

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 July 2024

DOCKET NUMBER: AR20230014462

APPLICANT REQUESTS: reconsideration of his previous request for an upgrade of his under honorable conditions (General) discharge.

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

- Request for Reconsideration, Foshee & Yaffe, Attorneys at Law, dated 20 September 2023
- Army Board for Correction of Military Records (ABCMR), Record of Proceedings (ROP), Docket Number AR20180001429, dated 20 February 2020
- ABCMR, ROP, Docket Number AR20150016700, dated 14 March 2017
- Notarized statement, C.R.S., undated

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous considerations of the applicant's case by the ABCMR in Dockets Number:

- AR20050005962 on 18 October 2005
- AR20150016700 on 14 March 2017
- AR20180001429 on 20 February 2020

2. Counsel states, in effect:

a. The applicant was unjustly separated from the U.S. Army with an under honorable conditions (General) discharge, following an incident involving his then wife, C.R.S. An incident that was disputed by C.R.S., in favor of the applicant. Prior to the incident, his service was exemplary. He continuously received high evaluations, awards, and commendations. He is a leader in his community. Despite this, the ABCMR has still found it appropriate to deny his discharge upgrade.

b. The Board gave no consideration to the signed affidavit from C.R.S. The signed statement is provided as evidence. Although the evidence was submitted in past proceedings, the Board gave no mention to the statement in its discussion. The Board reasoned the applicant's separation was voluntary. Therefore, he was not improperly

discharge. Since the sole reason for the general discharge was due to an alleged domestic violence incident, for which the allegations were retracted by the victim and found insufficient by a grand jury, the Board should grant the applicant's request for an honorable discharge.

3. The applicant accepted an appointment as a commissioned officer in the U.S. Army Reserve, in the rank of second lieutenant on 14 May 1994. He was ordered to active duty on 14 June 1994 and continued to serve in a voluntary indefinite status. He was promoted to captain on 1 June 1998.

4. An Alabama Uniform Incident/Offense Report and associated documents show an incident took place on or about 11 June 2004, between the applicant and his then wife, C.R.S., while they were out boating.

a. The report states [the applicant] became aggravated with his wife and began assaulting her. He struck her in the head, causing injury to her forehead and left eye. She was also bruised on her left leg and buttocks area and complained of pain in her ribs and lack of hearing in her left ear. She was transported to the hospital by ambulance. The initial report from the hospital indicated she had a broken nose and broken ribs.

b. In an Elmore County Domestic Violence Statement, the applicant stated, in effect, while boating, he and his wife became lost. He went to shore to ask for directions. After receiving directions, he waived his wife over to him. She was laughing and talking on her cell phone. He began to swim to the boat. He started panicking and screamed for help. He was able to latch onto the boat. When he came into the boat, he told his wife she was going to let him die. He lost control and hit the phone against her head.

c. A Military Police Desk Blotter, dated 12 June 2004, shows the applicant fled the scene of the incident and was later apprehended and placed in the Elmore County Jail, pending charges for domestic violence (2nd degree assault).

5. On 29 July 2004, the applicant received a General Officer Memorandum of Reprimand (GOMOR) for assaulting his wife and conduct unbecoming of an officer and gentleman.

a. The GOMOR specifically noted the assault resulted in C.R.S. having a broken nose and broken ribs.

b. The applicant acknowledged receipt of the GOMOR and elected to submit a rebuttal. In an attached statement, dated 5 August 2004, the applicant stated, the wrongful actions that occurred were not in his nature or acceptable. He would never recover from the emotional terror that occurred and the sorrow he felt for his wife. After

the incident, he self-referred to the Army Substance Abuse Program, completed a six week anger management course, and attended the Safety and Accountability for Everyone (SAFE) program which focused on prevention of domestic violence. He lost his wife to divorce and was faced with tremendous financial hardship. He strove to better his battalion and sustain his dignity as an officer. He requested the reprimand not be forwarded to his Official Military Personnel File (OMPF).

c. The applicant's immediate and intermediate commanders recommended the GOMOR be filed in the applicant's OMPF. They acknowledged his satisfactory performance, but further opined that based upon the seriousness of the incident, he needed to be held accountable. On 2 September 2004, the commanding general directed the GOMOR be filed in the applicant's OMPF.

d. In an undated, notarized letter to the commanding general, the applicant's wife, C.R.S., stated she did not receive injuries resulting in a broken nose or broken ribs. She went to the local hospital, was treated, and released on the same evening.

6. A review of the applicant's service records show:

a. On 6 December 2004, the applicant was notified that a Headquarters, Department of the Army (HQDA), Promotion Selection Board recommended him for promotion to major. Due to his receipt of a GOMOR, his record would be referred to a Promotion Review Board which would recommend to the Secretary of the Army, one or more of the following:

- that he be retained on the promotion list
- that his name be removed from the promotion list
- that he show cause for retention on active duty

b. Also on 6 December 2004, the Army Ad Hoc Review Board denied the applicant's initial request for Resignation in lieu of Elimination. The case was returned to the Commanding General, Fort Rucker, AL, for action as deemed appropriate.

c. On 23 March 2005, a board of inquiry convened to determine whether the applicant should be discharged from the Army. The board found by a preponderance of evidence, that he did commit acts of personal misconduct, and that he did conduct himself in a demeanor that is unbecoming of an officer. The board noted that this was an isolated incident; that he had 10 years of outstanding service; and that he would in fact, through separation, lose his military career. The board recommended that the applicant be discharged from the military under honorable conditions (General).

d. On 22 June 2005, the applicant was notified of the board's decision. He was told he could tender resignation in lieu of elimination, request discharge in lieu of elimination,

apply for retirement in lieu of elimination, or submit an appellate brief and statement. He submitted an appellate brief stating that he had taken responsibility for his actions. He also stated that, after seeing pictures of injuries, listening to a statement, and combining factual information, it was apparent that the injuries were exaggerated. He believed the injuries were either self-inflicted or caused by a skiing accident earlier in the day. He went on to provide a history of his wife's character, stating that she was unhappy, resentful, and had a cloudy past.

e. On 17 August 2005, the Acting Staff Judge Advocate (SJA) conducted a legal review of the board proceedings. He noted a lack of evidence, stated the applicant was a Reserve Component (RC) commissioned officer, which required one or more of the voting members to be an RC officer. The Acting SJA recommended the elimination packet be returned for rehearing.

f. On 24 August 2005, the applicant voluntarily tendered his resignation from the Army under the provisions of Army Regulation (AR) 600-8-24 (Officer Transfers and Discharges), Chapter 4, in lieu of further elimination proceedings.

g. The separation authority approved the applicant's resignation in lieu of elimination and directed the issuance of a General Discharge Certificate.

7. The applicant was discharged on 25 October 2005, under the provisions of AR 600-8-24, paragraphs 4-2b and 4-24a (1), by reason of unacceptable conduct. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows his characterization of service as under honorable conditions (General), with separation code BNC. He was credited with 11 years, 4 months, and 12 days of active service. He was awarded or authorized the following:

- Meritorious Service Medal
- Army Commendation Medal (3rd award)
- Army Achievement Medal (5th award)
- Army Reserve Component Achievement Medal
- National Defense Service Medal (2nd award)
- Armed Forces Service Medal
- Army Service Ribbon
- Overseas Service Ribbon
- North Atlantic Treaty Organization Medal
- U.S. Army Aviator Badge
- Parachutist Badge
- Air Assault Badge
- Global War on Terrorism Service Medal

8. On 18 October 2005, the ABCMR reviewed the applicant's request for removal of the GOMOR from his OMPF. The applicant stated the GOMOR was based upon erroneous findings. As evidence, he included the notarized letter from his former wife. The applicable ROP notes the undated statement from the applicant's former wife indicates that she did not receive injuries resulting in a broken nose or broken ribs, as reflected in the GOMOR. The Board concluded that while it may be true that the extent of the injuries he inflicted on his wife were misdiagnosed, the GOMOR was no less serious. The misdiagnosis did not invalidate the GOMOR or validate his conduct. The Board denied his request for relief.

9. The Army Discharge Review Board (ADRB) reviewed the applicant's request for an upgrade of his characterization of service and expungement of the GOMOR from his OMPF on 2 April 2010. Counsel stated, [the applicant] was wrongfully given an official reprimand based upon incorrect information, based upon a police report indicating the injuries his wife received were more serious than they were. As evidence, counsel provided the notarized statement from the applicant's former wife. After a careful review of the applicant's military records and the issues and documents submitted with the application, the analyst determined the evidence was not sufficiently mitigating to warrant an upgrade. The Board determined the applicant was properly and equitably discharged and denied his request.

10. The ABCMR reviewed the applicant's request for reconsideration of an upgrade of his characterization of service on 14 March 2017. In his request for reconsideration, counsel stated, the facts of the incident leading to the proceedings against the applicant were exaggerated and unfounded. In an affidavit (provided as an enclosure), the applicant's former wife stated she did not receive a broken nose and ribs. Counsel further stated, the grand jury of Alabama did not find probable cause, and the charges were dismissed. After careful review, the Board determined there was no evidence that showed the applicant was improperly discharged or that the type of discharge he received was incorrect. The Board denied his request.

11. The applicant petitioned the ABCMR to reconsider his request for an upgrade of his character of service, on 12 January 2018.

a. In his request, counsel stated the applicant's wife admitted the allegations were falsified, and the grand jury in Alabama found that there was insufficient evidence to indict the applicant. Counsel further stated, the Board failed to consider these facts in their previous decision. As evidence, counsel included a self-authored statement from the applicant's former wife, wherein she states, there were errors in the information presented at the time of his discharge. When her husband returned to the boat in a frenzied state, his body unintentionally contacted her forehead. She fell, causing bruising. Her husband asked people to call the authorities to make sure she was safe and went to look for the car. He got lost and did not return until early morning. She was

scared and upset when questioned by the police, and she was taken to the hospital as a precaution. The charges against her husband were dismissed. They divorced over issues outside of the situation. Her husband was discharged under false pretenses.

c. The Board reviewed the request on 20 February 2020. After careful consideration, the Board noted that based upon the findings of the Board of Inquiry, the standard of proof being different from a criminal proceeding and an administrative action, as well as the statement from the former spouse being unsigned, the Board concluded there was insufficient evidence of an error or injustice. The applicant's request was denied.

12. As evidence, counsel provides a request for reconsideration from Foshee & Yaffe, Attorneys at Law, dated 20 September 2023, two previous ROPs for Dockets Number AR20150016700, dated 14 March 2017 and AR2018001429, dated 20 February 2020, and an undated, notarized letter to the Commanding General, Fort Rucker Aviation Center, Fort Rucker, AL, from the applicant's former wife.

13. The Board should consider the applicant's argument and/or evidence in accordance with the published equity, injustice, or clemency determination guidance.

#### 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 unacceptable conduct, including assault upon his spouse. The Board found no error or injustice in the separation proceedings and designated characterization of service assigned during separation. Through his counsel, the applicant asserts his former spouse recanted her statement; however, the Board determined by a preponderance of the evidence that the applicant committed the offense and that a discharge upgrade is not warranted.

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 Numbers AR20050005962 on 18 October 2005, AR20150016700 on 14 March 2017, or AR20180001429 on 20 February 2020.

■

■ ■  
\_\_\_\_\_

■  
■

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 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR.

a. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. Paragraph 2-15 governs requests for reconsideration. This provision of the regulation allows an applicant to request reconsideration of an earlier ABCMR decision if the request is received within one year of the ABCMR's original decision and it has not previously been reconsidered." Applicants must include new evidence or arguments in its reconsideration for the Board to consider. The Board will review applications for reconsideration to see if new evidence is sufficient to demonstrate material error or injustice.

2. AR 600-8-24, in effect at the time, prescribes the officer transfers from active duty to the Reserve Component and discharge functions for all officers on active duty for 30 days or more. The regulations states when an officer's tour of active duty is terminated due to discharge, retirement, or released from active duty (REFRAD), the period of service will be characterized as honorable, general under honorary conditions, general under other than honorable conditions or dishonorable, depending on the circumstances. The character of service will be predicated on the officer's behavior and performance while a member of the Army. Characterization normally will be based on a pattern of behavior and duty performance rather than an isolated incident. However, there are circumstances in which conduct reflected by a single incident may provide the basis of characterization of service.

a. An officer will normally receive an Honorable characterization of service when the quality of the officer's service has met the standards of acceptable conduct and performance of duty for an officer.

b. An officer will normally receive an Under Honorable Conditions characterization of service when the officer's military record is satisfactory but not sufficiently meritorious to warrant an Honorable discharge. A separation under honorable conditions will normally be appropriate when an officer—

- submits an unqualified resignation or a request for REFRAD under circumstances involving misconduct



- is separated based on misconduct, including misconduct for which punishment was imposed, which renders the officer unsuitable for further service, unless an Under Other Than Honorable Conditions separation is appropriate

3. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) 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//