

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 15 November 2024

DOCKET NUMBER: AR20240006798

APPLICANT REQUESTS: in effect, correction of his DD Form 214 (Certificate of Release or Discharge from Active Duty) to show in:

- item 24 (Character of Service): honorable
- item 25 (Separation Authority): AR 635-200
- item 26 (Separation Code): JFV
- item 28 (Narrative Reason for Separation): condition, not a disability

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel's legal brief, with Exhibits 1-14
 - Exhibit 1: DD Form 214, for the period ending 29 June 2006
 - Exhibit 2: DD Form 369 (Police Record Check) and DD Form 2808 (Report of Medical Examination)
 - Exhibit 3: Chronological Record of Medical Care (6 pages)
 - Exhibit 4: Chronological Record of Medical Care (1 page)
 - Exhibit 5: Veterans Affairs (VA) letter (5 pages)
 - Exhibit 6: DA Form 2823 (Sworn Statement) (2 pages)
 - Exhibit 7: Sworn Statement and DA Form 3881 (Rights Warning Procedure/Waiver Certificate)
 - Exhibit 8: DA Form 4856 (Developmental Counseling Form) (page 1 of 2)
 - Exhibit 9: Results Report (1 page)
 - Exhibit 10: Case Separation File (
 - Exhibit 11: Medical documents (9 pages)
 - Exhibit 12: Character statements (13 pages)
 - Exhibit 13: Office of the Under Secretary of the Army memorandum
 - Exhibit 14: Resume

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, through counsel, states:

a. The Army made a material error in discretion when they discharged the applicant without providing him a reasonable period of time to correct these deficiencies and to rehabilitate into a productive, satisfactory Soldier. The applicant should have received this opportunity under Army Regulation 635 200 (Active Duty Enlisted Administrative Separations), paragraphs 1-16 (Counseling and Rehabilitative Requirements).

b. The applicant recognized an issue with his mental health and went through the proper channels to obtain help. He visited the clinic four times within 80 days and was prescribed medication to alleviate his symptoms. When the medication did not work, the applicant sought alternative means to self-medicate. The applicant then asked Private First Class (PFC) M to join him. The applicant's request for companionship demonstrates a cry for help from a Soldier unable to find a viable solution to his mental health challenges. PFC M recognized this and tried to encourage the applicant to seek professional help twice before expressing his concern to the command that the applicant may turn to self-harm or other dangerous behavior.

c. The applicant was told he would be given time to rehabilitate and improve, which he and his peers recognized he clearly needed. Despite this promised time to rehabilitate, Criminal Investigation Division (CID) closed their investigation when the applicant passed a separate urinalysis and the applicant's command proceeded with separation, noting "none" under "medical or other data meriting consideration."

d. Since his separation, the applicant found the support he needed among his friends and family. By having this need met, the applicant was enabled to flourish in his career and earn accolades as "hardworking," "dependable," and "a good husband and father." If the Army had provided this support, there is little doubt that the applicant would have moved beyond this isolated mistake and gone on to be an exemplary soldier. Discharging the applicant without providing such treatment or recovery time was clearly a discretionary error in need of correction by this honorable Board.

3. The applicant, through counsel, provides:

a. Medical records, to be considered by the Army Review Boards Agency's medical staff and discussed below in MEDICAL REVIEW.

b. Veterans Affairs letter (17 pages), dated 7 March 2023, reflects the applicant was awarded a combined rating evaluation of 50 percent for his unspecified anxiety disorder (claimed as anxiety).

c. DA Form 2823 (2 pages), dated 18 April 2006, given by PFC M who recounts the events of 15 April 2006, which included the applicant's use of marijuana and cocaine.

d. Sworn Statement and DA Form 3881, dated 19 April 2006, given by the applicant, provide details of the events of 15 April 2006, which included him acquiring a "twenty sack of marijuana and a twenty sack of cocaine both of which cost twenty dollars a piece" and his use of both marijuana and cocaine. He invited his friend, PFC M, to his room where he offered him to smoke with him; however, PFC M declined the offer.

e. DA Form 4856 (page 1 of 2), dated 20 April 2006, reflects the applicant was counseled regarding the sworn statement given by PFC M.

f. Results Report (1 page), dated 24 April 2006, reflects the applicant's urine sample, collected on 18 April 2006, tested negative.

g. Separation proceedings, summarized below in the applicant's service record.

h. Character statements (13 pages), dated between 17 September 2022 and 7 September 2023, written by work colleagues and previous customers, all of which attest to his professionalism, work ethics, personal values, and his reliability.

i. Office of the Under Secretary of the Army Memorandum, dated 25 August 2017, Subject: Clarifying Guidance to Military Discharge Review Boards for Correction to Military/Naval Records Considering Requests by Veterans for Modifications of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment.

j. Resume that summarizes the applicant's qualifications, which include his work experience, as well as his education and certifications.

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

a. He enlisted in the Regular Army on 23 November 2004.

b. On 20 June 2006, the applicant's commander notified the applicant of his intent to initiate separation action against him under the provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), paragraph 14-12c(2), Commission of a Serious Offense. The reason for the proposed action was based on the applicant's admittance to using marijuana and cocaine on or about 15 April 2006.

c. The applicant acknowledged receipt of the commander's intent to separate him on 20 June 2006. On 21 June 2006, he consulted with legal counsel who advised him of

the basis for the contemplated separation action for Commission of a Serious Offense, the type of discharge he could receive and its effect on further enlistment or reenlistment, the possible effects of this discharge, and of the procedures/rights available to him. He elected not to submit a statement in his own behalf. He acknowledged he:

- understood he could expect to encounter substantial prejudice in civilian life if a general discharge under honorable conditions were issued to him
- understood he could be ineligible for many or all benefits as a veteran under Federal and State laws as a result of the issuance of a discharge under other than honorable conditions
- understood if he received a discharge characterization of less than honorable, he could make an application to the Army Discharge Review Board (ADRB) or the ABCMR for an upgrade, but he understood that an act of consideration by either board did not imply his discharge would be upgraded

d. Consistent with the chain of command recommendations, the separation authority approved the applicant's discharge on 22 June 2006, under the provisions of AR 635-200, paragraph 14-12c(2), with his service characterized as general under honorable conditions.

e. On 29 June 2006, the applicant was discharged accordingly. His DD Form 214 shows he completed 1 year, 7 months, and 7 days of active service. It also shows in:

- item 24 (Character of Service): under honorable conditions (General)
- item 25 (Separation Authority): AR 635-200, paragraph 14-12C
- item 26 (Separation Code): JKQ
- item 28 (Narrative Reason for Separation): misconduct (Serious Offense)

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

6. By regulation, action will be taken to separate a member for misconduct such as commission of a serious offense. A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter.

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

8. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under honorable conditions (general) discharge to honorable and a change in the narrative reason for separation. The applicant indicates OMH as 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 into the Regular Army on 23 November 2004. On 20 June 2006, the applicant's commander notified the applicant of his intent to initiate separation action against him under the provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), paragraph 14-12c(2), Commission of a Serious Offense. The reason for the proposed action was based on the applicant's admittance to using marijuana and cocaine on or about 15 April 2006. Applicant's DD Form 214 reflects he was discharged on 29 June 2006 under the provisions of AR 635-200, paragraph 14-12c, misconduct (serious offense), with separation code JKQ, reentry code 3, and character of service of general under honorable conditions.

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's counsel states, the "Army made a material error in discretion when they discharged the applicant without providing him 'a reasonable period of time to correct these deficiencies and to rehabilitate into a productive, satisfactory Soldier'. The applicant should have received this opportunity under Army Regulation 635 200, paragraphs 1-16." The applicant recognized an issue with his mental health and went through the proper channels to obtain help. He visited the clinic four times within 80 days and was prescribed medication to alleviate his symptoms. When the medication did not work, the applicant sought alternative means to self-medicate. The applicant then asked private first class (PFC) M to join him, despite believing that PFC M had 'been a lot lately regarding [his] actions'. The applicant's request for companionship demonstrated a cry for help from a Soldier unable to find a viable solution to his mental health challenges. PFC M recognized this and tried to encourage the applicant to seek professional help twice before expressing his concern to the command that the applicant may turn to self-harm or other dangerous behavior. The applicant was told he would be given time to rehabilitate and improve, which he and his peers recognized he clearly needed. Despite this promised time to rehabilitate and the Criminal Investigation Division (CID) closing their investigation when the applicant passed a separate urinalysis, the applicant's command proceeded with separation and noted 'none' under 'medical or other data meriting consideration'.

d. Active-duty electronic medical records available for review show on 27 February 2006, the applicant presented for mental health services and reported increasing

symptoms of anxiety with impaired functioning for approximately a year. He was diagnosed with Generalized Anxiety Disorder. A mental health encounter dated 10 March 2006, indicates he reported feelings of anxiety and frustration along with experiencing a panic attack. He was once again seen on 13 March 2006, and continued to be diagnosed with Generalized Anxiety Disorder. On 22 March 2006, he was diagnosed with both Generalized Anxiety Disorder and Social Phobia. On 10 April 2006, he participated in a mental health follow-up session since he was started on medication to manage his symptoms. A BH encounter dated 11 May 2006, shows he continued to meet diagnostic criteria for Generalized Anxiety Disorder. A mental status evaluation for the purpose of separation, dated 7 June 2006, diagnosed him with Generalized Anxiety Disorder and Social Phobia.

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

f. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to support the applicant had a BH condition during military service that mitigates his misconduct.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts OMH as related to his request.

(2) Did the condition exist or experience occur during military service? Yes. The applicant is 50% service connected for Anxiety Disorder.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. The applicant was discharged due to use of marijuana and cocaine. Given the association between Anxiety Disorder and the use of substances to cope with the symptoms of the condition, the applicant's misconduct is mitigated by his BH condition. It is recommended the Board consider granting the applicant's request of an upgrade of his under honorable conditions (general) discharge to honorable and a change in the narrative reason for separation to a description that is more favorable.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was 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 Board reviewed and concurred with the medical advisor's review finding sufficient evidence to support the applicant had a behavioral health condition during military service that mitigated his misconduct.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

■	■	■	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant's DD Form 214, for the period ending 29 June 2006 to show in:

- item 24 (Character of Service): Honorable
- item 25 (Separation Authority): Army Regulation 635-200
- item 26 (Separation Code): JFV
- item 28 (Narrative Reason for Separation): condition, not a disability

■

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), sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a provides that 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. Paragraph 3-7b provides that 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, of the version in effect at the time, established policy and prescribed procedures for separating members for misconduct. Specific categories included minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, and convictions by civil authorities. It provided that action would be taken to separate a member for misconduct when it was clearly established that rehabilitation was impracticable or was unlikely to succeed. A discharge under other than honorable conditions was normally appropriate for a Soldier discharged under this chapter. However, the separation authority could direct an honorable discharge if merited by the Soldier's overall record.

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 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; TBI; sexual assault; sexual harassment. Boards were directed to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part to 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 that misconduct which 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. 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. 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//