

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 2 August 2024

DOCKET NUMBER: AR20230013656

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

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Report of Separation from Active Duty)
- Medical Document
- Department of Veterans Affairs (VA) Form 21-4183 (Support of Claim)

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 AR20060014011 on 3 May 2007.

2. As a new argument the applicant lists post-traumatic stress disorder (PTSD), other mental health, sexual assault/harassment, Don't Ask Don't Tell (DADT), and transgender as issues related to his request. The applicant states:

a. He is requesting upgrade due to military sexual trauma (MST), which includes assault/battery, rape, and threats of murder due to his sexual orientation. He was stationed at McGregor Range at Fort Bliss, TX when he was jumped, beaten, and raped by a group of Soldiers because they claimed that he stole drugs and money from them which is false. He has completed a VA Form 21- 183 (Statement in Support of Claim) to explain what happened to him and what actions he had to take that led to his 17 days of absence without leave (AWOL).

b. His Statement in Support of Claim states something went wrong when the missiles were fired off and it returned back to where it was first deployed and blew up. A lot of them ran and hid for cover. They all thought they were going to die but the blame was placed on him. Soon after this incident he was jumped by 7 or 8 Soldiers claiming that he put their lives in danger and that he stole sacks of drugs and money from them, which is totally false. The applicant sustained multiple injuries from being raped, kicked

in the groin, side of his head, and eye, one of the guys took a knife and cut into the swollen area and blood spurt out everywhere. He has neck pain and swelling to this day. His right arm has numbness due to the neck injury. One of the guys beating him told him to open his mouth and forced something down his throat which left scars inside his throat.

c. He did not go to the infirmary or police because he was afraid that they would kill him if they saw him again. Instead, he went to the dentist on post, and they did surgery on his gums because they were swollen and had to be drained. He was so afraid for his life he decided to go AWOL for 17 days to get his thoughts together then he realized it had not been about drugs or drug money but his sexual orientation.

3. The applicant enlisted in the Regular Army on 22 September 1975.

4. The applicant was counselled on numerous occasions between 20 May and 17 November 1976 for:

- standards of conduct and responsibilities within the unit
- poor duty performance, attitude, and personal appearance (four)
- failure to perform morning details and get up on time
- sleeping on duty
- AWOL (twice)
- failure to perform extra duty
- failure to report for duty
- substandard duty performance, disobeying a lawful order and possible elimination action under the provisions of Army Regulation (AR) 635-200 (Personnel Separations, Enlisted Personnel), Chapter 13 (twice)

5. The applicant accepted non-judicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) on:

- 13 November 1975, for negligently failing to stay awake and alert during his appointed tour of Fire Guard on or about 10 November 1975
- 2 March 1976, for being drunk on duty on or about 27 February 1976
- 10 May 1976, for five specifications of failing to go to his appointed place of duty on or about 1 May 1976, 2 May 1976, and 5 May 1976; his punishment consisted of restriction, extra duty, forfeiture of \$84.00 for one month, and reduction to private/E-1
- 7 June 1976, for failing to go to his appointed place of duty on or about 5 June 1976; his punishment consisted of reduction to private/E-1 (suspended), forfeiture of \$75.00 for one month, and extra duty
- 4 October 1976 for failing to go to his appointed place of duty and disobeying a lawful order on or about 25 September 1976

6. The applicant was AWOL on 15 October 1976.

7. A Bar to Reenlistment, dated 21 October 1976 shows the applicant's commander stated the applicant shirks his duties in all aspects. He requires constant supervision no matter how small the task and he had been counseled repeatedly by his section chief and first sergeant. Paperwork to eliminate the applicant had been initiated. The Bar to reenlistment was approved on 24 November 1976.

8. The applicant surrendered to military authorities on 28 October 1976 and was present for duty (PDY) on 1 November 1976.

9. The applicant accepted of NJP under the provisions of Article 15 of the UCMJ on:

- 8 November 1976, for being AWOL from 15 October 1976 until 1 November 1976; his punishment consisted of reduction to private/E-1, forfeiture of \$187.00 per month for two months, extra duty, and restriction
- 30 November 1976, for being derelict in his duty by failing to go to his appointed place of duty on or about 21 November 1976 and 23 November 1976

10. The Report of Mental Status Evaluation, dated 15 December 1976 shows the applicant did not have significant mental illness, was mentally responsible, able to distinguish right from wrong, able to adhere to the right, had the capacity to understand and participate in board proceedings. He was psychiatrically cleared for administrative action deemed appropriate by command.

a. The applicant was in favor of the planned action since he could not adapt or cope with military life. He had six Article 15s of which several were purposely and intentionally obtained by the applicant.

b. The examiner's impression was that no evidence of psychiatric disease was found; however, the applicant displays passive aggressive traits of behavior. Attitude, interest, and motivation toward modifying his behavior and becoming a productive Soldier are poor at the present time. It can thus be surmised that rehabilitative efforts would also appear futile.

11. The applicant's commander letter, dated 17 December 1976 shows the applicant had been afforded every opportunity at rehabilitation and had resisted all attempts within the unit. He had been counselled on numerous occasions. He had no desire to continue his military career and had resisted all efforts to help him. Rehabilitative transfer would not be in the best interests of the applicant or the Army.

12. The applicant's immediate commander notified him on 22 December 1976, of his intent to initiate action to separation the applicant under the provisions of AR 635-200,

paragraph 13-5a, by reason of misconduct. The applicant acknowledged receipt on the same date.

13. The applicant consulted with legal counsel on 23 December 1976 and was advised of the basis for the contemplated separation and its effects, the rights available to him, and the effect of a waiver of those rights.

a. Subsequent to receiving this legal counsel, the applicant waived his right to have his case considered by a board of officers, his right to personal appearance before a board of officers, and representation by counsel.

b. He also elected not to submit a statement in his own behalf.

14. The applicant's commander recommended his discharge on 27 December 1976 for misconduct due to frequent incidents of a discreditable nature with civil or military authorities. The applicant resisted all attempts to be rehabilitated. The chain of command strongly recommended approval and the assistant adjutant recommended approval.

15. The separation authority approved the recommended discharge on 17 January 1977 and directed the issuance of a DD Form 258A (Undesirable Discharge Certificate).

16. The Statement of medical Condition, dated 24 January 1977 shows to the best of his knowledge there had been no change in the applicant's medical condition since his last separation examination.

17. The applicant was discharged on 24 January 1977. His DD Form 214 shows he was discharged under the provision of AR 635-200, paragraph 13-5a(1), with Separation Program Designator JKA (discreditable incidents – civilian or military) and Reenlistment Code 3-3B. His service was characterized as UOTHC. He completed 1 year, 3 months, and 16 days of net active service. He had 17 days of lost time.

18. Regulatory guidance provides when an individual is discharged under the provisions of Army Regulation 635-200, paragraph 13-5a, by reason of misconduct, "JKA" is the appropriate separation code. Additionally, a discharge UOTHC is normally appropriate; however, the separation authority may direct a general discharge if merited by the Soldier's overall record.

19. The applicant provides a medical document that shows a diagnosis of schizoaffective disorder, depressive type, and post-traumatic stress disorder (PTSD), it lists medications the applicant has been prescribed for various conditions or ailments.

20. On 8 March 1984, the Army Discharge Review Board (ADRB), after careful consideration determined the applicant's discharge was proper and equitable, and denied the applicant's petition to upgrade his discharge.

21. On 3 May 2007, the ABCMR determined that the evidence presented did not demonstrate the existence of a probable error or injustice. Therefore, the Board determined that the overall merits of the case were insufficient as a basis for correction of the records of the individual concerned.

22. On 7 October 2010, the ABCMR notified the applicant that a reconsideration of an earlier ABCMR decision is allowed if the request is received within one year of the ABCMR's original decision and it has not previously been reconsidered. The ABCMR determined that the applicant's request for reconsideration was not received within one year of the ABCMR's original decision. As a result, his request was closed without further action.

23. On 3 May 2024, in the processing of this case the U.S. Army Criminal Investigation Division, searched their criminal file indexes, which revealed no Sexual Assault records pertaining to the applicant.

24. 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.

25. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting reconsideration of an upgrade to his characterization of service from under other than honorable conditions (UOTHC) to honorable. He contends he experienced an undiagnosed mental health condition, including PTSD, and sexual harassment/assault (MST) that mitigates his 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 22 September 1975.
- The applicant received numerous counselings between May and November 1976, and he accepted NJP for the following offenses that occurred between November 1975 and October 1976: failing to stay awake and alert during duty; seven specifications of failing to be at his appointed place of duty; and disobeying a lawful order.

- The applicant accepted NJP for being AWOL from 15 October to 1 November 1976 as well being derelict in his duty. In December 1976, he was notified by his commander that separation actions were being initiated by reason of misconduct.
- The applicant was discharged on 24 January 1977 and completed 1 year, 3 months, and 16 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 he experienced MST and physical assault by a group of soldiers, and he believes this event was the result of his sexual orientation. He related that he went AWOL because he did not know what to do after this event. A Report of Medical Examination dated 29 September 1976 stated there are no disqualifying mental or physical defects sufficient to warrant disposition through medical channels. In a review of the medical records provided, there was notation on 31 December 1976 that the applicant was seen for a mental status exam and was psychiatrically cleared to return to duty. A Report of Mental Status Evaluation dated 15 December 1976, which indicated the applicant admitted he was in favor of the separation action because he cannot adapt or cope with military life, was also included. The document stated, "no evidence of a psychiatric disease found, however, SM displays passive-aggressive traits of behavior" and that effort toward rehabilitation would be futile. It was "unknown" if he met retention standards; however he was psychiatrically cleared for administrative action deemed appropriate by command. There was insufficient evidence that the applicant was diagnosed with PTSD or another psychiatric condition while on active service.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed the applicant engaged mental health treatment through the VA on 15 September 2022. Documentation indicated that the applicant reported a significant mental health history, including multiple hospitalizations associated with suicidal thoughts and behavior as well as treatment for Schizophrenia and Bipolar Disorder dating back to his discharge from the military. He presented with disorganized thought patterns, paranoia, poor social boundaries, and tangential speech. The applicant complained of depression, sleep difficulty, nightmares, panic attacks, and PTSD symptoms associated with sexual assault and attack while in the military. He was started on two antipsychotic medications, an antidepressant, and two medications to help with sleep and nightmares. He was diagnosed with Schizoaffective Disorder, Bipolar Type, Major Depressive Disorder, Generalized Anxiety Disorder with panic attacks, and PTSD. At follow up in October 2022, he reported suicidal ideation and was referred to a community hospital for inpatient care, but it is unclear if he was actually hospitalized (records not available). Documentation does indicate a hospitalization through community care in early December 2022, and at follow up with the VA, he was described as "a poor historian" and noted auditory and visual hallucinations as well as paranoid thinking, including a belief that the perpetrators of the attack he endured while in the military are pursuing him. In January 2023, the applicant was enrolled in the VA's homeless program, but

documentation indicated he discontinued his medication when he moved into this shelter. Medication was restarted in March 2023, but the applicant could not tolerate the delusions and paranoia without medication so he left the shelter and presented to the ER reporting suicidal ideation. He was hospitalized for one week, stabilized on medication, and discharged back to the shelter with diagnoses of Schizoaffective Disorder and PTSD. Since then to current date, documentation reflects admissions and discharges from the homeless program and various shelters based on the applicant moving to live with a sister or opting to reside in his car. His most recent fill of medication was in April 2024.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to support that the applicant had a condition or experience that mitigates 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 he had an undiagnosed mental health condition, including PTSD resulting from MST, at the time of his discharge. While there are no mental health records documenting a diagnosis during active service, the applicant's erratic and disorganized pattern of behavior, which began within two months of his accession into the military, is consistent with behaviors associated with the early symptoms of Schizoaffective Disorder, and the Mental Status Examination conducted in December 1976 indicated it was "unknown" if the applicant met retention standards. Additionally, the applicant asserts he experienced MST, which resulted in PTSD, while on active service. The applicant has been diagnosed by the VA with Schizoaffective Disorder and PTSD, and documentation indicates a long history of mental health symptoms, including psychiatric hospitalizations.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition while on active service and he purports having experienced MST, resulting in PTSD, while in the 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 diagnosed with a mental health condition on active service, the applicant asserts a fully mitigating experience, MST. As there is an association between MST and avoidant behavior, such as going AWOL, disregard for authority, and alcohol use, there is a nexus between his experience of MST and his pattern of misconduct. Additionally, the behaviors exhibited throughout his time in service are also consistent with an underlying mental health condition such as Schizoaffective Disorder.

g. The applicant contends he had a MST and was experiencing a mental health condition that mitigates his misconduct, and per Liberal Consideration his assertion of MST alone is sufficient for the board's consideration.

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 misconduct. The Board found no error or injustice in the separation proceedings and designated characterization of service assigned during separation and noted the applicant's five nonjudicial punishment proceedings with infractions including dereliction, drunk on duty, failure to report, and later being absent without leave. The Board noted the medical advisor's review find potential mitigation for his contention of military sexual trauma; however, were not convinced by a preponderance of the evidence of his assertion. The Board concluded that the characterization of service the applicant received upon separation was appropriate and denied relief.

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 AR20060014011 on 3 May 2007.

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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. 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.

2. AR 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 Soldiers whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Paragraph 13-5(a), as then in effect, provided for separation for unfitness, which included frequent incidents of a discreditable nature, sexual perversion, drug abuse, shirking, failure to pay just debts, failure to support dependents and homosexual acts. When separation for unfitness was warranted, an undesirable discharge was normally considered appropriate.

3. 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 Service Discharge Review Boards (DRB) and 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 PTSD; traumatic brain injury (TBI); 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.

4. 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.

5. 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 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//