

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 June 2024

DOCKET NUMBER: AR20230009509

APPLICANT REQUESTS:

- upgrade of his under honorable conditions (general) discharge
- change to his reentry eligibility (RE) code to RE-1
- change to his narrative reason for separation to “for convenience of the government”
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 293 (Application for the Review of Discharge)
- Legal brief on behalf of the applicant
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- In-service medical documents
- Character reference letters (2)
- Biography
- Resume
- Civilian certificates of recognition
- Prior service medical documents

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. Counsel states, in pertinent part:

a. The applicant’s discharge was inequitable and served its purpose.

b. The applicant was diagnosed with Attention-deficit/hyperactivity disorder (ADHD) and Oppositional Defiance Disorder when he was a young boy. He was medicated for

these conditions for more than a decade. The applicant wanted to join the military so he could get an education and get access to the education benefits. The applicant completed initial entry training, which made him become very nervous, very obedient, and always say yes. He learned to not ask questions and to do as he was told.

c. At the time of his original enlistment, the applicant told the recruiter he had ADHD but was told that was not something that he had to follow up on. The behavioral health issue did affect him during his time in the military. Since his involuntary discharge, the applicant went back on the ADHD medication and has taken anti-depressants. He has also been diagnosed with anxiety and takes medication for that. He has received a bachelor's degree and several different certifications. He has held gainful employment, developed teams, worked for multiple non-profits in his community, and worked on opening a local brewery with another Veteran. The applicant now leads a stable and productive life, and has without incident, since his separation from the Army.

d. There is a procedural defect in this case. The request for administrative separation can be both command-initiated and initiated by the service-member. In this case, there was a hasty command-initiated request for separation. The applicant was under investigation for a pattern of misconduct, but the command did not wait to find out the results of the investigation. During a command-initiated discharge request consideration should be given to the Soldier's potential for rehabilitation, and review of his entire record before taking action. The commander must provide the member reasonable time to overcome deficiencies. In this case there was a rush to judgment. The commander should have evaluated the applicant as to whether he had a long-term problem or whether there was an immediate fix.

e. The applicant asks that this appeal be given the utmost scrutiny and all derogatory information be removed from his record. The success of the appeal and future actions by the Army and the ABCMR will have a significant impact on his ability to receive proper benefits and recognition. He will continue to fight this derogatory information up through the Secretary of the Army.

3. The applicant states his discharge was unfair at the time. The discharge is procedurally defective. His discharge is unfair now.

4. On 25 August 2004, the applicant enlisted in the Regular Army, for 4 years. Upon completion of training, he was awarded military occupational specialty 21J (General Construction Equipment Operator).

5. On 17 March 2005, the applicant accepted non-judicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ), for consuming alcohol while underage on or about 20 February 2005. His punishment included 45 days restriction and extra duty.

6. On 20 June 2005, the applicant was reported as absent without leave (AWOL) and remained absent until he returned to military authorities on 27 June 2005.
7. On 27 July 2005, the applicant accepted NJP under Article 15 of the UCMJ, for going AWOL. His punishment included forfeiture of \$617.00 pay for two months, and 45 days restriction and extra duty.
8. On 2 August 2005, the applicant underwent a mental status evaluation. He was psychiatrically cleared to participate in any administrative action deemed appropriate by the command.
9. On 17 August 2005, the applicant's commander notified him that he was initiating actions to separate him under the provisions of Army Regulation 635-200 (Personnel Separations – Active Duty Enlisted Administrative Separations), Chapter 14-12b, for a pattern of misconduct. As the specific reasons, his consumption of alcohol while under the legal age of 21 and his period of AWOL.
10. The applicant acknowledged that he had been advised by counsel of the contemplated separation action, the possible effects of the discharge, and the rights available to him.
  - a. He indicated he understood he could expect to encounter substantial prejudice in civilian life if a character of service that is less than honorable was issued to him.
  - b. The available record does not contain a statement in his own behalf.
11. The applicant's commander formally recommended his separation under the provisions of Army Regulation 635-200, paragraph 14-12b, for a pattern of misconduct.
12. Consistent with the chain of command's recommendation, the separation authority directed the applicant's discharge, with issuance of a DD Form 257A (General Discharge Certificate).
13. The applicant was discharged on 30 August 2005. He was credited with 11 months and 29 days of net active service this period with 7 days of lost time. His DD Form 214 contains the following entries in:
  - Item 24 (Character of Service) – Under Honorable Conditions (General)
  - item 25 (Separation Authority) – AR [Army Regulation] 635-200, PARA 14-12b
  - item 26 (Separation Code) – JKA
  - item 27 (Reentry Code) – 3
  - item 28 (Narrative Reason for Separation) – Pattern of Misconduct

14. The applicant petitioned the Army Discharge Review Board requesting upgrade of his under honorable conditions (general). On 13 September 2017, the Board voted to deny relief and determined his discharge was both proper and equitable.

15. The applicant provides the following (provided in entirety for the Board):

a. Two character reference letters attest to his leadership within the community and his employer. One letter details his numerous initiatives on behalf of Veterans.

b. Certificates of recognition and various civilian documents detailing his post-service professional accomplishments.

c. Medical documents that show he was diagnosed and received treatment for ADHD prior to his enlistment in the Army.

16. 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.

17. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to his characterization of service from under honorable conditions (general) to honorable.

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:

- The applicant enlisted into the Regular Army on 25 August 2004.
- The applicant received NJP for consuming alcohol while underage on or about 20 February 2005, and another NJP for being AWOL for seven days in June 2005. His commander formally recommended his separation under the provisions of Army Regulation 635-200, paragraph 14-12b, for a pattern of misconduct.
- The applicant was discharged on 30 August 2005 and was credited with 11 months and 29 days of net active service.

c. Review of Available Records: The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts he had ADHD which was aggravated in service and led to his misconduct. The application included a Report of Medical Examination dated 13 May 2004, which showed no psychiatric history, and a Mental Status Evaluation dated 2 August 2005, which showed that the applicant met retention standards and had the capacity to understand the proceedings. He was cleared for separation. Medical

documentation with dates ranging from 1994 to 2003 showed a history of diagnosis of ADHD with stimulant medications to treat this condition as well as an antidepressant, a medication typically used for sleep, and a blood pressure medication that was frequently used in conjunction with stimulants. There is a letter dated 21 September 1999 noting need for therapy for anger problems and diagnoses of ADHD, Oppositional Defiant Disorder (ODD), and Impulse Control Disorder. The most recent physician note on 28 May 2003 indicated continued prescriptions for ADHD and ODD, but it noted weaning off of the medications with difficulty in school as a result. There was insufficient evidence that the applicant was diagnosed with any psychiatric condition while on active service.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed no history of mental health related treatment or diagnoses while in service. There is notation of diagnoses of ADHD and Major Depressive Disorder in August 2010, but there is no documentation of symptoms or treatment.

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

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts he had a pre-enlistment diagnosis of ADHD, ODD, and Impulse Control Disorder at the time of the misconduct. He provided medical records documenting these diagnoses and treatment.

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

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant has provided documentation of pre-enlistment diagnoses of ADHD, ODD, and Impulse Control Disorder as well as need for multiple medications to function within the academic setting. He asserts that he informed his recruiter of his psychiatric history, but the Medical Examination dated 13 May 2004 showed no history of any psychiatric conditions or treatment. Additionally, there is no indication that he reported these conditions during the Mental Status Evaluation that was conducted as part of the separation process, and there is no documentation of a mental health condition while on active service.

g. Impulsive behaviors, such as underage drinking and AWOL, would not be inconsistent with these diagnoses. However, these diagnoses do not affect one's ability to distinguish right from wrong and act in accordance with the right. Additionally, the presence of these diagnoses can preclude someone from accession into the military.

h. There is insufficient evidence, beyond self-report, that the applicant was experiencing a mental health condition while on active service. However, the applicant contends he was experiencing a mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

#### 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, the Board concurred with the advising official finding insufficient evidence, beyond self-report, that the applicant was experiencing a mental health condition while on active service. there is no indication that he reported these conditions during the Mental Status Evaluation that was conducted as part of the separation process, and there is no documentation of a mental health condition while on active service. The opine noted there is no indication that the applicant reported these conditions during the Mental Status Evaluation that was conducted as part of the separation process, and there is no documentation of a mental health condition while on active service.

2. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the pattern of misconduct during his 11 months and 29 days of net active service which includes 7 days of lost time. The Board applauds the applicant on his post service achievements on receiving a bachelor's degree and several different certifications. The Board noted his continuous employment and working for multiple non-profits within his community. However, the Board agreed the applicant was discharged for a pattern of misconduct and was provided an under honorable conditions (General) characterization of service. The Board determined the applicant's discharge characterization is warranted as he did not meet the standards of acceptable conduct and performance of duty for Army personnel to receive an honorable discharge. Based on this, the Board determined relief was not warranted and denied relief.

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record 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.

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.



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, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the 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. 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.

a. Paragraph 2-9 states 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.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that 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 601-210 (Regular Army and Army Reserve Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment and processing into the Regular Army, U.S. Army Reserve, and Army National Guard. Table 3-6 provides:

- RE code "1" applies to Soldiers completing an initial term of active service, who are considered qualified for enlistment if all other criteria are met.
- RE code "2" is no longer in use but applied to Soldiers separated for the convenience of the government, when reenlistment is not contemplated, who are fully qualified for enlistment/reenlistment.
- RE code "3" applies to Soldiers who are not considered fully qualified for reentry or continuous service at time of separation, whose disqualification is waivable – they are ineligible unless a waiver is granted.
- RE code "4" applies to Soldiers separated from last period of service with a non-waivable disqualification.

5. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the separation codes to be entered on the DD Form 214. At the time, this regulation prescribed the separation code "JKA" is the appropriate code to assign Soldiers separated under the provisions of Army Regulation 635-200, for pattern of misconduct.

6. 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 a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 14 (Separation for Misconduct) established policy and prescribed procedures for separating members for misconduct. It states that action will be initiated to separate a Soldier for misconduct when it was clearly established that rehabilitation was impracticable or unlikely to succeed.

7. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Navy 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 under other than honorable conditions 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.

8. 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 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.

9. 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, 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//