

IN THE CASE OF: [REDACTED]

BOARD DATE: 16 December 2024

DOCKET NUMBER: AR20240003720

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions characterization of service to honorable.

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

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 would like the Board to grant him relief to allow him to qualify for benefits within his state and receive treatment for his service-connected mental health conditions outside of the Department of Veterans Affairs (VA) healthcare system.
 - a. During his military service, he became severely disabled and was repeatedly physically abused by his command to make him want out of the Army. The abuse included not allowing him to seek medical help and breaking his profile, which caused him great bodily pain and mental instability. Due to the treatment of his disabilities, he hid his mental health conditions from his command and medical team but did talk to his MFLAC [sic] (Military and Family Life Counselor). Between his depression, anxiety, and the medications, he admits to not making the greatest decisions; however, he feels he did not commit any crime to his knowledge.
 - b. He believes his commander wanted him out and claims she wanted him to beg her to leave so she could kick him out of the Army and replace him without due process. He also claims his commander waited until his profiles expired to make him do everything his expired profiles said not to do. Then she would send him to medical for reevaluation only to have medical write him a new profile. She told him there was no fighting it, and if he challenged her, he would regret it. He was often forced to go against his permanent profiles, to work longer and harder. He was subjected to constant check-

ins, deprived of his sleep because he could not take a physical fitness test or when he was ill, and being sick was considered going against his commander.

c. He regrets any wrongdoing the Army accused him of, but during that time, he was not in his right mind trying to escape any pain and conflict the Army caused him. He was hiding in hotels to escape the barracks and drowning himself in debt to live comfortably after being kicked out of the barracks, causing even more stress. He tried to distract himself with books, video games, movies, online dating, and drinking to avoid all of his problems. While his thoughts were unclear, he was still suffering anxiety, depression, and other issues at the hands of the Army.

d. Although he is out of the Army, every day is still hell from the conditions the Army left him. Every day, walking, eating, sleeping, dreaming, or enjoying hobbies he used to perform physically and mentally hurts. He can no longer go out in public or deal with the public due to the treatment by his commander. He has been unable to function in society due to his service-connected disabilities. He believes he was and is still suffering from mental health issues, unclear thought issues, and mistrust for the Army and is working to get better with the help he is receiving from the VA (Department of Veterans Affairs).

3. A review of the applicant's service record shows:

a. He enlisted in the Regular Army on 18 April 2017.

b. His Enlisted Record Brief shows he served in Poland from 16 September 2017 to 7 June 2018. Section VIII (Awards and Decorations) shows he was awarded or authorized the National Defense Service Medal.

c. On 3 June 2019, the applicant's immediate commander notified him of his intent to separate him under the provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), Chapter 14-12c, for misconduct - commission of a serious offense. As reasons for the proposed action, his commander cited the applicant's lewd acts upon a child not yet 16 years of age by using electronic communications technology to intentionally correspond with her in a manner that was indecent, grossly vulgar, and repugnant to common propriety and the applicant did so to affect the excitement of his sexual desire. His commander recommended the applicant an under other than honorable conditions characterization of service.

d. The applicant's record is void of an election of rights memorandum acknowledging he had been advised by counsel of the contemplated separation action, the possible effects of the discharge, and the rights available to him. His records are also void of any medical documentation showing he underwent a psychiatric evaluation or a medical examination as part of his consideration for discharge due to his

misconduct. However, his notification of separation memorandum notes in paragraphs 14 and 15, the applicant underwent a mental status evaluation and a complete medical examination.

e. On 16 July 2019, the separation authority approved the discharge recommendation for immediate separation under the provisions of AR 635-200, Chapter 14, paragraph 14-12c for misconduct, commission of a serious offense. He would be issued an under other than honorable conditions characterization of service.

f. On 6 September 2019, he was discharged from active duty with an under other than honorable conditions characterization of service. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 2 years, 4 months, and 19 days of active service with no lost time. He was assigned separation code JKQ and the narrative reason for separation listed as "Misconduct (Serious Offense)," with reentry code 4. It also shows he was awarded or authorized:

- National Defense Service Medal
- Global War on Terrorism Service Medal
- Army Service Ribbon

4. On 4 October 2022, the applicant was notified the Army Discharge Review Board (ADRB) reviewed the applicant's discharge processing but found it proper and equitable. The ADRB denied his request for an upgrade of his discharge.

5. By regulation (AR 635-200), action will be taken to separate a Soldier for misconduct, such as commission of a serious offense, when it is clearly established that despite attempts to rehabilitate or develop him or her as a satisfactory Soldier, further effort is unlikely to succeed.

6. In reaching its determination, the Board can consider the applicants petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

7. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) characterization of service to honorable. He contends, in effect, that Other Mental Health Issues are related to his request. More specifically, he stated on his application that he became 'severely disabled and was repeatedly abused by my command physically to make me want out.' 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 18 April 2017, 2) he served in Poland from 16 September 2017 to 07

June 2018, 3) the applicant's immediate commander notified him of his intent to separate him under the provisions of Army Regulation (AR) 635-200, Chapter 14-12c, for misconduct-commission of a serious offense. As reasons for the proposed action, his commander cited the applicant's lewd acts upon a child not yet 16 years of age by using electronic communications technology to intentionally correspond with her in a manner that was indecent, grossly vulgar, and repugnant to common propriety and the applicant did so to affect the excitement of his sexual desire, 4) the applicant was discharged on 06 September 2019. His DD Form 214 shows he was assigned a separation code of JQK and the narrative reason for separation was listed as "Misconduct (Serious Offense)" with a reentry code of '4.' 5) on 04 October 2022, the Army Discharge Review Board (ADRB) found his discharge to be proper and equitable and denied his request for upgrade.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. In-service medical records were available for review in JLV from 19 April 2017 through 04 September 2019. The applicant attended a Stress Management class through the Army Wellness Center on 15 September 2017 and 01 August 2018. A post-deployment BH health assessment on 11 June 2018 shows the applicant denied experiencing any ongoing worries or stressors, had no unprocessed losses, and denied experiencing suicidal or homicidal ideation (SI/HI). He was diagnosed with Problem Related to Primary Support Group, Unspecified, was cleared for SRP purposes, was not referred for specialty care, and was returned to duty. His profile status was noted as 'S1,' indicating he did not necessitate duty limitations for BH reasons. The applicant was evaluated by BH on 29 January 2019 for the purposes of a safety assessment to rule out imminent danger to himself following recent allegations against him in November 2018. A DA 3822 (Report of Mental Status Evaluation (MSE)) dated 30 January 2019 documented that the applicant was optimistic about the outcome of his case, that there was no evidence of suicidal ideation (SI), and he was determined to be at no elevated risk for SI or homicidal ideation (HI). The provider documented he endorsed mild anxiety and depressive symptoms that were secondary to exposure to incarceration and recommended ongoing BH services due to legal circumstances and to address psychological symptoms. He was diagnosed with Problems Related to Other Legal circumstances. He presented for a BH intake on 14 February 2019 with the chief complaint noted as his recent legal charges. It was documented that he did not report any previous BH treatment and documented he had no history of head injury. His diagnosis of Problems Related to Other Legal Circumstances was continued and no duty limitations for BH reasons were noted. At the time of his follow-up appointment on 27 February 2019, the applicant endorsed problems falling and staying asleep. He continued to follow-up with BH every 2-4 weeks until his separation from the military and

it was consistently documented that he did not require any duty limitations for BH reasons. Diagnoses throughout the course of treatment were noted as Problems Related to Other Legal Circumstances, Threat of Job Loss, and Worries. Prior to his discharge, on 21 August 2019 it was documented that he reported to his treating provider that he received a letter from the judge stating that the charges against him were going to be dropped. He underwent an MSE for the purposes of Chapter 14-12c separation on 28 February 2019. He reported having financial and legal stressors. He was diagnosed with Personal History of Other Mental and Behavioral Disorders. It was documented that he was screened for PTSD, TBI, Depression, and Sexual Assault and based on the evaluation it did not appear that a further comprehensive evaluation was necessary. The applicant was noted to be mentally responsible, able to distinguish right from wrong, had the mental capacity to understand and participate in administrative proceedings, and was cleared by BH for administrative separation. An MEB processing note dated 24 May 2019 shows applicant was diagnosed with Unspecified Insomnia Disorder through a VA examination. The reviewing provider noted there have been no significant limitations in duty related to an MEB-ratable BH diagnoses and noted that there were no BH conditions that failed retention standards.

d. Review of JLV shows the applicant is 100% service-connected through the VA, 70% of which is for Anxiety Disorder. The applicant completed a Compensation and Pension (C&P) examination on 23 May 2019 while he was still in-service which shows he was diagnosed with Insomnia Disorder and noted that his problems with sleep started after he got out of AIT. Two additional C&P examinations dated 06 August 2020 and 31 August 2021 were reviewed and show that he was diagnosed with Unspecified Anxiety Disorder during his 2020 evaluation and Major Depressive Disorder, Moderate, Recurrent was added as a diagnosis in 2021. The evaluating provider at the time of his evaluation in 2021 noted that the applicant's diagnoses were more 'likely than not service-connected due to the in-service treatment he received by his superiors due to the charges that he was freed from.' The providers documented that the applicant reported the charges against him while he was in service had been dropped.

e. The medical advisory from the applicant's previous petition to the ADRB was reviewed. The Advisor found that the applicant had one potentially mitigating BH condition, Anxiety Disorder. The Advisor opined that Anxiety Disorder does not interfere with one's ability to distinguish right from wrong and act in accordance with the right and that sexually based misconduct is not part of the natural history or sequelae of Anxiety Disorder, and, as such, that there were no mitigating BH conditions.

f. Based on the available information, it is the opinion of the Agency Medical Advisor that there is sufficient evidence that the applicant has been diagnosed with two potentially mitigating BH conditions since being discharged from the military, Anxiety Disorder and Major Depressive Disorder. His diagnosis of Insomnia is subsumed by his diagnoses of Anxiety Disorder and MDD. The applicant's in-service treatment for

Problems Related to Other Legal Circumstances, Threat of Job Loss, and Worries do not constitute mitigating conditions. Although there is evidence that the applicant has been diagnosed with two potentially mitigating BH conditions, as sexually-based misconduct is not associated with either Anxiety Disorder or MDD and the misconduct outweighs the relief offered through Liberal Guidance, BH mitigation is not supported.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant has been diagnosed and 70% service-connected for Anxiety Disorder and diagnosed with MDD.

(2) Did the condition exist or experience occur during military service? Yes, the applicant has been diagnosed and 70% service-connected for Anxiety Disorder and diagnosed with MDD.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. Review of the applicant's in-service medical records shows that he sought BH treatment secondary to legal issues. Psychosocial stressors such as legal problems, worries, and threat of job loss do not constitute mitigating conditions. Since being discharged from the military the applicant has been diagnosed and service-connected through the VA with Anxiety Disorder and has also been diagnosed with MDD which was attributed to his military service. Although there is evidence that the applicant has been diagnosed with two potentially mitigating BH conditions, consistent with the previous ADRB medical advisory findings, sexually-based misconduct is not part of the natural history and sequelae of Anxiety Disorder or MDD. Furthermore, neither Anxiety Disorder nor MDD interfere with the ability to distinguish between right and wrong and act in accordance with the right. Thus, BH mitigation is not supported.

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 relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the seriousness of the misconduct leading to the applicant's separation and the lack of mitigation found in the medical review, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant's characterization of service.

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 correction of the records of the individual concerned.

3/17/2025

X

CHAIRPERSON

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 635-200 (Active Duty Enlisted Administrative Separations), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.
 - 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 member 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.

3. 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 post-traumatic stress disorder (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.

4. 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; 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.

5. 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.

6. Section 1556 of Title 10, United States Code, 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//