

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 23 January 2025

DOCKET NUMBER: AR20240008019

APPLICANT REQUESTS:

- an upgrade of his under other than honorable conditions discharge to under honorable conditions (General)
- a video/telephonic 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) 21-4138 (Statement in Support of Claim)
- VA Form 21-526EZ (Application for Disability Compensation and Related Compensation Benefits)
- VA Form 21-0781a (Statement in Support of Claim for Service Connection for Post-Traumatic Stress Disorder (PTSD) Secondary to Personal Assault)
- VA Form 21-22 (Appointment of Veterans Service Organization as Claimant's Representative)
- Self-Authored Statement
- DD Form 214 (Report of Separation 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 aspired to follow his father's example. After being assigned to Fort Story, VA, he would go after work to Virginia Beach with other Soldiers for beers. One evening, he realized he had too much to drink and was swaying a bit while using the latrine. While using the latrine, two other Soldiers came in and offered to help him to his room, which they did. The next thing he realized he was face down on his bed and someone was holding him down and raped him. He tried to resist but someone was slapping him in the face with his penis trying to shove it in his mouth. The next morning he realized he needed to lighten up on drinking. He took it as a life lesson.

a. A few days later, he got a phone call in the recreation room and it was a guy from the other night asking if he enjoyed it and if he reported it, he would be back. He did not tell anyone and did not intend to at that point.

b. A few days later, he got another call and was told he was going to visit him again and he went to the training noncommissioned officer and company commander and said he had a problem. He was told not to worry about it.

c. He was off on Good Friday so he decided to go home for Easter and planned to return on Sunday night for work on Monday. Over the weekend, he realized he could not go back, it just was not safe. He was afraid that if he came back, he would kill the guy and end up in Leavenworth. He told his mother that something bad happened and he could not go back. She understood and told him that it would work out. He felt if he was a few days late, they would realize how serious the incident was and that they would address the problem. He knew he would be punished but he hoped they would fix the problem.

d. He called the unit and identified himself, told them he was at home and could not get back, and asked if they could arrange to come get him. He gave them his address and expected that the military police would be knocking on his door. He waited and got a job at an excavation company because he had no money. They still did not come. Months went by and finally the military police came and took him to the house of correction where he stayed for a month.

e. When he left the Army, he left his pride behind. He worked whatever construction job he could. He was homeless for a while and lived in a van. He could not trust anyone and could not maintain relationships, especially with women. He eventually married a woman who understands. He still does not sleep well and constantly thinks about that night and what came after.

3. The applicant provides several VA documents which show he claimed service-connected compensation for PTSD due to military sexual trauma.

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

a. He enlisted in the Regular Army on 1 September 1977.

b. He underwent a mental status evaluation on 22 March 1979, which showed, in pertinent part:

- Behavior: normal
- Mood: level
- Thinking Process: clear

- Thought Content: normal
- Significant Mental Illness: no
- Mentally Responsible: yes
- Able to distinguish right from wrong: yes
- Able to adhere to the right: yes
- Meets the retention standards: yes

c. On 27 March 1979, court-martial charges were preferred against the applicant for being absent without leave from 24 August 1978 to 21 March 1979.

d. On 28 March 1979, the applicant consulted with legal counsel and voluntarily requested discharge for the good of the service under the provisions of Chapter 10, Army Regulation 635-200 (Personnel Separations – Enlisted Personnel). He acknowledged he was guilty of the charge against him or of a lesser included offense therein contained which also authorizes the imposition of a bad conduct or dishonorable discharge.

(1) He understood that, if his request for discharge was accepted, he may be discharged under other than honorable conditions and furnished an Under Other Than Honorable Discharge Certificate. He was advised and understood the possible effects of an under other than honorable conditions discharge and that as a result of the issuance of such a discharge, he will be deprived of many or all Army benefits, that he may be ineligible for many or all benefits administered by the VA, and that he may be deprived of his rights and benefits as a veteran under both Federal and state law. He also understood that he may encounter substantial prejudice in civilian life because of an under other than honorable discharge.

(2) He was advised that he may submit statements in his own behalf which will accompany his request for discharge. Statements in his own behalf are submitted with this request. *The applicant's statement is unavailable for the Board's review.*

e. On 3 May 1979, the separation authority approved the applicant's request for discharge under the provisions of Army Regulation 635-200, Chapter 10. He would be furnished an Under Other Than Honorable Conditions Discharge Certificate. The reason and authority for discharge will be shown as separation program designator (SPD): JFS. He would be reduced to the lowest grade.

f. On 16 May 1979, he was discharged accordingly. His DD Form 214 shows he completed 1 year, 1 month, and 19 days of active service. It also shows he was discharged under the provisions of Army Regulation 635-200, Chapter 10 with an under conditions other than honorable characterization of service.

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

6. A Soldier who has committed an offense or offenses, the punishment for which under the Uniform Code of Military Justice, includes a bad conduct or dishonorable discharge, may submit a request for discharge in lieu of trial by court-martial. A discharge under other than honorable conditions normally is appropriate for a Soldier who is discharged in lieu of trial by court-martial.

7. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) characterization of service to under honorable conditions (General). On his DD Form 149, the applicant indicated Posttraumatic Stress Disorder (PTSD) and Sexual Assault/Harassment are related to his request. More specifically, he stated he was subjected to Military Sexual Assault (MST) while stationed at Ft. Story, VA. The applicant further indicated he reported the assault to his Commander and First Sergeant, as well as stalking threats, and was told to “be a man about it, keep quiet and go back to work.” 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 01 September 1977, 2) he underwent a Mental Status Evaluation (MSE) on 22 March 1979 which showed he was mentally responsible, was able to distinguish right from wrong and adhere to the right, and met retention standards, 3) on 27 March 1979, court-martial charges were preferred against the applicant for being absent without leave (AWOL) from 24 August 1978 to 21 March 1979, 4) the applicant was discharged on 16 May 1979 under the provisions of Army Regulation (AR) 635-200, Chapter 10, with a separation code of JFS and reentry code of ‘RE-3B.’

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. The applicant underwent an MSE on 22 March 1979. All domains of the MSE were within normal limits. The provider documented that the applicant did not have significant mental illness and met retention standards of AR 40-501, Chapter 3.

d. A memorandum from the Criminal Investigation Division dated 18 November 2024 shows that a search of their Army criminal file indexes revealed no Sexual Assault investigation pertaining to the applicant.

e. A review of JLV shows the applicant is 70% service-connected through the VA for PTSD. The applicant underwent a Compensation and Pension (C&P) examination through the VA on 18 September 2024 which shows he was diagnosed with PTSD. The stressor associated with his diagnosis of PTSD was documented as MST. The provider documented the applicant's ongoing symptoms of PTSD as a result of MST to include re-experiencing, avoidance, negative alterations in mood and cognition, and arousal which has impacted his ability to maintain relationships, concentrate, cope with stress, and maintain stable mood/motivation.

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 condition or experience in-service that mitigated his misconduct. This Advisor would contend the applicant's misconduct of going AWOL is mitigated by his diagnosis of PTSD due to MST.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant has been diagnosed and 70% service-connected through the VA for PTSD due to MST.

(2) Did the condition exist or experience occur during military service? Yes, the applicant has been diagnosed and 70% service-connected through the VA for PTSD due to MST. Service connection establishes that the condition existed in-service.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. Review of the applicant's in-service medical records were void of any BH diagnosis or treatment history. Post-discharge, the applicant has been diagnosed and 70% service-connected through the VA for PTSD due to MST. As there is an association between trauma and avoidance behaviors, there is a nexus between his diagnosis of PTSD due to MST and his misconduct of going AWOL. As such, 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 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 an offense 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 reviewed and concurred with the medical advisor's review finding sufficient evidence to support the applicant had a condition and/or experience in-service that mitigated his misconduct. Based on the foregoing and the following recommendation found in the medical review related to the liberal consideration, the Board determined relief was warranted:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant has been diagnosed and 70% service-connected through the VA for PTSD due to MST.

(2) Did the condition exist or experience occur during military service? Yes, the applicant has been diagnosed and 70% service-connected through the VA for PTSD due to MST. Service connection establishes that the condition existed in-service.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. Review of the applicant's in-service medical records were void of any BH diagnosis or treatment history. Post-discharge, the applicant has been diagnosed and 70% service-connected through the VA for PTSD due to MST. As there is an association between trauma and avoidance behaviors, there is a nexus between his diagnosis of PTSD due to MST and his misconduct of going AWOL. As such, BH mitigation is supported.

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

█	█	█	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 16 May 1979 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 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.
  - a. Paragraph 1-13a (Honorable Discharge) states an honorable discharge is a separation with honor. Issuance of an honorable discharge certificate is predicated upon proper military behavior and proficient performance of duty during the member's current enlistment or period of obligated service with due consideration for the member's age, length of service, grade, and general aptitude.
  - b. Paragraph 1-13b (General Discharge) states a general discharge is a separation from the Army under honorable conditions. It is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.
  - c. Chapter 10 (Discharge for the Good of the Service) states a member who has committed an offense or offenses, the punishment for any of which includes a bad conduct or dishonorable discharge, may submit a request for discharge for the good of the service.
3. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) also known as Separation Codes, provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty and the SPD code to be entered on the DD Form 214. The SPD code "JFS" was the appropriate code to assign Soldiers separated under the provisions of Army Regulation 635-200, Chapter 10, by reason of in lieu of trial by court-martial.
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 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. 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 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.

//NOTHING FOLLOWS//