

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 13 March 2025

DOCKET NUMBER: AR20240007308

APPLICANT REQUESTS:

- an upgrade of his other than honorable conditions discharge
- a video/telephonic appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Statement
- Service Record (22 pages)

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 he has been incarcerated multiple times due to drug and alcohol-related offenses, with his most recent arrest occurring on 27 September 2012, for a third offense of driving while intoxicated. He further notes that he has attended rehabilitation programs on five occasions, the most recent being on 23 October 2022, and has maintained sobriety since that time. He believes an upgrade of his discharge status would significantly aid in his personal development and educational opportunities. Furthermore, his father was a Veteran and that his children should be eligible for educational benefits. He also expresses financial hardship, mentioning outstanding student loans and the absence of a tax return for the past seven years.

3. The applicant provides a self-authored statement and a copy of the applicant's service record (22 pages), listed below:

- DD Form 4/1, (Enlistment/Reenlistment Document)
- Enlisted Record Brief, (ERB)

- DA Form 268, Report To Suspend Favorable Personnel Action (Flag)
- DA Form 4187, (Personnel Action)
- DA Form 2627, (Record of Proceedings) Under Article 15, UCMJ (Uniform Code of Military Justice)
- DD Form 2329, (Record of Trial By Summary Court Martial)
- DD Form 2707, (Confinement Order)
- DA Form 4856, (Developmental Counseling Form)
- Separation Authority Approval
- DD Form 214, (Certificate of Release or Discharge from Active Duty)

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

a. On both his DD Form 1999/1 (Record of Military Processing) and SF (Standard Form) 86, (Security Clearance Application), under your use of Illegal drugs and drug activity the applicant answered yes. On 15 October 2002 to 15 January 2003, on three separate occasions he tired it (marijuana) with friends.

b. His SF 86, (Security Clearance Application) further shows:

- Item 20 (Your Employment Record):
 - Fired from job
 - Quit job after being told you'd be fired
 - Left a job by mutual agreement following allegations of misconduct
 - Left a job by mutual agreement following allegations of unsatisfactory performance
- Item 21 (Your Police Record), Other Offenses:
 - Assault, 8 hours community service, 6 February 2002
 - Minors in Possession (MIP)(for to use or possess of Tobacco, 8 hours community service, paid \$100 fine, 21 August 2002
 - Disorderly Conduct, paid \$350 fine, 3 October 2002
 - Theft Under \$50, 8 hours community service, paid \$500 fine, 10 February 2003

c. On 25 July 2003, Commander, U. S. Army Recruiting Company, Memorandum for Determination of Eligibility, states the applicant's misdemeanor waiver was approved for enlistment in the U. S. Army, provided he is otherwise, qualified for enlistment. The supporting documents enclosed:

- USAREC Fm (U.S. Army Recruiting Form) 670-R-E (Moral Wavier Worksheet), dated 25 July 2003
- Four statements addressing the above-mentioned offenses, dated 23 July 2003

d. He enlisted in the U.S. Army Reserve (USAR) on 28 July 2003.

e. On 26 January 2005, a DA Form 2627 (Record of Proceedings Under Article 15, UCMJ) shows the applicant accepted nonjudicial punishment that he did, at or near Fort Campbell, Kentucky on or about:

- 9 October 2004 – wrongfully use marijuana
- 4 November 2004 – wrongfully use cocaine
- 9 November 2004 – wrongful use of both marijuana and cocaine
- 6 December 2004 – missing movement of a field training exercise
- 8 December 2004 – missing movement of a field training exercise; his punishment included reduction to private (PV2), E-2

f. On 17 December 2004, a DA Form 2823, (Sworn Statement), shows the applicant admitted to using marijuana and cocaine between October 31, 2004, and December 14, 2004. He also acknowledged attempts to circumvent drug testing procedures by consuming vinegar to alter urinalysis results. He further disclosed that, on one occasion, he consumed vinegar for four consecutive days due to uncertainty regarding the timing of his drug test. In the sworn statement, the applicant conceded that his drug use was in violation of UCMJ.

g. On 4 March 2005, the applicant underwent a medical evaluation for the purpose of separation noting the applicant indicated he was currently in good health.

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

h. Apart from his health complaints listed. He was marked qualified for separation:

- Coughed up blood
- Asthma, or any breathing problems related to exercise, weather, pollens, etc.
- Shortness of breath
- Wheezing or problems with wheezing
- Been prescribed or used an inhaler
- A chronic cough or cough at night
- Ear, nose, or throat trouble
- Foot pain from road march
- Sexually transmitted diseases HPV (Human Papillomavirus)
- Used illegal drugs or abused prescription drugs (marijuana)

i. On 15 March 2005, the applicant received a mental status evaluation for discharge due to misconduct and was psychiatrically cleared for any administrative action deemed appropriate by Command. The evaluation further outlined the following:

- normal behavior and fully alert
- fully oriented with unremarkable mood
- clear thinking process and normal thought content
- good memory and was mentally responsible
- has the mental capacity to understand and participate in board proceedings
- meet the retention requirements of Chapter 3 Retention Evaluation, Army Regulation (AR) 40-501, (Standards of Medical Fitness)

j. On 28 July 2005, the applicant's immediate commander notified the applicant of his intent to separate him under the provisions of Chapter 14-12c, AR 635-200 (Personnel Separations – Enlisted Personnel) for commission of a serious offense. The specific reasons for his proposed action is on 26 January 2005, he was found guilty at a Field Grade Article 15 proceeding for the wrongful use of cocaine on or about 9 November 2004. At the same proceedings he was also found guilty for the wrongful use of marijuana on or about 9 November 2004, all in violation of Article 112a, UCMJ. In addition, on or about 27 January 2005, he wrongfully used marijuana, a violation of Article 112a, UCMJ. The applicant acknowledged receipt with his signature.

k. On 18 August 2005, after consulting with legal counsel, he acknowledged:

- the rights available to him and the effect of waiving said rights
- he may encounter substantial prejudice in civilian life if a general, under honorable conditions discharge is issued to him
- he may be ineligible for many or all benefits as a Veteran under both Federal and State laws
- he may apply to the Army Discharge Review Board or the ABCMR for upgrading
- he elected not to submit matters

l. On 25 August 2005, his immediate commander initiated separation action against the applicant under AR 635-200, Chapter 14, paragraph 14-12c, for commission of a serious offense.

m. An extract of DD Form 2329 (Record of Trial By Summary Court-Martial) shows on 31 August 2005, the applicant was convicted of:

- Charge I: Article 86, UCMJ. Specification: o/a 6 Jul 05, w/o authority absent himself from his unit, and did remained so absent until o/a 8 July 2005.
- Charge II: Article 91, UCMJ.

- Specification 1: a/n Fort Campbell, KY, o/a 6 June 2005, was disrespectful in language toward SSG L__, a noncommissioned officer.
- Specification 2: a/n Fort Campbell, KY, o/a 8 June 2005, was disrespectful in language toward SFC K__, a noncommissioned officer.
- Specification 3: PVT Hooten, having received a lawful order from SSG C__, a noncommissioned officer to get in the right uniform, did a/n Fort Campbell, KY, willfully disobey the same.
- Specification 4: PVT Hooten, having received a lawful order from SFC K__, a noncommissioned officer to get a weapon, did a/n Fort Campbell, KY, willfully disobey the same.
- Charge III: Article 112a, UCMJ. Specification: a/n Fort Campbell, KY, o/a 27 January 2005, wrongfully use marijuana.

n. On 31 August 2005, DD Form 2707 (Confinement Order), shows the applicant sentence adjudged to be confined for 30 days; and to forfeit \$823.00 pay per month for one month.

o. On 19 September 2005, consistent with the chain of command recommendations, the separation authority approved the discharge recommendation for immediate separation, under the provisions of Chapter 14, AR 635-200, paragraph 14-12c for commission of a serious offense. He would be issued an under other than honorable conditions characterization of service.

p. On 27 September 2005, he was discharged from active duty with an under other than honorable conditions characterization of service. His DD Form 214 shows he completed 8 months and 4 days of active service with no lost time. He was assigned separation code JKK and the narrative reason for separation listed as "Misconduct, Abuse of Illegal Drugs with reentry code 4. It also shows he was awarded or authorized:

- National Defense Service Medal
- Army Service Ribbon
- Global War on Terrorism Service Medal

5. By regulation (AR 15-185), an applicant is not entitled to a hearing before the ABCMR. Hearings may be authorized by a panel of the ABCMR or by the Director of the ABCMR.

6. There is no evidence the applicant has applied to the Army Discharge Review Board for review of his 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, such as a pattern of 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 applicant's petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

9. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his other than honorable conditions (UOTHC) characterization of service. The applicant did not specify any BH reasons related to his request on his DD Form 149; however, his self-authored statement (undated) included as part of his application shows he reported that he had been to jail over a dozen times since being discharged from the military for drugs and alcohol, in addition to going to rehab five times, and as of the writing of the letter had remained sober. Thus, the applicant's request is considered as being related to Other Mental Health Issues. 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 U.S. Army Reserve (USAR) on 28 July 2003, 2) he received nonjudicial punishment (NJP) on 26 January 2005 for wrongful use of marijuana (09 October 2004), wrongful use of cocaine (04 November 2004), wrongful use of both marijuana and cocaine (09 November 2004), and missing movement of a field training exercise (06 and 08 December 2004), 3) a sworn statement by the applicant on 17 December 2004 shows the applicant admitted to using cocaine between 31 October 2004 and 14 December 2004. He also acknowledged attempts to circumvent drug testing procedures by consuming vinegar to alter urinalysis results and on one occasion consumed vinegar for four consecutive days due to uncertainty regarding the timing of his drug test, 4) the applicant underwent a medical evaluation for the purpose of separation on 04 March 2005 and was cleared for separation, 5) he underwent a mental status evaluation (MSE) for the purposes of separation on 15 March 2005 and was psychiatrically cleared for any administrative action deemed appropriate by command, 6) On 25 August 2005, his immediate commander initiated separation action against the applicant under AR 635-200, Chapter 14, paragraph 14-12c, for commission of a serious offense, 7) An extract of DD Form 2329 (Record of Trial By Summary Court-Martial) shows on 31 August 2005, the applicant was convicted of: on or about 06 July 2005 without authority absent himself from his unit, and did remained so absent until on or about 08 July 2005; being disrespectful in language toward a noncommissioned officer (NCO), disobeying lawful orders, and wrongful use of marijuana, 8) the applicant was discharged on 27 September 2005 under the provisions of AR 635-200, Chapter 14-12c, for commission of a serious offence. He was assigned separation code JKK and the narrative reason for separation listed as "Misconduct, Abuse of Illegal Drugs with reentry code 4.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. In-service medical records included as part of his application and available via JLV were reviewed. An in-service Report of Medical History dated 15 February 2005 for the purposes of separation show the applicant marked 'no' to all BH-related items (17a-h), with the exception of item 17i, 'use of illegal drugs or abused prescription drugs.' The Report of Medical Examination dated 04 March 2005 for the purposes of separation shows item number 40, psychiatric, as 'normal' on clinical evaluation. A DA Form 3822 (MSE) dated 15 March 2005 conducted for the purposes of misconduct shows all domains of the MSE were within normal limits (WNL). The provider noted the applicant had the capacity to understand and participate in proceedings, was mentally responsible, and met retention requirements of Chapter 3, AR 40-501. He was psychiatrically cleared for any administrative action deemed appropriate by command. The applicant had three medical records in JLV, none of which were BH-related. Review of his in-service prescription history shows he was prescribed Sertraline, an antidepressant, on 13 April 2005 which was expired on 13 May 2005; however, there is no diagnosis associated with the prescription.

d. A review of JLV shows the applicant is not service-connected through the VA for any conditions and there were no VA records available for review. It is of note that his UOTHC characterization of service renders him ineligible for VA clinical services.

e. Based on the available information, it is the opinion of the Agency Medical Advisor that there is insufficient evidence that the applicant had a condition or experience during his time in service that mitigated his misconduct. However, he contends that his misconduct was related to Other Mental Health Issues, and, per liberal guidance, his assertion is sufficient to warrant the Board's consideration.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends his misconduct was related to Other Mental Health Issues.

(2) Did the condition exist or experience occur during military service? Yes, per the applicant's assertion.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant's in-service medical records were void of any BH diagnosis. Although records show he was prescribed an antidepressant medication while in-service, there

was no diagnosis associated with the prescription and no documentation available for review showing that he was diagnosed with a mitigating BH condition. The applicant is not service-connected through the VA for any conditions and there were no VA records available for review. In absence of documentation, there is insufficient evidence to establish his misconduct was related to or mitigated by Other Mental Health Issues and insufficient evidence to support an upgrade based on BH mitigation. However, he contends that his misconduct was related to Other Mental Health Issues, and, per liberal guidance, his assertion is sufficient to warrant the Board's consideration.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the lengthy pattern of misconduct leading to the applicant's separation and the following findings outlined in the medical review:

- (1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes.
- (2) Did the condition exist or experience occur during military service? Yes.
- (3) Does the condition or experience actually excuse or mitigate the discharge? No.

the Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant's 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
:XXX	:XXX	:XXX	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.

//SIGNED//

X

CHAIRPERSON

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. 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. 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. Paragraph 14-12c further states commission of a serious offense includes abuse of illegal drugs or alcohol.

3. 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.

4. 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//