

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 2 August 2024

DOCKET NUMBER: AR20230013240

APPLICANT REQUESTS: reconsideration of his prior request for an upgrade of his under other than honorable conditions (UOTHC) discharge.

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

- DD Form 149 (Application for Correction of Military Record)
- Medical History (3 pages)
- Department of Veterans Affairs (VA) Letter, 23 July 2021
- VA Rating Decision, 24 September 2021
- VA Benefits Letter, 27 September 2021
- VA Certification Letter, 22 September 2023

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 AR20220003899 on 23 February 2023.

2. The applicant states he was diagnosed with general depression in 1997 with a subsequent diagnosis of post-traumatic stress disorder (PTSD) in 2021 or 2022. He did not know he had the disorder nor was he being properly treated. He was fighting a battle within himself over his sexual orientation, and he was acting out inappropriately. He has been properly diagnosed and under treatment by the VA with medication and counseling.

3. The applicant provides the following documents:

a. Three pages of medical records list the following:

- PTSD – latest occurrence 7 March 2023
- Unspecified Focal Traumatic Brain Injury (TBI) with Loss of Consciousness of 30 minutes or less, Sequela
- Depressive Disorder – latest occurrence 25 May 2021

b. A VA letter dated 23 July 2021, notified the applicant he was pending a mental health disability evaluation or a decision about his mental health evaluation and he could be eligible for mental health care while he awaited the outcome.

c. A VA rating decision dated 24 September 2021 shows the applicant was granted 70 percent for his service connection unspecified depressive disorder with unspecified anxiety disorder (claimed as major depressive disorder), effective 4 May 2021.

d. A VA decision letter dated 27 September 2021 notified the applicant of the decision to grant him service-connected disability with an evaluation of 70 percent effective 4 May 2021

e. A VA certification letter dated 22 September 2023, shows the applicant is receiving 100 percent combined service-connected disability compensation from the VA with an effective date of 1 December 2022.

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

a. He enlisted in the Regular Army on 25 July 1986. He served through a series of reenlistments with the last reenlistment date taking place on 9 September 1999.

b. His DA Form 2-1 (Personnel Qualification Record – Part II) shows he served in Southwest Asia from 28 January 1991 to 8 March 1991.

c. A USAREC Form 958 (Incident Information Report) shows on 9 May 2001, the Recruiting Battalion received a copy of the charges against the applicant from the county superior court. He was charged with nine counts of felony indictments involving a 17 year old female minor.

- two counts of sexual penetration with a foreign object
- two counts of oral sex with a minor under 18 years of age
- one count of sexual battery by restraint
- two counts of attempted copulation with minors under 18 years of age
- one count of dissuading a witness from reporting a crime
- one count of annoying and molestation of a child

d. On 5 June 2001, the applicant's immediate commander notified the applicant of his intent to separate him under the provisions of Chapter 14, paragraph 14-12c, Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel) for misconduct, commission of a serious offense. The specific reason for his proposed recommendation were:

- willfully disobeying a superior commissioned violating the no-contact order

- two counts of unauthorized relationships, including sexual activity and providing alcoholic beverages in violation of USAREC Regulation 600-25
- unauthorized relationship, including sexual activity in violation of USAREC Regulation 600-25
- two counts of misuse of a government vehicle by using it for unofficial purposes, to wit: drive to a remote location and engage in sexual activity
- indecent exposure
- sodomy and indecent acts
- genital penetration of a person under 18 years of age
- oral copulation with a person under 18 years of age
- sexual battery by restraint
- attempted oral copulation with a person under 18 years of age
- dissuading a witness from reporting a crime
- annoying and molesting a minor child

e. On 12 June 2001, a DA Form 3822-R (Report of Mental Status Evaluations) shows the applicant underwent a mental status evaluation due to misconduct. The evaluation indicated he was mentally responsible for his behavior, could distinguish right from wrong, and possessed sufficient mental capacity to participate in administrative or judicial proceedings. The applicant was cleared for any administrative action deemed appropriate by his chain of command.

f. The service record includes the applicant's medical evaluations, dated 12 June 2001, for the purpose of administrative separation which indicated he was generally in fair health with the exception of undergoing treatment for depression. He was marked qualified for separation.

- Standard Form (SF) 88 (Report of Medical Examination)
- SF 93 (Report of Medical History)

g. On 2 July 2001, after consultation with legal counsel, he acknowledged:

- the rights available to him and the effect of waiving said rights
- he may encounter substantial prejudice in civilian life if a general discharge under honorable conditions is issued to him
- he may be ineligible for many or all benefits as a veteran under both Federal and State laws
- he may apply to the Army Discharge Review Board or the ABCMR for upgrading
- he elected not to submit statements on his own behalf
- he requested consideration of his case by an administrative separation board

h. On 5 July 2001, the immediate commander initiated separation action against the applicant under the provisions of AR 635-200, paragraph 14-12b for commission of a serious offense. He recommended that his period of service be characterized as under other than honorable conditions. The intermediate commander recommended approval.

i. On 26 August 2001, the applicant was issued a General Officer Memorandum of Reprimand (GOMOR) for misconduct by engaging in inappropriate sexual relationships with three female applicants. Furthermore, he purchased alcohol for two of the applicants and used a government vehicle to drive one of the applicants to a secluded area so he could have sexual intercourse. After an investigation was initiated, he violated a no contact order and encouraged the victims to lie. The applicant acknowledged receipt of the GOMOR and elected not to make a statement in his own behalf.

j. On 26 December 2001, after thoroughly reviewing all matters submitted in response to the memorandum of reprimand and after careful consideration, the imposing general officer directed the GOMOR and all related documents, be permanently filed in the applicant's official military personnel file (OMPF).

k. On 12 October 2001, a separation board convened to determine if the applicant should be discharged from the Army under the provisions of AR 635-200, paragraph 14-12c. The Findings and Recommendations are available for review by the Board. The board recommended the applicant be separated from the U.S. Army and his service be characterized as under other than honorable conditions.

l. On 4 December 2001, consistent with the chain of command recommendations and the administrative separation board's recommendations, the separation authority approved the discharge recommendation for immediate separation under the provisions of AR 635-200, paragraph 14-12c for commission of a serious offense. He would be issued an Under Other Than Honorable Discharge Certificate and reduced to the lowest enlisted grade.

m. On 15 January 2002, he was released from active duty with a under other than honorable conditions discharge. His DD Form 214 shows he completed 15 years, 5 months, and 21 days of active service. He was assigned separation code JKQ and the narrative reason for separation listed as "Misconduct," with reentry code 3. It also shows he was awarded or authorized:

- Army Commendation Medal (3rd Award)
- Army Achievement Medal (4th Award)
- National Defense Service Medal
- Southwest Asia Service Medal with 1 Bronze Service Star
- Noncommissioned Officer Professional Development Ribbon with Numeral 2

- Army Service Ribbon
- Army Good Conduct Medal (4th Award)
- Overseas Service Ribbon (2nd Award)
- Kuwait Liberation Medal – Government of Kuwait
- Kuwait Liberation Medal
- Expert Marksmanship Qualification Badge with Rifle Bar
- Combat Infantryman Badge
- Expert Infantryman Badge
- Parachutist Badge
- Air Assault Badge
- Driver and Mechanic Badge with Driver-Wheeled Bar
- U.S. Army Gold Recruiter Badge with 3 Sapphire Achievement Stars
- U.S. Army Basic Recruiter Badge with 3 Gold Achievement Stars

5. On 25 June 2006, 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 and/or reason.

6. On 23 February 2023, the ABCMR rendered a decision in Docket Number AR20220003899. The Board found based upon the serious misconduct leading to the applicant's separation and the findings of the medical advisor, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant's characterization of service. His request was denied.

7. By regulation (AR 635-200), action will be taken to separate a Soldier for misconduct when it is clearly established that despite attempts to rehabilitate or develop him or her as a satisfactory Soldier, further effort is unlikely to succeed. Paragraph 14-12c states Soldiers are subject to action per this section for commission of a serious military or civil offense, if the specific circumstances of the offense warrant separation and a punitive discharge is, or would be, authorized for the same or a closely related offense under the Manual for Courts-Martial.

8. 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.

9. MEDICAL REVIEW:

a. Background: The applicant is requesting reconsideration of his prior request for an upgrade of his under other than honorable conditions (UOTHC) discharge. He contends PTSD mitigates his discharge.

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 in the Regular Army on 25 July 1986. He served through a series of reenlistments with the last reenlistment date taking place on 9 September 1999.
- His DA Form 2-1 (Personnel Qualification Record) shows he served in Southwest Asia from 28 January 1991 through 8 March 1991.
- A USAREC Form 958 (Incident Information Report) shows on 9 May 2001, the Recruiting Battalion received a copy of the charges against the applicant from the county superior court. He was charged with 9 counts of felony indictments involving a 17-year-old female minor:
  - two counts of sexual penetration with a foreign object
  - two counts of oral sex with a minor under 18 years of age
  - one count of sexual battery by restraint
  - two counts of attempted copulation with minors under 18 years of age
  - one count of dissuading a witness from reporting a crime
  - one count of annoying and molestation of a child
- On 5 June 2001, the applicant's immediate commander notified the applicant of his intent to separate him under the provisions of Chapter 14, paragraph 14-12c, Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel) for misconduct, commission of a serious offense. The specific reason for his proposed recommendation were:
  - willfully disobeying a superior commissioned violating the no-contact order
  - two counts of unauthorized relationships, including sexual activity and providing alcoholic beverages in violation of USAREC Regulation 600-25
  - unauthorized relationship, including sexual activity in violation of USAREC Regulation 600-25
  - two counts of misuse of a government vehicle by using it for unofficial purposes, to wit: drive to a remote location and engage in sexual activity
  - indecent exposure
  - sodomy and indecent acts
  - genital penetration of a person under 18 years of age
  - oral copulation with a person under 18 years of age
  - sexual battery by restraint
  - attempted oral copulation with a person under 18 years of age
  - dissuading a witness from reporting a crime
  - annoying and molesting a minor child
- On 26 August 2001, the applicant was issued a General Officer Memorandum of Reprimand (GOMOR) for misconduct by engaging in inappropriate sexual relationships with three female applicants. Furthermore, he purchased alcohol for two of the applicants and used a government vehicle to drive one of the

applicants to a secluded area so he could have sexual intercourse. After an investigation was initiated, he violated a no contact order and encouraged the victims to lie. The applicant acknowledged receipt of the GOMOR and elected not to make a statement in his own behalf.

- On 15 January 2002, he was released from active duty with a under other than honorable conditions discharge. His DD Form 214 shows he completed 15 years, 5 months, and 21 days of active service with no lost time. He was assigned separation code JKQ and the narrative reason for separation listed as "Misconduct," with reentry code 3.
- On 25 June 2006, 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 and/or reason.
- On 23 February 2023, the ABCMR rendered a decision in Docket Number AR20220003899. The Board found based upon the serious misconduct leading to the applicant's separation and the findings of the medical advisor, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant's characterization of service. His request was denied.

c. Review of Available Records: The Army Review Board Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant states, he was diagnosed with general depression in 1997 with a subsequent diagnosis of post-traumatic stress disorder (PTSD) in 2021 or 2022. He did not know he had the disorder nor was he being properly treated. He was fighting a battle within himself over his sexual orientation, and he was acting out inappropriately. He has been properly diagnosed and under treatment by the VA with medication and counseling. Due to the period of service no active-duty electronic medical records were available for review. Hardcopy documentation shows on 12 June 2001, the applicant underwent a mental status evaluation that indicated he was mentally responsible for his behavior, could distinguish right from wrong, and possessed sufficient mental capacity to participate in administrative or judicial proceedings. The applicant was cleared for any administrative action deemed appropriate by his chain of command. The service record also includes a medical evaluation, dated 12 June 2001, for the purpose of administrative separation which indicated he was generally in fair health with the exception of undergoing treatment for depression. He was deemed qualified for separation.

d. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is 100% service connected, including 70% for Mood Disorder effective date of 2021. The applicant appears to have first engaged with the VA for behavioral health services on 6 May 2021, seeking evaluation and treatment for TBI. The applicant reported exposure to three IED incidents (missile in 1987, Artillery in 1991, and grenade in 1994), with brief loss of consciousness (less than one minute). He complained of irritability, poor memory, light sensitivity and headaches, poor concentration, and forgetfulness. However, a note dated 10 May 2021, for a medical consult/TBI evaluation indicates the

applicant did not have a diagnosis of TBI and recommended referral to behavioral health for therapy and possible medication. The applicant's record indicates intermittent participation in behavioral health services with a diagnosis of Generalized Anxiety Disorder and Major Depressive Disorder. However, his VA record appears void of a PTSD diagnosis.

e. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is evidence the applicant had an experience and subsequent BH condition during military service. However, his BH condition would not mitigate the reason for his discharge.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts a mitigating condition, PTSD.

(2) Did the condition exist or experience occur during military service? Yes. The applicant is 70% service-connected for Mood Disorder.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant contends he was recently diagnosed with PTSD and learned his misconduct of sexually abusing a minor was an outlet for his undiagnosed and untreated condition. The applicant is service-connected for Mood Disorder and contends PTSD. In addition, his VA record shows a diagnosis of Generalized Anxiety Disorder and Major Depressive Disorder. Regardless of diagnosis, the applicant's misconduct would not be mitigated by PTSD, Mood Disorder, Generalized Anxiety Disorder, and/or Major Depressive Disorder. Sexual misconduct is not part of the natural history or sequelae of any of these behavioral health conditions, and none of the disorders impacts one's ability to differentiate between right and wrong and adhere to the right. Overall, the applicant engaged in repeated purposeful, conscious decisions; including violating a no contact order and encouraging the victims to lie, after an investigation was initiated, in an effort to avoid accountability for his crimes.

#### BOARD DISCUSSION:

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 separated for misconduct with the commander citing

disobeying a no-contact order, having an unauthorized relationship with three different women, misusing a government vehicle, indecent exposure, indecent acts, sexual activity with a person under 18 years of age, sexual battery by restraint, and molesting a minor child. The Board found no error or injustice in the separation proceedings and designated characterization of service assigned during separation. The Board noted the applicant's contention of general depression and post-traumatic stress disorder and the medical advisor's review finding his condition did not mitigate the reason for his discharge. Based on the foregoing, the Board concluded relief was not appropriate.

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 amendment of the ABCMR decision rendered in Docket Number AR20220003899 on 23 February 2023.

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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 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. 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 14 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions (a pattern of misconduct consisting solely of minor military disciplinary infractions), a pattern of misconduct (consisting of discreditable involvement with civil or military authorities or conduct prejudicial to good order and discipline). Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter; however, the separation authority may direct a general discharge if merited by the Soldier's overall record.

3. 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 post-traumatic stress disorder (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.

4. 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, on 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.

5. 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.

//NOTHING FOLLOWS//