

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 21 September 2023

DOCKET NUMBER: AR20220010685

APPLICANT'S REQUEST: reconsideration of his earlier requests to upgrade his bad conduct discharge.

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge)
- Applicant's request for assistance to his U.S. Representative
- Two letters from the applicant's U.S. Representative
- Three letters from the Army Review Boards Agency (ARBA)
- Department of Veterans Affairs (VA) Form 21-0960P-3 (Review of Post-Traumatic Stress Disorder (PTSD) Disability Benefits Questionnaire (DBQ)) with associated psychological evaluation
- Surgical hospital memorandum

FACTS:

1. Incorporated herein by reference are military records, as were summarized in the previous considerations of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Numbers AR20060015949 on 21 June 2007 and AR20090002394 on 23 April 2009.

2. The applicant states when he committed his misconduct, he was (and still is) suffering from PTSD; at the time, his PTSD was undiagnosed.

3. The applicant provides a 15 January 2019 evaluation report from a psychologist. The report was part of the applicant's VA application for treatment and benefits, and it reflects a diagnosis of PTSD (chronic) with depressive features.

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

a. On 15 May 1968, the applicant enlisted into the Regular Army for 3 years; upon completion of initial entry and airborne training, and the award of military occupational specialty 11C (Infantryman Indirect Fire Crewmember), orders transferred him to Vietnam, and, on or about 21 December 1968, he arrived at his unit, Troop A, 2nd Squadron (Airmobile), 17th Cavalry Regiment, 101st Airborne Division.

b. On 30 January 1969, shrapnel from an enemy grenade injured the applicant, and he received treatment at a surgical hospital in Vietnam. While there, the hospital commander awarded him the Purple Heart. In or around April 1969, and upon his release from the hospital, the applicant transferred to Troop D, 2nd Squadron (Airmobile), 17th Cavalry Regiment. At some point prior to September 1969, the applicant's leadership promoted him to specialist four (SP4)/E-4.

c. On 4 September 1969, consistent with the applicant's pleas, a general court-martial found the applicant guilty of Uniform Code of Military Justice (UCMJ) violations; the applicant elected trial by military judge alone.

(1) The court convicted the applicant of the following UCMJ offenses:

- Article 99 (Misbehavior before the Enemy) – on 28 July 1968, and in the presence of the enemy, the applicant caused a false alarm in the camp by needlessly, and without authority, detonating a fragmentation grenade
- Article 128 (Assault with a Dangerous Weapon) – On 28 July 1968, the applicant assaulted Platoon Sergeant (PSG) C__ L. N__ by detonating a fragmentation grenade in close proximity of PSG C__ L. N__'s living quarters

(2) The military judge sentenced the applicant to 4-years' confinement, forfeiture of all pay and allowances, reduction to private (PV1)/E-1, and a dishonorable discharge; the court remanded the applicant to confinement. On 26 September 1969, the applicant arrived at Fort Leavenworth to serve the remainder of his confinement term.

d. On 16 October 1969, the applicant's defense counsel appealed for clemency, and he provided the general court-martial convening authority with letters of support from the applicant's high school principal, a personal friend, and a chaplain; all spoke highly of the applicant.

e. On 27 December 1969, the 101st Airborne Division (Airmobile) Staff Judge Advocate (SJA) provided a review of the applicant's case for the general court-martial convening authority.

(1) The SJA summarized the evidence and described matters in extenuation and mitigation.

(a) The applicant's platoon leader had testified the applicant was a good Soldier whose excellent performance had led the chain of command to send him to a leadership school; while he had believed the victim (PSG C__ L. N__) to be a tough but fair leader, he later learned many in the platoon held hard feelings toward the victim due to the extra duties he had imposed.

(b) Two noncommissioned officers affirmed the applicant was worthy of rehabilitation, but they did not condone what the applicant had done; they also indicated that the victim had contributed to his platoon's low morale.

(c) The applicant's company commander's testimony substantially aligned with the other witnesses, and he expressed surprise that the applicant had been the one to throw the grenade.

(2) The applicant also provided sworn testimony and spoke of a chaotic childhood and young adulthood before enlisting into the Army. When questioned about the incident, the applicant explained the victim had been a source of aggravation for the members of his platoon; he was "attempting to bring to the victim's attention his effect on the morale of the platoon by scaring him with the grenade. [The applicant] stated that he had overthrown the grenade and had not meant to physically injure the victim."

(3) The SJA noted the general court-martial convening authority had previously approved a binding pre-trial agreement for the applicant, and it limited the sentence to a dishonorable discharge, 2-years' confinement, total forfeitures, and reduction to the lowest enlisted grade. The SJA then addressed counsel's request for clemency.

(a) The SJA summarized the applicant's personal history prior to enlistment and briefly outlined his military history; he reported the applicant had arrived in Vietnam, on 21 December 1968, and was wounded, on 30 January 1969. He stated the applicant held the following awards and decorations:

- National Defense Service Medal
- Vietnam Service Medal
- Republic of Vietnam Campaign Medal with Device (1960)
- Combat Infantryman Badge
- Parachutist Badge
- Purple Heart
- Army Commendation Medal

(b) The SJA stated, "Although the accused had a good record both as a civilian and as a member of the military and has strongly expressed remorse concerning the offenses and a desire for rehabilitation and return to active duty, I feel that further clemency would be inappropriate." The SJA recommended the approval of the

applicant's pre-trial agreement with no modification and indicated that the U.S. Disciplinary Barracks at Fort Leavenworth, KS was the appropriate place to confine the applicant.

f. On 27 December 1969, the general court-martial convening authority approved only so much of the applicant's sentence as allowed for a dishonorable discharge, total forfeitures, 2-year's confinement, and reduction to the lowest enlisted grade.

g. On 13 July 1970, the U.S. Army Court of Military Review rendered an opinion in the applicant's case.

(1) The applicant's appellate counsel argued the trial defense counsel had failed to inform the presiding military judge of the applicant's personal decorations (i.e., the Purple Heart and the Army Commendation Medal), and in a supplemental assignment of error, the appellate defense counsel asserted legal arguments questioning the trial judge's authority to try the case.

(2) After considering appellate counsel's arguments, the court ruled the supplemental arguments had no basis, but, as to the applicant's awards, the court agreed the trial defense counsel had erred.

(3) The Court of Military Review affirmed the findings of guilty but directed the approval of only so much of the applicant's sentence as provided for a bad conduct discharge, 18-months' confinement, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.

h. On 7 October 1970, a general court-martial order announced the completion of the applicant's appellate process and directed the implementation of the revised sentence; the order indicated the applicant would continue serving his confinement, but his bad conduct discharge would be executed. On 19 October 1970, orders separated the applicant with a bad conduct discharge.

i. The applicant's DD Form 214 shows he completed 1 year, 2 months, and 28 days of his 3-year enlistment contract, with a total of 432 days of lost time.

- Item 22c (Statement of Service Foreign and/or Sea Service) – reflects service in USARPAC (U.S. Army Pacific Command), but the term of that service is unverified
- Item 24 (Decorations, Medals, Badges, Commendations, Citations, and Campaign Ribbons Awarded or Authorized) – "NA" (not available)

j. On 11 October 2006, the applicant petitioned the ABCMR, requesting an upgraded character of service; in support of his request, he provided five letters of

support and documentation indicating he had been gainfully employed and earned an associate's degree. On 21 June 2007, while acknowledging the applicant's post-service achievements, the Board voted to deny relief due to the seriousness of his misconduct.

k. On 22 January 2009, the applicant requested reconsideration of his previous request.

(1) The applicant argued that, by today's standards, his separation was inequitable, and that no one had "thoroughly explored" his state of mind before, during, or after he committed the offenses that led to his discharge. With his application, the applicant provided a psychological evaluation that found, based on testing, the applicant's behavioral health condition approached but did not exceed PTSD cut-off scores; nonetheless, the evaluator opined the scores indicated a "strong likelihood that [applicant] may have partial war-related PTSD" and recommended weekly counseling sessions.

(2) On 23 April 2009, the Board voted to deny the applicant's request; the Board noted the applicants' PTSD diagnosis but did not find it sufficiently mitigating to warrant relief.

5. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10 (Armed Forces), U.S. Code, section 1552 (Correction of Military Records: Claims Incident Thereto), the ABCMR is not empowered to set aside a conviction. Rather, the law only authorizes the Board 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.

6. Clemency guidance to the Boards for Correction of Military/Naval Records (BCM/NR) does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority to ensure each case will be assessed on its own merits. In determining whether to grant relief 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. This includes consideration of changes in policy, whereby a service member under the same circumstances today would reasonably be expected to receive a more favorable outcome.

7. Published guidance to the BCM/NRs clearly indicates that the guidance is not intended to interfere or impede on the Board's statutory independence. The Board will determine the relative weight of the action that led to the discharge and whether it supports relief or not. In reaching its determination, the Board shall consider the

applicant's petition, available records and/or submitted documents in support of the petition.

8. MEDICAL REVIEW:

a. Background: The applicant is requesting a reconsideration of his previous request for upgrade of his bad conduct discharge. The applicant asserts PTSD was a mitigating factor.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Below is a summary of information pertinent to this advisory:

- The applicant enlisted in RA on 15 May 1968.
- He deployed to Vietnam on, or about, 21 December 1968. The applicant was awarded the Purple Heart for an injury that occurred on 30 January 1969.
- On 4 September 1969, consistent with the applicant's pleas, a general court-martial found the applicant guilty of Uniform Code of Military Justice (UCMJ) violations; the applicant elected trial by military judge alone. The court convicted the applicant of the following UCMJ offenses:
 - Article 99 (Misbehavior before the Enemy) – on 28 July 1968, and in the presence of the enemy, the applicant caused a false alarm in the camp by needlessly, and without authority, detonating a fragmentation grenade
 - Article 128 (Assault with a Dangerous Weapon) – On 28 July 1968, the applicant assaulted Platoon Sergeant (PSG) C__ L. N__ by detonating a fragmentation grenade in close proximity of PSG C__ L. N__'s living quarters.
- He was sentenced to 4-years confinement, forfeiture of pay and allowances, reduction in rank and a dishonorable discharge. He arrived at FT Leavenworth on 26 September 1969.
- He appealed for clemency 16 October 1969. See supporting documents for a summary, which includes significant details about the events and mitigating circumstances. See ROP for summary of additional decisions prior to discharge. He eventually received a revised sentence.
- The applicant was discharged 19 October 1970, after the completion of his confinement, with a bad conduct discharge.
- The applicant has submitted to ABCMR on two previous occasions, 21 Jun 2007 and 23 April 2009; both times he was denied.

c. Review of Available Records Including Medical:

The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 149, his ABCMR Record of Proceedings (ROP), his DD 214, documents from his service record and separation, two letters from the applicants US representatives, three letters from

ARBA, VA DBQ, and a surgical hospital memorandum. The VA electronic medical record and DoD health record were reviewed through Joint Longitudinal View (JLV) and AHLTA, though applicant did not appear to be registered in the system and no data was available. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

d. This applicant contends that when he committed his misconduct he was, and still is, suffering from PTSD, though he reports at the time he was undiagnosed. Outside of self-report, there is no documentation of psychological symptoms present before or near the time of his offense, which is not uncommon given the years he served. However, it is important to note that during his deployment to Vietnam he was injured by a grenade and received a Purple Heart. Hence, he experienced a traumatic event. And given his offense, there is some evidence of impulsive/reckless behavior. In addition, there are assessments available from after his incarceration. This included a Prisoner's Admission Summary Data form that contained a psychiatric intake. It was noted that he had a tendency toward impulsive behavior and that he was not trying to harm the platoon sergeant, only to scare him. He was diagnosed with "Immature personality, chronic, moderate, manifested by unfulfilled dependency needs, impulsivity, and poor judgment under stress." Further psychiatric evaluations continued to mark his ability to own up to his mistake, his remorse, the fact that his behavior had been impulsive yet likely acted on in a "misguided sense of responsibility to his fellow platoon members," and that he was adjusting exceptionally well and was finding success in his rehabilitation.

e. The applicant's electronic health record (EHR) was void of any documents to review. However, numerous mental health records were provided in the supporting documents submitted. The applicant included a summary of his readjustment counseling, where he was diagnosed with PTSD. His supporting documents also included a VA Review Post traumatic Stress Disorder Disability Benefits Questionnaire (PTSD DBQ) as part of his VA application for treatment and benefits. The DBQ included a letter summarizing the psychological evaluation conducted by HJC Psychology on 15 January 2019. The evaluating provider supports a current PTSD diagnosis stemming from his deployment experience (PTSD, chronic with depressive features). The provider also summarized the applicant's stance; that he was experiencing significant symptoms of PTSD while deployed, that if not for those symptoms he never would have done what he did (throwing the grenade), and that the "fragging" incident was not meant to hurt his SGT, only scare him. No other medical or mental health documents since his time in service were provided.

f. Another data point to consider is the testimony given during the Review of Staff Judge Advocate. The applicant's misconduct did appear inconsistent with his typical

behavior. He had been viewed as an “outstanding man in his section,” by his staff sergeant and even after his bad conduct, was considered to be someone who still had potential (by his lieutenant). During this testimony another sergeant noted that the applicant’s victim was believed to have been harassing people in the unit, leading to low morale and that the applicant had “reached his limit.” However, it was also acknowledged that throwing a grenade was not a normal reaction to harassment.

g. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence he received a mitigating condition diagnosis while in the service, though there is sufficient evidence that he has since received a PTSD diagnosis that was determined to be connected to his service. However, his potentially mitigating condition would not typically mitigate the misconduct he was discharged for. However, he contends his misconduct was related to PTSD, and per Liberal Consideration guidance, his contention is sufficient to warrant the Board’s consideration.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes. The applicant asserts PTSD as a mitigating factor.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends a mitigating condition was present during his time in service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant contends he was experiencing a mental health condition that mitigated his discharge, and per Liberal Consideration, his contention is sufficient to warrant the board’s consideration. There is no medical documentation from his time in service to support a PTSD diagnosis. However, he had experienced a significant injury and potentially traumatic event when he was hit with a grenade and shrapnel. During Vietnam, he was not likely to have mental health support readily available, let alone documentation of such support. The applicant has since been assessed and diagnosed with PTSD “as a result of his exposure to traumatic events while serving in the Army and in Vietnam.” There is no nexus between PTSD and throwing a grenade at someone. This behavior is not part of the natural history or sequelae of PTSD. PTSD does not typically affect one’s ability to distinguish right from wrong and act in accordance with the right. However, impulsive and risky behaviors can be associated with PTSD, as well as being hypervigilant, on guard and irritability or anger outbursts. The stress of the war, compounded by the increased stressor of a challenging (and potentially harassing) leader was likely very psychologically taxing. While PTSD does

not excuse his behavior, PTSD symptoms, the stressors of war, a harassing leader, a misguided sense of trying to support his fellow soldiers, and an immature personality structure with impulsivity issues, all likely combined to lead this seemingly hardworking, “outstanding” soldier to do something very risky to scare his platoon sergeant. In addition, he has consistently shown great remorse and taking responsibility for his action. When all the data is considered, to include his diagnoses, this advisor would suggest clemency be considered.

BOARD DISCUSSION:

The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service to include deployment, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the applicant's PTSD claim and the review and conclusions of the ARBA BH Advisor. The applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding his misconduct not being mitigated by PTSD. Based on a preponderance of evidence, the Board determined the character of service the applicant received upon separation was not in error or unjust. The Board concurred with the corrections described in Administrative Note(s) below.

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:

Other than the corrections addressed in Administrative Note(s) below, the Board determined 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 otherwise 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.

ADMINISTRATIVE NOTE(S):

The applicant's DD Form 214 is missing required entries. Please amend the applicant's DD Forms 214 as follows:

- a. Replace the entry in item 22c with "0/9/4."
- b. Add to item 24:
 - National Defense Service Medal
 - Vietnam Service Medal with three bronze service stars
 - Republic of Vietnam Campaign Medal with Device (1960)
 - Republic of Vietnam Gallantry Cross with Palm Unit Citation
- c. Add to Item 30 (Remarks): "SERVICE IN VIETNAM FROM 21 DECEMBER 1968 TO 25 SEPTEMBER 1969."

REFERENCES:

1. Title 10, USC, section 1552(b) states, with respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under the Uniform Code of Military Justice (UCMJ), action to correct any military record of the

Secretary's Department may extend only to correction of a record so that it reflects actions taken by reviewing authorities under the UCMJ or action on the sentence of a court-martial for purposes of clemency. Such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that Military Department.

2. Title 10, United State Code, section 1556 (Ex Parte Communications Prohibited) provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

3. Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, prescribed policies and procedures for enlisted administrative separations.

a. Paragraph 1-9d (Honorable Discharge). An honorable discharge was a separation with honor; commanders issued an honorable discharge certificate based on the Soldier's proper military behavior and proficient duty performance. Separation authorities could characterize a Soldier's service as honorable if he/she received at least "Good" for conduct, and at least "Fair" for efficiency. In addition, the Soldier could have no general court-martial convictions or more than one special court-martial conviction.

b. Paragraph 1-9e (General Discharge) stated a general discharge was a separation from the Army under honorable conditions, where the Soldier's military record was not sufficiently meritorious to warrant an honorable discharge.

c. Paragraph 11-1b (Dishonorable and Bad Conduct Discharges – When Authorized) stated an enlisted person will be discharged with a bad conduct discharge pursuant only to an approved sentence of a general court-martial imposing a bad conduct discharge.

4. 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.

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 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 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 misconduct that led to the discharge.

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//