, the Board denied relief.

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.



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:

Army Regulation 135-178 (Army National Guard and U.S. Army Reserve – Enlisted Administrative Separations) establishes policies, standards, and procedures governing the administrative separation of certain enlisted Soldiers of the Army National Guard/Army National Guard of the United States and the U.S. Army Reserve.

a. Paragraph 1-12, Reduction in grade, Involuntary reduction. When the separation authority has determined that the Soldier has committed misconduct in the current grade, and potentially lower grade(s).

b. Paragraph 2-9 (a): Characterization of service, Honorable. An 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.

c. Paragraph 2-9 (b) General (under honorable conditions). If a Soldier’s service has been honest and faithful, it is appropriate to characterize that service as general, under honorable conditions. Characterization of service as general (under honorable conditions) is warranted when significant negative aspects of the Soldier’s conduct or performance of duty out-weigh positive aspects of the Soldier’s military record. When authorized, a characterization of under honorable conditions is awarded to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge. A characterization of under honorable conditions may be issued

only when the reason for the Soldier's separation specifically allows such characterization.

d. Paragraph 209 (c) Under other than honorable conditions. Service may be characterized as under other than honorable conditions only when discharge is for misconduct, fraudulent entry, unsatisfactory participation, or security reasons, and under other circumstances such as when the reason for discharge is based upon a pattern of behavior, or one or more acts or omissions, that constitutes a significant departure from the conduct expected of Soldiers. Examples of factors that may be considered include the following: Use of force or violence to produce serious bodily injury or death; Abuse of a position of trust; Disregard by a superior of customary superior-subordinate relationships. A discharge where service is characterized as under other than honorable conditions will be directed only by a general officer in command who has a judge advocate or legal advisor available to the command, or a higher authority. When a Soldier is to be discharged under other than honorable conditions, the separation authority will direct an immediate reduction to private E – 1, in accordance with AR 600–8–19 (Enlisted Promotions and Reductions) .

d. Paragraph 11-1(c) Enlisted Soldiers may be discharged for the commission of a serious offense. Commission of a serious military or civilian offense if the specific circumstances of the offense warrant discharge and a punitive discharge would be authorized for the same or a closely related offense under the UCMJ. Any Soldier convicted of rape, sexual assault, forcible sodomy, or an attempt to commit one of those offenses who is not punitively discharged must be processed for administrative separation for commission of a serious offense.

e. Paragraph 11-8, Characterization of service. Characterization of service for enlisted Soldiers separated for serious misconduct normally will be under other than honorable conditions, but characterization as general (under honorable conditions) may be warranted under certain guidelines in chapter 2, section III

//NOTHING FOLLOWS//