

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 13 February 2024

DOCKET NUMBER: AR20230003584

APPLICANT REQUESTS: His U.S. Army Reserve (USAR) under honorable conditions (general) discharge be upgraded to an honorable discharge.

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

- DD Form 149 (Application for Correction of Military Record)
- Personal statement
- Separation Authority Memorandum of Record (MOR)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Certificate of an associate degree, Internal Revenue W-2
- Police records check
- 3 Letters of support

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:

a. He served honorably for nearly 4 years by the time he tested positive for cocaine. This was his first and only time testing positive for cocaine. He was not counseled, was brought to an interrogation room by CID and questioned about where he had purchased the cocaine he had used; he was refused an administrative board; was refused Army assigned legal representation; and within a few months discharged with a general discharge.

b. Instead of inquiring whether he was suffering from a substance abuse addiction, having had otherwise served honorably, he was treated like a criminal or a member of a narcotics gang. His due process rights were violated, as well as his rights under Article 31, the 5th Amendment (against self-incrimination), and 6th amendment( right to counsel). Moreover, Army Regulation 135-178 (Army National Guard and Reserve

Enlisted Administrative Separations), paragraphs 2-2c and d; paragraphs 2-4 a, b, and c; and paragraphs 2-8 a, b, d, and e; and AR 600-85 (ASAP) were violated first in how the positive result was handled and used, then in separating, and in characterizing his service as General Under Honorable Conditions.

c. He seeks to correct his discharge characterization to accurately reflect the true nature of his nearly 4 years of service instead of based on a single and isolated instance of personal drug use. He should first have been counseled and referred to a drug treatment program; he should have been assigned legal counsel; he should not have been interrogated by a law enforcement agency merely because he tested positive in a unit-wide and routine drug test; and because several regulations and constitutionally guaranteed rights were violated during the process leading up to, during and through the separation and characterization actions. Moreover, it is clear that the Command acted in an overly zealous and unlawful manner to separate a Soldier who had by then served honorably for nearly 4 years.

3. On the applicant's DD Form 149, he indicates mental health as a contributing and mitigating factor in the circumstances that resulted in his separation. However, the applicant has not provided any evidence to support the contentions.

4. A review of the applicant's service record shows he enlisted in the USAR on 27 January 1997, was ordered to initial active duty for training on 25 July 1997, completed training with award of the military occupational specialty 92M (Mortuary Affairs Specialist), and was released from active duty (REFRAD) with reassignment to his USAR unit.

5. The applicant was REFRAD on 11 September 1997 in the pay grade of E-1. His DD Form 214 shows he was discharged under the provisions of Army Regulation (AR) 635-200 (Personnel Separations), Chapter 4, for completion of active service with his service uncharacterized. He was credited with 3 months and 19 days of active service.

6. 311th Quartermaster Company, Puerto Rico Orders 9811-07, dated 23 November 1998 reduced the applicant from E-3 to E-2 for unsatisfactory participation.

7. The available records do not include copies of his USAR separation processing documents, except the separation authority's approval memorandum. On 30 March 2001, the separation authority approved a recommendation to discharge the applicant and directed he be separated with a general discharge. The separation authority stated

a. On 17 September 2000 the Soldier tested positive for cocaine during a command directed urinalysis test. Both the Company Commander and the Battalion Commander are recommending that the soldier be separated and receive an Under Other the Honorable Conditions discharge.

b. The Soldier has less than six years of creditable military service and has been deemed unfit for rehabilitative counseling and rehabilitative transfer. The Soldier has requested appearance before an administrative separation board; however, he is not entitled to appear before an administrative separation board unless an under other than honorable conditions discharge is pursued.

8. On 6 April 2001, Headquarters, 65th Regional Support Command published Orders 01-096-008 ordering the applicant's discharge from the USAR effective 27 April 2001, in accordance with AR 135-178, with a general, under honorable conditions discharge.

9. The applicant was discharged from the USAR on 27 April 2001 under AR 135-178 in the grade of E-4 with a general discharge.

10. The applicant provided:

- An Associate in Science Degree diploma
- His IRS W-2 for 2021
- A negative police records check; and
- Three third party letters of character

11. In determining whether to grant relief, the Boards can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance.

12. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the supporting documents, the Record of Proceedings (ROP), and the applicant's available records in the Interactive Personnel Electronic Records Management System (iPERMS), the Health Artifacts Image Management Solutions (HAIMS) and the VA's Joint Legacy Viewer (JLV). The applicant requests discharge upgrade from Under Honorable Conditions (General) to Honorable. He indicated that 'Other Mental Health' condition was related to his request. The ABCMR ROP summarized the applicant's record and circumstances of the case. He was a member of the USAR and entered the first period of active duty 23May1997. He tested positive for cocaine 17Sep2000. He was discharged from USAR 27Apr2001. His service was characterized as Under Honorable Conditions, General.

b. The applicant indicated that he grew up with an abusive and alcoholic father. He said that after he tested positive for cocaine, he wasn't counseled. The circumstances surrounding his drug use were reported as follows: He was married in 1999 and shortly afterwards they separated. He became depressed and soon after that, he tested positive for cocaine. He stated that he was never offered the opportunity to address his

mental health issues. He further stated that he was traumatized by the CID interrogation (“close eye contact and other verbal threatening and intimidating tactics”).

c. JLV search today showed no VA facility records or VA disability ratings. VA community partner records showed diagnoses Major Depressive Disorder, Single Episode, Unspecified; Anxiety Disorder, Unspecified; and Anxiety Neurosis. There were no details available concerning these diagnoses—their specific connection to his time in service is unknown. However, it is known that children raised with an abusive and alcoholic parent are at higher risk for suffering from mental health illness in adulthood including Depression. As an adult, the applicant experienced a significant life stressor (separation from his wife), then he manifested depression by his report, and subsequently responded with inappropriate coping or self-treatment by unlawful use of a controlled substance. The 03Sep2014 Secretary of Defense Liberal Guidance Memorandum and the 25Aug2017 Clarifying Guidance were considered. In the ARBA Medical Reviewer’s opinion, there is sufficient evidence a behavioral health (BH) condition(s) existed during his time in service and is mitigating for the misconduct which led to his discharge from service. Consideration by the Board for discharge upgrade from Under Honorable Conditions, General to Honorable, is warranted.

#### Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The medical evidence and the applicant’s self-assertion of Depression under Liberal Consideration is evidence of a mitigating BH condition.

(2) Did the condition exist, or did the experience occur during military service? Yes. The applicant had predisposing childhood factors and he described having depression while in service and the circumstance which led to his unlawful use of a controlled substance (cocaine).

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. The Depression condition supported by medical evidence and the applicant’s self-assertion under Liberal Consideration, is mitigating for the misconduct of unlawful use of controlled substance (cocaine). Substance abuse issues are commonly associated with BH conditions including Depression.

#### BOARD DISCUSSION:

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 DoD guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant’s statement, the applicant’s record of service, the

frequency and nature of the applicant's misconduct and the reason for separation. The applicant's complete separation packet is not available. However, the record contains a memorandum from the separation authority approving the applicant's discharge from the USAR, after testing positive for cocaine. He received a general discharge. Based on the available documentary evidence, the Board found no error or injustice in his separation processing. But, the Board also considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewer. The Board concurred with the medical reviewer's finding sufficient evidence a behavioral health (BH) condition(s) existed during his time in service and is mitigating for the misconduct which led to his discharge from service. As such, the Board determined his character of service should be upgraded to honorable.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

■	■	■	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

In addition to the correction addressed in Administrative Note(s) below, the Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending Orders 01-096-008, issued by Headquarters, 65th U.S. Army Regional Support Command on 6 April 2001, to show his character of service as honorable.

■

■ ■ ■

---

■

■

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):

A review of the applicant's service record shows he successfully completed his initial active duty training (IADT) with subsequent service in the USAR. During the review of the case, it was noted that there have been changes in regulations as they relate to the characterization of periods of IADT service.. Therefore, a DD Form 214 for the service period ending 11 September 1991, should be reissued to show his character of service as honorable.

#### 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, USC, section 1556 provides the Secretary of the Army shall ensure that an applicant seeking corrective action by the Army Review Boards Agency (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. 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 Army Board for Correction of Military Records (ABCMR). Paragraph 2-9 states that 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 the evidence.
4. Army Regulation 135-178 provides general guidance, which applies when referenced under the reasons for separation in this regulation. Further guidance is set forth under the specific reasons for separation:
  - 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 Soldiers whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. A Soldier may request an administrative separation board if they have more than 6 years of service or an under other than honorable conditions discharge is pursued.

5. The Under Secretary of Defense for Personnel and Readiness issued guidance to DRBs and BCM/NR 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//