

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 December 2023

DOCKET NUMBER: AR20230004737

APPLICANT REQUESTS: reconsideration of his prior requests for upgrade of his discharge under other than honorable conditions.

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

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- Headquarters, First United States Army Special Court-Martial Order Number 42, dated 2 October 1970
- DA Form 20 (Enlisted Qualification Record)
- DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge)
- National Personnel Records Center (NPRC) letter, dated 12 July 2007

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous considerations of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Dockets Number:

- AC72-00974B on 1 September 1982
- AR20140013505 on 24 February 2015
- AR20160004141 on 30 May 2017

2. The applicant states he is requesting an upgrade to his character of service due to post-traumatic stress disorder (PTSD) as a result of combat in the jungles of Vietnam from July 1967 through July 1968.

3. The applicant enlisted in the Regular Army on 29 June 1966 and was awarded the Military Occupational Specialty (MOS) 12B (Combat Engineer).

4. The applicant's DA Form 20 shows he served in Vietnam from 16 July 1967 through 15 July 1968, in the duty MOSs of 52B (Power Generator Equipment

Operator/Mechanic) and 64B (Heavy Vehicle Driver). His conduct and efficiency ratings for this period of service are excellent.

5. A DA Form 2627-1 (Record of Proceedings Under Article 15, Uniform Code of Military Justice (UCMJ)) shows the applicant accepted nonjudicial punishment (NJP) under the provisions of Article 15 of the UCMJ on 25 March 1969, for failing to go to his prescribed place of duty at battalion guard mount on 23 March 1969.

6. Headquarters, 613th Engineer Battalion Special Court-Martial Order Number 14, dated 29 March 1969, shows the following:

a. The applicant was arraigned and tried before a special court-martial at Fort Carson, CO, pursuant to Court-Martial Convening Order Number 4, this headquarters, dated 11 February 1969, where the applicant was charged with and found guilty of the following:

(1) Failing to go at the time prescribed to his appointed place of duty at guard mount on 23 January 1969.

(2) Being disrespectful in language to First Sergeant (1SG) J____ E____, on 24 January 1969, by saying to him "you stupid people should know better than to put a man on kitchen police one day and guard the next one," or words to that effect.

(3) Being derelict in the performance of his duties in that he negligently failed to properly report to his commanding officer as it was his duty to do on 24 January 1969.

(4) Being derelict in the performance of his duties in that he negligently failed to get a haircut and shine his shoes for an inspection, as it was his duty to do on 25 January 1969.

(5) Being derelict in the performance of his duties in that he negligently failed to properly perform his work while on kitchen police, as it was his duty to do on 28 January 1969.

b. On 13 March 1969, the applicant was sentenced to forfeiture of \$100.00 per month for 3 months, reduction to the rank/grade of private (PV2)/E-2.

7. A second DA Form 2627-1 shows the applicant again accepted NJP under Article 15 of the UCMJ on 28 April 1969, for the following misconduct:

- failing to obey a lawful order to leave the 2nd Platoon area in D company, 613th Engineer Battalion, on 14 April 1969
- absenting himself without authority from reveille formation on 28 April 1969

8. Headquarters, 5th Infantry Division (Mechanized) and Fort Carson General Court-Martial Order Number 61, 15 October 1969, shows the following:

a. The applicant was arraigned and tried before a general court-martial which convened at Fort Carson, CO, pursuant to Court-Martial Convening Order Number 17, this headquarters, dated 3 July 1969, as amended by Court-Martial Convening Order Number 19, same Headquarters, where he was charged with and found guilty of the following:

(1) Striking his superior officer, Second Lieutenant (2LT) R____ R____, who was then in the execution of his office, on 19 June 1969.

(2) Striking Staff Sergeant (SSG) L____ F____, his superior noncommissioned officer (NCO), who was then in the execution of his office, on 18 June 1969.

(3) Violating a lawful general regulation by having one riot CS (M7A2) cannister of gas with pin in tact in his wall locker on 18 June 1969.

(4) Violating a lawful general regulation by having a switch blade knife in his possession on 18 June 1969.

(5) Wrongfully communicating to 2LT R____ R____ a threat to kill him on 18 June 1969.

b. On 20 August 1969, he was sentenced to discharge from the service with a bad conduct discharge, forfeiture of all pay and allowances, reduction to the rank/grade of PVT/E-1, and confinement at hard labor for 18 months.

c. On 15 October 1969, the sentence was approved. The forfeitures shall apply to all pay and allowances becoming due on and after the date of this action. The record of trial is forwarded to The Judge Advocate General of the Army for review by a Court of Military Review. Pending completion of the appellate review, the applicant would be confined in the U.S. Disciplinary Barracks, Fort Leavenworth, KS.

9. Headquarters, U.S. Disciplinary Barracks, Fort Leavenworth, KS, Special Court-Martial Order Number 30, dated 5 May 1970, shows the following:

a. The applicant was arraigned and tried before a special court-martial at Fort Leavenworth, KS, pursuant to Court-Martial Convening Order Number 1, this headquarters, where the applicant was charged with and found guilty of the following:

(1) While assigned to the U.S. Army correctional Holding Detachment, U.S. Disciplinary Barracks, Fort Leavenworth, KS, willfully disobeying a lawful order from SSG R____ F____, his superior NCO, on 28 March 1970, to report to the bench.

(2) While assigned to the U.S. Army correctional Holding Detachment, U.S. Disciplinary Barracks, Fort Leavenworth, KS, unlawfully striking Private First Class (PFC) J____ F____ and knocking off his glasses on 28 March 1970.

(3) While assigned to the U.S. Army correctional Holding Detachment, U.S. Disciplinary Barracks, Fort Leavenworth, KS, unlawfully striking PFC J____ F____ in the chest with his hands on 28 March 1970.

b. On 15 April 1970, the applicant was sentenced to forfeiture of \$50.00 per month for 3 months and confinement at hard labor for 3 months.

10. U.S. Army Judiciary, Office of The Judge Advocate General of the Army Decision, dated 6 May 1970, shows the findings of guilty, adjudged on 20 August 1969, were affirmed. Reassessing the sentence and the entire record, the Court affirmed only so much of the sentence as provides for a bad conduct discharge, forfeiture of all pay and allowances, confinement at hard labor for 1 year, and reduction to the rank/grade of PVT/E-1.

11. A Headquarters, U.S. Army Judiciary, Office of The Judge Advocate memorandum, dated 28 July 1970, advised the Commandant, U.S. Disciplinary Barracks, that the U.S. Court of Military Appeals granted the applicant's petition for review.

12. A letter from the U.S. Army Judiciary, dated 19 August 1970, informed the applicant of the results of his request for relief with respect to his conviction by court-martial, the results of which were promulgated in Special Court-Martial Order Number 30, Headquarters, U.S. Disciplinary Barracks, Fort Leavenworth, KS, dated 5 May 1970. Following examination and consideration of his request, the record of trial, and such matters presented by the applicant, it was determined that a sufficient basis for relief was not established. Accordingly, his application for relief was denied.

13. Headquarters, U.S. Disciplinary Barracks, Fort Leavenworth, KS, General Court-Martial Order Number 824, dated 28 August 1970, shows the applicant, having served the period of confinement adjudged on 20 August 1969, was restored to duty pending completion of appellate review. That portion of the sentence adjudging forfeitures shall not apply to pay and allowances becoming due to him during the period commencing on the date of this order and terminating on the date of the order directing execution of the sentence.

14. Headquarters, First U.S. Army General Court-Martial Order Number 41, dated 2 October 1970, shows only so much of the sentence promulgated in General Court Martial Order Number 61, Headquarters, 5th Infantry Division (Mechanized) and Fort Carson, CO, dated 15 October 1969, as provides for a bad conduct discharge, forfeiture of all pay and allowances, as modified by General Court-Martial Order Number 824, Headquarters, U.S. Disciplinary Barracks, Fort Leavenworth, KS, dated 28 August 1970, which limits forfeiture to the period from 15 October 1969 to 27 August 1970, confinement at hard labor for 1 year, and reduction to the rank/grade of PVT/E-1, has been affirmed. All else having been complied with, the sentence as modified will be duly executed. That portion of the sentence pertaining to confinement has been served.

15. The applicant's DD Form 214 shows the following:

a. On 27 October 1970, the applicant was discharged under conditions other than honorable under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel) chapter 11 (Dishonorable and Bad Conduct Discharge), with separation program number (SPN) 292 (Court-martial, other than desertion).

b. He was credited with 3 years, 1 month, and 18 days of net active service, including 1 year of service in Vietnam and lost time from 18 June 1969 through 27 August 1970.

c. He was awarded or authorized the National Defense Service Medal, the Vietnam Service Medal, the Republic of Vietnam Campaign Medal with Device (1960) and two overseas service bars.

16. A memorandum from the ABCMR to The Adjutant General, dated 31 August 1972, shows it was requested that the applicant be notified that on 30 August 1972, the Board determined there was insufficient evidence presented to indicate probable material error or injustice and his application was denied. Note the applicant's application to the Board from this time frame is not in his available records for review.

17. The applicant again applied to the Board for reconsideration of his request to upgrade his discharge and on 1 September 1982, as seen in Docket Number AC72-00974B, the Board denied his request, determining there was not sufficient relevant evidence to demonstrate the existence of probable material error or injustice to warrant a formal hearing.

18. The applicant provided a letter from NPRC, dated 12 July 2007, which advised him they were authorizing shipment of the following medal sets based on documents he provided:

- National Defense Service Medal

- Vietnam Service Medal with 4 bronze service stars
- Republic of Vietnam Campaign Ribbon with Device (1960)
- Expert Marksmanship Badge with Rifle Bar and Auto Rifle Bar

19. The applicant previously provided a letter signed by Veteran Constituent Services in the Office of his Member of Congress, dated 17 August 2009, which shows the applicant was requesting upgrade of his discharge based on having PTSD. The applicant is a respectable man of society, has determination and a composed demeanor, which is the complete opposite of his bad conduct discharge. Since he left the service, he has demonstrated excellent leadership skills and team spirit working with others. He retired from the Social Security Administration and Penn Dot and is a deserving candidate for a change to his record.

20. A previously provided Initial Evaluation/Psychological Examination, signed by Dr. H____ C____ Clinical/Counseling Psychology, Department of Veterans Affairs (VA), dated 20 September 2012, which has been provided in full to the Board to review, shows in pertinent part the following:

a. The applicant was seen for an initial evaluation/psychological examination on the date of the form. As part of the evaluation, the applicant's

b. As part of the evaluation, the applicant's service records, to include his DD Form 214, were reviewed. The applicant conveyed he believes his misconduct leading to his bad conduct discharge was the result of his untreated PTSD stemming from his exposure to traumatic events while serving in Vietnam, which altered his personality and manner of dealing with daily stressors.

c. The applicant was diagnosed with PTSD chronic/moderate, with depressive features.

21. The applicant again applied to the ABCMR requesting reconsideration of his prior application for an upgrade of his discharge due to PTSD, as seen in the Record of Proceedings for Docket Number AR20140013505. On 24 February 2015, the Board denied his request, determining the evidence presented does not demonstrate the existence of a probable error or injustice and the overall merits of his case were insufficient as a basis to amend the prior ABCMR decision.

22. The applicant again applied to the ABCMR requesting reconsideration of his prior applications for an upgrade of his discharge due to PTSD, as seen in the Record of Proceedings for Docket Number AR20160004141.

23. In the adjudication of this case, an advisory opinion was obtained from the Army Review Boards Agency (ARBA) medical advisor on 5 December 2016, which has been provided in full to the Board for review, and shows in pertinent part the following:

a. The applicant met medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness) at the time of his service.

b. A review of available documentation did not find evidence of a medical disability or conditions which would support a change to the character or reason for his discharge. A causal nexus between the applicant's behavioral-health diagnosis and his misconduct was not discovered.

24. On 6 December 2016, the applicant was provided a copy of the medical advisory opinion and given an opportunity to provide comments, but he did not respond.

25. On 30 May 2017, the Board denied the applicant's request, determining the evidence presented does not demonstrate the existence of a probable error or injustice and the overall merits of his case were insufficient as a basis to amend the prior ABCMR decisions.

26. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting reconsideration of his prior requests for upgrade of his discharge. He asserts he was experiencing PTSD during his active service, which contributed to his misconduct.

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: 1) The applicant enlisted into the Regular Army on 29 June 1966; 2) The applicant served in Vietnam from 16 July 1967-15 July 1968; 3) The applicant was charged and found guilty before a special court-martial on 11 February 1969 of: A) failing to go at the time prescribed to his appointed place of duty at guard mount, B) Being disrespectful in language to First Sergeant, and C) Being derelict in the performance of his duties on three separate occasions; 3) The applicant again accepted NJP on 28 April 1969 for failing to obey a lawful order and absenting himself without authority from reveille; 4) The applicant was charged with and found guilty before a general court-martial on 3 July 1969 of A) striking an officer and NCO; B) having a riot cannister of gas in his wall locker; C) having a switch blade knife in his possession; and threatening to kill an officer; 5) The applicant was found guilty before a special court-martial at Fort Leavenworth, KS, on 5 May 1970, of a disobeying an order from an NCO to report to the bench and striking a Private First Class; 6) The applicant was discharged on 27 October 1970, chapter 11 (Dishonorable and Bad Conduct Discharge), with separation program number (SPN) 292 (Court-martial, other than desertion).

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service records. The VA's Joint Legacy Viewer (JLV) and civilian documentation provided by the applicant were also examined.

d. The applicant noted PTSD as contributing and mitigating factors in the circumstances that resulted in his misconduct. There is insufficient evidence the applicant reported mental health symptoms while on active service. A review of JLV provided evidence the applicant had reported a history of PTSD related to his deployment to Vietnam and substance and alcohol abuse in 2014. The applicant reported an improvement in symptoms, and he has not engaged in formal behavioral health treatment at the VA. The applicant receives no service-connected disability for any condition. The applicant did provide civilian medical documentation from a licensed civilian psychologist dated 20 September 2012. The applicant was found to meet criteria for PTSD with depressive features related to his experiences during his deployment to Vietnam.

e. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence to support the applicant had condition or experience that mitigated his misconduct.

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 contends he was experiencing PTSD that contributed to his misconduct. He provided civilian documentation that he met criteria for PTSD during his military service due to his experiences in Vietnam.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he was experiencing PTSD that contributed to his misconduct. He provided civilian documentation that he met criteria for PTSD during his military service due to his experiences in Vietnam.

(3) Does the condition or experience actually excuse or mitigate the discharge? No, there is sufficient evidence the applicant was experiencing PTSD while on active service related to his deployment to Vietnam. However, there is no nexus between the applicant's PTSD and the applicant's misconduct of repeated assault, possession of a switch blade and gas canister, and threats to kill an officer given that: 1) these types of misconduct are not part of the natural history or sequelae of the applicant's PTSD; 2) the applicant's PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing PTSD that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, a medical review, and regulatory guidance were carefully considered. The applicant's trial by a court-martial was warranted by the gravity of the offense (striking his superior officer, striking superior NCO, having a riot cannister of gas with pin intact in his wall locker and having a switch blade knife in his possession, and communicating a threat to kill someone). His conviction and discharge were conducted in accordance with applicable laws and regulations and the discharge appropriately characterizes the misconduct for which he was convicted. He was given a bad conduct discharge pursuant to an approved sentence of a court-martial. The appellate review was completed, and the affirmed sentence was ordered duly executed. The Board concurred with the medical advisor's finding sufficient evidence the applicant was experiencing PTSD while on active service related to his deployment to Vietnam; however, there is no nexus between the applicant's PTSD and the applicant's misconduct of repeated assault, possession of a switch blade and gas canister, and threats to kill an officer given that: 1) these types of misconduct are not part of the natural history or sequelae of the applicant's PTSD; 2) the applicant's PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right. The applicant provided insufficient evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination, and that outweigh the serious misconduct that led to his discharge. Based on a preponderance of evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

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:

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 to amend the decision of the ABCMR set forth in Dockets Number

- AC72-00974B on 1 September 1982
- AR20140013505 on 24 February 2015
- AR20160004141 on 30 May 2017

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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. 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

2. 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 court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds. This guidance does not mandate relief, but rather provides standards and principles to guide BCM/NRs 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. 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.

3. Title 10, U.S. Code, section 1552, provides that the Secretary of a Military Department may correct any military record of the Secretary's Department when the Secretary considers it necessary to correct an error or remove an injustice. 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, action to correct any military record of the Secretary's Department may extend only to correction of a record to reflect actions taken by reviewing authorities under the Uniform Code of Military Justice 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.

4. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel.

a. 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. 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 11, in effect at the time, 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. The appellate review was required to be completed and the affirmed sentence ordered duly executed.

5. Title 10, U.S. Code, section 1556 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//