

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 July 2024

DOCKET NUMBER: AR20230012683

APPLICANT REQUESTS: upgrade of his bad conduct discharge (BCD) to under honorable conditions (General).

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:  
DD Form 149 (Application for Correction of Military Record), 31 October 2023

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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 he has been separated for almost 17 years and is seeking mental health treatment. He believes if he had proper mental health treatment and drug treatment he would not have been discharged and could have continued until retirement. The Army pushed Percocet on him knowing he had substance abuse issues; this did not help him with proper treatment. The Army also fabricated stolen check charges in his platoon to make him look bad.
3. On his DD Form 149, he notes other mental health is related to his request.
4. The applicant enlisted in the Regular Army on 30 December 2003.
5. Two DA Forms 4187 (Personnel Action) shows the applicant's duty status was changed from present for duty to confined to military authorities, effective 5 April 2005 and changed from confined to military authorities to present for duty effect 25 August 2005.
6. Special Court Martial Order Number 46, issued by Headquarters, 82nd Airborne Division, Fort Bragg, NC on 12 December 2005 shows:
  - a. The applicant was found guilty of the following charges:

- wrongful use of cocaine on divers occasions between on or about 3 June 2005 and on or about 10 June 2005
- failure to report to his appointed place of duty on 18 July and 19 July 2005

b. He was sentenced to confinement for 79 days and discharge from the service with a BCD, which was adjudged on 23 August 2005.

c. The sentence was approved, and the record of trial was forwarded to the U.S. Court of Criminal Appeals for appellate review.

7. The U.S. Court of Criminal Appeals affirmed the findings of guilty and the sentence on 26 June 2006.

8. Special Court-Martial Order Number 247, issued by Headquarters, U.S. Army Armor Center, Fort Knox, KY on 26 October 2006, shows the sentence was finally affirmed, the provisions of Article 71(c) had been complied with, and the sentence of BCD was ordered duly executed.

9. The applicant was discharged on 18 May 2007, under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3, by reason of court-martial, other, in the grade of E-1. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows his service was characterized as bad conduct. He was credited with 2 years, 11 months, and 29 days of active service, with lost time from 5 April 2005 to 22 August 2005 and from 23 August 2005 to 24 August 2005.

10. 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.

11. 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.

12. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his bad conduct discharge (BCD) to under honorable conditions (General) discharge. He contends he experienced mental health conditions that mitigates his misconduct. 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 30 December 2003; 2) Special Court Martial Orders on 12 December 2005 shows the applicant was found guilty of use of cocaine and failure to report to his place of duty on two occasions; 3) The applicant was discharged on 18 May 2007, Chapter 3, by reason of court-martial, other, in the grade of E-1. His service was characterized as bad conduct. He was credited with 2 years, 11 months, and 29 days of net active service, with lost time from 5 April 2005 to 22 August 2005 and from 23 August 2005 to 24 August 2005.

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

c. The applicant asserts he was experiencing mental health conditions while on active service, which mitigates his misconduct. On 29 June 2005, the applicant underwent a Chapter 14-12c physical exam. He was noted to be using cocaine and was diagnosed with Cocaine Dependence-Episodic. The applicant was reported to state he will stop using cocaine when he returns home, and he used cocaine due to depression/loneliness/isolation. He was also diagnosed with depression and was currently involved in behavioral health care. On 11 July 2005, the applicant underwent a Mental Status Exam as part of his Chapter proceedings. He again was reported having a significant substance abuse problem with cocaine. He was described as having two positive urinalyses for cocaine as well as three incidents of going AWOL. The applicant was enrolled in the Army Substance Abuse Program (ASAP), but he was experiencing personal, family, and marital stressors. There was also evidence the applicant was experiencing problems at the unit with his leadership, which made his attendance at ASAP and other behavioral health appointments difficult to attend regularly. The applicant also reported to be prescribed psychiatric medication to assist him with his reported stress, anxiety, and depression. There was also evidence the applicant was prescribed Oxycodone, which had last been filled on 27 June 2005. He was diagnosed with cocaine abuse and occupational problem. On 20 July 2005, he underwent a confinement physical and was diagnosed with Bipolar Disorder, but there was no additional information provided to support this diagnosis.

d. A review of JLV provided evidence the applicant has been incarcerated and received assistance from the VA while still incarcerated starting in 2019. Since his release, he has received assistance with homelessness. Currently, the applicant has not been diagnosed with a service-connected mental health condition and does not receive service-connected disability.

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

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant asserts he experienced mental health conditions that mitigates his misconduct. There is evidence the applicant was experiencing depression, anxiety, and stress while on active service. In addition, he was prescribed psychiatric medication and was enrolled into ASAP due to his cocaine addiction.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced mental health conditions that mitigates his misconduct. There is evidence the applicant was experiencing depression, anxiety, and stress while on active service. In addition, he was prescribed psychiatric medication and was enrolled into ASAP due to his cocaine addiction.

(3) Does the condition experience actually excuse or mitigate the discharge? Yes, there is sufficient evidence beyond self-report the applicant was experiencing mental health symptoms of depression and anxiety while on active service. The applicant did go AWOL and used cocaine while on active service. Going AWOL can be avoidant behavior, which is a natural sequelae to depression and anxiety. In addition, the applicant also was found to be repeatedly using illegal drugs, and he had also been prescribed Oxycodone medication. This opiate pain medication prescribed to the applicant does have a high potential to cause addictive behavior and self-medication with illegal drugs can also be an attempt to avoid negative emotion. Therefore, per Liberal Consideration, the applicant's misconduct, which led to his bad conduct discharge is mitigable.

#### 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 request, supporting documents, evidence in the records, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was separated for conviction by court-martial for wrongful use of cocaine and failure to go to his appointed place of duty. The Board majority determined a preponderance of the evidence shows an error or injustice did not occur when the applicant was discharged with a bad conduct discharge by reason of a court-martial. The Board reviewed the medical advisor's opinion finding the applicant's

contention of a mental health condition to be sufficient evidence toward mitigation; however, the Board majority was not convinced by the applicant's statement. The Board minority concurred with the medical advisor's opinion finding sufficient evidence to support the applicant experienced a behavioral health condition that mitigated his misconduct.

2. The applicant was given a bad conduct discharge pursuant to an approved sentence of a general court-martial. The appellate review was completed and the affirmed sentence was ordered duly executed. All requirements of law and regulation were met with respect to the conduct of the court-martial and the appellate review process and the rights of the applicant were fully protected.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

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|---|---|---|----------------------|
| : | █ | : | 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, USC, 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. Army Regulation 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 bad conduct 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; 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//