

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 2 August 2024

DOCKET NUMBER: AR20230014019

APPLICANT REQUESTS:

- reconsideration of his previous request to upgrade his under honorable conditions (General) discharge
- amendment of his narrative reason for separation from misconduct to a more favorable reason

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
DD Form 149 (Application for Correction of Military Record)

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 AR20200004115 on 29 November 2020.
2. The applicant states his discharge was inequitable because it was based on one isolated incident in the 9 years he was on active duty. He deeply regrets his actions, and he can never change what happened but only wants this behind him as he continues to move forward in his life. Other than this one incident, he served his country from the age of 17 to 32. He made a mistake and only wants this behind him.
3. The applicant enlisted in Regular Army on 23 February 2004.
4. A Report of Investigation, dated 27 August 2011 shows a U.S. Army Criminal Investigation Command (CID) investigation established probable cause to believe the applicant committed the offense of "Wrongful Sexual Contact," when he touched Ms. No****'s buttock and placed her hand on top of his groin area and making a false official statement.
5. On 11 October 2011, court-martial charges were preferred against the applicant. The relevant DD Form 458 (Charge Sheet) shows he was charged with:

- one specification of, at or near Wiesbaden, Germany, on or about 27 August 2011, engage in sexual contact with L*** No**** by intentionally touching her buttocks with hand, while she was substantially incapacitated.
 - one specification of, at or near Wiesbaden, Germany, on or about August 2011, cause L*** No**** to engage in sexual contact, by forcing her hand to touch his genitalia through clothing, while she was substantially incapacitated
6. On 12 December 2011, in accordance with Rule for Courts-Martial 306(b) and 401(c)(1), the charges were dismissed without prejudice due to the victim's reluctance to pursue the charge.
7. On 14 December 2011, the applicant was issued a General Officer Memorandum of Reprimand (GOMOR) for wrongful sexual contact and making a false official statement to CID. The applicant acknowledged the reprimand on 15 December 2011.
8. On 14 April 2012, the applicant's immediate commander notified the applicant of his intent to initiate separation actions against him under the provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), paragraph 14-12c, for misconduct, commission of a serious offense. The reason for the proposed action is on 27 August 2011, he engaged in wrongful sexual contact with his wife's cousin while she was substantially incapacitated and unable to consent.
9. On 26 April 2012, the applicant consulted with legal counsel. He was advised of the basis for the contemplated separation action. Subsequent to receiving legal counsel, the applicant acknowledged the proposed discharge under the provisions of AR 635-200, paragraph 14-12c and its effects, and his available rights. He further acknowledged he understood that if a general discharge was approved, he could be deprived of some or all Army benefits, he could be ineligible for many or all benefits administered by the Department of Veterans Affairs (VA), and he could be deprived of some of his rights and benefits as a veteran under both Federal and State laws.
10. The applicant submitted a conditional waiver wherein he waived his right to an administrative separation board, provided he receives a characterization of service not less than a general, under honorable conditions discharge.
11. On 9 May 2012, the applicant's immediate commander initiated separation action against the applicant for misconduct – commission of a serious offense.
12. On 22 May 2012, the applicant's brigade commander recommended approval of the request to voluntarily waive consideration of his case by an administrative separation board contingent on his receiving a characterization of service no less favorable than General under Honorable Conditions. His recommendation was based on the unwillingness of the victim to participate in any proceedings in this matter and the

facts of the case. The lack of victim testimony may severely hinder the ability of counsel to show the board members the severity and impact of this crime. Further, while this crime is still very serious, it falls low on the spectrum of sexual assaults captured under Article 120, Uniform Code of Military Justice. For these reasons, the brigade commander believes the command is best served by ensuring this Soldier is immediately separated with a characterization of service of General under Honorable Conditions, which will result in very few military benefits for him as he leaves the service and will ensure that other Soldiers see that this type of crime can lead to separation.

13. On 14 March 2012, the applicant underwent a mental status evaluation that found no mental or medical defects and cleared him for participation in any administrative action deemed appropriate.

14. On 30 April 2012, the separation authority approved the conditional waiver and the recommendation for discharge, under the provisions of AR 635-200, paragraph 14-12c, by reason of misconduct – commission of a serious offense. He directed the applicant be separated with service characterized as under honorable conditions.

15. The applicant was discharged on 14 July 2012. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of AR 635-200, paragraph 14-12c, with the narrative reason for separation as “misconduct (serious offense),” Separation Code “JKQ” and Reentry Code “3.” He was awarded or authorized the Army Achievement Medal (2nd Award), Army Good Conduct Medal (2nd Award), National Defense Service Medal, and Global War on Terrorism Service Medal, NCO Professional Development Ribbon, Army Service Ribbon, and Overseas Service Ribbon.

16. On 30 July 2014, after careful review of his application, military records and all other available evidence, the Army Discharge Review Board (ADRB) determined that he was properly and equitably discharged. Accordingly, the ADRB denied his request for a change in the character and/or reason of his discharge,

17. On 29 November 2020, after reviewing the application and all supporting documents, the Board found that relief was not warranted. The Board carefully considered the applicant’s request, supporting documents, evidence in the records and published DoD guidance for consideration of discharge upgrade requests. The Board considered the applicant’s statement, his record of service, the nature of his misconduct and the reason for his separation. The Board determined the applicant was discharged for a criminal offense 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. Therefore, the Board denied relief.

18. The Board should consider the applicant's statement in accordance with the published equity, injustice, or clemency determination guidance.

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 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 wrongful sexual contact with his spouse's cousin while she was substantially incapacitated and unable to consent. The Board found no error or injustice in the separation proceedings and designated characterization of service assigned during separation. The Board noted the applicant provided no documentation to support his request, including post-service achievements or letters of reference to support clemency. Based on a preponderance of the evidence, the Board concluded that the characterization of service the applicant received upon separation was appropriate.

2. Additionally, the Board concluded the narrative reason for separation for misconduct was appropriate and an amendment to a more favorable reason was not warranted 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 AR20200004115 on 29 November 2020.

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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. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), sets forth the basic authority for the separation of enlisted personnel. This regulation provides 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. A characterization of under honorable conditions may be issued only when the reason for the Soldier's separation specifically allows such characterization.

c. Chapter 14 (Separation for Misconduct) establishes policy and prescribes procedures for separating personnel for misconduct because of minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, and absence without leave. Paragraph 14-12c (Commission of a Serious Offense) applied to Soldiers who committed a serious military or civilian offense, when required by the specific circumstances warrant separation and a punitive discharge was or could be authorized for that same or relatively similar offense under the UCMJ.

2. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records 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.

//NOTHING FOLLOWS//