

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 August 2024

DOCKET NUMBER: AR20240000639

APPLICANT REQUESTS: Upgrade of his characterization of service from Under Other than Honorable Conditions (UOTHC).

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- Self-authored statement
- Letters of support/recommendation (6)
- Articles from various media sources (6)

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 provides a self-authored statement which is available in its entirety for the Board's consideration. In effect, he states he is a victim of Military Sexual Trauma (MST). He was a good Soldier and was a squad leader during Basic Combat Training (BCT). Upon completion of Advanced Individual Training (AIT) he was assigned to a unit in Germany. He moved up the ranks quickly, culminating at the rank/grade of specialist (SPC)/E-4.

a. His career was on track until he was charged with petty theft and tried by court-martial. At the age of 20 he was incarcerated in the Ft. Leavenworth Correctional Facility with hardened criminals. The day he arrived in February 1979, the prisoners started yelling, "Fresh fish" and "Yellow meat." Yellow meat because of his complexion due to being bi-racial. That same night, three guys showed up at his cell and said they were going to rape him. Then he heard the door unlock and the three of them ran in all together and gang raped him. He tried to fight back but couldn't stop them. The next morning, he reported the incident but the guard either did not believe him or did not

want to believe him and told him to "Suck it up" and not to say anything else. He left it alone for fear that he might make things worse for himself. He guesses something was said because within the next day or two his assailants were moved, and the applicant was placed on suicide watch for a week before being placed into general population. He had nightmares and was extremely depressed, scared and always on guard. He isolated himself so as not to draw attention. He did not want to be victimized again. He was moved to a personnel control facility unit three months later and remained there for about 6 months.

b. He did not have any infractions following his court-martial and subsequent incarceration. His command kept him on active duty an additional 9 months after his incarceration and he was a model Soldier who performed his duties even better than he did before his court-martial. His court-martial offense was the only trouble that he had been in during his entire military career. He paid the ultimate restitution and yet, he was still discharged UOTHC. He wanted to be a career Soldier and felt the punishment was too harsh.

c. He fell into a deep depression due to the MST. After his discharge, he became homeless and spiraled downhill for a while. He needed help, but based upon his type of discharge, he was told that he would not receive any Veterans Affairs (VA) benefits. For over 43 years, he did not know where to turn. He could not find employment or housing. His characterization of service prevented him from obtaining the very help that he desperately needed.

3. On 4 November 1976, the applicant enlisted in the Regular Army for a period of 4 years in the rank/grade of private (PV1)/E-1. Upon completion of BCT and AIT, he was assigned to a unit in Germany.

4. On 23 November 1976, the applicant accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for, on or about 21 November 1976, assaulting four other Soldiers by striking them with a hand and/or foot. His punishment included forfeiture of \$90.00 pay and confinement in the Correctional Custody Facility for 7 days.

5. He was advanced to the rank of SPC on 8 August 1978, the highest rank he held.

6. Special Court-Martial Order (SPCMO) Number 19, issued by Headquarters, VII Corps on 2 May 1979 shows the applicant was arraigned and tried before a Special Court-Martial.

a. He pled guilty and was found guilty of the following offenses in violation of the UCMJ:

- four specifications of wrongfully and unlawfully opening certain mail matter in an Army Post Office before it was delivered to the person it was directed to
- four specifications of wrongfully and unlawfully stealing certain mail matter in an Army Post Office before it was delivered to the person it was directed to

b. He was sentenced to be reduced to PV1; confined at hard labor for 3 months; and to be discharged with a Bad Conduct Discharge (BCD).

c. On 2 May 1979, the sentence was approved and except for that portion of the sentence pertaining to the BCD, was ordered to be executed. Pending completion of appellate review, the applicant was ordered to be confined in the U.S. Disciplinary Barracks, Fort Leavenworth, KS, or elsewhere as competent authority may direct.

8. The applicant's duty status was changed from Present for Duty to Confined by Military Authorities effective 15 March 1979 when he was placed in confinement. His rank/grade was SPC/E-4 at the time.

9. SPCMO Number 13, issued by Headquarters, U.S. Army Field Artillery Center and Fort Sill, Fort Sill, OK on 19 February 1980 shows the approved sentence adjudged on 26 February 1979 had been affirmed. The provisions of Article 71(c), of the UCMJ having been complied with, the sentence would be duly executed.

10. Orders and his DD Form 214 (Certificate of Release or Discharge from Active Duty) show the applicant was discharged in the grade of E-1 on 26 February 1980, as a result of court-martial. He was assigned separation code "JJD" and reenlistment code "RE-3B." His service was characterized as UOTHC. He was credited with completion of 3 years, 1 month, and 28 days of net active service. He had lost time due to confinement from 15 March 1979 to 10 May 1979.

11. The applicant petitioned the Army Discharge Review Board (ADRB) for relief. On 21 September 1981, he was informed the ADRB had reviewed his case and determined that he was properly discharged and denied his request.

12. The applicant provides the following documents which are available in their entirety for the Board's consideration.

- six letters rendered by his mother's healthcare provider, his mother, two of his brothers, the senior deacon at his church, and a work colleague who all make favorable comments about his character
- three articles written about racial disparities in the military justice system

- article written about how Veterans may experience post-traumatic stress disorder (PTSD) differently depending on their personal characteristics
- article about racial disparities in clinical outcomes of VA residents between black and white Veterans

13. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, USC, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Rather, it is only empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

14. Army Regulation 635-200 (Personnel-Separations –Enlisted Personnel) provides that a Soldier would be given a BCD pursuant only to an approved sentence of a general or special court-martial and that the appellate review must be completed, and the affirmed sentence ordered duly executed.

15. On 23 April 2024, in response to a written request, a member of the Army Criminal Investigation Division, Quantico, VA informed a staff member of the Case Management Division of the Army Review Boards Agency (ARBA), Arlington, VA that a search of the Army criminal file indexes revealed no Sexual Assault records pertaining to the applicant.

16. In reaching its determination, the Board can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance. Applicants do not have a right to a hearing before the ABCMR.

17. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his Under Other than Honorable Conditions (UOTHC) characterization of service. He contends MST as related to his request.

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 on 4 November 1976.
- On 23 November 1976, the applicant accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for, on or about 21 November 1976, assaulting four other Soldiers by striking them with a hand and/or foot. His punishment included forfeiture of \$90.00 pay and confinement in the Correctional Custody Facility for 7 days.

- He was advanced to the rank of SPC on 8 August 1978, the highest rank he held.
- Special Court-Martial Order (SPCMO) Number 19, issued by Headquarters, VII Corps on 2 May 1979 shows the applicant was arraigned and tried before a Special Court-Martial. He pled guilty and was found guilty of the following offenses in violation of the UCMJ:
- four specifications of wrongfully and unlawfully opening certain mail matter in an Army Post Office before it was delivered to the person it was directed to
- four specifications of wrongfully and unlawfully stealing certain mail matter in an Army Post Office before it was delivered to the person it was directed to
- He was sentenced to be reduced to PV1; confined at hard labor for 3 months; and to be discharged with a Bad Conduct Discharge (BCD).
- On 2 May 1979, the sentence was approved and except for that portion of the sentence pertaining to the BCD, was ordered to be executed. Pending completion of appellate review, the applicant was ordered to be confined in the U.S. Disciplinary Barracks, Fort Leavenworth, KS, or elsewhere as competent authority may direct.
- Orders and his DD Form 214 (Certificate of Release or Discharge from Active Duty) show the applicant was discharged in the grade of E-1 on 26 February 1980, as a result of court-martial. He was assigned separation code "JJD" and reenlistment code "RE-3B." His service was characterized as UOTHC. He was credited with completion of 3 years, 1 month, and 28 days of net active service. He had lost time due to confinement from 15 March 1979 to 10 May 1979.

c. Review of Available Records: The Army Review Board Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant states, "his career was on track until he was charged with petty theft and tried by court-martial. At the age of 20 he was incarcerated in the Ft. Leavenworth Correctional Facility with hardened criminals. The day he arrived in February 1979, the prisoners started yelling, "Fresh fish" and "Yellow meat." Yellow meat because of his complexion due to being bi-racial. That same night, three guys showed up at his cell and said they were going to rape him. Then he heard the door unlock and the three of them ran in all together and gang raped him. He tried to fight back but couldn't stop them. The next morning, he reported the incident but the guard either did not believe him or did not want to believe him and told him to "Suck it up" and not to say anything else. He left it alone for fear that he might make things worse for himself. He guesses something was said because within the next day or two his assailants were moved, and the applicant was placed on suicide watch for a week before being placed into general population. He had nightmares and was extremely depressed, scared and always on guard. He isolated himself so as not to draw attention. He did not want to be victimized again. He was moved to a personnel control facility unit three months later and remained there for about 6 months. He did not have any infractions following his court-martial and subsequent incarceration. His command kept him on active duty an

additional 9 months after his incarceration and he was a model Soldier who performed his duties even better than he did before his court-martial. His court-martial offense was the only trouble that he had been in during his entire military career. He paid the ultimate restitution and yet, he was still discharged UOTHC. He wanted to be a career Soldier and felt the punishment was too harsh. He fell into a deep depression due to the MST. After his discharge, he became homeless and spiraled downhill for a while. He needed help, but based upon his type of discharge, he was told that he would not receive any Veterans Affairs (VA) benefits. For over 43 years, he did not know where to turn. He could not find employment or housing. His characterization of service prevented him from obtaining the very help that he desperately needed.”

d. Due to the period of service no active-duty electronic medical records were available for review.

e. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is not service connected, likely due to the characterization of his service. However, a discharge summary dated 23 December 2019 indicates the applicant was hospitalized on 18 December 2019. He was diagnosed with Psychoactive substance-induced organic mood disorder, Cocaine Dependence, and History of Alcohol Abuse). After his discharge, he was seen for a follow-up appointment but was not provided ongoing treatment due to issues with eligibility. Although the applicant does not provide any medical documentation indicating a diagnosis of PTSD, his assertion of MST is sufficient to warrant consideration by the Board.

f. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to support the applicant had an experience, MST, and subsequent mental health condition. However, the experience of MST occurred after his misconduct and would not mitigate his discharge.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts experiencing MST.

(2) Did the condition exist or experience occur during military service? Yes. The applicant asserts being gang raped while incarcerated at Ft. Leavenworth.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant was court-martialed for four specifications of unlawfully opening and stealing mail. His misconduct is not mitigated by his experience of MST since his crime predates his experience of MST. However, as a young 20-year-old he was incarcerated at Ft. Leavenworth, where he was gang raped. He later returned to full duty after his release on 10 May 1979 and served until his discharge on 26 February 1980. Given the

applicant already served his sentence for his crime and his experience of MST far outweighs his misconduct, in an attempt to make him whole, it is recommended the Board consider providing the applicant with full relief. The applicant has suffered with the stigma of an Under Other than Honorable Conditions (UOTHC) characterization of service for over forty years.

#### BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests.

a. The applicant's trial by a court-martial was warranted by the gravity of the offense charged (wrongfully and unlawfully opening certain mail matter in an Army Post Office before it was delivered to the person it was directed to and wrongfully and unlawfully stealing certain mail matter in an Army Post Office before it was delivered to the person it was directed to). The applicant's conviction and discharge were conducted in accordance with applicable laws and regulations and the discharge appropriately characterizes the misconduct for which he was convicted. He was given a bad conduct discharge pursuant to an approved sentence of a court-martial. The appellate review was completed, and the affirmed sentence was ordered duly executed. All requirements of law and regulation were met with respect to the conduct of the court-martial and the appellate review process, and the rights of the applicant were fully protected. The Board found no error or injustice in his separation processing.

b. The Board also considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewing official. The Board concurred with the medical official's finding the applicant had an experience, MST, and subsequent mental health condition. However, the experience of MST occurred after his misconduct and would not mitigate his discharge. Nevertheless, the Board accepted the medical reviewer's determination that there is mitigation, even if partial. Additionally, the applicant provides six letters rendered by his mother's healthcare provider, his mother, two of his brothers, the senior deacon at his church, and a work colleague who all make favorable comments about his character. The Board determined such letters support a clemency consideration.

c. Therefore, the Board determined that although his service did not rise to the level required for an honorable discharge, a general, under honorable conditions characterization of service is appropriate under published DoD guidance for liberal consideration of discharge upgrade requests. The Board determined that such upgrade did not change the underlying reason for separation and thus the narrative reason for separation and corresponding codes should not change.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

█	█	█	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

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 amending the DD Form 214 for the period of service ending 26 February 1980

- Character of Service: Under Honorable Conditions (General)
- Separation Authority: No Change
- Separation Code: No Change
- Reentry Code: No Change
- Narrative Reason for Separation: No Change

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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. Title 10, USC, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

3. Title 10, USC, Section 1552(b), provides, with respect to courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under the Uniform Code of Military Justice (UCMJ), action to correct any military record of the Secretary's Department may extend only to actions taken by reviewing authorities under the UCMJ or action on the sentence of a court-martial for purposes of clemency. The Secretary of the Army shall make such corrections by acting through boards of civilians within the executive part of the Army.

4. Title 10, USC, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Court-martial convictions stand as adjudged or modified by appeal through the judicial process, it is only empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

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 the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing. 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 635-200 (Active Duty Enlisted Separations), in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. An honorable discharge was separation with honor. Issuance of an honorable discharge certificate was appropriate when the quality of the Soldier's service generally met the standards of acceptable conduct and performance of duty or was otherwise so meritorious that any other characterization would clearly be inappropriate. Where there were infractions of discipline, commanders were to consider the extent thereof, as well

as the seriousness of the offense. Separation authorities could furnish an honorable discharge when subsequent honest and faithful service over a greater period outweighed disqualifying entries in the Soldier's military record. It was the pattern of behavior, and not the isolated instance, which commanders should consider as the governing factor.

b. A general discharge was a separation from the Army under honorable conditions. When authorized, separation authorities could issue a general discharge to Soldiers whose military record was satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. A discharge under other than honorable conditions (UOTHC) is an administrative separation from the Service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, homosexual conduct, security reasons, or in lieu of trial by court martial in the following circumstances.

(1) An under-other-than-honorable-conditions discharge will be directed only by a commander exercising general court-martial authority, a general officer in command who has a judge advocate or legal advisor available to his/her command, higher authority, or the commander exercising special court-martial convening authority over the Soldier who submitted a request for discharge in lieu of court-martial (see chapter 10) when delegated authority to approve such requests.

(2) When the reason for separation is based upon one or more acts or omissions that constitutes a significant departure from the conduct expected of Soldiers of the Army. Examples of factors that may be considered include the following:

- Use of force or violence to produce bodily injury or death
- Abuse of a position of trust
- Disregard by a superior of customary superior-subordinate relationships
- Acts or omissions that endanger the security of the United States or the health and welfare of other Soldiers of the Army
- Deliberate acts or omissions that seriously endanger the health and safety of other persons

d. A bad conduct discharge will be given to a Soldier pursuant only to an approved sentence of a general or special court-martial. The appellate review had to have been completed and the affirmed sentence then ordered duly executed. Questions concerning the finality of appellate review should be referred to the servicing staff judge advocate.

e. A dishonorable discharge will be given to a Soldier pursuant only to an approved sentence of a general court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed. Questions concerning the finality of appellate review should be referred to the servicing staff judge advocate.

7. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) implements the specific authorities and reasons for separating Soldiers from active duty. It also prescribes when to enter SPD codes on the DD Form 214.

a. Paragraph 2-1 provides that SPD codes are three-character alphabetic combinations that identify reasons for, and types of, separation from active duty. The primary purpose of SPD codes is to provide statistical accounting of reasons for separation. They are intended exclusively for the internal use of Department of Defense and the Military Services to assist in the collection and analysis of separation data. This analysis may, in turn, influence changes in separation policy. SPD codes are not intended to stigmatize an individual in any manner.

b. Table 2-3 provides the SPDs and narrative reasons for separation that are applicable to enlisted personnel. It shows, in part, SPD "JJD" is the appropriate code to assign to an enlisted Soldier who is involuntarily separated under the provisions of Army Regulation 635-200, Chapter 3, as a result of trial by court-martial. Additionally, the SPD/RE Code Cross Reference Table established RE code "4" as the proper reentry code to assign to Soldiers separated under this authority and for this reason.

8. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Service Discharge Review Boards (DRB) and Service 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; 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. 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.

9. 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, 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.

//NOTHING FOLLOWS//