

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 7 May 2025

DOCKET NUMBER: AR20240011629

APPLICANT REQUESTS:

- upgrade of his under honorable conditions (general) discharge
- personal appearance hearing before the Board via video/telephone

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

- DD Form 149 (Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552)
- Department of Veterans Affairs (VA) Form 21-4138 (Statement in Support of Claim), 24 July 2024

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 was assaulted while at Fort Lewis, WA, by multiple noncommissioned officers after his return from emergency leave. In his statement, he noted after returning from emergency leave he as harassed by multiple non-commissioned officers and was assaulted by multiple Soldiers. He was told by his leadership that if he made a report, he would regret his actions. His morale eroded and he stopped showing up for formations and the leadership started actions to discharge him from the service. He did not know he could have asked to see behavioral health/mental health help. He received a general discharge for unsuitability but wanted to serve his country.
3. On his DD Form 149, the applicant indicates sexual assault/harassment issues are related to his request.
4. He enlisted in the Regular Army on 26 October 1973.

5. He accepted nonjudicial punishment (NJP) on 14 March 1974, under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ), in that on or about 11 March 1974, without authority absent himself from his unit and did so remain absent unit on or about 13 March 1974 in violation of Article 86, UCMJ.

6. He accepted NJP on 9 July 1974, under the provisions of Article 15, UCMJ, in that on or about 9 July 1974 was disrespectful in language to a superior noncommissioned officer, who was then in the execution of his officer, by saying "s____ my d____" or words to that effect in violation of Article 91, UCMJ.

a. His punishment included restriction to the company area for 14 days, suspended for 30 days, extra duty for 14 days, forfeiture of \$85 pay per month for one month, suspended for 30 days unless sooner rescinded.

b. On 22 July 1974, he elected to appeal and submitted matters in consideration. His statement noted he should not be punished as he did make the inappropriate remarks/language but not directly toward the noncommissioned officer but was made out of being emotional at the time.

c. On 9 August 1974, the approval authority denied his appeal.

7. On 22 November 1974, he was counseled by his commander noting he was eligible for promotion to private first class; however, his advancement was being withheld due to him failing to demonstrate the attitude and/or performance required by Army standards.

8. A DA Form 3822-R (Report of Mental Status Evaluation), 4 December 1974, shows he underwent a mental examination. The medical professional determined the applicant's behavior was normal; he was fully alert with clear thinking process and normal thought content. The applicant had no mental illness, he was mentally responsible, and he was able to distinguish right from wrong.

9. On 31 December 1974, his immediate commander notified him of his intent to take elimination actions against him with an expeditious discharge with a recommendation to be furnished a general discharge. On 6 January 1975, he acknowledged receipt of the notification and voluntarily consented to be discharged.

10. In an undated self-authored statement, he requested to stay in the Army for the remaining 1 year and 10 months he had left on his obligation. If he receives less than an honorable discharge he would encounter prejudice from future employers and be denied full veteran benefits. In a subsequent self-authored statement, 12 January 1975, he again noted his desire to remain in the service.

11. On 15 January 1975, his immediate commander recommend he receive a rehabilitative transfer. His intermediate commander recommended approval on 17 January 1975, noting he needed a fresh start.

12. DA Form 2446-R (Request for Orders), 22 January 1975, shows his command requested orders for his rehabilitative transfer assignment with a reporting date of 5 February 1975.

13. A DA Form 3822-R, 15 May 1975 shows he again underwent a mental examination prior to commencement of elimination proceedings for unsuitability. The medical professional determined he had the mental capacity to understand and participate in board proceedings and met retention standards.

14. On 19 May 1975, his immediate commander notified him of his intent to initiate elimination actions against him under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), chapter 13, for unsuitability.

15. He acknowledged receipt of the proposed separation action on 19 May 1975 and consulted with legal counsel. He acknowledged he had been counseled regarding the basis for the contemplated separation, its effect, and of the rights available to him. He further acknowledged he understood he could expect to encounter substantial prejudice in civilian life in the event a general discharge was issued to him. He elected not to submit a statement on his own behalf.

16. On 19 May 1975, his immediate commander recommended that he be discharged under the provisions of Army Regulation 635-200, chapter 13, for unsuitability due to apathy.

17. On 20 May 1975, the intermediate commander recommended that he be discharged under the provisions of Army Regulation 635-200, chapter 13, for unsuitability.

18. Special Court-Martial Order Number 22, issued by Headquarters, 1st Brigade, 9th Infantry Division, Fort Lewis, WA on 30 May 1975, shows he plead guilty and was found guilty of violating Article 86 of the UCMJ, in that on 11 March 1975, without authority absent himself for his unit and did remain so absent until 23 March 1975.

a. He was sentenced to perform extra duty for 30 days, 14 days restriction to his unit area, place of duty, and worship, and forfeiture of \$100 pay a month for one month. The sentence was adjudged on 8 May 1975.

b. The sentence was approved and ordered to be duly executed on 30 May 1975.

19. On 30 May 1975, the separation authority approved the applicant's discharge action under the provisions of Army Regulation 635-200, chapter 13, by reason of unsuitability, and directed his service be characterized as under honorable conditions (general).

20. He was discharged accordingly on 9 June 1975, under the provisions of Army Regulation 635-200, paragraph 13-5b(3), by reason of unsuitability – apathy, defective attitude or inability to expend effort constructively. His DD Form 214 (Report of Separation from Active Duty) shows his service was characterized as under honorable conditions (general) and he completed 1 year, 7 months, and 1 day of total active service. It further shows he had 14 lost days. His records contains a DD Form 215 (Correction to DD Form 214) that corrected his date of birth.

21. On 2 December 2024, the Army Review Boards Agency petitioned the Criminal Investigation Division (CID) for any reports pertaining to his contention to sexual assault/harassment. On 4 December 2024, the Chief, Freedom of Information Act/Privacy Act Division, CID noted that the CID database did not contain any report pertaining to his contentions.

22. The Board should consider the applicant's statement in accordance with the published equity, injustice, or clemency determination guidance.

23. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under honorable conditions (general) discharge. On his application, the applicant indicated that sexual assault/harassment was 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 Regular Army on 26 October 1973; 2) The applicant accepted nonjudicial punishment (NJP) on 14 March 1974 for being AWOL from 11-13 March 1974; 3) The applicant accepted NJP on 9 July 1974, for being disrespectful in language to an NCO; 4) On 22 January 1975, the applicant's command requested orders for his rehabilitative transfer assignment with a reporting date of 5 February 1975; 5) The applicant was found guilty as a result of a Special Court-Martial hearing, on 30 May 1975, of going AWOL from 11-23 March 1975; 6) The applicant was discharged on 9 June 1975, Chapter 13-5b(3), by reason of unsuitability – apathy, defective attitude or inability to expend effort constructively. His service was characterized as under honorable conditions (general), and he completed 1 year, 7 months, and 1 day of total active service.

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

c. The applicant indicated on this application that sexual assault/harassment was related to his request. In his narrative documentation provided, he reported being physically assaulted and harassed after returning from emergency leave. There is insufficient evidence the applicant reported or was diagnosed with a mental health condition while on active service. The applicant underwent two Mental Status Exams, while on active service (4 December 1974 and 15 May 1975). Both evaluations determined the applicant did not meet criteria for a mental health condition, met medical retention standards, and had the mental capacity to understand and participate in board proceedings.

d. A review of JLV provided evidence the applicant began to engage with the VA in 2013. Later in 2017, he was diagnosed and treated for non-service-connected mental health conditions, including an Adjustment Disorder and an unspecified Anxiety Disorder. These conditions were determined to be nonservice-connected, and the applicant does not receive any service-connected disability for a mental health condition. He did not report being exposed to sexual assault/harassment during his active service to the VA. He did consistently describe going AWOL for what he determined to be a family emergency. Upon his return, he reported being physically assaulted and harassed, which is consistent with his narrative description on his application.

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

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant asserts he experienced a physical assault and harassment during his active service, which mitigates his discharge. On his application, he indicated sexual assault/harassment was related to his request, but he has consistently only referred to physical assault and harassment in additional documentation.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced a physical assault and harassment during his active service, which mitigates his discharge. On his application, he indicated sexual assault/harassment was related to his request, but he has consistently only referred to physical assault and harassment in additional documentation.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is insufficient evidence beyond self-report the applicant was experiencing a mental health condition related to his report of physical assault or harassment, while on active

service. The applicant did indicate on his application that sexual assault/harassment is related to his request, and his contention alone is sufficient for the Board's consideration per Liberal Consideration. However, there is insufficient evidence beyond self-report the applicant experienced a physical assault/harassment and a resultant mental health condition, while on active service. He did engage in avoidant and erratic behavior such as repeatedly going AWOL, but the presence of misconduct is not sufficient evidence of a mitigating 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 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 evidence of record establishes that the applicant engaged in multiple acts of misconduct. As a result, the applicant's commander initiated separation proceedings in accordance with the governing regulation. The applicant was afforded the opportunity to consult with counsel, and following such consultation, the applicant was discharged under the applicable regulatory authority. The Board reviewed and concurred with the medical advisory opinion. The advisory concluded that there was insufficient evidence to support a finding that the applicant suffered from a condition or experience that would mitigate the misconduct. The record does not demonstrate medical circumstances sufficient to alter the characterization of service or to warrant relief. Therefore, the Board denied relief.

2. The Board considered the following Kurta questions under liberal consideration:

a. Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant asserts he experienced a physical assault and harassment during his active service, which mitigates his discharge. On his application, he indicated sexual assault/harassment was related to his request, but he has consistently only referred to physical assault and harassment in additional documentation.

b. Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced a physical assault and harassment during his active service, which mitigates his discharge. On his application, he indicated sexual assault/harassment was related to his request, but he has consistently only referred to physical assault and harassment in additional documentation.

c. Does the condition experience actually excuse or mitigate the discharge? No, there is insufficient evidence beyond self-report the applicant was experiencing a mental health condition related to his report of physical assault or harassment, while on active service. The applicant did indicate on his application that sexual assault/harassment is related to his request, and his contention alone is sufficient for the Board's consideration per Liberal Consideration. However, there is insufficient evidence beyond self-report the applicant experienced a physical assault/harassment and a resultant mental health condition, while on active service. He did engage in avoidant and erratic behavior such as repeatedly going AWOL, but the presence of misconduct is not sufficient evidence of a mitigating mental health condition or experience.

3. 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:

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

//SIGNED//

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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. 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 ABCMR applicants (and/or their counsel) prior to adjudication.
3. 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 evidence. The ABCMR may, in its discretion, hold a hearing (sometimes referred to as an evidentiary hearing or an administrative hearing) or request additional evidence or opinions. 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.

4. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), set forth the requirements and procedures for administrative separation of enlisted personnel.

a. An honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. 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. Chapter 13 established policy, procedures and guidance for eliminating enlisted personnel found to be unfit or unsuitable for further military service. It provided for the separation of individuals for unsuitability whose record evidenced apathy (lack of appropriate interest), defective attitudes, and an inability to spend effort constructively. When separation for unsuitability was warranted, an honorable or general discharge was issued as determined by the separation authority based upon the individual's entire record.

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 Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder; 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 Military 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.

//NOTHING FOLLOWS//