

IN THE CASE OF: [REDACTED]

BOARD DATE: 14 February 2024

DOCKET NUMBER: AR20230007763

APPLICANT REQUESTS: his under other than honorable conditions (UOTHC) discharge be upgraded.

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Letter
- 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 he joined the Army at age 17. He is almost 71 years old and feels it is important to attempt to once again ask for an upgrade. He received two Article 15s under the Uniform Code of Military Justice (UCMJ). On 27 November 1971 he missed morning duty call, and a company noncommissioned officer (NCO) came to his hut and woke him up. On his bunk, he had a 4-inch knife in case of a helicopter crash during flight missions. He was confined by the Military Police (MP) during the time the hut was searched. The hut was used by a large amount of personnel, and had been recycled and reassigned over the years. The MPs searched the hut for contraband. The hut was torn down and a number of contraband items were found in the walls and ceilings of the structure.

a. His decision to sign the discharge documents because of coercion. He was a nineteen-year-old boy, a high school drop without options and limited common sense who was under a high degree of mental stress. This should be taken into consideration. In January 1972, he was approached by three Army officers who were lawyers representing the Army. They told him there was a court martial process starting that will include over 15 specific contraband charges which would be brought against him. The

lawyers told him he would be serving a life sentence at Fort Leavenworth, KS. The only other option was to sign their legal forms and he would be shipped home immediately and forgo any further legal action. Although he asked to be represented by an assigned lawyer, he was never given any legal representation regardless of his request. He was being unfairly pressured to sign the legal forms, there was no one to turn to for advice. It was never explained to him by the Army legal team what would be the consequences of signing the legal forms. He was demoted and issued an undesirable discharge.

b. In his post service life, he was a paramedic and deputy superintendent/shift commander. Since leaving the Army in January 1972 he has never had any negative interactions with law enforcement or even a motor vehicle infraction. He has four children, of which three have completed their college education and the youngest is currently in high school. He has dedicated his life to public service and to his family. He believes he has shown to be a responsible and lawful citizen and that his life and conduct since then should be a consideration in the decisions to grant this discharge upgrade request.

c. He also asks that he be allowed to be buried as a veteran next to his father who was a highly decorated World War II veteran. This would be no cost to the Veterans Administration (VA) since he already has purchased burial plots and headstones for his family and himself. He has had a long medical history of heart disease and other serious health issues and it would be his wish to have the flag next to his headstone.

3. The applicant enlisted in the Regular Army on 24 November 1969 for three years. His military occupational specialty was 67U (Helicopter Repairman).

4. He served in Vietnam from 7 January 1971 to 15 January 1972.

5. The applicant accepted nonjudicial punishment (NJP) under Article 15 of the UCMJ on 29 April 1971, for disrespect of a superior commissioned officer on or about 26 April 1971. His punishment consisted of detention of \$75.00 per month for two months, restriction, and extra duty.

6. Court marital charges were preferred against the applicant on 1 December 1971 for violations of the UCMJ. His DD Form 458 (Charge Sheet) shows he was charged with:

- without authority, failure to go at the time prescribed to his appointed place of duty on or about 27 November 1971
- having in his possession one gram, more or less of heroin, a narcotic on or about 27 November 1971
- having in his possession one gram more or less of marijuana on or about 27 November 1971

- having in his possession an unauthorized dangerous weapon, one sawed off shotgun on or about 27 November 1971
- having in his possession an unauthorized dangerous weapon, one straight razor on or about 27 November 1971
- having in his possession an unauthorized dangerous weapon, one fragmentation grenade on or about 27 November 1971
- having in his possession one gram more or less of Seconal a controlled substance on or about 23 September 1970
- having in his possession one gram more or less of Librium controlled substance on or about 23 September 1970
- having in his possession one gram more or less of Valium controlled substance on or about 23 September 1970

7. The available record is void of a separation packet containing the specific facts and circumstances surrounding the applicant's discharge processing.

8. A Statement of Medical Condition, shows to the best of the applicant's knowledge, there had been no change in his medical condition since his last separation examination on 11 January 1972.

9. The applicant was discharged on 16 January 1972. His DD Form 214 shows he was discharged under the provisions of Army Regulation (AR) 635-212 (Personnel Separations-Discharge Unfitness and Unsuitability), with Reenlistment Code 3. His service was characterized as UOTHC. He completed 2 years, 1 month, and 23 days of net active service. He was awarded or authorized the: National Defense Service Medal, Republic of Vietnam Service Medal, Republic of Vietnam Campaign Medal with 1960 device, and the Air Medal.

10. Regulatory guidance provides that an individual is subject to separation when it is clearly established that despite attempts to rehabilitate or develop as a satisfactory Soldier further effort is unlikely to succeed.

11. On 17 January 1972, a correction to DD Form 214 was requested. The applicant was issued a DD Form 215 (Correction to DD Form 214), which shows in Item 11c (Reason and Authority) he was discharged under the provisions of AR 635-200 (Personnel Separations-Enlisted Personnel) with Special Program Number (SPN) 246 for the good of the service-in lieu of trial by court martial.

12. On 28 November 1972, the Army Discharge Review Board (ADRB) notified the applicant that the ADRB had determined he was properly discharged and denied his request for a change in the type and nature of his discharge. He was issued the amended DD Form 215.

13. Regarding his burial request decisions of the Veterans Administration are solely within the jurisdiction of that agency. While the ABCMR can correct errors in an individual's military records it has no authority to direct or influence decisions by other agencies.

14. A review of the applicant's service record contains sufficient evidence to support he is eligible for awards that are not annotated on his DD Form 214 for the period ending 16 January 1972. These awards will be added to his DD Form 214 as administrative corrections and will not be considered by the Board, to show in block 24.

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

16. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) discharge. He contends he experienced mental health conditions that mitigate 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 in the Regular Army on 24 November 1969; 2) The applicant served in Vietnam from 7 January 1971-15 January 1972; 3) Court-martial charges were preferred against the applicant on 1 December 1971 for failure to go at the time prescribed to his appointed place of duty and multiple charges of possession of illegal or controlled substances and unauthorized dangerous weapons; 4) The available record is void of a separation packet containing the specific facts and circumstances surrounding the applicant's discharge processing; 5) The applicant was discharged on 16 January 1972. His DD Form 214 shows he was discharged under the provisions of Army Regulation (AR) 635-212 (Personnel Separations-Discharge Unfitness and Unsuitability), with Reenlistment Code 3. His service was characterized as UOTHC.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's available military service and medical records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical documentation was provided.

d. On his application, the applicant contends mental health conditions were contributing and mitigating factors in the circumstances that resulted in his separation. There was no indication the applicant reported mental health symptoms while on active service. A review of JLV was void of any behavioral health documentation, and the applicant receives no service-connected disability.

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) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends he was experiencing mental health conditions contributed to his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he was experiencing mental health while on active service.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is insufficient evidence beyond self-report the applicant was experiencing a mental health condition while on active service. In addition, there is no nexus between the applicant's reported mental health conditions and his misconduct of possession of illegal and controlled substances and unauthorized dangerous weapons in that: 1) these types of misconduct are not part of the natural history or sequelae of his reported mental health conditions; 2) His reported mental health conditions do not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant's petition, available military records and the medical review, the Board concurred with the advising official finding insufficient evidence to support the applicant had condition or experience that mitigated his misconduct. The opine noted there is insufficient evidence beyond self-report the applicant was experiencing a mental health condition while on active service.

2. The Board noted the applicant provided no character letters of support attesting to his honorable conduct, the Board considered applicant’s post service accomplishments to weigh a clemency determination. The Board found there is insufficient evidence of in-service mitigating factors to overcome the pattern of misconduct. The Board agreed, based on the advising opine finding no nexus between the applicant’s reported mental health conditions and his misconduct of possession of illegal and controlled substances and unauthorized dangerous weapons. The Board determined the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief, specifically an upgrade of the under other than honorable conditions (UOTHC) discharge. Therefore, the Board denied relief.

3. Prior to closing the case, the Board did note the analyst of record administrative notes below, and recommended the correction is completed to more accurately depict the military service of the applicant.

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:

Except for the correction addressed in Administrative Note(s) below, the Board found 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.

3/29/2024

X

[REDACTED]

CHAIRPERSON

[REDACTED]

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 NOTES:

A review of the applicant's records shows he is authorized additional awards not annotated on his DD Form 214 for the period ending 16 January 1972. As a result, amend his DD Form 214 by adding in:

- item 24(Decorations, Medals, Badges, Commendations, Citations Ribbons Awarded or Authorized)
 - Vietnam Counteroffensive Phase VI
 - Consolidation I
 - Republic of Vietnam Gallantry Cross with Palm Unit Citation
- Delete- Vietnam Service Medal
 - Add – Vietnam Service Medal w/ 2 bronze service stars

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. Army Regulation 635-200 currently in effect, sets forth the basic authority for the separation of enlisted personnel, provides 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 10 of the version in effect at the time provided that a member who committed an offense or offenses for which the authorized punishment included a punitive discharge, could submit a request for discharge for the good of the service at any time after court-martial charges were preferred. Commanders would ensure that an individual was not coerced into submitting a request for discharge for the good of the service. Consulting counsel would advise the member concerning the elements of the offense or offenses charged, type of discharge normally given under the provisions of this chapter, the loss of Veterans Administration benefits, and the possibility of prejudice in civilian life because of the characterization of such a discharge. An Undesirable Discharge Certificate would normally be furnished an individual who was discharged for the good of the Service.

4. Army Regulation 635-212, then in effect, provided the policy and procedures for administrative separation of enlisted personnel for unfitness and unsuitability. It provided that individuals would be discharged by reason of unfitness when their records were characterized by one or more of the following: frequent incidents of a discreditable nature with civil or military authorities, sexual perversion, drug addiction, an established pattern of shirking, and/or an established pattern showing dishonorable failure to pay just debts. This regulation also prescribed that an undesirable discharge was normally issued.

5. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRB) and Service 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.

6. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and Service BCM/NRs on 25 July 2018, 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.

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, Boards shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses, or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

//NOTHING FOLLOWS//