

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 22 January 2025

DOCKET NUMBER: AR20240004757

APPLICANT REQUESTS: upgrade of his under other than honorable conditions discharge to honorable or (general) under honorable conditions.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Certificate of Release of Discharge from Active Duty)

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 wants an upgrade of discharge to honorable due to undiagnosed Traumatic Brain Injury and mental health conditions resulting from service-connected injury. During active duty he suffered a head injury and back and foot injuries from M61 Vulcan rotating cannon falling on him. Spent time in base hospital and was on crutches. He was not diagnosed with TBI although signs of TBI are apparent based on spiraling behavioral issues post-injury. Around the same time, he began heavy drinking as a coping mechanism and using drugs. Suffered from anxiety and depression. Behavioral issues stemmed from undiagnosed TBI including mental health condition and unhealthy coping through alcohol and drugs. Resulted in domino effect of being in trouble with military and civilian authorities and eventually an under other than honorable discharge.

3. The applicant enlisted in the Regular Army on 2 January 1980. He held military occupational specialty 16R (ADA Short Range Crewman).

4. He received non-judicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ) on:

- 9 July 1980, for on or about 2 July 1980, he was found drunk on duty
- 4 November 1980, for on or about 23 October 1980, fail to go at the time prescribed to his appointed place of duty; he was reduced to private/E-1 (suspended until 4 December 1980)
- 7 April 1981, for on or about 16 March 1981, be absent without leave (AWOL) until on or about 19 March 1981; he was reduced to private/E-1

5. DA Form 2-2 (Record of Court-Martial Conviction) shows on 29 May 1981, a Special Court-Martial (SPCM) convened and found him guilty of:

- Disrespect toward a senior commissioned officer on or about 12 April 1981
- 2 counts of disobeying a lawful order on or about 12 April 1981
- Disrespect toward a senior non-commissioned officer on or about 12 April 1981
- Communicating a threat on or about 12 April 1981
- His sentence included confinement at hard labor for three months and forfeiture of \$250.00 per month for three months
- His sentence was approved on 16 June 1981
- Appellate review was completed on 30 June 1981

6. SPCM Order Number 195, issued by Headquarters, 3rd Battalion, Fort Riley, KS, on 22 July 1981, shows the unexecuted portion of the approved sentence to confinement at hard labor for three months, not subsequently modified, is suspended until 10 November 1981, at which time, unless sooner vacated, the suspended portion of the sentence will be remitted without further action.

7. He received NJP under Article 15 of the UCMJ on:

- 28 July 1981, for on or about 25 July 1981, failed to obey a direct order
- 5 August 1981, for being AWOL from on or about 29 July 1981 until on or about 3 August 1981
- 13 August 1981, for on or about 10 August 1981, failed to obey a direct order

8. The applicant's record is void of the complete facts and circumstances that led to his separation. However, his service record contains a DD Form 214 that shows he was discharged on 1 October 1981. He completed 1 year, 6 months, and 28 days net active service this period. His DD Form 214 also shows:

- Item 24 (Character of Service): Under other than honorable conditions
- Item 25 (Separation Authority): Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), paragraph 14-33b (1)
- Item 26 (Separation Code): JKA
- Item 27 (Reenlistment Code): RE-3B

- Item 28 (Narrative Reason for Separation): frequent involvement in incidents of a discreditable nature with civil or military authorities
- Item 29 (Dates of Time Lost During This Period): 810316 – 810318 (16 March 1981 – 18 March 1981; 810529 – 810721 (29 May 1981 – 21 July 1981); 810730 – 810802 (30 July 1981 – 2 August 1981)

9. There is no evidence the applicant applied to the Army Discharge Review Board for review of his discharge within the Board's 15-year statute of limitations.

10. During the processing of this case a response for sanitized copies of Law Enforcement Reports from Department of the Army, Criminal Investigation Division (DACID) was received on 14 November 2024. A search of the Army criminal file indexes, utilizing the information provided, revealed no Sexual Assault investigations pertaining to the applicant. Be advised that records at DACID are Criminal Investigative and Military Police Reports and are indexed by personal identifiers such as names, social security numbers, dates and places of birth and other pertinent data to enable the positive identification of individuals.

11. By regulation (AR 635-200) sets forth the basic authority for the separation of enlisted personnel. Chapter 14 establishes policy and prescribes procedures for separating members for misconduct.

12. 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.

#### MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade his other than honorable conditions discharge. He contends he experienced a Traumatic Brain Injury (TBI), military sexual trauma (MST), and mental health conditions including PTSD, which are related to his request. 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 2 January 1980; 2) The applicant received non-judicial punishments (NJPs) between July 1980-March 1981 for the following misconduct: A)intoxicated while on duty; B) failure to be at place of duty on time; and C) being AWOL from 16-19 March 1981; 3) On 29 May 1981, a Special Court-Martial found him guilty of: A) disrespecting a senior commissioned officer; B) disobeying an order (2 counts); C) disrespecting an NCO; and D) communicating a threat; 4) The applicant received NJPs between July-August 1981 for the following misconduct: A) failing to obey an order; B) being AWOL from 29 July 1981-03 August 1981; and C) failing to follow an order; 5) The applicant's record is void of the complete facts and circumstances that led to his separation. However, his service record contains

a DD Form 214 that shows he was discharged on 1 October 1981 for frequent involvement incidents of a discreditable nature with civil or military authorities. His character of service was under other than honorable conditions. The applicant completed 1 year, 6 months, and 28 days net active service.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the available supporting documents and the applicant's available military service records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical documentation was provided for review.

c. The applicant asserts he experienced a TBI, MST, and mental health conditions including PTSD, while on active service, which are related to his request. There is insufficient evidence the applicant reported or was diagnosed with a mental health condition, while on active service. In addition, there is insufficient evidence the applicant reported or was treated for a TBI while on active service. Lastly, there is insufficient evidence the applicant reported being exposed to MST while on active service.

d. A review of JLV provided evidence the applicant began to engage with the VA for assistance for homelessness and substance abuse treatment in May 2024. Initially, the applicant was diagnosed with nonservice connected depression, and he was provided psychiatric medication, which he did not report taking consistently. He was arrested again after starting treatment at the VA, and after his most recent incarceration, the applicant was provided inpatient treatment at the VA for substance abuse/dependence. The applicant was reported to have a lengthy history of incarceration after his military discharge and polysubstance abuse/dependence. The applicant reported in August 2024 feeling he was exposed to trauma during his military service by doing "intense drills late at night." Later, he reported being exposed to MST when he was 17 years old. The focus the applicant's treatment has been directed at his substance abuse recovery and depressive symptoms. There is insufficient evidence the applicant was diagnosed with a service-connected TBI or PTSD by the VA. The applicant does not receive service-connected disability at this time.

e. Based on the available information, it is the opinion of the Agency Medical Advisor that there is sufficient evidence to support the applicant reported experiencing MST to VA providers recently in 2024. There is also evidence the applicant was diagnosed with depression in 2024. However, there is insufficient evidence the applicant was experiencing a TBI or mental health conditions including PTSD at the time of his active service. While the experience of MST is a mitigating experience per Liberal Consideration for some of the misconduct the applicant engaged in during his active service, there is insufficient evidence surrounding the complete events and circumstances which resulted in the applicant's discharge to provide an appropriate opinion on possible mitigation as the result of his mental health condition or experience.

## f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant asserts he experienced a TBI, MST and mental health conditions including PTSD, which mitigates his misconduct. The applicant was diagnosed with depression by the VA in 2024, and he reported experiencing MST to his VA providers in 2024.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced a TBI, MST, and mental health conditions, including PTSD while on active service, which mitigates his misconduct. The applicant reported to his VA providers experiencing MST in 2024.

(3) Does the condition or experience actually excuse or mitigate the misconduct? Partially, there is insufficient evidence beyond self-report the applicant has been diagnosed with a mental health condition including PTSD or a TBI related to his active service. However, the applicant has reported experiencing MST to his VA providers, and he asserts this experience is related to his request for an upgrade. The applicant did engage in extensive misconduct which could be determined to be erratic or avoidant behavior. Erratic or avoidant behavior can be a natural sequelae to the applicant's experience of MST, and per Liberal Consideration, the applicant's contention of MST alone is sufficient for the board's consideration. However, there is insufficient evidence surrounding the complete events and circumstances which resulted in the applicant's discharge to provide an appropriate opine on possible mitigation as the result of his mental health condition or experience.

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 relief based on the medical opine finding sufficient evidence of MST. However, upon review of the applicant's petition, available military record and medical review, the Board considered the advising opinion of the Agency Medical Advisor that there is There is also evidence the applicant was diagnosed with depression in 2024.

2. However, there is insufficient evidence the applicant was experiencing a TBI or mental health conditions including PTSD at the time of his active service. While the

experience of MST is a mitigating experience per Liberal Consideration for some of the misconduct the applicant engaged in during his active service, there is insufficient evidence surrounding the complete events and circumstances which resulted in the applicant's discharge to provide an appropriate opinion on possible mitigation as the result of his mental health condition or experience.

### 3. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant asserts he experienced a TBI, MST and mental health conditions including PTSD, which mitigates his misconduct. The applicant was diagnosed with depression by the VA in 2024, and he reported experiencing MST to his VA providers in 2024.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced a TBI, MST, and mental health conditions, including PTSD while on active service, which mitigates his misconduct. The applicant reported to his VA providers experiencing MST in 2024.

(3) Does the condition or experience actually excuse or mitigate the misconduct? Partially, there is insufficient evidence beyond self-report the applicant has been diagnosed with a mental health condition including PTSD or a TBI related to his active service. However, the applicant has reported experiencing MST to his VA providers, and he asserts this experience is related to his request for an upgrade. The applicant did engage in extensive misconduct which could be determined to be erratic or avoidant behavior. Erratic or avoidant behavior can be a natural sequelae to the applicant's experience of MST, and per Liberal Consideration, the applicant's contention of MST alone is sufficient for the board's consideration. However, there is insufficient evidence surrounding the complete events and circumstances which resulted in the applicant's discharge to provide an appropriate opinion on possible mitigation as the result of his mental health condition or experience.

4. The Board notwithstanding the advising official finding sufficient evidence to support the applicant reported experiencing MST to VA providers recently in 2024. However, noting insufficient evidence surrounding the facts and circumstances resulting in the applicant's discharge. The Board acknowledged the applicant's account of injury and subsequent struggles, there is no medical documentation in the available record confirming a diagnosis of TBI or linking his misconduct to a service-connected condition at the time of discharge. The Board noted, the applicant's service record reflects a consistent pattern of misconduct, including multiple nonjudicial punishments under

Article 15 of the UCMJ and a conviction by Special Court-Martial for serious offenses such as disrespect, disobedience, and communicating threats. The Board acknowledged the applicant provided no post service achievements or character letters of support for the Board to weigh a clemency determination.

5. The Board found, based on frequent involvement in incidents of a discreditable nature with civil or military authorities, the applicant’s post-service claims of mental health conditions and TBI may warrant clinical attention, they do not mitigate the severity or frequency of the applicant’s misconduct during service. The Board agreed, in light of the documented disciplinary history, absence of medical evidence, and the nature of the offenses committed, the Board found insufficient basis to warrant relief. Therefore, the request for upgrade of discharge is denied.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	XXX	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
XXX	XXX	:	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.

X //SIGNED//  
\_\_\_\_\_

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 (Personnel Separations) sets forth the basic authority for the separation of enlisted personnel. Chapter 14 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, and convictions by civil authorities. Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter. However, the separation authority may direct a general discharge if such is merited by the Soldier's overall record. Only a general court-martial convening authority may approve an honorable discharge or delegate approval authority for an honorable discharge under this provision of regulation.

a. Paragraph 3-7a (1) states an honorable discharge is a separation with honor. 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. Only the honorable characterization may be awarded a member upon completion of his or her period of enlistment or period for which called or ordered to active duty or active duty for training, or where required under specific reasons for separation, unless an entry level status separation (uncharacterized) is warranted.

b. Paragraph 3-7b (1) states 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. Paragraph 3-7b (2) states a characterization of under honorable conditions may be issued only when the reason for the member's separation specifically allows such characterization. It will not be issued to members upon separation at expiration of their period of enlistment, military service obligation, or period for which called or ordered to active duty.

d. Paragraph 14-33 states members are subject to separation under the provisions of this section for acts of misconduct or patterns of misconduct.

3. The Acting Principal Deputy Under Secretary of Defense (Personnel and Readiness) provided clarifying guidance to Service DRBs and Service BCM/NRs on 24 February 2016 [Carson Memorandum]. The memorandum directed the BCM/NRs to waive the statute of limitations. Fairness and equity demand, in cases of such magnitude that a Veteran's petition receives full and fair review, even if brought outside of the time limit. Similarly, cases considered previously, either by DRBs or BCM/NRs, but without benefit of the application of the Supplemental Guidance, shall be, upon petition, granted de novo review utilizing the Supplemental Guidance.

4. The Under Secretary of Defense (Personnel and Readiness) provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017 [Kurta Memorandum]. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating 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.

a. Guidance documents are not limited to under other than honorable conditions discharge characterizations but rather apply to any petition seeking discharge relief including requests to change the narrative reason, re-enlistment codes, and upgrades from general to honorable characterizations.

b. An honorable discharge characterization does not require flawless military service. Many veterans are separated with an honorable characterization despite some relatively minor or infrequent misconduct.

c. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with mental health conditions, including PTSD; TBI; or behaviors commonly associated with sexual assault or sexual harassment; and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.

5. 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. 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 based on 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. 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//