

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 1 March 2024

DOCKET NUMBER: AR20230008676

APPLICANT REQUESTS: A personal appearance before the Board and that his under honorable conditions (general) discharged be upgraded to an honorable discharge.

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

- DD Form 149 (Application for Correction of Military Record)
- A personal statement
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Department of Veterans Affairs (VA) decisional document
- Three third party 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 the VA has recently increased his 50 percent disability rating for major depressive disorder; alcohol dependence in remission; panic disorder; methamphetamine dependence in remission; and marijuana abuse in remission; to a 70 percent disability rating. These conditions are related directly to his discharge. In his statement, the applicant outlines his post service work with Veterans and people in the vulnerable population, especially those with previous incarceration, addictions, and homeless issues.
3. On the applicant's DD Form 149, he indicates mental health issues as contributing and mitigating factors in the circumstances that resulted in his separation.
4. A review of the applicant's service record shows he enlisted in the Regular Army for 4 years on 29 August 2001. He completed training with award of the military occupational specialty 11B (Infantryman). The highest grade he held was E-4.

5. His record contains a positive urinalysis for marijuana on a random sampling taken on 15 October 2003. There is also an indication of a second positive urinalysis; however, the supporting documentation is not of record.
6. He received counseling on 30 October 2003 for this offense and was notified that separation proceedings were being initiated.
7. On 30 October 2003, he was evaluated by the Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) service and found not to meet the criteria for enrollment but was referred to the Alcohol and Drug Abuse and Prevention Training (ADAPT) program, with enrollment in that program on 12 November 2003.
8. The applicant was counselled for driving under the influence on 9 November 2003 with a recommendation of nonjudicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ).
9. A DA Form 3822-R (Report of Mental Status Evaluation), dated 18 November 2003 shows the applicant had no abnormalities in behavior, level of orientation, mood, thinking process, thought content or memory. He was determined to be mentally capable to understand and participate in the proceedings deemed appropriate by command.
10. The applicant accepted NJP on 24 November 2003 , under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ), for being illegal use of marijuana between on or about 15 September 2003 and on or about 15 October 2003. His punishment was reduction to E-1, forfeiture of \$579.00 pay per month for two months; 45 days extra duty; restriction for 45 days to the limits of the company area, place of duty and dining and medical facilities.
11. The applicant was afforded a medical examination on 2 March 2004 that found no medical conditions warranting consideration for a physical disability processing.
12. The applicant's immediate commander notified the applicant on 31 March 2004 of his intent to initiate actions to separate him under Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), paragraph 14-12c for misconduct – abuse of illegal drugs.
13. The applicant consulted with legal counsel on 31 March 2004. He was advised of the basis for the contemplated discharge, the possible effects of an under honorable conditions discharge, and the procedures and rights that were available to him. He elected not to submit a statement in his own behalf.

14. The applicant's immediate commander formally recommended his separation from service under the provisions of Army Regulation 635-200, paragraph 14-12c on 31 March 2004. He noted the applicant had tested positive twice for marijuana.

15. The appropriate authority approved the discharge recommendation on 14 May 2004 under Army Regulation 635-200, para 14-12c. He directed the applicant be issued a General Discharge Certificate.

16. The applicant was discharged on 25 June 2004, in the pay grade of E-1. His DD Form 214 shows he was discharged under the provisions of Army Regulation 635-200, paragraph 14-12c(2) for misconduct and his service characterization was under honorable conditions . He was credited with 2 years, 9 months, and 27 days of net active service. His awards are listed as the National Defense Service Medal, Army Service Ribbon, Global War on Terrorism Service Medal, and the Marksman Qualification Badge with Rifle Bar.

17. The applicant provided:

a. A copy of a VA Decisional Document, dated 3 May 2023, that shows he was granted and increase in his disability evaluations to:

- major depressive disorder,
- panic disorder
- alcohol dependence in remission,
- methamphetamine dependence in remission
- marijuana abuse in remission
- radiculopathy upper right extremities
- right knee strain with trauma with instability and limitation of flexion
- right knee strain with limitation of extension
- left knee iliotibial band (IT band) syndrome with limitation of flexion
- left knee IT band syndrome with limitation of extension
- left extra-articular distal radius fracture (healed)

b. The letters of character describe the applicant a positive factor in mentoring other individuals on their journeys of recovery and the rebuilding their lives. They have witnessed growth in his journey in both recovery and spirituality. Throughout the years, he has been actively helping others in the recovery, reentry and veteran communities and is very involved in those community activities.

18. In determining whether to grant relief the Boards for Correction of Military/Navy Records (BCM/NR) can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance.

MEDICAL REVIEW:

1. The applicant is applying to the ABCMR requesting an upgrade of his under honorable conditions (general) discharge to an honorable discharge. He contends he experienced mental health conditions that mitigated his misconduct.
2. 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 in the Regular Army on 29 August 2001; 2) His record contains a positive urinalysis for marijuana on 15 October 2003. There is also an indication of a second positive urinalysis. However, the supporting documentation is not of record; 3) The applicant was counselled for driving under the influence on 9 November 2003 with a recommendation of nonjudicial punishment (NJP); 4) The applicant was discharged on 25 June 2004, Chapter, 14-12c(2) for misconduct, and his service characterization was under honorable conditions.
3. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's available military service and medical records. The VA's Joint Legacy Viewer (JLV) was also examined. In addition, the applicant provided hardcopy VA medical documentation for review.
4. On his application, the applicant contends mental health conditions were contributing and mitigating factors in the circumstances that resulted in his separation. There is insufficient evidence the applicant ever reported or was diagnosed with a mental health condition while on active service. There is also insufficient evidence the applicant ever deployed to an area of combat. On 30 October 2003, the applicant was Command referred to the Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) for drug use. He was not diagnosed with a drug abuse condition or a mental health condition. The applicant was recommended for 2 days of drug and alcohol education at the Alcohol and Drug Abuse and Prevention Training (ADAPT) program. On 18 November 2003, the applicant completed a mental status evaluation as part of his administrative separation proceedings for a Chapter 14-12c. He was not diagnosed with a mental health condition. He was found to be mentally responsible for his actions and able to participate in the proceedings. He was psychiatrically cleared for any administrative or judicial action deemed appropriate by command. On his Report of Medical Examination on 02 March 2004, the applicant reported he was treated for Seasonal Affective Disorder and mild depression with psychiatric medication. The applicant was stationed in Alaska at this time of his active service.
5. A review of JLV provided evidence the applicant has been provided treatment for severe polysubstance abuse/dependence disorders. He was also treated for an Adjustment Disorder with Mixed Anxiety and Depressed Mood. The applicant has had a

lengthy history of problems with substance abuse/dependence and corresponding legal problems related to use and distribution of narcotics. He was seen for a Compensation and Pension Evaluation for Mental Health Disorders in 2019. He reported that he experienced anxiety and depression after 9/11 while on active service. He admitted to not deploying, but he stated he experienced negative emotions at the mere thought of deploying, and he started to abuse alcohol and illegal drugs as a result. Due to this report, he was awarded his service-connected disability for Major Depression, which was raised to 70% in 2022.

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

7. Kurta Questions:

a. Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes. The applicant has been diagnosed with service-connected Major Depression by the VA.

b. Did the condition exist, or experience occur during military service? Yes. The applicant contends he was experiencing mental health conditions while on active service, and he has been diagnosed with service-connected Major Depression by the VA.

c. Does the condition or experience actually excuse or mitigate the discharge? Yes. There was sufficient evidence the applicant has been diagnosed with service-connected depression by the VA, which resulted from the thought that he may deploy to a combat zone as an infantryman. The applicant had a repeated history of substance use while on active service. This could have been an attempt to avoid his negative emotions associated with the possibility that he may deploy to a combat zone like the majority of other service members at the time of his active service.

**BOARD DISCUSSION:**

1. The Board carefully considered the applicant's request for an upgrade of his character of service from under honorable conditions (general) to honorable and a personal and a personal appearance before the Board. The Board also thoroughly reviewed and considered the applicant's request, statements, arguments, all supporting documents, the evidence found within the military record, regulatory and statutory guidance, and Department of Defense guidance regarding requests for discharge upgrades on the basis of clemency.
2. The applicant's request for a personal appearance hearing was carefully considered. However, in this case, the evidence of record and independent evidence provided by the applicant and was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.
3. The Board found that relief was not warranted. During the applicant's 2 years, 9 months, and 27 days of net active service, there is no evidence he ever deployed as an infantryman. During the period of his service, his urine tested positive for the presence of marijuana on two separate occasions and one instance of driving under the influence.
4. The Board also considered the medical opinion and the character letters provided; however, the Board was not sufficiently moved to upgrade the characterization of his service. The Board felt any mitigating circumstances were addressed when the chain of command issued the applicant an under honorable conditions 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 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. 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 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, 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.

4. Army Regulation 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 Soldiers whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. 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.

d. Paragraph 14-12c (Commission of a Serious Offense) applied to Soldiers who committed a serious military or civilian offense, when required by the specific circumstances warrant separation and a punitive discharge was, or could be authorized for that same or relatively similar offense under the UCMJ.

5. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records 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//