

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 June 2024

DOCKET NUMBER: AR20230012947

APPLICANT REQUESTS:

- upgrade of his under honorable conditions (general) discharge
- a different, presumably more favorable, narrative reason for separation
- favorable change to his separation code and reentry eligibility (RE) code
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Self-authored letter
- Email, request for application status
- Case Management Division response letter
- DD Form 214 (Certificate of Release or Discharge from Active Duty)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, 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:

a. He currently resides in Shippensburg, PA with his wife and two children. He has a full-time job and suffers from post-traumatic stress disorder (PTSD) due to sexual harassment that he received while he was in the Army. He feels ashamed even talking about it and to write the words, it is very un-comfortable. He cannot keep living with this all the time, there are certain things that trigger PTSD moments. He tries to block the events from his mind. He had never experienced any of this until he was stationed at Fort Huachuca, AZ. He was young in the military, and he did not know who to turn to; but when he did, he was alienated, harassed, abused, and made fun of. This trauma led him to act out, drink, and fight. These actions led to his discharge for misconduct.

b. It all started within a few months after arriving. It was hard for him to make friends so he would go with the flow to fit in. One day while in the shower another Soldier pinned him up against the wall and told him that if he did not buy him beer, food, or other items, he would rape him and apply prison rules. He did not know what to do or who to turn to, he was young and never experienced this before. To avoid any kind of penetration or further assault, he complied. He would give him whatever he wanted, which resulted in him bouncing checks. He received multiple Article 15s. He told another Soldier what was happening to him, who probably told his harasser. One night, he was slammed by a group of Soldiers and warned that if he told, he would be sexually assaulted. At that point he did not know who to trust or who he could talk to. He remembers confiding in a civilian he worked with, who apparently went and told someone about his issues. Soon after he was discharged for misconduct.

c. After his discharge, he did not know what to do with his life. He was still young and felt so much torture inside for what happened to him. Things started to look up a little, he thought he was finally over everything. He stopped drinking and got his life together. He got accepted to the police academy and became a police officer. Due to various incidents beyond his control, he would leave the police department and work in other career fields. For the first time, he is reaching out to the Board for assistance, so he can receive therapy. He wants to get his mind right, to be able to talk to someone. He wants to be able to cope with his PTSD, he is tired of running away. He would like a minimum disability rating so he can receive mental health treatment.

3. On his DD Form 149, the applicant notes PTSD, other mental health, sexual assault/harassment, and reprisal/whistleblower issues are related to his request.
4. A portion of the applicant's request concerns a change to his disability rating. This issue is outside the ABCMR's purview; therefore, this issue will not be further addressed.
5. On 13 April 1994, the applicant enlisted in the Regular Army. Upon completion of training, he was awarded military occupational specialty 92Y (Supply Specialist).
6. The applicant's record is void of a separation packet containing the specific facts and circumstances surrounding his discharge processing.
7. The applicant was discharged on 19 June 1995. He was credited with 1 year, 2 months, and 7 days of net active service this period. His DD Form 214 contains the following entries in:
  - Item 24 (Character of Service) – Under Honorable Conditions (General)
  - item 25 (Separation Authority) – AR [Army Regulation] 635-200 (Personnel Separations – Enlisted Personnel), PARA 14-12b

- item 26 (Separation Code) – JKA
- item 27 (Reentry Code) – 3
- item 28 (Narrative Reason for Separation) – Misconduct

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

9. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under honorable conditions (general) characterization of service. He contends he experienced military sexual trauma (MST) and resultant mental health conditions including PTSD that mitigate his misconduct. 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 13 April 1994; 2) The applicant's record is void of a separation packet containing the specific facts and circumstances surrounding his discharge processing; 3) The applicant was discharged on 19 June 1995, Chapter 14-12b, due to Misconduct. His service was characterized as under honorable conditions (General). He was credited with 1 year, 2 months, and 7 days of net active service this period.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the available supporting documents and the applicant's available military service records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical records were provided for review.

c. The applicant asserts he experienced MST and resultant mental health conditions including PTSD that mitigate his misconduct while on active service. There is insufficient evidence the applicant reported or was diagnosed with a mental health disorder including while on active service.

d. A review of JLV provided insufficient evidence the applicant has been diagnosed with a mental health condition. The applicant does not receive any service-connected disability.

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 his misconduct. In addition, there is insufficient evidence surrounding the events which resulted in the applicant's discharge to provide an appropriate opinion on possible mitigation as the result of a mental health condition or experience. However, the applicant contends he experienced MST while on active

service, which mitigates his discharge. The applicant's contention alone is sufficient for consideration per the Liberal Consideration Policy.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? N/A. There is insufficient evidence to support the applicant had a condition or experience that mitigates his misconduct. In addition, there is insufficient evidence surrounding the events which resulted in the applicant's discharge to provide an appropriate opine on possible mitigation as the result of a mental health condition or experience. However, the applicant contends he experienced MST while on active service, which mitigates his discharge. The applicant's contention alone is sufficient for consideration per the Liberal Consideration Policy.

(2) Did the condition exist or experience occur during military service? N/A.

(3) Does the condition experience actually excuse or mitigate the misconduct? N/A.

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 his characterization of service. Upon review of the applicant's petition, available military records and the medical review, the Board concurred with the advising official finding insufficient evidence to support the applicant had a condition or experience that mitigates his misconduct. The opine noted there is a lack of evidence surrounding the events which resulted in the applicant's discharge to provide an appropriate opine on possible mitigation as the result of a mental health condition or experience.

2. The Board determined there is insufficient evidence of in-service mitigating factors for the misconduct and the applicant provided no substantiating evidence to support his claims of PTSD. The Board applauds the applicant's post-service achievements of becoming a police officer, however the applicant provided no letters of support for the Board to weigh a clemency determination. The applicant was discharged for misconduct and was provided an under honorable conditions (General) characterization of service. The Board agreed that the applicant's discharge characterization is warranted as he did not meet the standards of acceptable conduct and performance of duty for Army personnel to receive an Honorable discharge.

3. The Board agreed the burden of proof rest on the applicant; however, he did not provide any supporting documentation and his service record has insufficient evidence to support the applicant contentions for consideration of PTSD. Based on this, the Board 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:

Mbr 1      Mbr 2      Mbr 3

:            :            :            GRANT FULL RELIEF

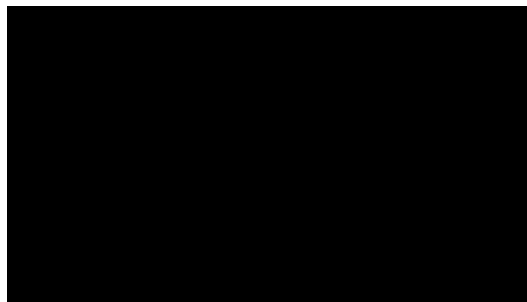
:            :            :            GRANT PARTIAL RELIEF

:            :            :            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:

1. Title 10, U.S. Code, 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. Section 1556 of Title 10, U.S. Code, 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. 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.
  - a. Paragraph 2-9 states 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.
  - 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. Army Regulation 601-210 (Regular Army and Army Reserve Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment and processing into the Regular Army, U.S. Army Reserve, and Army National Guard. Table 3-6 provides:
  - RE code "1" applies to Soldiers completing an initial term of active service, who are considered qualified for enlistment if all other criteria are met.
  - RE code "2" is no longer in use but applied to Soldiers separated for the convenience of the government, when reenlistment is not contemplated, who are fully qualified for enlistment/reenlistment.
  - RE code "3" applies to Soldiers who are not considered fully qualified for reentry or continuous service at time of separation, whose disqualification is waivable – they are ineligible unless a waiver is granted.

- RE code "4" applies to Soldiers separated from last period of service with a non-waivable disqualification.

5. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the separation codes to be entered on the DD Form 214. At the time, this regulation prescribed the separation code "JKA" is the appropriate code to assign Soldiers separated under the provisions of Army Regulation 635-200, for pattern of misconduct.

6. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

a. 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. 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 (Separation for Misconduct) established policy and prescribed procedures for separating members for misconduct. It states that action will be initiated to separate a Soldier for misconduct when it was clearly established that rehabilitation was impracticable or unlikely to succeed.

7. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Navy Records (BCM/NR), on 3 September 2014, 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.

8. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating 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 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.

9. 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, 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.

10. On 4 April 2024, 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 eligibility for medical retirement or separation benefits. This guidance is being promulgated in light of *Doyon v. United States* and is consistent with that decision. Accordingly, the BCM/NR will apply liberal consideration to the eligible applicant's assertion that combat- or military sexual trauma -related PTSD or traumatic brain injury (TBI) potentially contributed to the circumstances resulting in their discharge or dismissal to determine whether any discharge relief is appropriate. After making that determination, the BCM/NR will then separately assess the individual's claim of medical unfitness for continued service due to that PTSD or TBI condition as a discreet issue, without applying liberal consideration to the unfitness claim or carryover of any of the findings made when applying liberal consideration.

//NOTHING FOLLOWS//



