

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 31 July 2024

DOCKET NUMBER: AR20240000742

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions discharge to general, under honorable conditions.

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

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) Letter of Entitlement dated 18 October 2023
- Completion Certificates (2)
- DD Form 214 (Certificate of Release or Discharge from Active Duty) for the service period ending 15 November 2004

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 due to an injury he abused drugs to deal with the pain which led to him failing a urinalysis test and ultimately being discharged from the service. Early in his military career he was an outstanding Soldier, was promoted ahead of his peers and served honorably. Unfortunate after his back injury he turned to using drugs to deal with the pain. Since his discharge from the service, he has been a model citizen with zero arrests or any dealings with law enforcement and maintains employment. He traveled to Puerto Rico in support of Hurricane Maria efforts and volunteered with the local government as a translator for Federal Emergency Management Agency (FEMA). He wants to be able to tell his children he served honorably and was discharged honorably. The applicant marked "other mental health" on his DD Form 149 as an issue related to his request.
3. The applicant provides:

a. A letter from the VA dated 18 October 2023, which certified the applicant receives an 80% service-connected combined disability evaluation effective 1 June 2023 with a monthly stipend.

b. Two certificates for completion of a Professional Cooking Program dated 6 December 2016 and a Defensive Driver's Discount Course for an insurance reduction program on 2 February 2020.

4. A review of the applicant's service record shows:

a. He enlisted in the Regular Army on 1 April 1999.

b. On 12 June 2004, he accepted nonjudicial punishment for one specification of wrongful use of marijuana, between on or about 6 May 2004 and 6 Jun 2004. His punishment included reduction to private (PVT)/E-1.

c. On 13 September 2004, he accepted nonjudicial punishment for one specification wrongful use of marijuana, between 25 July 2004 and 24 August 2004 and one specification of wrongful use of cocaine between on or about 20 August 2004 and 24 August 2004.

d. A SF 600 (Chronological Record of Medical Care - Mental Status Evaluation), dated 26 August 2004, confirmed the applicant was referred for a mental evaluation for the purpose of discharge. The physician noted in the remarks, the applicant was psychiatrically cleared for any administrative action deemed appropriate by his command. The evaluation further indicated:

- normal behavior and fully oriented level of alertness
- his mood unremarkable
- clear thinking process and normal thought content
- good memory and the mental capacity to understand and participate in the proceedings and mentally responsible
- met the retention requirements of chapter 3, AR 40-501

e. The service record includes the applicant's medical examinations dated 11 August 2004, for the purpose of administrative separation which indicated he was generally in good health. The applicant was marked qualified for service and separation.

- DD Form 2807-1 (Report of Medical History)
- DD Form 2808 (Report of Medical Examination)

f. On 18 October 2004, the applicant's immediate commander notified him of his intent to separate him under the provisions of Chapter 14, Army Regulation (AR)

635-200 (Active Duty Enlisted Administrative Separations) for commission of a serious offense. The specific reasons for his proposed recommendation were based upon the applicant's failure on unit urinalyses; two positive test results for marijuana and one positive test result for cocaine. The applicant acknowledged receipt on the same day.

- g. The available service record is void of the applicant's elections of rights.
- h. The immediate commander initiated separation action against the applicant under the provisions of AR 635-200, Chapter 14-12c(2), for commission of a serious offense. The commander recommended a general, under honorable conditions discharge.

- i. On 19 October 2004, the separation authority approved the discharge recommendation for immediate separation under the provisions of AR 635-200, Chapter 14, paragraph 14-12c(2) for commission of a serious offense. He would be issued an under other than honorable conditions characterization of service.

- j. On 15 November 2004, he was discharged from active duty with an under other than honorable conditions characterization of service. His DD Form 214 shows he completed 5 years ,7 months, and 15 days of active service with no lost time. He was assigned separation code JKK and the narrative reason for separation listed as "Misconduct", with reentry code 4. It also shows he was awarded or authorized:

- Army Good Conduct Medal
- National Defense Service Medal
- Global War on Terrorism Service Medal
- Army Service Ribbon
- Army Aviator Badge

5. On 7 February 2024, the applicant was notified by the Army Review Boards Agency that he was required to provide a copy of medical documentation in support of his claim of medical and mental health issues (back injury, behavioral health). The applicant was provided 30 days to submit supporting documentation with a suspense of 7 March 2024. The applicant provided 7 pages of medical documents from a provider at Sharp Assessments, LLC dated 18 May 2023, in support of his claim.

6. There is no evidence the applicant has applied to the Army Discharge Review Board for review of her discharge within that board's 15-year statute of limitations.

7. By regulation (AR 635-200), action will be taken to separate a Soldier for misconduct when it is clearly established that despite attempts to rehabilitate or develop him or her as a satisfactory Soldier, further effort is unlikely to succeed.

8. In reaching its determination, the Board can consider the applicants petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

9. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under other than honorable conditions (UOTHC) discharge to general, under honorable conditions. The applicant marked “other mental health” on his DD Form 149 as an issue related to his request.

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 in the Regular Army on 1 April 1999.
- On 12 June 2004, he accepted nonjudicial punishment for one specification of wrongful use of marijuana, between on or about 6 May 2004 and 6 Jun 2004. His punishment included reduction to private (PVT)/E-1.
- On 13 September 2004, he accepted nonjudicial punishment for one specification wrongful use of marijuana, between 25 July 2004 and 24 August 2004 and one specification of wrongful use of cocaine between on or about 20 August 2004 and 24 August 2004.
- On 18 October 2004, the applicant’s immediate commander notified him of his intent to separate him under the provisions of Chapter 14, Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations) for commission of a serious offense. The specific reasons for his proposed recommendation were based upon the applicant’s failure on unit urinalyses; two positive test results for marijuana and one positive test result for cocaine.
- On 15 November 2004, he was discharged from active duty under the provisions of AR 635-200, Chapter 14, paragraph 14-12c(2) for commission of a serious offense with an under other than honorable conditions characterization of service. His DD Form 214 shows he completed 5 years, 7 months, and 15 days of active service with no lost time. He was assigned separation code JKK and the narrative reason for separation listed as “Misconduct”, with reentry code 4.

c. Review of Available Records: The Army Review Board Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant’s file. The applicant states, “due to an injury he abused drugs to deal with the pain which led to him failing a urinalysis test and ultimately being discharged from the service. Early in his military career he was an outstanding Soldier, was promoted ahead of his peers and served honorably. Unfortunately, after his back injury he turned to using drugs to deal with the pain. Since his discharge from the service, he has been a model citizen with zero arrests or any dealings with law enforcement and maintains employment. He traveled to Puerto Rico in support of Hurricane Maria efforts and volunteered with the

local government as a translator for Federal Emergency Management Agency (FEMA). He wants to be able to tell his children he served honorably and was discharged honorably."

d. Due to the period of service, limited active-duty electronic medical records were available for review. The applicant submitted hardcopy medical documentation indicating he participated in a mental status evaluation for the purpose of separation on 26 August 2004. The evaluation psychiatrically cleared him for any administrative action deemed appropriate by his command, no significant behavioral health findings were noted. The applicant also participated in a medical examination for the purpose of separation, dated 11 August 2004, he was deemed to be generally in good health and qualified for service and/or separation.

e. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is 80% service connected, including 50% for Chronic Adjustment Disorder.

f. The applicant provides a C and P evaluation, dated 18 May 2023, that shows he was diagnosed with Unspecified Depressive Disorder with anxious distress. The psychologist opined the applicant's BH condition was at least as likely as not incurred in or caused by active-duty service and aggravated by his service-connected condition of lumbosacral strain. The psychologist further indicated the applicant's substance use suggests he was self-medicating due to his symptoms.

g. Based on the available information; it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence the applicant had a behavioral health condition during military service that mitigates his discharge.

h. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts a mitigating condition, OMH.

(2) Did the condition exist or experience occur during military service? Yes. The applicant is service connected for Chronic Adjustment Disorder.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. The applicant was discharged due to "failure on unit urinalyses; two positive test results for marijuana and one positive test result for cocaine". Given the nexus between depression/anxiety and the use of substances to alleviate/cope with the symptoms of his behavioral health condition, the applicant's use of substances is mitigated by his condition.

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, available military records and the medical review, the Board considered the advising official finding sufficient evidence the applicant had a behavioral health condition during military service that mitigates his discharge. The opine noted a nexus between depression/anxiety and the use of substances to alleviate/cope with the symptoms of the applicant's behavioral health condition, his use of substances is mitigated by his condition.
2. However, the Board after careful review, determined there is insufficient evidence of in-service mitigating factors to overcome the misconduct of cocaine drug use. The Board noted the applicant was psychiatrically cleared with normal behavior and fully oriented level of alertness, clear thinking process and normal thought content, good memory and the mental capacity to understand right from wrong and the applicant met retention requirement based on regulatory guidance. The Board notwithstanding the advising official finding the applicant's adjustment disorder mitigating. The Board found insufficient evidence in the applicant's file indicating injury of his back. The applicant PULHES reflect 11111. The Board found the applicant's self-authored statement was insufficient to mitigate the misconduct 20 years after his discharge. The Board noted, no character letters of support for the Board to determine a clemency determination. Based on this, the Board denied relief.

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.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.
 - a. Honorable Discharge states an honorable discharge is a separation with honor. 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. General Discharge states a general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a member whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.
 - c. Chapter 14 of the regulation states action will be taken to separate a Soldier for misconduct when it is clearly established that despite attempts to rehabilitate or develop him or her as a satisfactory Soldier, further effort is unlikely to succeed.

3. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) 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.
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 DRBs and BCM/NRs 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, on those conditions or experiences. The guidance further describes evidence sources and criteria and requires boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.
5. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (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 based on 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.

6. Section 1556 of Title 10, United States 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.

//NOTHING FOLLOWS//