

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 11 December 2024

DOCKET NUMBER: AR20240004528

APPLICANT REQUESTS: reconsideration of his earlier request for upgrade of his under other honorable conditions discharge to honorable.

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

- Letter, Request for Reconsideration, 6 February 2024
- Letter, CM____, Registered Mental Health Counselor (RMHC) Intern, Family and Child Development, 25 January 2024

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20080018442 on 12 February 2009.
2. The applicant, in effect, requests reconsideration of his earlier request.
3. The applicant provides a copy of a letter from CM____, RMHC, his counselor who evaluated him following a 2-year treatment program consisting of 15 sessions. His counselor noted he was assessed for post-traumatic stress disorder (PTSD), and presented with a history of depression, anxiety, following sexual assault while he was in the Army. This stressor was consistent with and supporting of a diagnosis for chronic PTSD. The complete assessment is available for Board review.
4. A review of the applicant's service records reflect:
 - a. On 22 July 1980, he enlisted in the Regular Army for a period of 3 years.
 - b. On 8 December 1980, he accepted nonjudicial punishment (NJP) under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) for stealing a cassette tape of a value of \$5.50 from the Main Exchange (PX) at Fort Jackson. His punishment consisted of forfeiture of \$116.00, confinement for 7 days, and extra duty for 14 days. The part of the punishment consisting of confinement was suspended for 30 days. He did not appeal this punishment.

c. On 1 March 1981, he was promoted to private 2/E-2.

d. On 17 April 1981, he accepted NJP under the provisions of Article 15 of the UCMJ for failing to go to his place of duty at the dining facility on 29 March 1981. His punishment consisted of forfeiture of \$116.00 for one month, suspended; 14 days of restriction, and 14 days of extra duty. He did not appeal this punishment.

e. On 31 March 1982, court-martial charge was preferred against him. A DA Form 458 (Charge Sheet) shows he was charged with being absent without leave (AWOL) from on or about 5 August 1981 to on or about 26 March 1982 (231 days).

f. On the same date, he was counseled on the requirement for undergoing a medical examination, which he waived; he was also counseled on the mandatory requirement to undergo a mental status evaluation; however, this evaluation is not contained in the available records.

g. On 2 April 1982, he consulted with legal counsel and requested a discharge in lieu of trial by courts-martial under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), chapter 10. He acknowledged:

- he was making the request of his own free will
- at least one of the charges preferred against him under the UCMJ authorized the imposition of a bad conduct or dishonorable discharge
- he was guilty of at least one of the charges against him or of a lesser included offense
- he did not desire further rehabilitation or further military service
- if his request for discharge was accepted, he may be discharged under other than honorable conditions and furnished an Under Other Than Honorable Conditions Discharge Certificate
- he would be deprived of many or all Army benefits, he may be ineligible for many, or all benefits administered by the Veterans Administration, and he may be deprived of his rights and benefits as a Veteran under both Federal and State law
- he may expect to encounter substantial prejudice in civilian life
- there was no automatic upgrading or automatic review of a less than honorable discharge by any Government agency
- he must apply to either the Army Discharge Review Board or the Army Board for Correction of Military Records if he wished a review of his discharge
- he realized that the act of consideration by either Board did not imply that his discharge would be upgraded
- he may submit a statement in his own behalf with this request and indicated did not desire to do so

- he may request a physical evaluation prior to his separation but indicated he did not desire to undergo such physical evaluation

h. On 2 April 1982, his request for excess leave was approved.

i. On 8 April 1982, his company commander recommended approval of his request for separation. On the same date his intermediate commander recommended approval of his request.

j. On 14 April 1982, the separation approval authority, approved his request and directed his discharge with issuance of an other than honorable conditions characterization of service and his reduction to the lowest enlisted grade.

k. On 20 May 1982, the applicant was discharged under the provisions of Army Regulation 635-200, Chapter 10, for conduct triable by court-martial. His service was characterized as under other than honorable condition with separation code JFS and reenlistment code 3. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows in:

- Block 12c (Net Active Service This Period) – 1 year, 1 month, and 11 days
- Block 13 (Decorations, Medals, Badges, Commendations, Citations, and Campaign Ribbons Awarded or Authorized) – Army Service Ribbon, Marksman Marksmanship Qualification Badge with Rifle Bar (M-16)
- Block 18 (Remarks) – excess leave of 49 days from 2 April 1982—20 May 1982
- Block 29 (Dates of Time Lost During This Period) – 3 August 1981 (1 day); 5 August 1981—25 March 1982 (231 days)

5. There is no evidence indicating he applied to the Army Discharge Review Board for an upgrade of his discharge within that board's 15-year statute of limitations.

6. On 12 February 2009 and in ABCMR Docket Number AR20080018442, the Board determined the evidence presented did not demonstrate the existence of error or injustice and voted to deny relief.

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

8. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting a reconsideration of his previous request for an upgrade of his under other than honorable conditions discharge

to honorable. The applicant's previous petition to the ABCMR is summarized in Docket Number AR20080018442 dated 12 February 2009. A review of his previous case shows that the applicant stated that he was sexually attacked at Ft. Jackson by a sergeant from the firing range. 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 (RA) on 22 July 1980, 2) he accepted nonjudicial punishment (NJP) on 08 December 1980 for stealing a cassette tape from the Main Exchange at Ft. Jackson, 3) on 17 April 1981, he accepted NJP for failing to go to his place of duty at the dining facility on 29 March 1981, 4) on 31 March 1982, court-martial charges were preferred against the applicant for being absent without leave (AWOL) from 05 August 1981 to 26 March 1982, 5) the applicant was discharged on 20 May 1982 under the provisions of Army Regulation (AR) 635-200, Chapter 10, for conduct triable by court-martial. His service was characterized as under other than honorable conditions with a separation code of JFS and reenlistment code of '3.' 6) the applicant's previous petition for relief to the ABCMR was denied.

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. The electronic military medical record (AHLTA) was not reviewed as it was not in use during the applicant's time in service. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. There were no in-service medical records available for review.

d. A review of JLV shows he is not service connected through the VA for any conditions. VA records show that the applicant sought housing assistance beginning 02 February 2012 and continued to follow-up on-and-off through 08 February 2019. It is of note that due to his UOTHC characterization of service, he is ineligible for VA clinical services. A VA Form 21-4138 dated 04 October 2010 provided by the applicant outlines the events that led to the MST. In the statement, the applicant indicated in 2010 during his first leave before AIT he was sexually assaulted by a Sergeant who had picked him up from the firing range.

e. The applicant included a civilian BH treatment summary from Family & Child Development dated 25 January 2024. The provider noted the applicant had been engaged in treatment since March 2022. It was documented that the applicant reported his BH symptoms began while in the Army, largely in between basic training and prior to Advanced Individual Training (AIT) [*Advisor's note:* review of the applicant's DA Form 2-1 shows he started AIT on 17 September 1980]. The provider noted the applicant reported a traumatic experience which was documented as being sexually assaulted and raped by a higher-ranking servicemember in his chain of command. The provider documented that the applicant's BH symptoms were consistent with a diagnosis of

PTSD, Chronic and specifically noted the traumatic event associated with his diagnosis as Military Sexual Trauma (MST). It was also documented that the applicant previously disclosed the history of sexual trauma in previous psychological treatment through a separate civilian facility in 2010, to which the provider documented that they had a copy of the records and reviewed them for accuracy. The provider documented the applicant was making progress in treatment through Cognitive Therapy though recommended continued treatment with the option of Trauma-Focused treatment modalities to continue to reduce his PTSD symptoms.

f. Based on the available information, it is the opinion of the Agency Medical Advisor that there is sufficient evidence that the applicant had a potentially mitigating condition or experience in-service that mitigated his misconduct, MST. Although there were no in-service medical records available for review, the applicant provided post-discharge documentation to include a VA claim statement authored in 2010 and a BH treatment summary from a non-VA/civilian provider showing that he reported a history of MST. This Advisor would contend that his misconduct of going AWOL is mitigated by his experience of MST.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant reported a history of MST.

(2) Did the condition exist or experience occur during military service? Yes, the applicant reported a history of MST.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. There were no in-service medical records available for review and the applicant is not service connected through the VA. Under Liberal Consideration, the applicant's self-assertion of MST alone is sufficient to establish that the applicant was a victim of MST. Review of the available information shows the applicant provided a statement to the VA as part of a claim in 2010 that he experienced MST. Additionally, a non-VA/civilian BH treatment summary shows the applicant reported a history of MST, was diagnosed with PTSD, Chronic due to the MST, and had been receiving ongoing treatment for this condition since 2022. As there is an association between avoidance behaviors and MST, there is a nexus between the applicant's misconduct of going AWOL and his experience of MST. Thus, BH mitigation is supported.

BOARD DISCUSSION:

1. 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 record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. One potential outcome was to grant partial relief based on the medical review finding sufficient evidence that the applicant had a potentially mitigating condition or experience in-service that mitigated his misconduct and MST. However, upon review of the applicant's request, available military records and the medical review, the Board majority considered the medical opine finding potential mitigating conditions insufficient.

2. The Board determined there is insufficient evidence to support the applicant's contentions for reconsideration of his earlier request for upgrade of his under other honorable conditions discharge to honorable. The Board noted the applicant provided no post service achievements or character letters for the Board to weigh a clemency determination. The Board noted the applicant's self-assertion and his VA medical counseling's documentation. The Board found the applicant's misconduct of theft and his AWOL could not be mitigated prior to his MST. Furthermore, the Board agreed the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief, specifically an upgrade of the under other than honorable conditions (UOTHC) discharge to a honorable discharge. Therefore, the Board denied relief.

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.

AR20080018442 on 12 February 2009.

[REDACTED]

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 (Army Board for Correction of Military Records) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. 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.
2. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, set 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.

a. Chapter 3-7 provided:

(1) 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. Only the honorable characterization may be awarded a member upon completion of his/her period of enlistment or period for which called or ordered to active duty or active duty training or where required under specific reasons for separation unless an entry level status separation (uncharacterized) is warranted.

(2) 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 active duty.

a. Chapter 10 stated a member who has committed an offense or offenses, the punishment of which under the UCMJ and the Manual for Court Martial, 1984, includes a bad conduct or dishonorable discharge, may submit a request for discharge for the good of the service. The discharge request may be submitted after court-martial charges are preferred against the member, or, where required, after referral, until final actions by the court-martial convening authority.

(1) A medical examination is not required but may be requested by the member under Army Regulation 40-501 (Medical Services – Standards of Medical Fitness), chapter 10. A member that requests a medical examination must also have a mental status evaluation before discharge.

(2) Commanders will insure that a member will not be coerced into submitting a request for discharge for the good of the service. The member will be given a reasonable time (not less than 72 hours) to consult with consulting counsel and to consider the wisdom of submitting such a request for discharge. Consulting counsel will advise the member concerning:

- the elements of the offense or offenses charged
- burden of proof
- possible defenses
- possible punishments
- provisions of Chapter 10
- requirements of voluntariness
- type of discharge normally given under provisions of Chapter 10
- rights regarding the withdrawal of the member's request
- loss of Veterans Administration benefits
- prejudice in civilian life because of the characterization of the discharge

(3) The separation authority will be a commander exercising general court-martial jurisdiction or higher authority. However, authority to approve discharges in cases in which a member has been AWOL for more than 30 days and has been dropped from the rolls of his or her unit as absent in desertion, and has been returned to military control, may be delegated to the commander exercising special court-martial convening authority over the member.

(4) An under other than honorable discharge certificate normally is appropriate for a member who is discharged for the good of the service. However, the separation authority may direct a general discharge certificate if such is merited by the member's overall record during the current enlistment.

3. Army Regulation 635-5-1 (Personnel Separations – Separation Program Designators), in effect at the time, listed the specific authorities, regulatory, statutory, or other directive, and reasons for separation from active duty, active duty for training, or full time training duty. The separation program designator "JFS" corresponded to "Court-Martial," and the authority, Army Regulation 635-200, Chapter 10.

4. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) 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.

5. 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. 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.

6. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to 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.

7. Section 1556 of Title 10, U.S. 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//