

IN THE CASE OF: [REDACTED]

BOARD DATE: 17 August 2023

DOCKET NUMBER: AR20230000546

APPLICANT REQUESTS: upgrade of his under honorable conditions (general) discharge to honorable.

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Statement

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 had a lack of wisdom in his youth and made a mistake due to peer pressure. Wisdom comes with age. To him that means making better judgements and/or choices. It also means to be patient, don't jump right into something in haste; think about it for a while and ponder the ramifications. He tells himself, "Don't be selfish, think about others, be empathetic, and be considerate." His life in Arizona is good, he has a wife and belongs to a veteran's riding club. This is a great outlet. He has a servant's heart and is wiser and older. On his DD Form 149, the applicant notes mental health is related to his request.
3. The applicant enlisted in the Regular Army on 29 January 1991 for 4 years. His military occupational specialty was 63J (Quartermaster and Chemical Equipment Repairer).
4. The applicant received both positive and adverse counseling on multiple occasions between 15 January and 2 June 1992 for:
 - a dishonored check returned from his bank for insufficient funds
 - failing to be at his appointed place of duty at the prescribed time

- always having to be told to keep busy and showed a negative attitude when told to keep busy
- needed to make himself more available
- doing well in learning dispatching procedures
- worked well with others
- enthusiastic about learning the Prescribed Load List and Army Maintenance Management System

5. On 24 January 1992, the applicant was questioned by a Criminal Investigation Command Investigator about possession and use of cocaine. By sworn statement, the applicant stated he asked some guys if they had any cocaine. He purchased about \$50.00 or \$60.00 worth of cocaine, and he consumed it in his car. He had used cocaine as a civilian before he entered the military. He had not used any other drugs since he had been in the military.

6. The applicant accepted nonjudicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ) on 7 July 1992, for wrongful use of cocaine on or about 10 June 1992. His punishment consisted of reduction to private/E-1, extra duty, restriction, and forfeiture of \$363.00 pay for two months.

7. The applicant underwent a mental status evaluation on 27 July 1992, which shows he had the mental capacity to understand and participate in the proceedings and he was mentally responsible.

8. The applicant's immediate commander notified him on 13 August 1992, that he was initiating action to separate him under the provisions of Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Personnel), Chapter 14, for misconduct-abuse of illegal drugs. His commander recommended he receive an honorable characterization of service.

9. The applicant consulted with legal counsel on 19 August 1992 and was advised of the basis for his separation and the procedures and rights that were available to him.

a. He acknowledged that he may expect to encounter substantial prejudice in civilian life if discharged under other than honorable conditions.

b. He elected to submit a statement in his own behalf; wherein, he requested an extension on the time he had to submit in all his papers. He was in the midst of the process to recruit people to represent him on his behalf. He asked that he be granted a 14-day extension. The time was very critically needed.

10. On 3 September 1992, the applicant's immediate commander formally recommended the applicant's separation under the provisions of AR 635-200,

paragraph 14-12c, for misconduct. He noted the applicant had on or before 10 June 1992 wrongfully used cocaine. He further noted the applicant had clearly demonstrated that he could not abide by the rules and regulations of the Army.

11. A memorandum from the Community Counselling Center, dated 9 September 1992, states the applicant was enrolled for treatment by his commander on 18 July 1992, due to a positive urine test for cocaine. Since his enrollment the applicant had reported continuous abstinence from alcohol and illicit drugs. He has been faithful to weekly counselling sessions and attended Alcoholics Anonymous meetings on a regular basis. He is productively working early recovery issues. This information was provided at the applicant's request.

12. A memorandum from the applicant's Defense Judge Advocate, dated 14 September 1992, states the applicant did not dispute that he used cocaine. He did not have sufficient time in service to merit a Board. His company commander recommended he receive an honorable discharge. The applicant had submitted matters on his own behalf. Granting of an honorable discharge required the concurrence of the General Court Martial Convening Authority. The applicant had been found to have committed serious misconduct. His record was not so meritorious that a general discharge would be inappropriate. He recommended the applicant's service be characterized as general, under honorable conditions.

13. The separation authority approved the recommended discharge on 14 September 1992, and directed that the applicant be furnished a General Discharge Certificate.

14. The applicant was discharged on 25 September 1992. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of AR 635-200, paragraph 14-12c, for misconduct - abuse of illegal drugs. His service was characterized as under honorable conditions (general). He completed 1 year, 7 months, and 27 days of net active service. He was awarded or authorized the: Parachutist Badge, Army Service Ribbon, National Defense Service Medal, and two marksmanship badges.

15. Soldiers are subject to separation under the provisions AR 635-200, Chapter 14, for commission of a serious offense. A discharge under other than honorable conditions (UOTHC) is normally appropriate for a Soldier discharged under this chapter. However, the separation authority may direct a general discharge if such is merited by the overall record.

16. On 27 August 2021, the Army Discharge Review Board (ADRB) determined that the characterization of the applicant's discharge was both proper and equitable. However, the Board determined that the reason and authority for his discharge should be changed from Misconduct - Abuse of Drugs to Misconduct. Accordingly, his military

personnel records were modified, and he was issued a DD Form 215 (Correction to DD Form 214) that shows:

- Item 25 (Separation Authority) - AR 635-200, Paragraph 14-12c (2)
- Item 28 (Narrative Reason for Separation) - Misconduct

17. On 28 February 2023, the applicant was asked to provide a copy of the medical documents that support his claim of mental health issues. No response was provided.

18. In reaching its determination, the Board can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance.

19. MEDICAL REVIEW:

a. Background: The applicant is requesting upgrade of his under honorable conditions (general) discharge to honorable. The applicant contends that other mental health mitigates his discharge.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Below is a summary of information pertinent to this advisory:

- The applicant enlisted in the RA on 29 January 1991.
- The applicant received both positive and adverse counseling on multiple occasions between 15 January and 2 June 1992 for. See ROP for details.
- The applicant accepted nonjudicial punishment (NJP), on 7 July 1992, for wrongful use of cocaine on or about 10 June 1992.
- The applicant's immediate commander notified him on 13 August 1992, that he was initiating action to separate him under AR 635-200, Chapter 14, for misconduct-abuse of illegal drugs.
- The applicant was discharged on 25 September 1992 under AR 635-200, paragraph 14-12c, for misconduct - abuse of illegal drugs. His service was characterized as under honorable conditions (general).
- Previous application to ADRB was denied on 27 August 2021 (proper and equitable), though they did change his reason and authority for discharge from "Misconduct- Abuse of Drugs" to "Misconduct."

c. Review of Available Records Including Medical:

The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 149, his ABCMR Record of Proceedings (ROP), self-authored statement, DD 214, and service and separation documents. The VA electronic medical record and DoD health record

were reviewed through Joint Longitudinal View (JLV). Lack of citation or discussion in this section should not be interpreted as lack of consideration.

d. The applicant asserts other mental health, stating “lack of wisdom at youth.” He noted making a mistake due to lack of wisdom as a young man and peer pressure. There are minimal medical records available for review in his service record, and no EHRs available from his time in service. His service record contains his mental status exam (MSE) and a memorandum from his substance use treatment program. The applicant underwent the MSE, as part of the separation process, on 27 July 1992. The applicant was found to have the mental capacity to understand and participate in the proceedings and was found mentally responsible. No comment was given to whether or not he met medical retention standards or needed further evaluation. A memorandum from the Community Counselling Center, dated 9 September 1992, was provided at the applicant’s request. It summarized that applicant was enrolled for treatment by his commander on 18 July 1992, due to the applicant testing positive for cocaine and that he had reported continuous abstinence from alcohol and illicit drugs. He had “been faithful to weekly counselling sessions and has attended Alcoholics Anonymous meetings on a regular basis.” It was noted he had productively worked early recovery issues. No other records were provided to substantiate his assertion of other mental health concerns. In summary, there is no record of the applicant ever receiving a psychiatric diagnosis during his time in service.

e. Per the applicant’s EHR post discharge from the Army, he began engaging in care at the VA in 2007. The applicant does not appear to have begun mental health care until 2021, though has consistently stayed engaged with medication management since that time. During an encounter 16 April 2021, the applicant did report having dealt with depression and mood swings since his teenage years. While no compensation and pension evaluation (C&P) was available for review, he is 50% service connected for major depressive disorder (MDD; with a 60% service connection overall). He has also been diagnosed with alcohol use disorder – severe, stimulant use disorder – severe, depression, other mixed anxiety disorder.

It is the opinion of this Agency Behavioral Health Advisor that there is insufficient evidence, outside of self-report, to support the applicant had a potentially mitigating condition during his time in service, though there is evidence he likely had a substance use disorder. There is evidence that he has since been diagnose with a potentially mitigating condition (MDD), however there is minimal evidence that this condition was present during his time of misconduct. However, per Liberal Consideration guidance, his contention is sufficient to warrant the Board’s consideration.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes, applicant asserts other mental health though

did not specify what condition. He also asserted youth and lack of wisdom, however that is not a mitigating condition or experience.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts other mental health concerns were present during his time in service. He has since been service connected for PTSD.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. The applicant asserts that he was experiencing a mitigating condition during his time in service, however he did not specify what mental health condition and only cited him being young and lacking wisdom. While youth and lack of wisdom is not a mitigating condition, he has since been service connected for MDD. There was no evidence presented from his time in service to suggest this condition was present during the time of his misconduct. His records indicate he was diagnosed with depression in 2021, approximately 31 years after his discharge. However, in a medical encounter in 2021 he did report depressive and mood issues starting as early as his teenage years. While the onset of MDD can occur at any time, the likelihood of onset during puberty is higher. The course of MDD is also variable, but if he had symptoms in his teenage years, and has been diagnosed and service connected MDD in adulthood, it is likely he has experienced episodes of depression throughout his life. Also, the applicant was likely experiencing a substance use disorder (SUD) during his time in service, however a standalone SUD diagnosis is not a mitigating condition. Of note, the applicant's misconduct of substance possession and use is a self-medicating and avoidance symptom, consistent with the natural history and sequelae of MDD. There is a nexus between his diagnosis and the misconduct that led to his discharge. While there is minimal evidence of a mitigating diagnosis during his time in service, his records since discharge, his service connection, and use of Liberal Consideration, leads to this Agency Behavioral Health Advisor recommending an upgrade.

BOARD DISCUSSION:

The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service to include deployment, the frequency and nature of his misconduct and the reason for his separation. The Board considered the applicant's mental health claim and the review and conclusions of the ARBA BH Advisor. The applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. The Board found insufficient evidence of in-service mitigating factors and, while concurring with the conclusion of the medical advising official that his misconduct was mitigated by a behavioral health condition, found this an insufficient basis to show his service as fully honorable. Based on a

preponderance of evidence, the Board determined the character of service the applicant received upon separation was not in error or unjust.

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.

X [Redacted Signature]

CHAIRPERSON
[Redacted Name]

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. Title 10, U.S. Code, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all

correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

3. AR 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

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. A general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 14 established policy and prescribed procedures for separating members for misconduct. Specific categories included minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, or absences without leave. Action would be taken to separate a member for misconduct when it was clearly established that rehabilitation was impracticable or was unlikely to succeed. A discharge under other than honorable conditions was normally considered appropriate. However, the separation authority could direct a general discharge if merited by the Soldier's overall record.

4. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR), on 3 September 2014, 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 UOTHC 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. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD, 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. The Under Secretary of Defense for Personnel and Readiness issued guidance to Service DRBs and Service BCM/NRs on 25 July 2018, 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.

//NOTHING FOLLOWS//