

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 November 2024

DOCKET NUMBER: AR20230005421

APPLICANT REQUESTS:

- Reconsideration of his previous requests to upgrade his bad conduct discharge and change the reason and authority, and associated codes/entries, to show "Secretarial Authority"
- Permission to appear personally before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Enclosure A – Applicant's Official Military Personnel File
- Enclosure B – Army Board for Correction of Military Records (ABCMR) Docket Number AR20180010323 Record of Proceedings (ROP) and notification correspondence
- Enclosure C – Mental Health Record Extract, 8 December 2022
- Enclosure D – Recent Mental Health Records (Previously submitted but not considered)
- Enclosure E – Recent Mental Health Records (Including new records not previously submitted)
- Enclosure F – Department of Corrections Medical Records (Part 1 of 2)
- Enclosure G – Department of Corrections Medical Records (Part 2 of 2)
- Enclosure H – Memorandum from Anthony M. Kurta, Under Secretary of Defense for Personnel and Readiness, Office of the Under Secretary of Defense, to Secretaries of the Military Departments (August 25, 2017) ("Kurta Memo")
- Enclosure I – Memorandum from Robert L. Wilkie, Under Secretary of Defense for Personnel and Readiness, Office of Under Secretary of Defense, to Secretaries of the Military Departments (July 25, 2018) ("Wilkie Memo")
- Enclosure J – Emmeline N. Taylor et al., Posttraumatic Stress Disorder and Justice Involvement Among Military Veterans: A Systematic Review and Meta-Analysis, J. of Traumatic Stress vol. 33, 804-812 (Oct. 2020)
- Enclosure K – Affidavit of Ms. [REDACTED]
- Enclosure L – Affidavit of Ms. [REDACTED]
- Enclosure M – Affidavit of Mr. [REDACTED]

- Enclosure N – National Personnel Records Center (NPRC) Email regarding Record of Trial
- Enclosure O – ABCMR Director Mr. [REDACTED] regarding Record of Trial
- Enclosure P – Cone Health Medical Records
- Enclosure Q – Original ABCMR Application (AR20180010323)
- Enclosure R – Response and Supplemental Brief (AR20180010323)

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous considerations of the applicant's case by the ABCMR in Docket Numbers AC82-05747, on 28 July 1982, and AR20180010323, on 11 January 2021.
2. The applicant states that he is filing this reconsideration request because the Board's last review contained a legal error; the Army Review Boards Agency (ARBA) medical advisor analyzed medical records for someone other than the applicant, and the Board did not include a legal advisory by a qualified attorney. On his current application, the applicant has checked the blocks for PTSD (post-traumatic stress disorder) and other mental health conditions.
3. Counsel states the applicant is requesting the Board's expeditious reopening and review of the application he filed for ABCMR Docket Number AR20180010323. The original application should receive a "de novo" review, with all time that is calculable pursuant to Title 10 (Armed Forces), United States Code (U.S. Code), section 1557 (Timeliness Standards for Disposition of Applications Before Corrections Boards), to be attributed to the ABCMR, based on the errors in its previous decision.
 - a. The applicant warrants the requested relief because he embodies the Soldier envisioned in the "Kurta" and "Wilkie" memos.
 - (1) The applicant suffers from severe PTSD, which he incurred during his combat service in Vietnam; further, the misconduct that led to his bad conduct discharge can be directly attributed to his PTSD.
 - (2) "The Army lost the Record of Trial for the special court-martial that led to his (bad conduct) discharge, and any presumptions about whether his misconduct that led to the special court-martial were in fact due to his undiagnosed PTSD must be resolved in [applicant's] favor due to the Army's malfeasance (by losing the record of trial)." Additionally, "Because the Army has lost [applicant's] Record of Trial, this Board is not able to rely on the presumption of regularity in assuming he received a proper court-martial or that (the court-martial) afforded him the required due process."

(3) After describing "liberal consideration," as outlined in the "Kurta Memo," counsel contends, "An immediate correction of [applicant's] record could save his life, as it would entitle him to proper care for his presumptively service-connected conditions and any conditions that are related to or aggravated by them." Counsel offers details of the applicant's additional medical conditions and asserts, because of his character of service, the applicant is precluded from receiving the health care he deserves.

b. "Further, relief is appropriate because the Board violated [applicant's] statutory right to a fair hearing and thereby prejudiced [applicant] by unfairly denying relief and continuing his ineligibility for life-saving Veterans' benefits, including health care."

(1) "In the previous ABCMR decision denying [applicant's] requested relief, the medical records of another person, possibly another person with the same first and last name, were inexplicably and improperly considered in the Board's decision process. Further, [applicant] never consented to the Board looking at his VA (Department of Veterans Affairs) medical files."

(2) "Unlike the current version of DD Form 293 (Application for the Army Discharge Review Board (ADRB)), ... (the) DD Form 149 does not provide any consent for this board to view [applicant's] VA medical records. Though [applicant] isn't currently eligible for any VA benefits and likely has no VA medical records given the type and characterization of his discharge, it still is prejudicial to consider any records that are not his own. The use of the incorrect records invalidates any decision made by the Board, and [applicant] is entitled to a 'de novo' review of his case."

(3) "The mistake has prejudiced [applicant] by denying him the chance at the requested relief. Additionally, the Board violated HIPAA (Health Insurance Portability and Accountability Act) and must take remedial action to remedy all people whose rights were trampled. [Applicant] never consented to the Board looking at his files."
"[Applicant] is also entitled to relief because the Army lost the Record of Trial from the Special Court-Martial that adjudged his punitive discharge. For the reasons set forth in this brief, a grant of the requested relief is required."

(4) "Finally, this Board must not violate the statutory, judicial, and regulatory mandates of how to properly considering (sic) an application such as this by doing what it often does, which is denying relief with nothing more than an informal ledger of the misconduct committed during service followed by conclusory statements that the evidence submitted was not sufficient. If this Board chooses to deny relief, [applicant] is legally and morally entitled to a detailed explanation of why the evidence he submitted is not sufficient, particularly in light of the Kurta and Wilkie Memos. Failure to provide such an explanation of the Board's rationale, particularly given the egregious error that this Board committed in reviewing the wrong medical records, would be arbitrary and capricious."

c. The applicant is also entitled to a "de novo" review due to the Board's violation of the Administrative Procedure Act (Title 5 Government Organization and Employees, U.S. Code, subchapter II (Administrative Procedure)), in that it based its decision in ABCMR Docket Number AR20180010323 on someone else's medical records.

(1) In paragraph 5e of the ROP, the "Problem List" includes references to schizophrenia and indicates the applicant has been diagnosed with this condition; he has "never once received a diagnosis of schizophrenia in his decades of treatment. Thus, it is apparent that the medical records of another person were erroneously used in the process of reaching the decision of denial of [applicant's] original request."

(2) In paragraph 6 of the ROP, "the Board declares in its 'Board Discussion' section that it reached its finding and decision to not grant relief '[a]fter reviewing the application and all supporting documents....' Further, the Board mentions that it 'considered the applicant's request, supporting documents...' and 'the medical records and conclusions of the advising official.' Therefore, the Board relied upon the aforementioned incorrect medical records to reach its previous decision of denial." "The fact that this mistake was made is incredibly troubling."

d. ABCMR Docket Number AR20180010323 is invalid under the arbitrary and capricious standard of the APA, as the decision was made using the incorrect records.

(1) "According to the APA, a reviewing court must 'compel agency action unlawfully withheld or unreasonably delayed; and hold unlawful and set aside agency action, finding, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law....' An agency's decision is found to be arbitrary and capricious when the agency 'has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'"

(2) "...[B]ecause of the Board's error in using the wrong person's medical records to reach their decision of denying him an upgrade, the Board's previous decision met none of the thresholds required to avoid a finding that its decision was arbitrary and capricious. Accordingly, the error must be considered as an independent basis for relief in this application, and the prior opinion should otherwise be completely voided." "Further, in response to [applicant's] original extensive application, the Board provided only a six-sentence denial in the 'Board Discussion' section. With such a short, cursory response to over 100 pages of information and evidence, the Board failed to 'offer an explanation for its decision that runs counter to the evidence before the agency' and 'articulate a satisfactory explanation for its action.'"

e. The applicant exemplifies the Soldier envisioned in the "Kurta Memo." The applicant suffers from PTSD, which he incurred during his military service. Multiple independent doctoral-level mental health providers have consistently diagnosed this condition and its military service and wartime-related etiology. First diagnosed in August 1988 while the applicant was in prison, subsequent psychiatrists and psychiatric nurse practitioners have reconfirmed his PTSD, and he continues to receive treatment due to his sister's generosity; "his current discharge status disqualifies him from all VA-sponsored mental health care." (Effective 25 June 2024, VA finalized a new rule that allows former service members separated with bad conduct discharges to apply for VA benefits and services; the VA reviews all applications to determine whether benefits can be provided).

f. The applicant's PTSD "may excuse or mitigate" his discharge; this premise is conclusively proven by the submitted evidence.

(1) Counsel details the history of the applicant's PTSD diagnoses and notes one physician stated that, despite the applicant's claims of PTSD and insomnia, "there is no objective evidence of these complaints." Counsel argues the "Kurta Memo" anticipated that medical providers might disagree on diagnoses and required that the evidence be "liberally considered...(to) excuse or mitigate the discharge." It is nonetheless clear in the applicant's mental health records that he incurred PTSD while on active duty and that the misconduct, which resulted in his adverse discharge, was a manifestation of PTSD.

(2) Further, the severity of his misconduct does not outweigh any mitigation the Board is empowered to grant. "The manner in which the Army mishandled his misconduct proves that it was not as serious as the charges initially indicate without additional context. First [applicant's] case was a special court-martial rather than a general court-martial, and special court-martial is far less serious and severe...(it) is the rough equivalent of a misdemeanor in civilian courts...Further, [applicant] was sentenced to five months' confinement. The jurisdictional maximum of a special court-martial at the time was six months' confinement."

(3) "This Board must remember that when adjudging the non-maximum sentence, the military had no knowledge about PTSD in 1971 and the mitigating fact that [applicant] suffered from it. PTSD was not recognized as a diagnosable condition in the DSM (apparently referring to the Diagnostic and Statistical Manual of Mental Disorders, Third Edition (DSM-III)) until 1980. The court didn't know that PTSD could cause someone to experience 'feeling tense or 'on edge' or to have 'angry outbursts.' Even when they didn't know about the condition or its effects, [applicant] still only went to a special court-martial rather than a general court-martial."

(4) The applicant is, however, precluded from offering further details about his special court-martial because, through malfeasance, the Army lost his record of trial. The applicant has also consistently maintained that the military judge recommended suspending the punitive discharge's execution, but, without the record of trial, this cannot be verified.

g. The applicant exemplifies the Soldier envisioned in the "Wilkie Memo." The "Wilkie Memo" states "it is consistent with military custom and practice to punish only to the extent necessary, to rehabilitate to the greatest extent possible, and to favor second chances in situations in which individuals have paid for their misdeeds."

(1) The applicant has demonstrated a continued commitment to rehabilitation and bettering himself. Additionally, he will "never escape the consequences of his civilian murder conviction...In fact, [applicant's] conviction will forever be on his record and prejudice him more than his bad conduct discharge ever could." (A January 1990 correctional institute mental health services document states, "On 12-13-78, [applicant] began serving 40 years to Life for Second Degree Murder. He killed a man with a .22 caliber pistol during a confrontation at a community center" In the applicant's 1 May 2018 application to the Board, his counsel reported that, in 2005, a State Parole Commission placed the applicant on parole, and he successfully completed his parole 5 years later).

(2) The "Wilkie Memo" additionally states Boards should consider that, "[s]imilarly situated members sometimes receive disparate punishments." Given the applicant's relatively light sentence, counsel asserts it is very unlikely that the applicant's case would have ever been referred to a court-martial in modern times.

(3) "Although his punishment may not have been perceived to be too harsh at the time it was given, such was during a time when PTSD was not diagnosable and the impacts of service on servicemembers were not understood. Further, [applicant's] separation from the Army nearly fifty years ago served its purpose long ago and the collateral consequences of his discharge now punish him more harshly than his chain of command could have recognized at the time."

(4) Besides PTSD, the applicant also suffers from congestive heart failure, chronic respiratory infections, and is pre-diabetic; these conditions are presumptively caused by his exposure to Agent Orange while in Vietnam. The Army must seriously consider the "crushing impact of a benefits-denying discharge on a Vietnam War Veteran like [applicant]."

(5) The "Wilkie Memo" tells Boards to consider the aggravating and mitigating facts related to the record or punishment received; however, the lack of a record of trial means the Board is unable to properly evaluate all of the relevant facts and

circumstances pertaining to the applicant's conviction. The Board should not penalize the applicant for the Army's failure to preserve its records.

(6) The "Wilkie Memo" additionally states Boards should consider the length of time since the misconduct occurred, whether the former service member has accepted responsibility and shown remorse, and the former service member's age. The applicant is over 74 years of age, and it has been more than 50 years since the applicant's conviction; he accepts full responsibility for the misconduct that led to his adverse discharge, and, through years of treatment, the applicant has changed significantly for the better.

h. PTSD and its impact on the applicant's life. The applicant had difficulty in adjusting to civilian life after his Army separation. He began getting into fights and, ultimately, killed a man he believed was about to attack him. Unfortunately, PTSD was not understood or recognized until after his incarceration. Counsel offers details of how access to therapy helped the applicant turn his life around. The applicant has manifested dedication to leading a better life and he has found steady employment; he has remarried and has two children.

i. Referencing the absence of the applicant's record of trial, counsel cites a Federal court case that found the Board for Correction of Naval Records (BCNR) had erred when it reached a decision without an applicant's complete records.

(1) "The court held the BCNR could not rely on the presumption of regularity when there was a 'total absence of any one of the multiple steps that were required before [applicant] could be properly inducted.'" Counsel contends those findings equally apply to the applicant's situation.

(2) "In sum, the presumption of regularity that would normally allow the Board to assume that Army officials properly carried out [applicant's] court-martial is 'overcome by the total absence of any record evidence of any one of the multiple paper-intensive steps that were required,' that is, [applicant's] Record of Trial, [applicant's] appellate records, and any primary records of UCMJ (Uniform Code of Military Justice) proceedings prior to [applicant's] Special Court-Martial."

j. Counsel concludes, the applicant has been without Veterans' benefits for the nearly 50 years following his separation for misconduct that almost certainly resulted from PTSD. Now, with multiple medical conditions that are presumptively service connected, the applicant is in a perilous position with no income and incomplete health care options. Removing the obstacles to VA health care is the only fair and equitable option.

4. The applicant provides his digital service record, documents associated with his most recent ABCMR decision, and medical records (both previously reviewed and those not yet evaluated).

a. Counsel additionally submits copies of Department of Defense (DOD) memoranda that provided guidance to Boards for Correction of Military Records (BCMR) and an article pertaining to the association between PTSD and criminal justice involvement among military Veterans. The medical documentation shows that medical providers have diagnosed him with PTSD.

b. Also offered for the Board's review are letters of support from three of his family members. All three say the applicant returned from Vietnam a completely different person; he was angry and drank alcohol to excess. The family was devastated when the applicant went to prison, but, because he underwent therapy there, he came home a better person. They now all enjoy a much better relationship with him.

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

a. On 24 February 1969, the Army of the United States inducted the applicant for a 2-year term on active duty; on 26 February 1969, the AUS honorably discharged the applicant, and, on 27 February 1969, he immediately enlisted into the Regular Army. His DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows he completed 3 days of net active duty and was awarded the National Defense Service Medal.

b. While in basic combat training, the applicant accepted nonjudicial punishment under the provisions of Article 15, UCMJ, for having been absent without leave from 7 to 8 April 1969 (1 day). Upon completion of initial entry training and the award of military occupational specialty 76Y (Unit Armorer/Supply Specialist), orders assigned him to Germany; he arrived at his new unit, on 15 August 1969.

c. On 11 September 1969, the applicant accepted NJP for missing bed check. Effective 10 October 1969, the applicant's leadership promoted him to private first class (PFC)/E-3. On 16 January 1970, a special court-martial convicted the applicant of UCMJ violations.

(1) Contrary to his pleas, the court found him guilty of the following two specifications of Article 128 (Assault with a Dangerous Weapon):

- On 12 November 1969 and at a barracks, the applicant assaulted Specialist Four (SP4) [REDACTED] by cutting his face with a broken beer bottle
- On 22 November 1969, the applicant assaulted German National [REDACTED] by striking him in the chin with a beer bottle

(2) The court sentenced the applicant to 3-months' confinement.

(3) On 12 February 1970, the special court-martial convening authority approved the sentence but directed its suspension for 6 months.

d. On 7 April 1970, a special court-martial order announced the vacation of the suspension of the confinement sentence and directed the applicant serve his sentence in a local stockade; when he entered confinement, on 8 April 1970, the applicant held the rank/grade of private (PV1)/E-1. (Per UCMJ Article 58a (Reduction in Enlisted Grade upon Approval), enlisted Soldiers were automatically reduced to the lowest enlisted grade (private (PV1)/E-1) upon approval of confinement). The available service record is void of documentation explaining why the convening authority vacated the suspension.

e. On 22 May 1970, military authority released the applicant from confinement and reassigned him to a military police (MP) company. Effective 21 August 1970, the applicant's MP company leadership promoted him to PFC. On 6 October 1970, the applicant accepted NJP for three specifications of failing to report to his place of duty at the time prescribed (Article 86, UCMJ); punishments included a suspended reduction to private (PV2)/E-2. The applicant filed an appeal, arguing the punishment was too severe; however, the appellate authority denied the appeal.

f. In or around November/December 1970, the applicant received reassignment instructions for Vietnam; he arrived in Vietnam on or about 21 February 1971, and orders further assigned him to the 158th Aviation Battalion, 101st Airborne Division (Airmobile); he arrived at his new unit, on or about 7 March 1971. Effective 11 April 1971, the aviation battalion chain of command promoted the applicant to SP4.

g. On 2 September 1971, a special court-martial empowered to adjudge a bad conduct discharge convicted the applicant of aggravated assault (Article 128, UCMJ) and communicating a threat (Article 134 (General Article)). The court sentenced the applicant to 5-months' confinement, forfeiture of \$60 per month for 6 months, reduction to PV1, and a bad conduct discharge. (The special court-martial order promulgating the trial results is unavailable for review).

h. On 24 November 1971, military authority placed the applicant in confinement. On 20 December 1971, the special court-martial convening authority directed that the term of the \$60 forfeitures be reduced to 5 months but otherwise approved the sentence and, except for the bad conduct discharge, ordered its execution. On or about 6 January 1972, orders transferred the applicant to a confinement facility at Fort Dix, NJ. On 25 March 1972, military authority placed the applicant on excess leave, pending the outcome of the appellate process.

i. On 17 October 1972, the U.S. Army Court of Military Review affirmed the findings and sentence in the applicant's case; on 20 February 1973, the U.S. Court of Military Appeals denied the applicant's request for a case review. On 26 February 1973, special court-martial orders announced the completion of the applicant's appellate process and ordered the execution of his bad conduct discharge; on 29 March 1973, orders separated the applicant accordingly.

j. The applicant's DD Form 214 shows he completed 3 years, 10 months, and 5 days of net creditable service with two periods of lost time. The report additionally reflected the following:

- Item 11c (Reason and Authority) – Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Separation Program Number (SPN) 292 (chapter 11 (Dishonorable and Bad Conduct Discharge), Other than Desertion (Court-Martial))
- Item 13a (Character of Service) – Under Other than Honorable Conditions
- Item 13b (Type of Certificate Issued) – DD Form 259A (Bad Conduct Discharge Certificate)
- Item 15 (Reenlistment (RE) Code) – RE-4 (nonwaivable disqualification)
- Item 24 (Decorations, Medals, Badges, Commendations, Citations, and Campaign Ribbons Awarded or Authorized) – National Defense Service Medal, Vietnam Service Medal, Republic of Vietnam Campaign Medal with Device (1960) and two marksmanship qualification badges
- Item 30 (Remarks) – Vietnam service 21 February 1971 to 20 February 1972

k. On 23 July 1980, the applicant petitioned the ADRB, requesting an upgraded character of service.

(1) The applicant maintained, in effect, that his misconduct resulted from a personality disorder, and the offenses were committed while under the influence of alcohol and drugs. He argued his command should have had him undergo a psychiatric evaluation while he was still in Germany.

(a) While stationed in Vietnam, the applicant always felt fearful and in a depressed mood; he also experienced the effects of racial attitudes between white and black Soldiers. Regarding the incident that resulted in his court-martial conviction, he "just happened" to get involved in a fist fight with another Soldier; two other black Soldiers tried to break up the fight. The applicant had just been promoted to SP4, and the other two Soldiers did not want to see the applicant get into trouble.

(b) Those other two black Soldiers were also charged with assault, but one of them took the easy way out and volunteered for an undesirable discharge because, "'quote' he felt like there was no justice for a black man, 'unquote.'"

(c) The applicant nonetheless felt the truth would come out and destroy the lie and injustice he was facing. The trial judge who conducted the applicant's court-martial found the applicant guilty of assault but recommended the suspension of the bad conduct discharge. Despite that recommendation, the applicant's battalion commander advocated for the applicant's separation with a bad conduct discharge; that was when the applicant began to feel just like the other black Soldier (i.e., there was no justice for a black man).

(d) After his separation from the Army, the applicant carried this hate and insecurity with him into civilian life; as of the time of his ADRB application, he had been sentenced to life in prison for second degree murder.

(e) While he no longer had any of his original military documents, the applicant could affirm that, while in Vietnam, he had been admitted into the amnesty program for heroin addiction. Following his conviction, he initially spent time in a jail in Vietnam and then transferred to Fort Dix; when the Army finally discharged him, they never sent him any of his records.

(2) On 12 February 1982, the ADRB conducted a records review and noted the applicant's special court-martial documentation was not available for its evaluation; nonetheless, the ADRB voted to deny relief and rejected the applicant's contentions.

(a) Concerning the applicant's personality disorder and insistence that his command should have sent him for a psychiatric evaluation, the ADRB stated, if the applicant had felt an evaluation was needed, he would have been free to request one.

(b) Additionally, the ADRB noted that the circumstances described by the applicant did not justify the repeated acts of assault, and, as to the trial judge's recommendation for a suspended discharge, the ADRB found no evidence to support that claim.

I. On 28 March 1982, the applicant applied to the ABCMR; he contested the ADRB's findings and asked the Board to grant an upgrade.

(1) Regarding the ADRB's assertion that he would have been free to request a psychiatric evaluation if he thought it was necessary, the applicant pointed out that the person requiring psychiatric assistance is not, in that moment, aware help is needed. He maintained that, had he realized he had a mental disorder, he would have volunteered for an evaluation. Further, the applicant posited that the ADRB had held his current status as an inmate against him and unfairly made their decision without having access to his complete military records.

(2) On 28 July 1982, the Board evaluated the applicant's requests. The Board incorporated into the memorandum the applicant's military and medical records.

(a) After summarizing the applicant's service, the Board offered the following summary of the events, which led to the applicant's court-martial and based on the evidence presented at trial:

- On 21 July 1971, the victim (an SP4) entered his "hootch" (quarters) and noticed the applicant was holding a hammer as he was leaving the victim's billeting area
- In his billeting area, the victim discovered a knife lying next to a wooden box containing the victim's stereo; the knife blade was broken, giving it the appearance and function of a screwdriver
- The victim saw that one of the screws on the wooden box's hinges had been removed, and two other screws were partially removed; the victim went to the applicant's side of the "hootch" and confronted him and demanded to know the knife's ownership
- The applicant suddenly grabbed the knife, and the applicant and two other Soldiers pushed, shoved, hit, and kicked the victim
- The applicant and the victim squared off and a "typical" fist fight and wrestling match ensued, but each time the victim did well, the other two Soldiers would hit him in the back of the head
- The fight moved outside, where the victim held the applicant on the ground in a headlock; at that point, one of the other Soldiers kicked the victim in the face; the victim sustained a broken nose and required eight stitches in his face
- Later in the shower, the applicant told the victim, "I'm not finished with you yet; I'm going to kill you"

(b) Under "Discussion," the Board stated it had no basis for granting relief after stating the following conclusions:

- The applicant's special court-martial trial and subsequent discharge were "essentially free from error and in conformance with law"
- The applicant's claim of a personality disorder was not supported by evidence
- While the Board empathized with the applicant's predicament, it appeared that his discharge reflected his service

m. On 1 May 2018, the applicant applied again to the Board, requesting reconsideration of its previous denial of relief.

(1) Through counsel, the applicant argued he had incurred PTSD during his Vietnam service, and his PTSD had contributed to the misconduct that led to his bad

conduct discharge. In addition to a summary of the applicant's service and documents from his service record, counsel included an extract from the applicant's medical records, showing mental health assessments and diagnoses. On 15 April 2020, the applicant's counsel submitted a supplemental brief, along with more recent medical records.

(2) On 11 January 2021, the Board evaluated the applicant's evidence and the available documents from his service record.

(a) An Army Review Boards Agency (ARBA) psychologist provided a medical review. The ARBA psychologist summarized the available information about the applicant's court-martial and noted a civilian doctor's 1988 PTSD diagnosis.

(b) Additionally, the ARBA psychologist reported that the applicant's VA electronic medical record showed the VA had awarded him a 100 percent service connected disability, but "consult encounter" notes were missing. A problem list included diagnoses for "Schizophrenia, Unspecified (July 2019)," "Cannabis Use Unspecified (May 2017)," "Cocaine Dependence (December 2005)," "Psychosis (July 2005)," and "Chronic Paranoid Schizophrenia (October 2002)."

(c) The ARBA psychologist stated, "Based on the information in the applicant's medical record, it is the opinion of the Agency psychologist that there are no mitigating Behavioral Health conditions. Problems arising from PTSD often contribute to self-isolation, anger outbursts, minor assaultive behavior, intrusive memories, nightmares, interpersonal difficulties and self-medication with drugs/alcohol. Assaultive and threatening behavior with dangerous weapons, even when provoked, is not part of the natural history or sequelae of PTSD, or psychotic related disorders and, as such, is not mitigated under Liberal Consideration."

(3) The Board voted to deny relief.

(a) Under "Board Discussion," the Board wrote, "After reviewing the application and all supporting documents, the Board found that relief was not warranted. The Board carefully considered the applicants request, supporting documents, evidence in the records, counsel's petition, a medical advisory opinion and published DOD guidance for liberal consideration of discharge upgrade requests."

(b) "The Board considered the applicant's statement, his record of service, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the medical records and conclusions of the advising official. The Board concurred with the medical advisory opinion finding insufficient evidence of in-service mitigating factors to overcome the egregious misconduct. Based on a preponderance of

evidence, the Board determined that the reason and authority for discharge and character of service the applicant received upon separation were not in error or unjust."

5. AR 15-185 (Army Board for Correction of Military Records (ABCMR)), currently in effect, states an applicant is not entitled to a hearing before the Board; however, the request for a hearing may be authorized by a panel of the Board or by the Director of ABCMR.

6. Title 10 (Armed Forces), U.S. Code, section 1552(b) (Correction of Military Records: Claims Incident Thereto), states, with respect to 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 a Secretary's Department may only extend to actions taken by reviewing authorities under the UCMJ or action on the sentence of a court-martial for purposes of clemency. The Secretary of the Army shall make such corrections by acting through boards of civilians within the executive part of the Army.

7. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting a reconsideration of his Bad Conduct Discharge (BCD) and change the reason and authority, associated codes/entries, to show "Secretarial Authority." His previous petitions to the Board are summarized in Docket Numbers AC82-05747, on 28 July 1982, and AR20180010323, on 11 January 2021. The applicant states that he is filing this reconsideration request because the Board's last review contained a legal error; the Army Review Boards Agency (ARBA) medical advisor analyzed medical records for someone other than the applicant, and the Board did not include a legal advisory by a qualified attorney. On his current application, the applicant has checked the blocks for PTSD (post-traumatic stress disorder) and other mental health conditions. 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 Regular Army on 27 February 1969, 2) he received an Article 15 in basic combat training (BCT) for being absent without leave (AWOL) for one day, 3) he received nonjudicial punishment (NJP) on 11 September 1969 for missing bed check, 4) on 16 January 1970, a special court-martial convicted the applicant of UCMJ violations. He was found guilty of two specifications of assault (12 November 1969 and 22 November 1969), 5) on 22 May 1970 he was released from confinement and reassigned to a military police (MP) company. On 06 October 1970 accepted NJP for three specifications for failing to report to his place of duty at the time prescribed, 6) the applicant arrived in Vietnam on or about 21 February 1971, 6) on 02 September 1971, a special court-martial empowered to adjudge a bad conduct discharge convicted the applicant of aggravated assault and communicating a threat, 7) the applicant's DD Form 214 shows he was discharged under the provisions of Army Regulation (AR) 635-200, SPN 292 (chapter 11

(Dishonorable and Bad Conduct Discharge), Other than Desertion (Court-Martial), Under Other Than Honorable Conditions, DD Form 259A (Bad Conduct Discharge Certificate), and a reentry code of RE-4. He had service in Vietnam from 21 February 1971 to 20 February 1972.

b. The Army Review Boards 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 and Veterans Benefit Management System (VBMS). The electronic military medical record (AHLTA) was not reviewed as it was not in use during the applicant's time in service. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

c. An in-service Record of Induction (DD Form 47) dated 03 May 1968 shows his PULHES was noted as 111111, indicative that there were not any BH concerns noted at the time. There were no in-service BH records available for review.

d. Review of JLV shows the applicant is 100% service-connected through the VA: 0% for second degree burns, 0% for hypertensive vascular disease, 50% for PTSD, and 100% for arteriosclerotic heart disease. The BH Disability Benefits Questionnaire (DBQ) dated 21 February 2024 available via VBMS dated was reviewed. The provider documented that the applicant met criteria for the following conditions: PTSD (noted due to combat in Vietnam), Alcohol Use Disorder (AUD), Moderate, In Sustained Remission (noted to be secondary to PTSD), Opioid Use Disorder, Moderate, In Sustained Remission (noted to be secondary to PTSD), and Cannabis Use Disorder, Moderate, In Sustained Remission (noted to be secondary to PTSD). The stressor associated with his diagnosis was noted as "Vietnam War, Combat, Numerous." The provider further documented he reported being hit with rockets and incoming, loss of some of his buddies, and was in direct combat during a search and destroy mission. The symptoms associated with his diagnosis were documented as depressed mood, anxiety, suspiciousness, panic attacks, chronic sleep impairment, mild memory loss, and difficulty establishing and maintaining effective work and social relationships.

e. In his self-authored statement (undated) that was received on 29 December [illegible year], the applicant stated that while he was assigned to 101st Airborne Division he was admitted to a treatment program for heroin addiction. The applicant also provided several affidavits from family members as part of his application. The affidavits from his sisters (30 January 2017 and 27 January 2017) and younger brother (27 January 2017), in effect, express that the applicant had changed after his return from Vietnam. More specifically, it was noted that upon his return from Vietnam he was withdrawn, sullen, cold, had a short fuse, and violent nightmares. It was also noted that there was an increase in the applicant's drinking upon his return.

f. The applicant provided medical records while he was incarcerated for review. Review of the records show he was diagnosed with several BH conditions while incarcerated to include: Personality Disorder Not Otherwise Specified (NOS), Posttraumatic Syndrome, Other Specified Trauma-or Stressor-Related Disorder [*Advisor's Note*: this diagnosis is documented in the record as 309.89], Adjustment Disorder with Mixed Emotional Features, Antisocial Personality Disorder, PTSD, Sleep Disorder NOS, history of Alcohol Abuse, Intravenous Heroin Abuse, and History of Marijuana Abuse. His treatment regimen while incarcerated included medication management, individual and group therapy. Records show that he was trialed on various medications to include Elavil (antidepressant), Benadryl (used for sleep), Prozac (antidepressant), Imipramine (antidepressant), Vistaril (can be used to treat anxiety), and Sinequan (antidepressant) [*Advisor's Note*: it is unclear if the applicant ever started this medication]. Review of his treatment records shows that sleep and symptoms of PTSD were the predominant focus of treatment. The records also show that the applicant reported to his providers that he was treated for alcohol and drug withdrawal while in the military in 1970 and 1971. It was also noted he was treated in a civilian mental health center in 1975 and 1976 due to 'bad nerves' and attempted suicide [*Advisor's Note*: these records were not available for review to this Advisor].

g. The applicant provided civilian/non-VA medical records as part of his application from Triad Psychiatric Counseling Center, PA, and Cone Health. Records from Cone Health from January 2015 through April 2020 show the applicant was diagnosed with PTSD, Anxiety State, Unspecified, Alcohol Abuse and Alcohol Abuse with Withdrawal, Adjustment Disorder with Mixed Anxiety and Depressed Mood, and Panic Attack. He was prescribed various medications throughout his treatment to include Xanax (anxiolytic), Valium (anxiolytic), Librium (can treat anxiety and acute alcohol withdrawal symptoms), and Prozac. Treatment records from Triad Psychiatric Counseling Center, PA show he was diagnosed with PTSD, Unspecified, Major Depressive Disorder, Recurrent, Mild, Anxiety Disorder, Unspecified, Alcohol Abuse, Uncomplicated, and Alcohol Abuse, In Remission, Early Remission. He was trialed on several psychotropic medications to include Diazepam (also known as Valium), Fluoxetine (also known as Prozac), Librium, and Escitalopram (antidepressant). During his intake on 21 January 2020, it was documented that the applicant had a long history of PTSD since his service in Vietnam. The provider noted he was previously incarcerated for 27 years due to manslaughter after he thought he was being attacked.

h. Based on the available information, it is the opinion of the Agency Medical Advisor that the applicant has one potentially mitigating BH condition: PTSD. Although it is acknowledged by this Advisor that he has been diagnosed with several other BH conditions throughout his lifetime by civilian/non-VA providers (Anxiety, Major Depressive Disorder, Panic Attack, Adjustment Disorder(s)), these conditions have not been associated with his military service and are otherwise subsumed by his diagnosis of PTSD. Additionally, Personality Disorders as well as alcohol and substance use

disorders do not constitute mitigating conditions. Review of the applicant's military records was void of any history of BH diagnosis or treatment history, though it is acknowledged that he reported a history of treatment for alcohol and drug withdrawal while in-service. Since being discharged from the military, the applicant has been diagnosed and 50% service-connected for PTSD through the VA. Regarding the misconduct that led to his discharge, aggravated assault and communicating a threat are not part of the natural history and sequelae of PTSD. It is also of note that PTSD does not interfere with the ability to distinguish between right and wrong and act in accordance with the right. As such, BH mitigation is not supported.

i. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant has been diagnosed and 50% service-connected for PTSD through the VA.

(2) Did the condition exist or experience occur during military service? Yes, the applicant has been diagnosed and 50% service-connected for PTSD through the VA. Service connection establishes that the condition existed during service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. Review of the available military medical records were void of any BH diagnosis or treatment history though it is acknowledged that his VA and civilian BH records indicate he reported a history of treatment for alcohol and drug withdrawal while in the military. Since being discharged from the military, the applicant has been diagnosed and service-connected for PTSD through the VA. Although he has been diagnosed with several other BH conditions throughout his lifetime (Anxiety, Major Depressive Disorder, Panic Attack, Adjustment Disorder(s)), these conditions have not been associated with his military service and are otherwise subsumed by his diagnosis of PTSD. Personality Disorders as well as alcohol and substance use disorders do not constitute mitigating conditions. Regarding the misconduct that led to his discharge, aggravated assault and communicating a threat are not part of the natural history and sequelae of PTSD. Additionally, PTSD does not interfere with the ability to distinguish between right and wrong and act in accordance with the right. Moreover, the severity of the misconduct outweighs the relief offered by Liberal Consideration. As such, BH mitigation is not supported.

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 following findings outlined in the medical review:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant has been diagnosed and 50% service-connected for PTSD through the VA.

(2) Did the condition exist or experience occur during military service? Yes, the applicant has been diagnosed and 50% service-connected for PTSD through the VA. Service connection establishes that the condition existed during service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No.

as well as the short term of honorable service completed prior to the pattern of misconduct leading to the applicant’s separation, some of which was of a violent nature against others, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the applicant’s characterization of service.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

: : : GRANT FULL RELIEF

: : : GRANT PARTIAL RELIEF

: : : GRANT FORMAL HEARING

█ █ █ DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. 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.
2. Prior to closing the case, however, the Board noted the administrative notes below from the analyst of record and recommended those changes be completed to more accurately reflect the applicant's military service.

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.

ADMINISTRATIVE NOTE(S):

1. Per his DD Form 214, the applicant served in Vietnam from 21 February 1971 to 20 February 1972 and, according to his DA Form 20 (Enlisted Qualification Record) he was assigned to the 158th Aviation Battalion, from 7 March 1971 until his departure from Vietnam.
2. Department of the Army General Orders (DAGO) Number 13, dated 1974, awarded the Presidential Unit Citation to the 158th Aviation Battalion, for the period 8 February to 28 March 1971.
3. DAGO Number 8, dated 1974, awarded the Republic of Vietnam Gallantry Cross with Palm Unit Citation to all units that served in Vietnam.
4. Based on the foregoing, amend the applicant's DD Form 214, ending 29 March 1973, by deleting the Vietnam Service Medal and adding the following:
 - Vietnam Service Medal with three bronze service stars
 - Presidential Unit Citation
 - Republic of Vietnam Gallantry Cross with Palm Unit Citation

REFERENCES:

1. Title 10 (Armed Forces), U.S. Code, section 1552(b) (Correction of Military Records: Claims Incident Thereto), states, with respect to 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 a Secretary's Department may only extend to actions taken by reviewing authorities under the UCMJ or action on the sentence of a court-martial for purposes of clemency. The Secretary of the Army shall make such corrections by acting through boards of civilians within the executive part of the Army.

2. Title 10, USC, section 1556 (Ex Parte Communications Prohibited) 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 applicant's (and/or their counsel) prior to adjudication.

3. Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Paragraph 1-9d (Honorable Discharge) stated an honorable discharge was a separation with honor. Separation authorities were to condition the issuance of an honorable discharge upon proper military behavior and proficient duty performance. Where members had served faithfully, performed to the best of his ability, and been cooperative and conscientious in the performance of their assigned tasks, separation authorities could furnish the Soldiers with an honorable character of service. Where there had been infractions of discipline, separation authorities were to consider the extent thereof, as well as the seriousness of the offense(s). Separation authorities should evaluate the pattern of behavior, and not the isolated incident when determining character of service.

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. Section II (Secretarial Authority), paragraph 5-3 (Authority) stated the Secretary of the Army had the prerogative to separate enlisted personnel for the convenience of

the Government, and such a separate would only be accomplished per the Secretary's authority. Except as delegated by this regulation or by special Department of the Army directives, the discharge or release of any enlisted member of the Army for the convenience of the government would, at the Secretary's discretion, result in the issuance of either an honorable or a general discharge certificate.

d. Chapter 11 (Dishonorable and Bad Conduct Discharges) outlined the steps to be taken for the separation of Soldiers who had been convicted by courts-martial and for whom the punishment included a punitive discharge. Paragraph 11-2 (DD Form 259A (Bad Conduct Discharge)) stated a member was to be given a bad conduct discharge only pursuant to an approved sentence of a general or special court-martial, following the completion of an appellate review, and after such affirmed sentence had been ordered duly executed.

4. AR 635-5 (Separation Documents), in effect at the time, prescribed policies and procedures for the completion of the DD Form 214.

a. Appendix A (SPN and Authority Governing Separations) showed Soldiers separated under the provisions of AR 635-212 for unfitness because of frequent involvement in incidents of a discreditable nature with civil or military authorities received the SPN "28B."

b. Item 15 (Reenlistment Code). The "Remarks" section of each enlisted person's qualification record will be checked for eligibility for reenlistment. The regulation listed the RE codes:

- RE-1 – Fully qualified for immediate reenlistment
- RE-3 – Not eligible for reenlistment unless a waiver is granted
- RE-4 – Not eligible for reenlistment

5. AR 601-280 (Army Reenlistment Program) prescribed eligibility criteria for the immediate reenlistment in the Regular Army of persons currently serving on active duty with the Army. Table 2-3 (Persons Ineligible for Immediate Reenlistment) listed disqualifications for immediate reenlistment; Line "K" disqualified Soldiers with more than one court-martial conviction.

6. 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.

7. 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 Discharge Review Boards (DRBs) and Board for Correction of Military/Naval Records (BCM/NRs) when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including Post Traumatic Stress Disorder (PTSD); Traumatic Brain Injury (TBI); 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.

8. 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.

9. AR 15-185 (Army Board for Correction of Military Records (ABCMR)), currently in effect, states an applicant is not entitled to a hearing before the Board; however, the request for a hearing may be authorized by a panel of the Board or by the Director of ABCMR.

//NOTHING FOLLOWS//