

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 30 September 2024

DOCKET NUMBER: AR20230014911

APPLICANT REQUESTS:

- Upgrade of his discharge to honorable
- Personal appearance before the Board in person or via video/telephone

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) Medical Records

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, 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, he was sexually assaulted when he was stationed at Fort Riley, Kansas in approximately January 1989. He reported the assault to his first sergeant (1SG) and the 1SG had him write a statement that was never followed up on. He was beaten, stabbed, and raped. He went to the Irwin Army Hospital where he had exploratory surgery for the stab wound he received on the right side of his neck. As a result of the experience, he resorted to using drugs and alcohol to relieve the pain and suffering he endured as self-medication. The three individuals that did this to him were also in the Army and he saw them now and then. They threatened to finish the job and kill him if he told anyone their identity. It seemed his 1SG never did anything with his statement as he was never contacted by the military police. After exiting the military, he used alcohol and drugs to treat himself for his post-traumatic stress disorder (PTSD). He is currently clean and sober for 13 years and is in a VA treatment program for PTSD. He is married and has raised two college educated children. He wanted to retire from the Army. He loved his job as a howitzer section chief.

3. The applicant provides his VA medical records, which are available for the Board's review and will be reviewed by the Army Review Board's Agency Medical staff for the Board's consideration.

4. The applicant's service record contains the following documents:

a. DD Form 4 (Enlistment or Reenlistment Document - Armed Forces of the United States) shows he enlisted in the Regular Army and entered active duty on 26 June 1978. He remained in the Regular Army through immediate reenlistments and extension of his enlistment.

b. Orders 142-22, published by Personnel Service Center, 24 July 1987 show he was promoted to the rank of staff sergeant effective 1 August 1987 with a date of rank of 7 July 1987.

c. Permanent Orders 18-6, published by Personnel service Center, 28 January 1988 shows he was awarded the Army Achievement Medal (2nd Oak Leaf Cluster) for meritorious achievement from 22 March 1986 through 14 May 1987.

d. DA Forms 2627 (Record of Proceedings Under Article 15, Uniform Code of Military Justice (UCMJ)) shows he accepted nonjudicial punishment on:

(1) 2 February 1989 for wrongful use of cocaine. His punishment included reduction to the rank of sergeant (SGT), forfeiture of \$612 a month for two months, and extra duty for 45 days. He did not appeal his punishment.

(2) 18 April 1989 for failing to go to extra duty. His punishment included reduction to the rank of specialist (SPC) suspended, forfeiture of \$541 a month for two months suspended, and extra duty for 45 days, suspended.

e. DA Form 2627-2 (Record of Supplementary Action under Article 15, UCMJ) 26 July 1989 shows the reduction to the rank of SPC, forfeiture of \$541 a month for 2 months, and extra duty for 15 days that was suspended on 18 April 1989 was vacated because he was derelict in the performance of duty on 26 July 1989.

f. Memorandum Administrative Reprimand, 21 February 1989, shows he was reprimanded for testing positive for the use of cocaine. On 2 March 1989, he acknowledged receipt of the reprimand and elected not to submit statements or documents in his behalf. His chain of command recommended the reprimand be filed in his Official Military Personnel File (OMPF). On 20 March 1989, the administrative reprimand was filed in his OMPF.

g. DA Form 4126-R (Bar to Reenlistment Certificate), 10 April 1989, shows his commander was recommending he, in the rank of SGT, be barred from reenlistment for receiving an Article 15, a letter for mandatory separation, and testing positive on a urinalysis. His commander states this kind of flagrant disregard for military regulation will not be tolerated by a noncommissioned officer. The applicant stated he had been counseled and advised on the basis of the bar to reenlistment and did not desire to submit a statement in his own behalf.

h. Disposition Form, 21 June 1989, shows it was alleged that his dependents were no longer residing in post quarters with him. A signed notice to terminate quarters was given to the applicant's command.

i. DD Form 458 (Charge Sheet), 28 August 1989, shows his commander preferred charges against him for:

- Making a false official statement on or about 23 June 1989
- Behaving with disrespect to a commissioned officer on or about 26 July 1989
- Wrongfully and unlawfully making and uttering a check for the procurement of lawful currency on or about 25 June 1989 on six occasions, 28 June 1989 on two occasions, and 29 June 1989, knowing he did not or would not have sufficient funds
- Dereliction of duties on or about 21 June 1989

j. Memorandum subject Request for Discharge for the Good of the Service, 5 September 1989, shows the applicant consulted with legal counsel and voluntarily requested to be discharged under the provisions of Army Regulation 635-200 (Personnel Separations – Active Duty Enlisted Administrative Separations), chapter 10. Legal counsel advised him of the basis for his contemplated trial by court-martial and the maximum permissible punishment authorized under the UCMJ; of the possible effects of a discharge under other than honorable conditions (UOTHC) if the request was approved; of the procedures and rights available to him, and of his right to submit statements in his own behalf. The applicant declined to submit statements in his own behalf.

k. The applicant's chain of command recommended approval of his request and that he receive an UOTHC discharge. The Staff Judge Advocate recommended the approval authority approve the discharge and direct he be separated with an UOTHC discharge. On 13 September 1989, the appropriate approval authority approved his request, directed he receive an UOTHC discharge, and directed he be reduced to private (PVT) E-1 under the provisions of Army Regulation 600-200 (Enlisted Personnel Management) paragraph 6-11.

l. DA Form 3822 (Report of Mental Status Evaluation), 20 September 1989 shows he had the mental capacity to understand and participate in the proceedings, was mentally responsible, and met retention requirements.

m. Order 184-5, published by Personnel Service Center, 21 September 1989 reduced him to the rank of PVT effective 13 September 1989.

n. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged, in the rank of PVT, on 28 September 1989. He had completed 11 years, 3 months, and 3 days of active duty service. He was discharged for the good of the service in lieu of court-martial. His character of service was UOTHC, his separation code was KFS, and his reentry code was 3, 3C.

o. His Army medical records show he was seen for a stab wound and human bites to his hands.

p. On 8 June 1993, the Army Discharge Review Board reviewed and denied his application to upgrade his discharge. The Case Report and Directive are available for the Board's review.

5. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. 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. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) character of service. He contends he experience military sexual trauma (MST) and resultant PTSD that mitigates his misconduct. 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 Regular Army on 26 June 1978; 2) The applicant accepted nonjudicial punishments on 02 February 1989 for use of cocaine and on 18 April 1989 for failing to go to extra duty; 3) On 28 August 1989, charges were preferred against the applicant for: A) making a false official statement; B) behaving disrespectful toward a commissioned officer; C) dereliction of duties; and D) writing bad checks on eight occasions; 4) The applicant was discharged on 28 September 1989, Chapter 10- for the good of the service in lieu of trial by court-martial. His characterization of service was UOTHC.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service and medical records. The VA's Joint

Legacy Viewer (JLV) and hardcopy VA medical documentation provided by the applicant were also examined.

c. On his application, the applicant noted MST and resultant PTSD were related to his request as contributing and mitigating factors in the circumstances that resulted in his separation. There is evidence the applicant was treated for a stab wound and human bites to his hands while on active service, which is consistent with his report of MST. There is insufficient evidence the applicant was diagnosed with a mental health condition including PTSD while on active service. He was seen for a Mental Status Evaluation as part of his administrative separation proceedings on 20 September 1989. He was not diagnosed with a mental health condition, and he was cleared to participate in the proceedings from a psychiatric perspective.

d. A review of JLV provided evidence the applicant has been engaged with treatment for PTSD related to MST since 2022. He has consistently reported being sexually assaulted and stabbed while on active service. In addition, he reported using cocaine at the time of his active service to cope with his negative symptoms associated with his experience of MST and symptoms of PTSD. He has been diagnosed with service-connected PTSD. However, he does not receive service-connected disability at this time for this condition.

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 partially mitigates his misconduct.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant contends he experienced MST and resultant PTSD while on active service. The applicant was diagnosed with PTSD related to MST by the VA in 2022.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he experienced MST and resultant PTSD while on active service. The applicant was diagnosed with service-connected PTSD related to MST by the VA in 2022.

(3) Does the condition experience actually excuse or mitigate the misconduct? Partially, there is sufficient evidence beyond self-report the applicant experienced MST and resultant PTSD, while on active service. He has been diagnosed with service-connected PTSD due to his experience of MST by the VA, and he is actively in treatment. The applicant did use illegal drugs, which could be an avoidant and self-medicating behavior. Avoidant behavior is a natural sequelae to PTSD and MST. In

addition, the applicant's erratic, and avoidant behavior of being disrespectful and avoiding his military duties are also potentially natural sequelae to MST and PTSD. However, there is no nexus between the applicant's experience of MST and resultant PTSD and his misconduct of making a false statement and writing bad checks in that: 1) these types of misconduct is not a part of the natural history or sequelae of MST and PTSD; 2) The applicant's MST and PTSD do not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing a mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration his contention alone is sufficient for the

BOARD DISCUSSION:

After reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined partial relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the lengthy pattern of misconduct leading to the applicant's separation and the findings in the medical review that only partial mitigation for the misconduct is appropriate, the Board concluded there was insufficient evidence of an error or injustice warranting an upgrade to the applicant's characterization of service. However, the Board did note that the applicant did complete a previous period of honorable service which is not currently reflected on his DD Form 214 and recommended that change be completed to more accurately reflect his military service.

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 a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by adding the following additional statement to block 18 (Remarks) of his DD Form 214: "Continuous honorable active service from 26 June 1978 until 13 May 1987."
2. The Board further determined 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 to upgrading the characterization of his discharge.

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, U.S. Code, 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. 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. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 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.
3. Army Regulation 635-200 (Personnel Separations – Active Duty Enlisted Administrative Separations) sets policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons. Readiness is promoted by maintaining high standards of conduct and performance.

a. An honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier'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.

c. 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 separation specifically allows such characterization. It will not be issued to Soldiers solely upon separation at expiration of their period of enlistment, military service obligation, or period for which called or ordered to AD.

d. A discharge under other than honorable conditions is an administrative separation from the Service under conditions other than honorable. It may be issued in lieu of trial by court martial.

e. A Soldier who requests discharge as prescribed in chapter 10 may be discharged under other than honorable conditions if he/she has been afforded the opportunity (not less than 72 hours) to consult with a consulting counsel.

(1) The Soldier must certify in writing that he/she understands that he/she may receive a discharge under other than honorable conditions.

(2) The Soldier must understand the adverse nature and possible consequences of such a discharge.

(3) The Soldier must personally sign a request for discharge. A conditional request is not permitted.

(4) The consulting counsel will sign as a witness, indicating that he/she is a commissioned officer of The Judge Advocate General's Corps. A Soldier may waive consultation with a consulting counsel. Counsel will prepare a statement to this effect that will be attached to the file; the Soldier will state that the right to counsel has been waived.

f. A Soldier who has committed an offense or offenses, the punishment for which under the UCMJ and the Manual for Courts-Martial includes a bad conduct or dishonorable discharge, may submit a request for discharge in lieu of trial by court-martial.

4. Army Regulation 635-5-1 (Personnel Separations – Separation Program Designator (SPD) Codes), in effect at the time, prescribes the specific authorities, reasons for separating Soldiers from active duty, and the SPD codes to be entered on DD Form 214. It shows code KFS is used for discharge In Lieu of Trial by Court-Martial.

5. Army Regulation 601-210 (Regular Army and Reserve Components Enlistment Program) table 3-1 (U.S. Army reentry eligibility codes) states:

a. RE-1: Applies to: Person completing his or her term of active service who is considered qualified to reenter the U.S. Army.

b. RE-3: Applies to: Person who is not considered fully qualified for reentry or continuous service at time of separation or disqualification is waiverable.

c. RE-4: Applies to: Person separated from last period of service with a nonwaiverable disqualification.

d. RE-4R: Applies to: A person who retired for length of service with 15 or more years active federal service.

6. 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 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.

7. 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 (TBI); 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. 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.

8. 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 on the basis of 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.

9. Title 10, U.S. Code, section 1556 requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (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 Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//