

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 October 2024

DOCKET NUMBER: AR20240005677

APPLICANT REQUESTS:

- an upgrade of his under other than honorable conditions to honorable
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) Benefit Letter, dated 24 March 2023

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 during his service he was absent without leave (AWOL) due to experiencing traumatic events while on active duty. He had applied to and was approved by the VA for service-connected disability benefits and compensation. The applicant marked post-traumatic stress disorder and sexual assault/harassment as conditions related to his request.
3. The applicant provides his VA Benefits letter, dated 24 March 2023 showing he is receiving 100 percent service-connected disability compensation and his entitlement to health care benefits with the VA.
4. A review of the applicant's available service record reflects the following:
 - a. He enlisted in the Regular Army on 30 July 1997.
 - b. A DA Form 2-1 (Personnel Qualification Record – Part II) reflects the following:
 - (1) Item 9 (Awards, Decorations, and Campaigns) shows the Army Service

Ribbon.

(2) Item 18 (Appointments and Reductions) shows:

- Private (PV1) effective 30 July 1997
- Private (PV2) effective 30 January 1998
- PV1 effective 1 February 1999

(3) Item 21 (Time Lost) shows 12 February 1998 to 15 July 1998 AWOL and Return.

(4) Item 35 (Record of Assignments) shows

- 5 December 1997 - A Company, 2/5th Cavalry, Fort Hood, Texas
- 12 February 1998 – AWOL
- 14 March 1998 – Dropped from Rolls (DFR)
- 16 July 1998 – Returned from DFR

c. DD Form 616 (Report of Return of Absentee) shows the applicant was apprehended on 16 July 1998, returned to military control and transferred to the Personnel Control Facility at Fort Knox, KY.

d. DD Form 458 (Charge Sheet), dated 21 July 1998, shows he was charged with violation of the Uniform Code of Military Justice (UCMJ), Article 86 for being AWOL from on or about 12 February 1998 until on or about 16 July 1998.

d. On 21 July 1998:

(1) After consulting with legal counsel, he requested a discharge in lieu of trial by courts-martial under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10. He acknowledged:

- he was guilty of the charges against him or of a lesser included offense
- he does 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,
- he may be deprived of his rights and benefits as a Veteran under both Federal and State law
- he may apply to the Army Discharge Review Board or the ABCMR for upgrading

- he may expect to encounter substantial prejudice in civilian life

(2) Consistent with the chain of command recommendations, the separation authority approved the applicant's request for discharge in lieu of trial by courts-martial under the provisions of AR 635-200, Chapter 10. He would be issued an under other than honorable discharge and reduced to the lowest enlisted grade, private (E-1).

e. On 27 July 1999, he was discharged from active duty with an under other than honorable conditions characterization of service, separation code KFS, and the narrative reason for separation as "In Lieu of Trial by Court-Martial," with reentry code 3. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 1 year, 6 months, and 24 days of active duty service and was awarded or authorized the Army Service Ribbon.

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

6. On 4 September 2024, the Criminal Investigation Division (CID) provided a response for Request for Redacted CID/Military Police (MP) (Sexual Assault) report stating that a search of the criminal file indexes utilizing the information provided revealed no CID/MP records pertaining to the applicant.

7. By regulation (AR 15-185), an applicant is not entitled to a hearing before the ABCMR. Hearings may be authorized by a panel of the ABCMR or by the Director of the ABCMR.

8. By regulation (AR 635-200), an individual who has committed an offense or offenses, the punishment for which, includes a bad conduct or dishonorable discharge, may submit a request for discharge in lieu of trial by court-martial. An Under Other than Honorable Discharge Certificate normally is appropriate for a member who is discharged in lieu of trial by court-martial.

9. 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.

10. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions discharge. He contends he experienced military sexual trauma (MST) and resultant PTSD that mitigates his misconduct. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following: 1) The applicant enlisted in the Regular

Army on 30 July 1997; 2) The applicant charged with being AWOL from 12 February-15 July 1998 on 16 July 1998; 3) The applicant was discharged on 27 July 1999, Chapter 10- In Lieu of Trial by Court-Martial. His service was characterized as under other than honorable conditions.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's available military records. The VA's Joint Legacy Viewer (JLV) and VA documentation provided by the applicant were also examined.

c. The applicant asserts he was experienced MST and resultant PTSD while on active service, which mitigates his misconduct. There is insufficient evidence the applicant reported MST or any resultant mental health condition while on active service.

d. A review of JLV provided evidence the applicant began to engage with the VA in 2023. He underwent a Compensation and Pension Evaluation for PTSD on 11 April 2023. He reported experiencing MST during Basic Training and experienced resultant behavioral health symptoms. The applicant was diagnosed with service-connected PTSD (100%SC).

e. Based on the available information, it is the opinion of the Agency Medical Advisor that there is sufficient evidence to support the applicant had a condition or experience that mitigates his misconduct which led to his discharge.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant reported experiencing MST and resultant PTSD during his active service. He was diagnosed with service-connected PTSD as a result of the applicant's report of MST by the VA in 2023.

(2) Did the condition exist or experience occur during military service? Yes, the applicant noted experiencing MST and resultant PTSD during his active service. He was diagnosed with service-connected PTSD as a result of the applicant's report of MST by the VA in 2023.

(3) Does the condition experience actually excuse or mitigate the discharge? Yes, the applicant has been diagnosed with service-connected PTSD as a result of the applicant's report of MST to the VA in 2023. The applicant did go AWOL, which is an avoidant behavior and a natural sequelae to MST and PTSD. Per Liberal Consideration, the applicant's diagnosis of service-connected PTSD as a result of MST is a mitigatable mental health condition and 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 warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was charged with absenting himself from his unit from 12 February 1998 to 16 July 1998, punishable under the Uniform Code of Military Justice with a punitive discharge. After being charged, he consulted with counsel and voluntarily requested discharge in lieu of trial by court-martial. The Board noted the applicant's contention of post-traumatic stress disorder and reviewed and concurred with the medical advisor's review finding sufficient evidence to support the applicant was experiencing symptoms consistent with post-traumatic stress disorder. Based on the applicant's contention, the Board granted relief.

2. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant's DD Form 214, for the period ending 27 July 1999 to show an honorable characterization of service.

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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, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

3. Army Regulation 635-5 (Separations Documents) in effect at the time, states the DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of release from active duty, retirement, or discharge. The information entered thereon reflects the conditions as they existed at the time of separation. Block 28 (Narrative Reason) is based on regulatory or other authority and can be checked against the cross reference in AR 635-5-1 (Separation Program Designator (SPD) Codes).

4. Army Regulation 635-5-1 (Separation Program Designator Codes), in effect at the time, provides separation program designator (SPD) codes are three-character alphabetic combinations that identify reasons for, and types of, separation from active duty. The narrative reason for the separation will be entered in Block 28 of the DD Form 214 exactly as listed in the regulation. The separation code KFS lists the narrative reason for separation as "In Lieu of Trial by Court-Martial," under the provisions of AR 635-200, chapter 10.

5. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a (Honorable Discharge) 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.

b. Paragraph 3-7b (General Discharge) 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. Chapter 5-13 of the regulation states a Soldier may be separated for personality disorder (not amounting to disability (see AR 635-40), that interferes with assignment or with performance of duty. This condition is a deeply ingrained maladaptive pattern of behavior of long duration that interferes with the soldier's ability to perform duty.

d. Chapter 5-17 states Soldiers may be separated under this paragraph on the basis of other physical or mental conditions not amounting to disability (AR 635-40) and excluding conditions appropriate for separation processing under paragraph 5-11 or 5-13 that potentially interfere with assignment to or performance of duty.

e. Chapter 10 of this regulation states an individual who has committed an offense or offenses, the punishment for any of which includes a bad conduct discharge or dishonorable discharge, may submit a request for discharge in lieu of trial by court-martial. An Under Other than Honorable Discharge Certificate normally is appropriate for a member who is discharged in lieu of trial by court-martial.

6. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to carefully consider the revised PTSD criteria, detailed medical considerations, and mitigating factors, when taking action on applications from former service members administratively discharged under other than honorable conditions, and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

7. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole, or in part, to: mental health conditions, including PTSD; TBI; sexual assault; sexual harassment. Boards were directed 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 that misconduct which led to the discharge.

8. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NRs) regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief 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.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

9. 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//