

IN THE CASE OF: ██████████

BOARD DATE: 15 December 2023

DOCKET NUMBER: AR20230006171

APPLICANT REQUESTS: an upgrade of his characterization of service from under other than honorable conditions (UOTHC) to honorable.

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

DD Form 149 (Application for Correction of Military Record), 21 February 2023

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 in effect, when he returned from being overseas he was not in his right mind and started acting out. He was young and thought he could handle it so he did not speak up and ask for help, which he now knows he should have. He has lived with regret and acknowledged his wrong doings and requests an upgrade of his discharge. On his DD Form 149, the applicant notes other mental health is related to his request.
3. The applicant enlisted in the Regular Army on 22 June 2001 for a period of 3 years. The highest rank he obtained was Private First Class/E-3, and he served in the military occupational specialty (MOS) of 11B (Infantryman)
4. On 3 February 2003, the applicant accepted nonjudicial punishment (NJP) under the provisions of Article 15, Uniform Code of Military Justice (UCMJ) for on or about between 5 November 2002 and 12 November 2002, wrongful use of cocaine. His punishment was reduction to private/E-1, forfeiture of \$575.00 pay, extra duty for 45 days, and restriction for 45 days.
5. A DD Form 2624 (Specimen Custody Document – Drug Testing) shows the applicant tested positive for cocaine on specimen dated 16 April 2003.

6. He received counseling on 27 June 2003 for wrongfully using cocaine, a controlled substance and being absent without leave (AWOL). The key point of discussion shows he was counseled for a second time drug offense and a second time AWOL offense.

7. On the same date, the applicant accepted NJP under the provisions of Article 15, of the UCMJ for failing to go to his appointed place of duty on 17 March 2003, being AWOL on or about 17 April 2003 until on or about 22 April 2003, and wrongfully using cocaine between on or about 9 April 2003 and 16 April 2003. His punishment was forfeiture of \$575.00 pay per month for two months, extra duty for 45 days, and restriction for 45 days.

8. On 25 July 2003, the trial counsel reviewed the commands action to separate the applicant under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 14, Commission of a Serious Offense and states the separation was legally sufficient.

9. On 31 July 2003, the applicant's immediate commander notified the applicant of his intent to recommend him for separation under the provisions of Army Regulation (AR) 635-200, paragraph 14-12(c)(2), by reason of misconduct - commission of a serious offense. He noted the specific reasons as the applicant's positive tests for wrongful use of cocaine on 12 November 2003 and on 16 April 2003 and for being AWOL on three separate occasions totaling 34 days. He additionally recommended an other than honorable characterization of service.

10. The applicant consulted with counsel on 31 July 2003 and was advised of the basis for the contemplated action to separate him abuse of illegal drugs and it effects of the rights available to him. He requested consideration of his case by an administrative separation board and an appearance before a board. He requested representation by counsel. He elected to submit a statement in his own behalf and understood he may encounter prejudice in his civilian life.

11. On 1 August 2003, the applicant voluntarily waived consideration of his case by an administrative separation board contingent upon receiving a general discharge. He elected to submit a statement in his own behalf; however, a statement is not available for review.

12. On 8 August 2003, the applicant's immediate commander formally recommended the applicant be separated under AR 635-200, paragraph 14-12c (commission of a serious offense) and that his service be characterized as other than honorable.

13. On 21 October 2003, a memorandum for the trial defense services states the applicant went AWOL from 8 October 2003 until 14 October 2003, additionally the following items were confiscated from the applicant's room during a legal search:

- 1 - pipe of pyrex material with bulbous end #9860
- 1 - "dime bag" with dust inside of it
- 5 – pieces of wire apparently used for scraping the inside of the pipe
- 1 – plastic straw cut to a length of approximately three inches presumably used for snorting drugs
- 36 white pills (m-7171)

14. On 28 October 2003 an email was sent from the trial defense counsel signed by the applicant stating he waived his rights to an administrative separation board, knowing he was being recommended for an other than honorable characterization of service. The applicant additionally submitted a written waiver waiving consideration of his case by an administrative separation board and waiving an appearance before a board. He elected to not submit a statement in his own behalf and understood he may encounter prejudice in his civilian life.

15. The separation authority approved the recommended discharge on 3 November 2003, and directed the applicant's service be characterized as other than honorable. He would not be transferred to the Individual Ready Reserve.

16. The applicant was discharged accordingly on 10 December 2003. 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(2), by reason of misconduct, in the grade of E-1. His service was characterized as UOTHC. He received a separation code of "JKK" and reentry code "4". He completed 2 years, 4 months, and 6 days of net active service. It additionally shows:

a. Item 13 (Decorations, Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized):

- National Defense Service Medal
- Army Service Ribbon
- Overseas Service Ribbon
- Expert Marksmanship Qualification Badge with Grenade Bar
- Sharpshooter Marksmanship Qualification Badge with Rifle Bar
- Sharpshooter Marksmanship Qualification Badge with Submachine Gun Bar

b. Item 29 (Dates of Time Lost During this Period):

- 13 May 2003 through 26 May 2003
- 3 June 2003 through 17 June 2003
- 25 November 2003 through 8 December 2003

17. There is no indication the applicant applied to the Army Discharge Review Board within that Board's 15-year statute of limitations.

18. Regulatory guidance states when an individual is discharged under the provisions of AR 635-200, Chapter 14, for misconduct, an under other than honorable conditions characterization of service is normally appropriate. However, the separation authority may direct a general discharge if such is merited by the Soldier's overall record.

19. In reaching its determination, the Board can consider the applicant's petition, service record, and statements in light of the published guidance on equity, injustice, or clemency. 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.

20. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his characterization service from under other than honorable conditions (UOTHC) to honorable. He contends he had mental health conditions that mitigated his misconduct.

b. 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 was enlisted in the Regular Army on 22 June 2001; 2) On 3 February 2003, the applicant accepted nonjudicial punishment (NJP) for wrongful use of cocaine on 5 November 2002 and 12 November 2002; 3) On 27 June 2003, the applicant accepted NJP for failing to go to his appointed place of duty on 17 March 2003, being AWOL on 17-22 April 2003, and wrongfully using cocaine between on or about 9 April 2003 and 16 April 2003; 4) On 21 October 2003, a memorandum for the trial defense services states the applicant went AWOL from 8-14 October 2003 and illegal drugs and drug paraphernalia was confiscated from the applicant's room during a legal search; 4) The applicant was discharged on 10 December 2003, Chapter 14-12c(2), by reason of misconduct. His service was characterized as UOTHC.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting military records and documents. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical documentation was provided for review.

d. The applicant noted mental health conditions as a contributing and mitigating factor in the circumstances that resulted in his separation. There was evidence the applicant was recommended for inpatient substance abuse treatment for extensive polysubstance abuse after returning from being AWOL in June 2003. The applicant was reported to have a history of polysubstance abuse prior to his enlistment, and he was diagnosed and treated for depression during his teens. The applicant was admitted to inpatient substance abuse treatment and diagnosed with polysubstance dependence. There was evidence provided that the admitting provider was unable to rule out a

reoccurrence of major depression or a substance induced mood disorder at the time of the applicant's admission. However, there was insufficient evidence available on future diagnostic clarification. There was also no additional information available on the applicant being diagnosed with a mental health condition beyond polysubstance dependence or additional behavioral health treatment for a mental health condition. A review of JLV was void of any behavioral health documentation, and the applicant receives no service-connected disability.

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

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends he was experiencing mental health conditions that contributed to his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant reports experiencing a mental health condition while on active service.

(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 beyond polysubstance dependence while on active service. There was some limited evidence the applicant was diagnosed with major depression and polysubstance abuse prior to his enlistment, but there was insufficient evidence he was ever diagnosed with a mental health condition while on active service. The applicant did engage in avoidant behavior such as substance abuse and going AWOL, which can be a natural sequelae to some mental health conditions, but this is not sufficient to establish a history of a condition during active service. However, the applicant contends he was experiencing a mental health condition that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, the Board found that relief was not warranted. The Board carefully considered the applicant's request, supporting documents available for review and evidence in the records. The Board considered the frequency and nature of the misconduct, the reason for separation and whether to apply clemency. Based on the available documentation and the multiple offenses leading to the applicant's separation, the Board concluded that any mitigation for the offenses was outweighed and the applicant received an equitable and just discharge. As a result, the

Board found insufficient evidence of an error or injustice which would warrant a change to the applicant's characterization of service.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined 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.

2/28/2024

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:

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 Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

3. AR 635-200 sets policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons.

a. Chapter 3, section II (Type of Characterization or Description) provides a description of the states the following types of characterization of service or description of service are authorized: separation with characterization of service as Honorable, General (under honorable conditions), or Under Other Than Honorable Conditions, and Uncharacterized (for entry level status) are authorized. These separation types will be used in appropriate circumstances unless limited by the reason for separation.

(1) Paragraph 3-7a states an honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier'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.

(2) Paragraph 3-7b states 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.

b. Chapter 14 (Separation for Misconduct) establishes policy and prescribes procedures for separating personnel for misconduct because of minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, and absence without leave.

(1) 14-12c(2) – Soldiers are subject to discharge for *Commission of a serious offense*. Commission of a serious military or civil offense, if the specific circumstances of the offense warrant separation and a punitive discharge is, or would be, authorized for the same or a closely related offense under the MCM. Specific instances of serious offenses include abuse of illegal drugs or alcohol

(2) A discharge under other than honorable conditions 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 Soldier's overall record.

4. 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 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 to those conditions or experiences.

5. 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.

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, 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//