

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 April 2024

DOCKET NUMBER: AR20220009251

APPLICANT REQUESTS:

- overturn disenrollment decision of the Army Reserve Officer Training Corps (ROTC) Program
- reinstate eligibility to accept a commission in the U.S. Army Reserve
- remove any unsubstantiated derogatory information related to the improper action from her Army Military Human Resource Record (AMHRR)

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

- DD Form 149 (Application for Correction of Military Record)
- Brief in support of application, with six (6) exhibits
 - Exhibit 1: Notification of Initiation of Separation Action
 - Exhibit 2: Quest Diagnostics Test Results
 - Exhibit 3: Memoranda regarding Board of Officers/Investigating Officer (IO), notification of disenrollment from the ROTC
 - Exhibit 4: Request for Reconsideration and Headquarters Air Force Drug Testing Laboratory Study of Sample Leakage during Shipment
 - Exhibit 5: General Counsel of the Department of Defense memorandum
 - Exhibit 6: Four (4) character statements

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. Counsel states, via brief, in support of application:

a. The applicant was a cadet in the Massachusetts Institution of Technology ROTC program. She was also an enlisted Reservist attached to the 302 Maneuver Enhancement Brigade, 338 Engineer Company, Chicopee, Massachusetts.

(1) On 11 February 2018, the applicant's Reserve unit conducted a urinalysis (UA); during which time the applicant provided a urine sample for the purpose of random drug testing.

(2) On 27 February 2018, the applicant was advised her specimen tested positive for cocaine. The positive UA threatened both applicant's Reserve position and her status as a cadet, therefore, she retained the undersigned counsel.

(3) On 8 April 2018, the applicant received official notification from her Reserve unit she was being recommended for involuntary administrative separation. The applicant immediately obtained a test of her hair follicle for the presence of any illegal substances. The hair sample was removed from an area of her body where the hair had existed, undisturbed, since before the 11 February 2018 UA. The laboratory in question, Quest Diagnostics, tested the sample for several different illicit substances to include the presence of cocaine. This test was negative across all substances. Likewise, although the applicant had received notice from her Reserve unit of intent to initiate an involuntarily administrative separation, no further action was taken by her Reserve command and the applicant continued to drill as required.

a. In January 2021, nearly three years after the initial UA, the applicant was again notified her unit intended to recommend her for involuntary administrative separation based upon the 27 February 2018, positive test result. Although her Reserve command chose to take no action, the ROTC command sought applicant's disenrollment. In October of 2018, approximately six months after she received the administrative separation notice from her Reserve unit, the applicant was notified by her ROTC command of their intent to disenroll her from the ROTC program. The applicant, confident she did not knowingly use any illegal substance, requested to appear before the Cadet Disenrollment Board. From October 2018 until approximately March of 2019, the applicant heard nothing additional regarding the allegation. She continued to attend classes in pursuit of her bachelor's degree and attend drill as required.

b. In March 2019, five months after receiving the ROTC notification regarding disenrollment, the applicant was informed that a Cadet Disenrollment Board had been scheduled. On 16 April 2019, the applicant appeared before a Cadet Disenrollment Board. The government presented scant evidence in the form of a positive test result to support their allegation of the applicant's misconduct. The applicant, by contrast, presented an overwhelming amount of evidence to show she had committed no misconduct and that the positive UA was either the product of mistake or unknowing ingestion. In spite of this, the Cadet Disenrollment Board found that the applicant had engaged in misconduct and recommended, clearly against the greater weight of the evidence, that disenrollment was appropriate.

c. On 31 May 2019, the applicant, through counsel, drafted a written appeal of the Disenrollment Board recommendation to Colonel (COL) M.R., Commander, 2nd Brigade, ROTC Cadet Command. Once again, the applicant provided specific and articulable facts as to why the Disenrollment Board's finding was unsupported by the evidence. On 27 August 2020, over a year after the applicant had successfully graduated with her bachelor's degree, she received notification from Headquarters, U.S. Army Cadet Command, that the disenrollment decision was sustained. Thus, the finality of the decision came long after the applicant had ceased to be a student.

d. The evidence supporting that the applicant did not knowingly nor intentionally use illegal substances far outweighed any evidence to the contrary and thus the findings and recommendations by the Cadet Disenrollment Board were clearly unsupported. To sustain a finding that the applicant engaged in misconduct related to unlawful use of a controlled substance by a preponderance of the evidence standard, the board must have at least some evidence supporting the necessary elements of such misconduct. Here, the initial burden was on the board, not on the applicant. The single piece of evidence offered to meet this burden was a positive finding by the laboratory for a urinalysis collected and completed by a completely different unit. The government offered no evidence that the collection of the sample was done in accordance with regulation or UPL guidelines, no evidence that it was properly packaged and sealed, and no evidence that the testing of the instant sample was reliable. The government called no witnesses and presented absolutely no testimony. Finally, and perhaps most telling, they applied the incorrect standard in determining whether there was misconduct. Specifically, the Board failed to consider the essential element of intent.

e. Assuming, the argument that the test result was sufficient to satisfy the element of use, nothing about a test result demonstrates intent. One cannot divine intentional and knowing consumption of an illegal substance simply based upon a positive test for that substance. This is so when the drug of interest is measured via indirect means and can readily be subject to false positive results. Applicant, in contrast, presented several pieces of evidence in her defense. These included proof of errors in the testing packet, a negative hair follicle test taken at applicant's expense at or near the time of the UA in question showing applicant was negative for all illicit substances and, in particular, negative for cocaine, several statements from various witnesses who knew applicant and could testify to her drug-free lifestyle, and her own testimony indicating that in spite of the numerous UA's she had been subject to as part of her military career, she had never before tested positive for any illegal drug and did not knowingly and/or intentionally use cocaine. These facts make clear that, by a preponderance of the evidence, the applicant did not commit the misconduct for which she was accused.

f. Since the lack of evidence presented by the government, combined with the substantial evidence presented by the applicant, demonstrates that she did not commit the misconduct for which she was accused, the findings of the Cadet Review Board that

ultimately prevented the applicant from accepting a commission in the Army Reserve and which lead to an effort by applicant's current command seeking her involuntary administrative separation, must be vacated. A careful examination of the facts in this case makes clear that this applicant suffered both material error and material injustice such that justice demands this honorable Board act to correct the applicant's record and grant the requested relief.

3. On 22 December 2015, she enlisted in the U.S. Army Reserve for eight (8) years in pay grade E-1.

4. On 13 September 2017, she also entered into an Army Senior Reserve Officers' Training Corps (ROTC) Scholarship Cadet Contract, with a date education commences as 13 September 2017 and completion date of 25 May 2019. She agreed to and acknowledged understanding the following contractual obligations:

a. Paragraph 2f (Medical and Physical Fitness Standards) -

(1) I agree to maintain eligibility for enrollment and retention in ROTC and commissioning, as defined by statute, DoD guidance, Army regulation, and this contract, throughout the period of this contract. I agree to meet and maintain standards of the Army fitness test of record and the screening weight or body fat percentage required by the Army Body Composition Program as required of active duty soldiers each year and prior to attendance at ROTC CST. These will be continuous requirements that I must meet until the date that I report to Officer Basic Course (OBC) or a Reserve Component unit and thereafter. Commissioning eligibility standards are subject to change, and I must keep myself informed of such changes through contact with the PMS. I understand and agree that failure to maintain the weight and physical fitness requirements and any other commissioning requirements prescribed by DoD and/or HQDA may subject me to disenrollment from the ROTC program.

(2) I agree to undergo precommissioning drug and alcohol screening tests, prescribed by U.S. Army Cadet Command. If the result of any test is positive, I may be subject to disenrollment from the ROTC program.

b. Paragraph 5 (Terms of Disenrollment) - I understand and agree that once I become obligated and I am disenrolled from the ROTC program for breach of contractual terms or any other disenrollment criteria established now or in the future by Army regulations (which include, but are not limited to, AR 145-1 [Senior Reserve Officer's Training Corps Program]) incorporated herein by reference, I am subject to the terms in paragraphs 5a through 5e below.

(1) Paragraph 5a (I Agree to Serve on Enlisted Active Duty) - Under the terms of this contract, the Secretary of the Army or his or her designee, may order me to active

duty as an enlisted soldier, if I am qualified, for a period of not more than four (4) years if I fail to complete the ROTC program. If I am disenrolled after the point of obligation, I may be ordered to active duty for one of the periods listed in paragraph 6 below based upon the year during which my disenrollment was initiated.

(2) Paragraph 5b (Agree to Reimburse the United States Government) - If I am offered the opportunity to repay my advanced educational assistance in lieu of being ordered to active duty, I will be required to reimburse the United States government through repayment of an amount of money, plus interest, equal to the entire amount of financial assistance (to include tuition, educational fees, books, laboratory expenses, and supplies), paid by the United States for my advanced education from the commencement of this contractual agreement to the date of my disenrollment or refusal to accept a commission. This amount includes any financial assistance I may have received prior to my obligation point. I agree that any money I am determined to owe to the United States shall bear interest at the rate equal to the highest rate being paid by the United States on securities having maturity dates of ninety days or less and shall accrue from the day that I am first notified of the amount I owe to the United States as reimbursement under this contract. I understand that I may be deemed to have failed to comply with the terms and conditions of this contract (breach of contract) regardless of whether I knew that the failure violated the contract and regardless of whether the failure was the result of an act or omission on my part made with a specific intent to avoid responsibilities under the contract.

(3) Paragraph 5c (Failure to Complete Required Service Obligation) - I understand and agree that if I voluntarily or because of misconduct fail to begin or fail to complete any period of active duty or duty in a reserve status not on active duty that I have incurred under this contract whether as an officer or an enlisted soldier, I will be required to reimburse the United States an amount of money, plus interest, that is equal to or bears the same ratio to the total cost of the financial assistance provided to me by the United States as the unserved portion of such duty bears to the total period of such duty I was obligated to serve.

(4) Paragraph 5d (I Agree That Pending Discharge from ROTC, I May Not Enlist) - I may not enlist in the active Army, another military service, or in a military service academy while I am a contracted ROTC cadet unless I am properly released from my ROTC cadet status.

(5) Paragraph 5e (I Agree that Any Obligation to Reimburse Will Not be Altered by Subsequent Enlisted Duty) - If I am disenrolled from ROTC, I understand the Secretary of the Army, or his or her designee, retains the prerogative to either order me to active duty or order monetary repayment of my scholarship benefits. Therefore, if I am required to repay my advanced educational assistance under the terms of this

contract, my subsequent enlistment in an Armed Service will not relieve me from my repayment obligation.

5. The applicant's USAR commander notified the applicant she was initiating action to separate her from the USAR under the provisions of Army Regulation 135-178 (Army National Guard and Reserve Enlisted Administrative Separations), paragraph 11-1a, for Misconduct-Abuse of Illegal Drugs because the urine sample she provided tested positive for cocaine on 27 February 2018; this was her first offense. Her commander recommended her receipt of an honorable character of service. She was further advised:

a. Her commander's recommendation and her reply would be submitted to the Commander, 412th Theater Engineer Command, who was the separation authority and would make the final decision in her case. The intermediate commander(s) and the separation authority were not bound by her commander's recommendation as to characterization of service. The separation authority may direct that she receives an honorable, general (under honorable conditions), or under other than honorable conditions characterization of service; or she may receive an uncharacterized description of service if you are in an entry-level status. The separation authority, however, may not direct the issuance of a type of discharge or characterization of service less favorable than that recommended by an administrative board should you request a hearing before such a board.

b. If her commander's recommendation is approved, the proposed separation could result in discharge from the Reserve of the Army; transfer or reassignment from your US Army Reserve unit to the Individual Ready Reserve; or your release from the custody and control of the Army.

c. She received 30 days to exercise the following rights:

- consult with an appointed military counsel, and/or with a civilian counsel at your own expense
- submit written statements for the separation authority to consider in making determinations about this proceeding
- obtain copies of documents that will be sent to the separation authority in support of the proposed separation
- request a hearing before an administrative separation board if she had six or more years of total military service or if an under other than honorable conditions characterization of service is contemplated
- if she requests a hearing before an administrative board, she had the right to representation by an appointed military counsel and/or by civilian counsel at your own expense

d. She acknowledged receipt on the same day.

6. Quest Diagnostics Test Results (Exhibit 2), note they collected specimens of the applicant's hair for testing on 11 April 2018. The specimens collected were tested for amphetamines, cocaine, marijuana, opiates, and phencyclidine (PCP). The result for each panel (drug tested) reflects "negative."

7. A memorandum from General Counsel of the Department of Defense memorandum, dated 16 June 2018, Subject: Notification Pursuant to Rule for Courts-Martial 701(a)(6) and Brady v. Maryland 373 U.S. 83 (1963) [Exhibit 5]. Note: documents contained in this exhibit are duplicates included in Exhibit 4.

8. A memorandum from the Massachusetts Institute of Technology memorandum, dated 17 October 2018, Subject: Notification of Disenrollment from the ROTC – Due Process and Appellate Rights of Scholarship / Non-scholarship, serves as notification that the applicant's Professor of Military Science (PMS) or designee was initiating her disenrollment from the ROTC program based on her misconduct as demonstrated by failing a USAR administered urinalysis and testing positive for drug use. As a consequence, effective immediately, the applicant was placed on leave of absence pending disenrollment.

9. A memorandum from 2nd Brigade U.S. Army Cadet Command (USACC) memorandum, dated 20 March 2019, Subject: Appointment of a Formal Board of Officers/Investigating Officer (IO) and Notification of Disenrollment from the ROTC Program and Amount and Validity of Scholarship Debt, reflects a board of Officers/IO was appointed to hear evidence and determine if the applicant should be disenrolled for misconduct as demonstrated by failing a U.S. Army Reserve administered urinalysis and testing positive for drug use and should be required to repay a debt of \$11,200.00 and if so, whether she should be ordered to active duty in her Reserve enlisted grade or, in the alternative, be required to repay funds expended on her behalf.

10. A memorandum, Subject: Request for Reconsideration and Headquarters Air Force Drug Testing Laboratory Study of Sample Leakage during Shipment [Exhibit 4] (5 pages), dated 31 May 2019, submitted on behalf of the applicant by Crisp and Associates, LLC, states, "it is believed that the findings are unsupported by the evidence of record and, as such, the recommendation cannot be found to be consistent or supportable as required by regulation." Counsel included General Counsel of the Department of Defense memorandum, dated 18 June 2018, Air Force Drug Testing Laboratory Study of Sample Leakage during Shipment (10 pages), and Quest Diagnostics Test Results, previously cited in paragraph 3b.

11. The applicant's service record found in the Interact Personnel Electronic Records Management System (iPERMS) is void of her case separation file that led to her disenrollment from the ROTC program.

12. The applicant and appointed counsel provide (Exhibit 6) four (4) character statements, written by a high school friend and fellow Soldiers, all of which attest to her compassion and consideration towards others, her leadership abilities and work ethics.

13. The applicant is currently serving as a sergeant (SGT) assigned to the 716th Engineer Company, Somersworth, New Hampshire.

BOARD DISCUSSION:

1. The applicant's contentions, the military record, and regulatory guidance were carefully considered. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted.

2. The applicant was attending ROTC when she her urine tested positive for the presence of cocaine during a urinalysis. She states she did not use drugs.

a. Cocaine, once ingested, leaves the system very quickly. Cocaine is difficult to trace in hair follicles; hair follicles generally come up negative.

b. The Board is not convinced in the accuracy of the test conducted on the hair follicles because it was tested too long after the urinalysis.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
█	█	█	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.

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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 (AR) 145-1 (Reserve Officers' Training Corps – Senior Reserve Officers' Training Corps Program: Organization, Administration, and Training) prescribes policies for the administration and execution of the Army's Senior Reserve Officers' Training Corps (SROTC) Program and implements Department of Defense Instruction (DoDI) 1215.08.

a. Paragraph 10-2b states, When ROTC Cadets are found to be in breach of their service agreements, under the terms of such contracts their obligation to the Army may be satisfied through enlisted active duty or through recoupment of the cost of advanced educational assistance provided by the Army. The means of fulfilling a Cadet's contractual obligation to the Army remains at the discretion of the SECARMY or a designated representative. Disenrollment proceedings will be considered for non-scholarship and scholarship Cadets for (subparagraph 14) undesirable character, demonstrated by an event, incident, or occurrence that may reasonably be considered misconduct. Examples include, but are not limited to stealing; unlawful possession, use, distribution, manufacture, sale (to include attempts) of any controlled substances, as listed or defined in 21 USC 812; discreditable incidents with civil or university authorities (to include arrest, detention, or apprehension by campus or civil authorities acting under color of any authority to arrest, detain, or apprehend); falsifying academic records or any form of dishonesty or cheating, academic or otherwise; failure to pay just debts; or similar acts

b. Paragraph 10-2d states, a board of officers will be appointed by the PMS or the brigade commander, according to the formal procedures outlined in AR 15–6, as modified by this regulation and guidance from the CG, USACC, to review the case of each Cadet considered for disenrollment under paragraphs 10–2b(12) through 10–2b(16) or when otherwise deemed necessary. In situations where a board of officers is not required by this regulation or other authority, the PMS will appoint an investigating officer to review the circumstances of any scholarship or contracted Cadet being considered for disenrollment, to include voluntary disenrollment or disenrollment to join another officer procurement program. If a board of officers is required or appointed, notwithstanding what AR 15–6 may allow, the board should consist of a minimum of three officers; the board president will be a field grade officer unless one is not reasonably available. An officer, general schedule–9 and above, or noncommissioned officer, staff sergeant or above will be appointed as a recorder to record the

proceedings and produce a summarized transcript. The recorder is in addition to the three voting board members. Any exceptions to this requirement must be approved by the CG, USACC or a designated representative. A Cadet is entitled to rebut any recommendation to disenroll. The approval authority and brigade commander will consider all rebuttal matters before making recommendations to the CG, USACC for disenrollment.

3. Army Regulation 600-37 (Unfavorable Information) sets forth policies and procedures to ensure the best interests of both the Army and Soldiers are served by authorizing unfavorable information to be placed in, transferred within, or removed from an individual's Army Military Human Resource Record (AMHRR).

//NOTHING FOLLOWS//