

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 22 January 2025

DOCKET NUMBER: AR20240007388

APPLICANT REQUESTS: an upgrade of his dishonorable discharge.

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Letter
- Four Character References

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 is requesting an upgrade of his dishonorable discharge. He marked post-traumatic stress disorder (PTSD) on his DD Form 149 as a condition related to his request.

a. In 1971 he volunteered for the U.S. Army draft as a 17-year-old. He served three honorable periods of active service and upon his fourth reenlistment, he made a mistake that cost him his career. He does not believe it should be held against him for his entire life. In 1986 he was sentenced to five years at Fort Leavenworth, KS paroled after two and a half years, and released in September 1988. He lives with shame. He returned home to his wife and kids but after seven years his wife could not get pass what happened, and they divorced.

b. In 1995 he remarried and has been married to his current wife for 29 years. It is hard for him to discuss the cause of his discharge. He was in a bad place. His mother died from brain cancer, and he was drinking too much. There is no excuse. He prays for forgiveness from his victims, as the Lord has forgiven him. He is hopeful after 38 years of "serving his sentence," and no further issues, the three honorable discharges will aid in his request for an upgrade.

c. He has been diagnosed with heart disease which he believes is caused by agent orange. No one in his family has heart diseases; but cancer has run in his family. He loves the military and is shameful that he let the Army and himself down. He cannot erase the past, but he can live one day at a time being the best person he can be. He is hopeful his good service will be considered for an upgrade of his dishonorable discharge.

3. The applicant provides four-character letters:

(1) His friend of approximately 12 years, T__ P. K__ states he and the applicant started a friendship over a paint job for his home. He believes the applicant is a man that exemplifies family and service to community. He is reliable, hardworking, trustworthy, and meticulous. He is always available when needed, he is selfless, loyal, and loving to family and friends.

(2) A letter from D__ L__ dated 19 March 2024 noted he employed the applicant as a painter, prior to employing him at his store. He is personable and respected by his peers and managers. He displays a high degree of integrity, responsibility, and respect in all situations.

(3) A statement from his daughter dated 20 March 2024, wherein she states her father is the best dad she knows. He has always been there for her and never caused her any harm. She believes wholeheartedly that her father is a different person and has matured since his discharge. Although she does not agree with his actions, she knows today he is not a threat to anyone. He is understanding and caring. Her father is almost 70 years old and believes he should be allowed to live peacefully without being viewed as a pedophile or a bad person. He was exposed to agent orange and has experienced many problems that do not have a logical explanation. He previously served his country with pride and even influenced her to join the military. She looks up to her father and received his guidance throughout her life, she could not appreciate him more! Her father's amazing characteristics today should allow him an opportunity for peace.

(3) A letter from his wife dated 20 March 2024, wherein she stated they had been married for 30 years. He disclosed the mistake he made while in the Army when they met in 1994 and it was important for him to be honest because she had two young daughters. Her children's father passed away and the applicant became a full-time father. She never witnessed any inappropriate behavior, and they were always honest about disclosing the truth when attending counseling. In 1997 she was diagnosed with an inoperable brain tumor which was later diagnosed as multiple sclerosis, and he took over all household duties. They have custody of their granddaughter; the applicant is the only father she has known and calls him dad. He is a good provider. He has paid his debt for his crime. In the 1970's it was more accepted by society, today men are considered pedophiles.

4. A review of the applicant's service records show:

- a. Having had prior service, he enlisted in the Regular Army on 15 May 1974.
- b. His DA Form 2-1 (Personnel Qualification Record) includes foreign service in Germany from 11 April 1979 to 6 April 1982.
- c. On 4 August 1983, he was convicted by a special court-martial of one specification of violation of a lawful general regulation by hugging a trainee, one specification of having sexual intercourse with a trainee, and one specification of drinking with trainees while assigned as a permanent party Soldier in the grade of staff sergeant, E-6. His sentence forfeiture of all \$100.00 pay per month for five months and reduction to the grade of specialist, E-4.
- d. On 8 September 1983, the convening authority approved the sentence.
- e. On 24 March 1986, he was convicted by a general court-martial of two specifications of committing indecent acts upon the body of a female under 16 years of age, not his wife and one specification of committing sodomy with a child under 16 years of age, not his wife. His sentence included reduction to the private (E-1), forfeiture of all pay and allowances, confinement for 6 years, and a dishonorable discharge.
- f. On 23 May 1986, the convening authority approved the sentence and except for the dishonorable discharge, ordered it executed. The record of trial was forwarded to the Judge Advocate General of the Army for appellate review.
- g. On 23 October 1986, in the U.S. Court of Military Appeals, the applicant petitioned the court for review of his conviction. The memorandum of opinion shows:
 - (1) In the interest of judicial economy, Specification I of Charge I and the specification of Charge II are consolidated by adding the words "by attempting sodomy while" in front of the words "kissing and caressing her vaginal area" in Specification 1 of Charge I.
 - (2) The finding of guilty of Specification 1, as amended, of Charge I is affirmed. The finding of guilty of the specification of Charge II and Charge II are set aside and this specification and this charge are dismissed. The remaining findings of guilty are affirmed.
 - (3) Reassessing the sentence on the basis that Specification 1 of Charge I and Charge 11 and its specification are multiplicitous for sentencing and also on the basis of the entire record, the sentence is affirmed.

(4) The court finds as fact that appellant guilty of Charge II

h. General Court-Martial Order Number 226, dated 18 June 1987:

(1) Specification 1 of Charge I and the specification of Charge II are consolidated by adding the words "by attempting sodomy while" in front of the words "kissing and caressing her vaginal area" in Specification 1 of Charge I.

(2) The finding of guilty to Specification 1, as amended, of Charge I is affirmed. The findings of guilty of the specification of Charge II and Charge II are set aside and dismissed. The court finds as fact that appellant is guilty of Charge II and its specification.

(3) Accordingly, if any reviewing authority subsequently concludes that prejudicial error has tainted the findings of guilty of Specification 1 of Charge I and orders the findings of guilty of Specification 1 of Charge I set aside, the findings of Charge II and its specification can be revived and affirmed without rehearing.

(4) The remaining findings of guilty and the sentence to dishonorable discharge, confinement for six years, [confinement in excess of five years is suspended for two years or [applicant's] successful completion of sex offenders' class, effective 23 May 1986, with provisions for automatic remission. Sex offenders' class was completed effective 16 April 1987.

(5) After Article 71(c) was complied with and the sentence was affirmed, the dishonorable discharge was ordered executed.

i. On 14 August 1987, he was dishonorably discharged from active duty. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 8 years, 1 month, and 8 days of active service and 5 years, 8 months, and 18 days of prior active service with 509 days of lost time. It also shows he was awarded or authorized:

- Army Good Conduct Medal (4th Award)
- Army Commendation Medal
- National Defense Service Medal
- Army Service Ribbon
- Overseas Service Ribbon
- Noncommissioned Officer Professional Development Ribbon
- Sharpshooter Marksmanship Qualification Badge with Rifle Bar (M-16)

5. A review of the applicant's record confirms an administrative entry was omitted from his DD Form 214. The entry will be added to his DD Form 214 as an administrative correction and will not be considered by the Board.

6. By regulation (AR 635-200), a Soldier will be given a dishonorable discharge pursuant only to an approved sentence of a general or special court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed.

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. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to his dishonorable characterization of service. He contends he experienced an undiagnosed mental health condition, including PTSD, that mitigates his misconduct.

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 15 May 1974 and had subsequent reenlistments.
- On 4 August 1983, he was convicted by a special court-martial of one specification of violation of a lawful general regulation by hugging a trainee, one specification of having sexual intercourse with a trainee, and one specification of drinking with trainees while assigned as a permanent party Soldier in the grade of staff sergeant, E-6.
- On 24 March 1986, he was convicted by a general court-martial of two specifications of committing indecent acts upon the body of a female under 16 years of age, not his wife, and one specification of committing sodomy with a child under 16 years of age, not his wife.
- An appeal was entered, and General Court-Martial order number 226 dated 18 June 1987 showed the consolidation of some of the charges and changes to the wording, and he was sentenced to a dishonorable discharge, confinement for six years, and required to complete a sex offender's class.
- The applicant was discharged on 14 August 1987 and completed 8 years, 1 month, and 8 days of active service and 5 years, 8 months, and 18 days of prior active service with 509 days of lost time.

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 asserts he was in a bad place in his life in 1986 and made mistakes he

regrets, and he indicated PTSD as a mitigating factor in his discharge. The application was void of any medical or mental health records. There was insufficient evidence that the applicant was diagnosed with PTSD or another psychiatric condition while on active service.

d. The Joint Legacy Viewer (JLV), which includes medical and mental health records from DoD and VA, was also reviewed and showed the applicant initiated mental health treatment through primary care at the VA on 15 October 2015 and reported anxiety, irritability, and worry related to difficulty with his mother-in-law living with him and his wife. He was diagnosed with Adjustment Disorder with anxiety and depressed mood, seen for five therapy visits, and started on an antidepressant and an as needed anxiolytic before being transferred to a higher level of care. An intake for outpatient psychotherapy was conducted on 18 November 2015, and he reported continued difficulty with anger, frustration, anxiety, and depressed mood secondary to his mother-in-law, who had Alzheimer's Disease, moving in with him and his wife. He was seen routinely through March 2016 and continued on the same medications with no significant improvement until documentation showed nursing home placement for the mother-in-law. In August 2017 he reengaged with psychotherapy to address the events that led to his incarceration while in the military, and he attended weekly to monthly sessions through 2018. His diagnosis was changed to PTSD, but documentation is unclear on the identified traumatic event and primarily focuses on marital and occupational problems. In October 2020 he restarted therapy with another provider, and he continued to report difficulty with his marriage and anger problems. He engaged supportive therapy weekly shifting to monthly, and his most recent visit was on 4 March 2021.

e. A VA Rating Decision letter dated 19 October 2018 showed that the applicant's claims for ischemic heart disease, neuropathy, and PTSD were denied. It explained that the evidence did not show an event, disease, or injury in service, and the treatment records do not contain complaints, treatment, or diagnosis for this condition. No link was found between the applicant's medical condition and military service.

f. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support that the applicant had a condition or experience that mitigates his misconduct.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts he had an undiagnosed mental health condition, including PTSD, at the time of the misconduct. There were no in-service mental health records, and VA records showed diagnoses of Adjustment Disorder and PTSD dating back to 2015. However, a VA Rating Decision letter showed that a claim for PTSD was

denied because there was evidence of a link between his mental health condition and military service.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition while on active service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of military medical and mental health records revealed no documentation of any mental health condition(s) while on active service. VA records show a history of diagnoses of Adjustment Disorder and PTSD, but the applicant's claim for PTSD was denied. Additionally, there is no nexus between his asserted mental health condition, including PTSD, and his misconduct related to murder and aggravated assault: 1) these types of misconduct are not part of the natural history or sequelae of a mental health condition; 2) his asserted mental health conditions do not affect one's ability to distinguish right from wrong and act in accordance with the right.

h. There is insufficient evidence, beyond self-report, that the applicant was experiencing a mental health condition while on active service. However, the applicant contends he had a mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was 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. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support that the applicant had a condition or experience that mitigates his misconduct.

2. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts he had an undiagnosed mental health condition, including PTSD, at the time of the misconduct. There were no in-service mental health records, and VA records showed diagnoses of Adjustment Disorder and PTSD dating

back to 2015. However, a VA Rating Decision letter showed that a claim for PTSD was denied because there was evidence of a link between his mental health condition and military service.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition while on active service.

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3. The Board acknowledged the applicant's post-service conduct, including his long-term marriage, community involvement, and character references from family, friends, and employers, these factors do not outweigh the gravity of the offenses for which he was convicted. The applicant's own statements reflect remorse and personal accountability, but the misconduct was of such a serious nature that it undermined the integrity of the military profession and violated the trust placed in him as a noncommissioned officer. The applicant's conviction by general court-martial for indecent acts involving a minor under the age of 16 resulted in a dishonorable discharge, which was affirmed through appellate review and executed in accordance with law and regulation. The nature of the offenses, particularly their severity and impact warrants the retention of the dishonorable characterization of service.

4. However, the Board found merit in granting partial relief to annotate the applicant's previously omitted periods of continuous honorable active service from 16 February 1978 to 16 February 1982 on his DD Form 214 which constitutes an administrative oversight of the three honorable periods of active duty prior to his serious misconduct during his fourth term of service. Therefore, the Board granted partial relief to correct the applicant's DD Form 214 to reflect these periods of honorable service, however request for discharge upgrade is denied.

BOARD VOTE:

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

BOARD DETERMINATION/RECOMMENDATION:

1. 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 adding in item 18 the entry "Continuous Honorable Active Service from 19780216-19820215."
2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to an upgrade of his dishonorable discharge.

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.

ADMINISTRATIVE NOTE(S):

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 – Enlisted Personnel) 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 the 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. Paragraph 3-7c (Under Other Than Honorable Conditions) states a discharge under other than honorable conditions is an administrative separation from the service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, homosexuality, security reasons, or for the good of the service.

d. Chapter 3 states a Soldier will be given a dishonorable discharge pursuant only to an approved sentence of a general court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed.

3. Title 10, U.S. Code, section 1552, provides that the Secretary of a Military Department may correct any military record of the Secretary's Department when the Secretary considers it necessary to correct an error or remove an injustice. With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under the UCMJ, action to correct any military record of the Secretary's Department may extend only to correction of a record to reflect actions taken by reviewing authorities under the UCMJ or action on the sentence of a court-martial for purposes of clemency. Such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that Military Department.

4. 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.

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; 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.

6. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military BCM/NRs and DRBs 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 court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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, Boards 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, 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//