

IN THE CASE OF: [REDACTED]

BOARD DATE: 15 December 2023

DOCKET NUMBER: AR20230005432

APPLICANT REQUESTS: upgrade of his under other than honorable conditions (UOTHC) discharge to an under honorable conditions (general) discharge. Additionally, he requests a personal appearance before the Board.

APPLICANT'S SUPPORTING DOCUMENT(S) 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)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant states, in effect, his service during the Vietnam war shows his commitment to his country because the stress caused him to make bad judgment calls. Bear in mind he was under the age of 20 at the time of service. He feels he made a mistake, but he served his country in battle, and he was not drafted. He loves this country and would serve his country again. To quote the late J.F.K. "ask not what your country can do for you, but what you can do for your country." In God we trust.

3. The applicant enlisted in the Regular Army on 29 November 1968 for two years. His military occupational specialty was 72C (Central Office Telephone Switchboard Operator).

4. The applicant accepted nonjudicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ) on the following dates:

- 29 April 1969, for without authority absenting himself (AWOL) from his unit on or about 27 April 1969 until on or about 27 April 1969; his punishment consisted of forfeiture of \$15.00 for one month, restriction, and extra duty

- 3 May 1969, for without authority, wrongfully and falsely with intent to deceive changed the wording on a document, knowing it to be false, and presented it on or about 26 April 1969 and for the purpose of avoiding service as an enlisted person, feigned illness on or about 26 April 1969; his punishment consisted of forfeiture of \$30, reduction to private first class/E-3 (suspended); appellate action-the punishment of reduction to E-3 (vacated on 1 May 1969)
 - 20 May 1969, for AWOL from Overseas Replacement Station, CA, on or about 9 May 1969 until on or about 19 May 1969; his punishment consisted of forfeiture of \$20.00 fine and restriction
5. The applicant served in Vietnam from 24 May 1969 through 23 April 1970.
6. The applicant accepted NJP under Article 15 of the UCMJ on the following dates:
- 14 June 1969, for being derelict in the performance of his duties by negligently failing to complete a telephone call to his detachment commander from the battalion, concerning a system outage on or about 13 June 1969; his punishment consisted of forfeiture of \$26.00 pay
 - 29 October 1969, for wrongfully appropriating a truck ¼ Ton, M151A1, value about \$3196.00 on or about 28 October 1969; his punishment consisted of forfeiture of \$27.00 per month for one month
 - 13 December 1969, for willfully disobeying a lawful command on or about 11 December 1969; his punishment consisted of forfeiture of \$26.00 per month for one month and restriction
7. Before a general court-martial (GCMO) adjudged on 21 April 1972, the applicant was found the guilty of:
- AWOL on or about 16 July 1970 until on or about 22 July 1970
 - AWOL on or about 3 August 1970 until on or about 18 October 1970
 - stealing a camera, value of about \$200.00 on or about 22 October 1970
 - stealing a television, piggy bank, laundry bag and its contents and a jar of change total value of about \$157.00, on or about 26 October 1970
 - AWOL on or about 5 January 1971 until on or about 11 December 1971
 - AWOL on or about 19 January 1972 until on or about 21 January 1972
 - Escape from lawful confinement on or about 19 January 1972
8. The court sentenced him to be discharged from service with a bad conduct discharge (BCD), and confinement at hard labor for eighteen months. The sentence was approved on 13 July 1972. The record of trial was forwarded for appellate review.
9. The applicant's Mental Status, dated 30 August 1972, shows he had no evidence of hallucinations for delusions or paranoid thinking. His emotions were relevant to what he

was talking about, and he demonstrated a good range, and they were appropriate. He was determined to have no psychiatric limitations.

10. The Psychiatric Diagnosis on his Clemency paperwork, dated 12 October 1972, shows no psychiatric disease. From the history there is indication of some traits of impulsivity, antisocial behavior, and immaturity. The applicant did not desire restoration and the applicant was not eligible for parole.

11. Clemency memorandum, dated 13 December 1972, shows clemency was not approved and parole was disapproved.

12. GCMO Number 483, dated 1 June 1973, issued by Headquarters, U.S. Disciplinary Barracks, Fort Leavenworth, KS, shows the applicant was restored to duty pending completion of appellate review.

13. GCMO Number 994, dated 23 October 1973, issued by Headquarters, U.S. Disciplinary Barracks, Fort Leavenworth, KS, shows "the forfeitures shall apply to pay and allowances becoming due on and after the date of this order," is incorrect in-law and is set aside, and the sentence to BCD and confinement at hard labor for eighteen months was affirmed and would be duly executed.

14. The applicant was discharged on 4 December 1973. His DD Form 214 shows he was discharged under the provisions of Army Regulation (AR) 635-200, paragraph 11. He was assigned Separation Program Designator 292 (other than desertion court martial) with Reenlistment Code 4. His service was characterized as UOTHC. He completed 2 years, 4 months, and 5 days of net active service. He had 96 days of lost time and 87 days were lost subsequent to normal expiration term of service. His awards included the: National Defense Service Medal, Vietnam Service Medal, Vietnam Campaign Medal, and two Overseas Bars.

15. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, USC, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Rather, it is only empowered 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.

16. On 5 June 2014, 8 April 2014, and 11 August 2014, the Army Review Boards Agency (ARBA) determined the applicant's request for upgrade must be directed to the ABCMR for consideration.

17. On 3 November 2022, an ARBA letter shows the applicants military records were requested from the National Archives and Records Administration (NARA). NARA

notified ARBA that his records were unavailable. ABCMR could not make a fair, impartial, and equitable determination of facts without his official records and closed the applicant's case without further action.

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

19. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his under other than honorable conditions (UOTHC) discharge to an under honorable conditions (general) discharge. The applicant asserts that "stress" caused him to make bad judgement calls and he was "under the age of 20 at the time of service."

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

c. The applicant enlisted in the Regular Army 29 November 1968.

d. The applicant accepted nonjudicial punishment (NJP) on the following dates:

- 29 April 1969, for without authority absenting himself (AWOL) from his unit on or about 27 April 1969 until on or about 27 April 1969
- 3 May 1969, for without authority, wrongfully and falsely with intent to deceive changed the wording on a document, knowing it to be false, and presented it on or about 26 April 1969 and for the purpose of avoiding service as an enlisted person, feigned illness on or about 26 April 1969
- 20 May 1969, for AWOL from Overseas Replacement Station, CA, on or about 9 May 1969 until on or about 19 May 1969

e. The applicant served in Vietnam from 24 May 1969 through 23 April 1970.

f. The applicant accepted NJP on the following dates:

- 14 June 1969, for being derelict in the performance of his duties by negligently failing to complete a telephone call to his detachment commander from the battalion, concerning a system outage on or about 13 June 1969
- 29 October 1969, for wrongfully appropriating a truck ¼ Ton, M151A1, value about \$3196.00 on or about 28 October 1969

- 13 December 1969, for willfully disobeying a lawful command on or about 11 December 1969; his punishment consisted of forfeiture of \$26.00 per month for one month and restriction

g. Before a general court-martial (GCMO) adjudged on 21 April 1972, the applicant was found the guilty of:

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- AWOL on or about 3 August 1970 until on or about 18 October 1970
- Stealing a camera, value of about \$200.00 on or about 22 October 1970
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- AWOL on or about 5 January 1971 until on or about 11 December 1971
- AWOL on or about 19 January 1972 until on or about 21 January 1972
- Escape from lawful confinement on or about 19 January 1972

h. The court sentenced him to be discharged from service with a bad conduct discharge (BCD), and confinement at hard labor for eighteen months. The sentence was approved on 13 July 1972. The record of trial was forwarded for appellate review.

i. Clemency memorandum, dated 13 December 1972, shows clemency was not approved and parole was disapproved.

j. The applicant was discharged on 4 December 1973 under AR 635-200, paragraph 11, and his service was characterized as UOTHC.

k. 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, ABCMR Record of Proceedings (ROP), his DD Form 214, as well as documents from his service record and separation. The VA electronic medical record and DoD health record were not able to be accessed as the applicant did not appear to be in the system (attempts were made through SSN and name, gender and birthdate). Lack of citation or discussion in this section should not be interpreted as lack of consideration.

l. The applicant asserts that "stress" and being under the age of 20 are mitigating factors in his misconduct and discharge. The applicant's time in service predates use of electronic health records (EHR) by the Army, hence no EHRs are available for review. His service record and supporting documents contained his service treatment records (STR) though there was no report of any mental health concerns nor substance use disorders. Administrative documents with relevant medical and mental health data were also available in the supporting documents. On clemency paperwork dated 12 October 1972, the applicant was listed as having no psychiatric disease, though it did state that based on history there are indications of "some traits of impulsivity, antisocial behavior

and immaturity.” Psychiatric information was also provided in the Prisoner’s Summary Continuation Sheet, dated 30 August 1972. There was no indication of any thought disorders, and overall, his mental status appeared normal. Again, no psychiatric diagnoses were given. He completed his separation medical examination on 31 May 1973. His Report of Medical Examination and Report of Medical History show that he reported he was in good health, and he denied frequent trouble sleeping, depression or excessive worry, loss of memory or amnesia, nervous trouble of any sort, or periods of unconsciousness. He did not report any psychiatric concerns. In addition, the applicant’s periodic medical examinations marked normal for psychiatric and PULHES was 111111.

m. The VA electronic medical record, DoD health, and community care summaries were not available for review as the applicant did not appear to be in the system. In his supporting documents there is a copy of a VA Statement in Support of Claim, where he seemingly asserts PTSD and agent orange (both spelled incorrectly, but this advisor believes these diagnoses were his meaning). He also asserted racial confrontations. No other medical records were provided. There is no evidence the applicant was ever seen, diagnosed or treated for any mental health concerns since his discharge.

n. It is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to indicate the applicant had a mitigating condition during his time in service, however per Liberal Consideration guidance, his contention is sufficient to warrant the Board’s consideration. That said, the severity and nature of a portion of his misconduct would not be mitigated.

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 asserted “stress” and age as mitigating factors in this application. Historical documents also note he has previously asserted PTSD.

(2) Did the condition exist, or experience occur during military service? Yes, the applicant asserts “stress” was a factor during his time in service.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There are numerous points to this opine. First, the applicant did not assert a mitigating mental health condition, as “stress” nor being 20 years old are mitigating conditions. That said, a previous statement for the VA did include the applicant asserting PTSD. However, there is insufficient evidence the applicant has ever been diagnosed with a mental health condition – during service, nor after. Second, in previous attempts at restoration, clemency and parole, the applicant had asserted that he’d acquired a heroin

addiction in Vietnam and that he felt his addiction was the thread that tied all of his offenses together. However, currently a stand-alone substance use disorder is not typically a mitigating condition. In addition, there was insufficient data provided to support that the applicant had a diagnosed substance use disorder. Third, there is no nexus between substance use disorders nor a stress or trauma related disorder and stealing and escaping lawful confinement. There is a nexus between going AWOL and trauma and stressor related disorders, however there is currently insufficient evidence that the applicant has ever been diagnosed with any mitigating mental health condition.

BOARD DISCUSSION:

1. The applicant's request for a personal appearance was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance before the Board is not necessary to serve the interest of equity and justice in this case.

2. After reviewing the application, supporting documents, evidence found within the military record, the Board found relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, applicable regulatory guidance and published DoD guidance for clemency in determining discharge upgrade requests. The Board considered the applicant's period of service, misconduct, court-martial charges and whether there was sufficient evidence of mitigating circumstances to weigh in favor of clemency determination. After due consideration of the request, and, in the absence of post-service achievements or letters of reference to weigh in support of a clemency determination, the Board determined 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 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 insufficient as a basis for correction of the records of the individual concerned.

2/28/2024

X 

CHAIRPERSON


I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, USC, Section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. Title 10, USC, Section 1556, 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. AR 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

4. AR 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

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 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, after completion of appellate review, and after such affirmed sentence has been ordered duly executed.

5. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, USC, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Rather, it is only empowered 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. 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 (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) 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; 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.

7. 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.

//NOTHING FOLLOWS//