

- wrongfully using cocaine (two specifications) between on or about 12 June 1992 to on or about 22 June 1992 and between on or about 27 June 1992 to on or about 7 July 1992
 - stealing a wallet and \$800.00 on or about 21 June 1992
 - breaking restrictions (two specifications) on or about 21 June 1992 and on or about 3 July 1992
 - wrongfully possessing less than one gram of cocaine on or about 16 July 1992
5. He was sentenced to a BCD, confinement for 18 months, and forfeiture of all pay and allowances. The sentence was approved on 25 September 1992 and the record of trial was forwarded to the U.S. Army Court of Review for appellate review.
6. On 4 November 1992, the U.S. Army Court of Military Review determined the findings of guilty and the sentence were correct in law and fact. The findings and sentence were affirmed.
7. General Court-Martial Order Number 106, issued by Headquarters, U.S. Army Armor Center, Fort Knox, KY on 13 August 1993, shows the sentence was finally affirmed, the provisions of Article 71(c) had been complied with, and the sentence was ordered duly executed.
8. The applicant was discharged on 7 September 1993, under the provisions of Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel), Chapter 3, by reason of court-martial, in the rank of private/E-1. His DD Form 214 (Certificate of Release or Discharge from Active Duty) confirms his service was characterized as bad conduct with separation code "JJD" and reentry code "4". He was credited with 11 months and 18 days of net active service with lost time from 4 September 1992 to 6 September 1993.
9. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, USC, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Rather, it is only empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.
10. Regulatory guidance provides a Soldier will receive a BCD pursuant only to an approved sentence of a general or special court-martial. The appellate review must be completed, and the affirmed sentence ordered duly executed.
11. The Army Review Boards Agency, Case Management Division, sent the applicant a letter on 11 August 2023, requesting the applicant provide medical documentation to

support his contention of mental health issues. To date, no additional documentation has been received.

12. The Board should consider the applicant's argument and/or evidence in accordance with the published equity, injustice, or clemency determination guidance.

13. MEDICAL REVIEW:

a. The applicant requests an upgrade of his BCD discharge to Honorable. He contends his misconduct was related to Other Mental Health Issues.

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 enlisted into the Regular Army on 17 September 1991; 2) Before a general court-martial adjudged on 4 September 1992, at Fort Stewart, GA, the applicant pled guilty and was found guilty of two specifications of wrongful use of cocaine, two specifications of breaking restriction, and one specification of stealing a wallet and \$800.00; 3) He was sentenced to a BCD, confinement for 18 months, and forfeiture of all pay and allowances; 4) The applicant was discharged on 7 September 1993, under the provisions of Army Regulation (AR) 635-200 (Personnel Separations - Enlisted Personnel), Chapter 3, by reason of court-martial

c. The VA electronic medical record (JLV), and ROP were reviewed. The military electronic medical record, AHLTA, was not reviewed as it was not in use during the applicant's period of service. No military BH-related records were provided for review. A review of JLV shows the applicant does not have a service-connected disability but does have a brief BH history with the VA characterized by seeking assistant for housing and counseling from March 2023 to August 2023. Records show the applicant entered the grant per diem program on 3 March 2023 due to current homelessness. It was noted the applicant had resided with a friend from 2004 – 2022 and living in a hotel room from 2022 to date of the encounter. He reported difficulty finding stable housing due to having to register as a sex offender for an incident that occurred in 1997 that he reportedly was not guilty of committing but was advised by his lawyer to plead guilty to an Alford Plea. As a result of the plea he was put on probation for 7 months. On 29 March 2023 the applicant was seen in the urgent care walk-in clinic and complained of anxiety, depression, and insomnia in the context of unstable housing and lack of family/social support. He reported the past year had been very difficult from him as he was made to register as a sex offender in ■■■, his sister passed away, he lost a toe due to diabetes, and he was confronted by police for reportedly threatening his roommate. He noted a primary interest in developing coping skills and declined medication. He was diagnosed with Anxiety Disorder Unspecified and scheduled for follow-up. Records show the applicant engaged in BH outpatient counseling and remained in the GDP through 9 August 2023. No civilian records were provided for review.

d. The applicant is requesting an upgrade of his BCD to Honorable and contends his misconduct was related to Other Mental Health issues. A review of the records was void of any history of BH diagnosis or treatment for the applicant during service. Post-service records show he has a brief BH treatment history with the VA for diagnosis of Anxiety Disorder Unspecified secondary to psychosocial factors with onset in 2022. Records were void of any evidence that the applicant had a BH condition during his time in service and he provided no documentation to support his contention. In absence of documentation supporting his contention, there is insufficient evidence to find his misconduct was related to, or mitigating by Other Mental Health issues, and insufficient evidence to support an upgrade.

e. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence that the applicant had an experience or condition during his time in service that would mitigate his misconduct. However, the applicant contends his misconduct was related to Other Mental Health issues, and per liberal 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. The applicant asserts his misconduct was related to Other Mental Health issues.

(2) Did the condition exist or experience occur during military service? Yes.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of the records was void of any history of BH diagnosis or treatment for the applicant during service. Post-service records show he has a brief BH treatment history with the VA for diagnosis of Anxiety Disorder Unspecified secondary to psychosocial factors with onset in 2022. Records were void of any evidence that the applicant had a BH condition during his time in service and he provided no documentation to support his contention. In absence of documentation supporting his contention, there is insufficient evidence to find his misconduct was related to, or mitigating by Other Mental Health issues, and insufficient evidence to support an upgrade.

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 record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of

the applicant’s petition and available military records and medical, the Board concurred with the advising official finding insufficient evidence that the applicant had an experience or condition during his time in service that would mitigate his misconduct. The applicant provided no post service achievements or character letters of support attesting to his honorable conduct for the Board to weigh a clemency determination.

2. The Board determined the applicant’s service record exhibits numerous instances of misconduct during his enlistment period for 11 months and 18 days of net active service with lost time from 4 September 1992 to 6 September 1993. The Board agreed there is insufficient evidence of in-service mitigating factors to overcome the misconduct of wrongfully using cocaine on two occasions, stealing and possession of illegal drugs. Based on the preponderance of evidence, the Board determined the character of service the applicant received upon separation was not in error or unjust. Therefore, relief was denied.

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.

2/22/2024



 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, USC, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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, in effect at the time, set forth the basic authority for the separation of enlisted personnel.
 - a. Chapter 3 provided that an enlisted person would be given a BCD discharge pursuant only to an approved sentence of a general or special court-martial, after

completion of appellate review, and after such affirmed sentence has been ordered duly executed.

b. 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.

c. 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.

4. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, USC, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Rather, it is only empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

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 (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.

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.

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//