

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 September 2024

DOCKET NUMBER: AR20230014454

APPLICANT REQUESTS:

- correction of his DD Form 214 (Certificate of Release or Discharge from Active Duty) to show:
 - an upgrade of his under other than honorable conditions characterization of service to honorable, under honorable (General), or “medical”
 - appropriate changes to the separation authority, narrative reason, and separation program designator (SPD) code, presumably more favorable
- a personal appearance before the Board

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

- DD Form 149 (Application for the Correction of Military Records)
- DD Form 214, for the period ending 9 April 2003
- Missouri Courts, Docket Number 13LW-DRxxxxx, dated 1 April 2013 to 10 September 2013
- Department of Veterans Affairs (VA) Documents (15 Pages), dated 23 December 2021 to 12 August 2022
- Statements of support
- Letter, K.G.

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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. His request is a plea for leniency based upon mitigating circumstances which led to a change in his behavior and mental status. He was subjected to physical, mental,

and sexual abuse from a member of his chain of command. Prior to these encounters, he was an outstanding Soldier. His promotion to E-3 is a clear indication of his conduct prior to the events which led him to go absent without leave (AWOL).

b. His commander recommended he receive a general discharge, and the VA concluded his character of service was "Honorable for VA Purposes." The unwarranted abuse, trauma, and its effect on his behavior and decision making are definitely mitigating factors. He was not given a proper medical evaluation prior to his separation. Had he been evaluated; the issues could have been exposed and impacted his discharge type.

c. The felony conviction against him was removed from his record. It should no longer be held against him. While in custody, following his AWOL, he tried to prove he was not responsible for the injury to his son. Being held by the military made it extremely hard. He took the advice of his attorney and took a plea deal so he could get out of the Army and fight the charges. Since his discharge, he has been awarded full custody of his children because they were still being abused by his ex-wife. This reinforces his claim of innocence.

d. He maintains a clean record and gainful employment. He is proud to be a high school science teacher. He volunteers every chance he gets, to include coaching a local elementary school age soccer team. He still tries to embody the morals and values instilled in him while he was in the Army. His discharge haunts him and is a constant reminder of the pain, shame, and trauma he endured.

3. The applicant enlisted in the Regular Army on 13 July 2000, for a 4-year period. Upon completion of initial entry training, he was awarded military occupational specialty 13B (Cannon Crewmember). The highest rank he attained was private first class/E-3.

4. The applicant was reported AWOL on 10 July 2001 and was subsequently dropped from the rolls on 11 August 2001.

5. The applicant was confined by civil authorities on 26 January 2002. Documents from the Superior Court of California, County of Riverside show the following:

a. The applicant was arrested and charged with willful harm/injury to a child; endangering person/health; with two enhancements: serious felony/used firearm and gross bodily injury (GBI) on a child under age 5. On or about 10 January 2003, the applicant pled guilty to the charge against him and admitted to both enhancements.

b. On or about 7 February 2003, the applicant was sentenced to formal probation for 60 months, to be committed to the custody of the Riverside County Sheriff Office for a substantial period of time, 365 days, with credit for time served, and a \$730.00 fine.

6. The applicant was reported present for duty on 27 February 2003.

7. The applicant's commander initiated a Report to Suspend Favorable Personnel Actions (FLAG), by reason of adverse action, effective 18 February 2003. On that same date, the applicant submitted a sworn statement, wherein he stated, he left Fort Carson to go home to his wife in California. He went AWOL because she was over 5 months pregnant and not receiving any medical aid. She was sick and thought something was wrong with the baby. Nobody was helping her. He knew leaving was not right, but he felt it was the only solution. He requested the following issues be considered:

- he was barely 19 years old when he left
- he was two weeks short of his one year mark when he left
- he was not running from anything; he left to help his family
- he would stay in if he had the opportunity
- he was a good Soldier until he went AWOL

8. The applicant was notified on 4 March 2003, of his immediate commander's intent to initiate separation action against him under the provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), Chapter 14, paragraph 14-5, by reason of conviction by civil court. As the specific reason, the commander stated the applicant deserted from the Army and remained in desertion until he was arrested, convicted by civilian authorities for injury or harm to a child, and returned to military custody. The commander further stated he was recommending a UOTHC characterization of service.

9. On the same date, the applicant acknowledged receipt of the notification and consulted with counsel. He was advised of the basis for the contemplated action to separate him and its effects; of the rights available to him; and the effect of any action taken by him to waive his rights.

a. He acknowledged understanding that he may expect to encounter substantial prejudice in civilian life if issued an under honorable conditions (general) discharge and may be ineligible for many or all benefits as a Veteran under both State and Federal laws if issued an UOTHC discharge.

b. He was advised he could submit any statements he desired in his own behalf. He elected to submit a statement; however, he failed to do so within the allotted seven days. After a ten day waiting period, the action was forwarded for final disposition.

10. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice, on 13 March 2003, for being AWOL, with intent to remain away permanently, from on or about 10 July 2001 until on or about 26 January

2002. His punishment consisted of reduction to private/E-1, forfeiture of \$575.00 pay per month for two months, 45 days of extra duty, and 45 days of restriction.

11. On 14 March 2003, the applicant's immediate commander formally recommended his separation from service, prior to his expiration term of service, under the provisions of AR 635-200, Chapter 14, by reason of conviction by civil court.

12. The applicant's intermediate commanders concurred with the recommended separation and further recommended a UOTHC characterization of service.

13. The separation authority approved the recommended separation action on 2 April 2003 and directed the issuance of a UOTHC characterization of service.

14. The applicant was discharged on 9 April 2003, under the provisions of AR 635-200, Chapter 14, Section II, by reason of misconduct. His DD Form 214 confirms his service was characterized as UOTHC, with separation code JKB and reentry code RE-4. He was credited with 1 year and 29 days of active service, with lost time from 10 July 2001 to 27 February 2003. He was awarded or authorized the National Defense Service Medal and the Army Service Ribbon.

15. The applicant provides:

a. A copy of Missouri Courts, case documents, show that on 26 July 2013, the petitioner was awarded sole legal and physical custody of minor children.

b. 15 pages of VA documents, dated 23 December 2021 to 12 August 2022, show the applicant's period of service from 13 July 2000 to 9 April 2003 was found honorable for VA purposes, entitling him to health care benefits and any disability determined to be service connected. The administrative decision details his chronicle of the military sexual trauma (MST) he experienced while in service. The VA determined a clear marker existed which indicated his unauthorized absence was due to the MST.

c. In a statement of support, the applicant's pastor states, in effect, he has known the applicant since the applicant was a young boy. When he learned the applicant went AWOL, he was shocked. No one that knew the applicant would have expected it. It was obvious he was struggling with something. He was arrested, clearly an injustice, and eventually kicked out of the Army. He came home changed and not in a good way. After prayer and counseling, the applicant opened up to him and told him about the sexual abuse and brutality he endured. Since the applicant's discharge, he was awarded custody of his three children, has remarried, and become a father of five. He is a loving and proud father, provider for his family, and actively works with troubled children. He still struggles with the lasting effects of his trauma.

d. In an undated letter, the applicant's wife details the applicant's emotional, cognitive, and social issues "in conjunction with the mental evaluation" her husband was to have. She further stated she was hopeful there was something that could be done to help his quality of life.

16. Regulatory guidance provides when an individual is discharged under the provisions of AR 635-200, Chapter 14, the separation authority may direct a general discharge if such is merited by the Soldier's overall record. Characterization of service as honorable is not authorized unless the Soldier's record is otherwise so meritorious that any other characterization clearly would be inappropriate.

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

18. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his discharge or a referral to IDES for a medical discharge. He contends he experienced military sexual trauma (MST), mental health conditions, including PTSD that mitigate his misconduct and could warrant a medical discharge. 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 July 2000; 2) The applicant was reported AWOL on 10 July 2001; 3) The applicant was arrested and charged with willful harm/injury to a child; endangering person/health; with two enhancements: serious felony/used firearm and gross bodily injury (GBI) on a child under age 5. On or about 10 January 2003, the applicant pled guilty to the charge against him and admitted to both enhancements; 4) The applicant accepted nonjudicial punishment on 13 March 2003, for being AWOL, with intent to remain away permanently, from 10 July 2001-26 January 2002; 5) On 14 March 2003, the applicant's immediate commander formally recommended his separation from service, Chapter 14, by reason of conviction by civil court; 6) The applicant was discharged on 9 April 2003, Chapter 14, Section II, by reason of misconduct. His service was characterized as UOTHC, with separation code JKB and reentry code RE-4. He was credited with 1 year and 29 days of net active service, with lost time from 10 July 2001 to 27 February 2003.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's available military service records. The VA's Joint Legacy Viewer (JLV) and hardcopy VA medical documentation provided by the applicant were also examined.

c. The applicant asserts he experienced MST, mental health conditions including PTSD while on active service, which mitigates his misconduct and potentially warranted a medical discharge. There is insufficient evidence the applicant reported MST while on

active service. There is insufficient evidence the applicant ever reported mental health symptoms or was diagnosed with a mental health condition including PTSD while on active service. The applicant was not placed on a temporary or permanent psychiatric profile or required inpatient psychiatric hospital treatment for PTSD or another mental health condition during her active service. Lastly, there is insufficient evidence the applicant was provided a Mental Status Exam as part of his administrative separation proceedings.

d. A review of JLV provided evidence the applicant began to engage with the VA for behavioral health treatment related to his report of MST in 2022. He has consistently reported being exposed to MST by a member of his chain of command, and he has been diagnosed with service-connected insomnia, anxiety disorder, unspecified and PTSD (100% SC for treatment purposes). The applicant has remained in behavioral health treatment for these conditions at the VA till present.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to support the applicant had a condition or experience that mitigates his misconduct of going AWOL, but there is insufficient evidence his case warrants a referral to IDES. The determination if there is sufficient evidence to dismiss the applicant's conviction by civil court is outside the area of expertise of the medical advisor. However, the applicant's mental health condition or experience of MST would not mitigate harm/injury to a child, if it is determined the applicant did commit those crimes.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant asserts he experienced MST and resultant mental health conditions including PTSD which mitigates his misconduct or warrants a referral to IDES. There is sufficient evidence the applicant was exposed to MST while on active service, and he was diagnosed by the VA with service-connected insomnia, an anxiety disorder, and PTSD as a result.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced MST and resultant mental health conditions including PTSD which mitigates his misconduct or warrants a referral to IDES. There is sufficient evidence the applicant was exposed to MST while on active service, and he was diagnosed by the VA with service-connected insomnia, an anxiety disorder, and PTSD as a result.

(3) Does the condition experience actually excuse or mitigate the misconduct? Partially, there is sufficient evidence the applicant was exposed to MST while on active service, and he was diagnosed by the VA with service-connected insomnia, an anxiety

disorder, and PTSD as a result. The applicant did go AWOL, which is an avoidant behavior and natural sequelae to MST and the applicant's service-connected mental health conditions including PTSD. Thus, the applicant's misconduct of going AWOL is mitigatable per Liberal Consideration. The determination if there is sufficient evidence to dismiss the applicant's conviction by civil court is outside the area of expertise of the medical advisor. The applicant's mental health conditions or his experience of MST would not mitigate harm/injury to a child, if it is determined the applicant committed those crimes in that: 1) harm/injury to a child is not a natural sequelae to MST or the applicant's mental health conditions including PTSD and; 2) MST and the applicant's mental health conditions including PTSD do not affect one's ability to distinguish right from wrong and act in accordance with the right. Lastly, there is insufficient evidence the applicant was ever found to not meet retention standards from a psychiatric perspective while on active service. There was also insufficient evidence the applicant was ever placed on a temporary or permanent psychiatric profile or warranted inpatient psychiatric treatment. Therefore, there is insufficient evidence his case warrants a referral to IDES, at this time.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was 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 convicted by civilian authorities for injury or harm to a child. However, the Board noted the applicant was later awarded sole legal and sole physical custody of his children. The Board determined based on the evidence provided by the applicant, an upgrade of his characterization of service to under honorable conditions (General) was warranted.
2. Upon review of the applicant's petition, military records, and concurrence with the medical advisor's review finding insufficient evidence the applicant was ever placed on a temporary or permanent psychiatric profile or warranted inpatient psychiatric treatment, the Board determined referral of the applicant's case to the Disability Evaluation System was unwarranted.
3. Upon review of the applicant's petition, military records, and concurrence with the medical advisor's review finding sufficient evidence to support the applicant had a

condition or experience that mitigated his misconduct of being absent without leave, the Board found the evidence supports amendment of his narrative reason for separation to Secretarial Authority with corresponding codes.

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:

1. The Board determined the evidence presented is sufficient to warrant partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant's DD Form 214, for the period ending 9 April 2003, to show:

- item 24 (Character of Service): under honorable conditions (General)
- item 25 (Separation Authority): Army Regulation 635-200
- item 26 (Separation Code): JFF
- item 27 (Reentry Code): 1
- item 28 (Narrative Reason for Separation): Secretarial Authority

2. The Board further determined that the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains upgrading his characterization of service to honorable or referring his case to the Disability Evaluation System.

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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 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, USC, 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 ABCMR applicants (and/or their counsel) prior to adjudication.
3. Title 10, USC, Section 1203 provides for the physical disability separation of a member who has less than 20 years of service and a disability rating at less than 30 percent (%).
4. Title 38, USC, Sections 1110 and 1131, permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.
 - a. The Army rates only conditions determined to be physically unfitting at the time of discharge which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career.
 - b. The VA does not have authority or responsibility for determining physical fitness for military service. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge, to compensate the individual for loss of civilian employability. As a result, the VA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform his duties. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.
5. 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. prescribes the policies and procedures for correction of military records by the Secretary

of the Army, acting through the ABCMR. The regulation provides 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.

6. Army Regulation 40-501 (Standards of Medical Fitness) governs medical fitness standards for enlistment, induction, appointment (including officer procurement programs), retention, and separation (including retirement). Once a determination of physical unfitness is made, the physical evaluation board (PEB) rates all disabilities using the Veterans Affairs Schedule for Rating Disabilities (VASRD).

a. Chapter 2, provides physical standards for enlistment, appointment, and induction with the purpose to ensure members medically qualified are medically capable of completing required training, adapt to a military environment without geographical limitations, perform duties without aggravation of existing physical defects or medical conditions.

b. The standards in Chapter 2 are applicable to individuals who enlist in the Regular Army - for medical conditions or physical defects pre-dating original enlistment, standards are applicable for enlistee's first 6 months of active duty. It states that enlisted Soldiers identified within the first 6 months of active duty with a condition that existed prior to service that does not meet the physical standards may be separated following an evaluation by an Entrance Physical Standards Board, under the provisions of Army Regulation 635-200, Chapter 5; for Reserve Component and ARNG/ARNGUS members, these standards are applicable during the enlistee's first period of active duty for training (ADT).

7. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities, reasons for separating Soldiers from active duty, and the separation codes to be entered on the DD Form 214. Separation code "JKB" is the appropriate code to assign to Soldiers separated under the provisions of Army Regulation 635-200, Chapter 14, Section II, by reason of misconduct.

8. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) establishes the Army Disability Evaluation System (DES) and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. It states, in part:

a. Only the unfitting conditions or defects and those that contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability. The mere presence of impairment does not, in and of itself, justify a finding of unfitness because of physical disability.

b. The PEB-appointed counsel advises the Soldier of the Informal PEB (IPEB) findings and recommendations and ensures the Soldier knows and understands his or her rights. The Soldier records his or her election to the PEB on the DA Form 199 and has 10 calendar days from the date of receiving the PEB determination to make the election, submit a rebuttal, or request an extension.

9. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations) sets forth the basic authority for the separation of enlisted personnel. The regulations provides:

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 established policy and prescribed procedures for separating members for misconduct. Specific categories included minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, or absences without leave. Action would be taken to separate a member for misconduct when it was clearly established that rehabilitation was impracticable or was unlikely to succeed. A discharge under other than honorable conditions (UOTHC) was normally considered appropriate. However, the separation authority could direct a general discharge if such was merited by the Soldier's overall record.

d. Chapter 14, Section II (Conviction by Civil Court) provides that a Soldier may be considered for discharge when initially convicted by civil authorities, or when action is taken that is tantamount to a finding of guilty. Initiation of separation action is not mandatory. The immediate commander must consider whether the specific circumstances of the offense warrants separation.

10. 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 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 post-traumatic stress disorder; 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 sexual assault or sexual harassment was

unreported, or 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.

11. 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.

//NOTHING FOLLOWS//