

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 15 March 2024

DOCKET NUMBER: AR20230007975

APPLICANT REQUESTS: upgrade of the former service member's (FSM) under than other honorable conditions (UOTHC) discharge.

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

- DD Form 293 (Application for the Review of Discharge) (duplicate)
- DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge)
- Certificate of Death

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, the widow, of the deceased FSM requests his discharge be upgraded.
3. The FSM enlisted in the Regular Army on 3 April 1967 for three years. His military occupational specialty was 51B (Carpenter).
4. He served in Vietnam from 3 December 1967 through 2 December 1968.
5. The FSM was counseled on several occasions between 11 April 1969 and 30 January 1970 for: finances-debt (several), bad checks, absent from assigned place of duty, disobedience, liquor in the barracks, unauthorized use of government vehicle, transporting girls in platoon leader's jeep, disrespect, leaving scene of an accident, personal appearance, turning water hose on noncommissioned officer, pass violation, breaking restriction, and missing formations.
6. The FSM accepted nonjudicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ) on:

- 16 September 1968, for sleeping on sentinel duty on or about 8 August 1968; his punishment consisted of reduction to private first class/E-3, forfeiture of \$50.00 pay for two months and restriction and extra duty (suspended)
- 5 March 1969, for without authority, absenting himself from his place of duty on or about 3 March 1969 and wrongfully appropriating a government vehicle with a female in the cab of the vehicle on or about 4 March 1969; his punishment consisted of reduction to private 2/E-2 and forfeiture of \$44.00 pay
- 10 June 1969, for having knowledge of a lawful order and failed to obey on or about 9 June 1969; his punishment consisted of reduction to private/E-1, loss of 7 days' pay and restriction

7. The FSM volunteered for duty in Vietnam on 26 August 1969.

8. Before a summary court martial adjudged on 29 September 1969, the FSM was found guilty of without authority, absenting himself from his unit on or about 2 September 1969 and leaving post without a pass on or about 6 September 1969. The court sentenced him to hard labor for 40 days and to be reduced to private/E-1. The findings and sentence were approved on 1 October 1969 and ordered to be executed.

9. The FSM accepted NJP under Article 15 of the UCMJ on 30 December 1969 for willfully disobeying an order on or about 29 December 1969. His punishment consisted of restriction.

10. The FSM was given a psychiatric evaluation, the Neuropsychiatric Certificate, dated 22 January 1970, shows the diagnosis of inadequate personality, with marked sociopathic features. The FSM had marked social inadaptability during military service. He used poor judgment, was in repeated difficulty with both military and civilian legal authorities and was often unaware of his own culpability. There are no disqualifying mental or physical defects sufficient to warrant disposition through medical channels and the FSM was mentally responsible, able to distinguish right from wrong and to adhere to the right; and had the mental capacity to understand and participate in board proceedings.

11. The FSM's commander notified him 29 January 1970, he was contemplating the FSM appear before a board of officers to determine if he should be separated from the Army before the expiration of his current term of service, for the reason of unfitness.

12. The FSM consulted with legal counsel on 29 January 1970 and was advised of the basis for the contemplated action to accomplish his separation for unfitness under the provisions of Army Regulation (AR) 635-212(Personnel Separations-Discharge-Unfitness and Unsuitability). He was advised of the possible effects and the rights available to him; he waived consideration of his case by a board of officers and waived

personal appearance before a board of officers. The FSM waived representation by military counsel.

a. After consulting with legal counsel, the FSM further acknowledged he understood he could be deprived of many or all Army benefits, he could be ineligible for many or all benefits administered by the Veterans Administration, and he could be deprived of his rights and benefits as a veteran under both Federal and State laws and he may expect to encounter substantial prejudice in civilian life because of an undesirable discharge.

b. He elected not to submit statements in his own behalf.

13. The FSM's commander formally recommended he be separated from service for reasons of unfitness under the provisions of AR 635-212, on 2 February 1970 and recommended the FSM be issued an undesirable discharge. The FSM had demonstrated an extreme and repeated disregard for military authority and discipline. His chain of command recommend approval.

14. The separation authority approved the recommended discharge on 9 February 1970 and directed and DD Form 258A (Undesirable Discharge Certificate) be issued.

15. A Statement of Medical Condition, dated 13 February 1970, shows the FSM's medical condition had changed since his separation medical examination on 6 August 1969 in that he had a car wreck on 6 November 1969 and had a laceration of the right ear that hurts when cold weather comes.

16. The FSM was discharged on 13 February 1970. His DD Form 214 shows he was discharged under the provisions of AR 635-212, Paragraph 6a (1) by reason of unfitness, with Separation Program Number 28B and Reenlistment Code 3. His service was characterized as UOTHC. He completed 2 years, 10 months, and 11 days of net active service this period. He was awarded the Republic of Vietnam Service Medal, Republic of Vietnam Campaign Medal, and the National Defense Service Medal.

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

18. The applicant provides a copy of the FSM's DD Form 214 and a Certificate of Death; the date of death is 10 May 2023. The applicant is listed as the surviving spouse.

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

**BOARD DISCUSSION:**

1. The applicant's contentions, the evidence the applicant provides, the military record, regulatory and Statutory guidance, and all Department of Defense guidance pertaining to requests for discharge upgrade consideration on the Basis of liberal consideration or clemency, were carefully considered. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted.
2. The FSM was counseled on several occasions between 11 April 1969 and 30 January 1970 for several debts he incurred, writing bad checks, being absent from his assigned place of duty, disobedience, having liquor in the barracks, unauthorized use of government vehicle, transporting girls in his platoon leader's jeep, disrespect, leaving scene of an accident, his personal appearance, turning a water hose on a noncommissioned officer, pass violation, breaking restriction, and missing formations.
3. The Board determined the FSM's discharge was equitable, and the evidence provided was insufficient to support an upgrade of his character of service based on clemency.

BOARD VOTE:

Mbr 1    Mbr 2    Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
█	█	█	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

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

REFERENCES:

1. Title 10, U.S. Code, 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. AR 635-212 (Personnel Separations-Discharge Unfitness and Unsuitability), 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.

a. Paragraph 6a (1) of the regulation provided, in pertinent part, that members involved in frequent incidents of a discreditable nature with civil or military authorities were subject to separation for unfitness. An undesirable discharge was normally considered appropriate.

b. Paragraph 1-9f (Issuance of an undesirable discharge) states an undesirable discharge is an administrative separation from the service under conditions other than honorable.

c. Paragraph 3-7a (Honorable Discharge) states an honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier'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.

d. Paragraph 3-7b (General Discharge) states a general discharge is a separation from the Army under honorable conditions.

3. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NR) 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//