

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 19 March 2024

DOCKET NUMBER: AR20230008552

APPLICANT REQUESTS: an upgrade of his under other than honorable conditions (UOTHC) characterization of service.

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

- DD Form 149 (Application for Correction of Military Record)
- Cover letter, Dechert LLP, 1 May 2023
- Legal brief (21 pages), 1 May 2023
- Appendix, undated
- Self-authored statement, 26 April 2023
- three statements of support, undated
- Exhibit A, DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge), for the period ending 17 July 1973
- Exhibit B, Department of Veterans Affairs (VA), Administrative Decision, undated
- Exhibit C, Discharge documents (18 pages), 27 June 1973 to 16 July 1973
- Exhibit D, Service Treatment Records, 18 February 1969 to 3 July 1973
- Exhibit E, VA Form 21-526EZ (Application for Disability Compensation and Related Compensation Benefits), 24 April 2014
- Exhibit F, Hagel, Carson, Kurta, and Wilkie Memoranda, dated 2 September 2014 to 25 July 2018
- Exhibit G, Decision letter, VA, dated 19 May 2015
- Exhibit H, Military Personnel Records (10 pages), 12 April 1971 to 1 June 1984

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. In a self-authored statement, the applicant states, in effect:

a. His father passed away when he was 13 years of age, leaving his mother to raise five children. He enlisted in the Army at 17 years old to help support his family. His first

duty station was in Germany, where he received excellent reviews and evaluations. He was placed in leadership roles, rose to the rank of sergeant/E-5, and decided to reenlist so he could join the fight in Vietnam.

b. He was deployed to Vietnam. He was subjected to Agent Orange and heavy enemy attacks. The most traumatic event he experienced was on an evening when he, his close friend, and a local girl, Mxx Lxxx, went to a restaurant. As they were chatting, the restaurant exploded. He and his friend crawled out of the explosion to find Mxx Lxxx's head caved in, and her body lying lifeless under the rubble. He tried to drag her body to get help, but he was forced to leave her. They made their way back to base under enemy fire. He was ordered to secure his post at the armory, which he lawfully obeyed. Several other incidents run through his mind to this day.

c. When he left Vietnam, he and his friend were sent to Fort Riley, KS. He thought he could manage the terrible things that happened in Vietnam because he and his friend were together. His friend went home one weekend, rolled his car, broke his neck, and never came back. He has not been able to talk with anyone about Vietnam since.

d. Shortly after losing his friend, he was notified he was being sent to Korea. His wife went back to Oregon. He followed her to try to salvage his life and be with family, which led to his discharge. After being discharged, he began drinking heavily and his care for life decreased. His marriage ended in divorce.

e. He suffered alone with post-traumatic stress disorder (PTSD) until meeting and marrying his wife of 41 years. They developed many successful businesses, to include a restaurant where they tried to create a sense of community for the people they loved. They are now retired. He is still active in the military community and provides support where he can. He regrets giving up his military career. At the time, he did not know how the war affected him or how to deal with it upon coming home.

3. Counsel states, in effect:

a. The applicant is a decorated Veteran of the Vietnam War, who suffers from PTSD. His UOHC discharge has added to his life difficulties over the past 49 years. His PTSD was a direct result of his military service in a combat environment. Current liberal guidance suggests that the PTSD the applicant developed in the Army excuses and mitigates the misconduct which led to his discharge. His misconduct was not premeditated or severe.

b. Since his discharge, he has lived an admirable life and maintains a lasting bond with his fellow servicemembers. He is an active member of the Band of Brothers and American Legion. He regularly attends group meetings and engages in efforts to

support the Veteran community. The VA has determined he is ineligible for benefits due to his UOTHC discharge.

4. In the processing of this case, an Army Review Boards Agency (ARBA) staff member requested the applicant's official military personnel file (OMPF) from the National Archives and Records Administration (NARA) in St. Louis, MO. According to the response received from NARA, his record is currently signed out and is unavailable for review at this time. Despite the lack of his OMPF, the applicant provides copies of military personnel records and a fully constituted DD Form 214 for the Board to conduct a fair and impartial review of the applicant's petition.

5. The applicant enlisted in the Regular Army on 27 February 1969. Upon the completion of initial entry training, he was awarded military occupational specialty 31M (Radio Relay and Carrier Attendant). The highest rank he attained was sergeant/E-5.

6. He was honorably discharged on 12 April 1971, for the purpose of immediate reenlistment. He reenlisted on 13 April 1971 for a 3-year period.

7. The applicant served in the Republic of Vietnam (RVN) from 22 June 1971 to 30 April 1972.

8. Court-martial charges were preferred against the applicant on 27 June 1973 for violations of the Uniform Code of Military Justice. The relevant DD Form 458 (Charge Sheet) shows the applicant was charged with one specification of being absent without leave (AWOL), from Fort Riley, KS, on or about 1 December 1972 until on or about 25 June 1973.

9. The applicant consulted with legal counsel on 2 July 1973.

a. He was advised of the basis for the contemplated trial by court-martial, the maximum permissible punishment authorized under the Uniform Code of Military Justice, the possible effects of a UOTHC discharge, and the procedures and rights that were available to him.

b. After receiving legal counsel, he voluntarily requested discharge, for the good of the service, under the provision of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10. In his request for discharge, he acknowledged making this request free of coercion. He further acknowledged understanding that if his discharge request were approved, he could be deprived of many or all Army benefits, he could be ineligible for many or all benefits administered by the VA, and he could be deprived of his rights and benefits as a veteran under both Federal and State laws.

c. He was advised he could submit any statements he desired in his own behalf. In an attached statement, the applicant stated he did well at his job and trained others. Following his return from Vietnam, he requested duty at Fort Lewis, WA. He was sent to Fort Riley, KS. He tried to handle it down there, but he could not. His morale factor was down to nothing. He drank more frequently than he did when he first came into the Army. He could not do a sufficient job or act as a Soldier because everything kept going wrong. He could not support his wife and child on Army pay. His wife was threatening a divorce if he did not get out.

10. The applicant underwent a medical examination on 3 July 1973. The relevant Standard Form (SF) 93 (Report of Medical History) and corresponding SF 88 (Report of Medical Examination) shows the applicant denied having current medical problems but noted several issues, including but not limited to, frequent or severe headaches, dizziness or fainting spells, shortness of breath, frequent trouble sleeping, and depression or excessive worry. The examining provider determined he was medically qualified for separation.

11. On 5 July 1973, the applicant's immediate commander recommended approval of his request for a discharge for the good of the service and further recommended the issuance of an Undesirable Discharge Certificate.

12. The separation authority approved the applicant's request for discharge on 16 July 1973 and further directed the applicant be reduced to the lowest enlisted grade and the issuance of a DD Form 258A (Undesirable Discharge Certificate).

13. Accordingly, the applicant was discharged on 17 July 1973, under the provisions of Army Regulation 635-200, Chapter 10. His DD Form 214 confirms his service was characterized as UOTHC, with separation program number 246 and reenlistment code RE-4. He was credited with 3 years, 9 months, and 10 days of total active service, with 220 days of lost time. He was awarded or authorized the:

- National Defense Service Medal
- Vietnam Service Medal
- Republic of Vietnam Campaign Medal with device (1960)
- Army Good Conduct Medal
- Overseas Service Bar

14. The Army Discharge Review Board reviewed the applicant's request for an upgrade of his characterization of service on or about 1 June 1984. After careful consideration, the Board determined the applicant was properly and equitably discharged. The Board denied his request.

15. A memorandum, from the Army Review Boards Agency (ARBA), dated 11 May 2023, shows the applicant provided documentation to support his request which contained CONFIDENTIAL markings. These documents were reviewed by the ARBA Security Manager, who determined, beyond a reasonable doubt, that the CONFIDENTIAL markings were for privacy reasons and the documentation does not appear to be classified information as defined by Army regulation.

16. The applicant provides the following:

a. A cover letter, 21 page legal brief, and appendix, from Dechert LLP, dated 1 May 2023.

b. A self-authored statement dated 26 April 2023, which is summarized above.

c. In an undated statement of support from the applicant's wife, she states, in effect, the applicant is an engaged family-man and entrepreneur, who provides security for his family. He remains close with his family and friends and is always up for trying new things. He teaches and mentors his grandchildren, and his personality provides much laughter to any conversation.

d. In two additional undated statements of support, the authors, who are both Veterans, attest to the applicant's high moral compass. He is honest, jovial, and well-adjusted. He is attentive to family and friends and provides unwavering physical and emotional support to his family. He is active with the American Legion and has volunteered to support many Veterans over the years. He was a young man who was scared to death when he was sent to Vietnam, but he comported himself honorable during his tour of duty. He has since made amends with himself and his fellow Veterans.

e. An undated administrative decision from the VA shows that the applicant's period of service from 27 February 1969 to 17 July 1973 was held to be dishonorable for VA purposes and was a bar to VA benefits.

f. Eighteen pages of discharge documents, dated 27 June 1973 to 16 July 1973 and eight pages of Service Treatment Records, dated 18 February 1969 to 3 July 1973, are summarized, in pertinent part, above.

g. A VA Form 21-526EZ, dated 24 April 2014, shows the applicant applied for VA benefits, claiming multiple service-connected disabilities, to include PTSD.

h. The Hagel, Carson, Kurta, and Wilkie Memoranda provide clarifying guidance to Military Discharge Review Boards (DRBs) and Boards for the Correction of Military/Naval Records (BCM/NR) on liberal consideration, statute of limitations, and

requests by Veterans for modification of their discharge due to mental health conditions, sexual assault/harassment, PTSD, and traumatic brain injury.

i. A letter from the VA, dated 19 May 2015, shows that his period of service was not honorable for VA purposes, and he and his dependents were not eligible for any VA benefits.

j. Ten additional pages of military personnel records, dated 12 April 1971 to 1 June 1984, are summarized, in pertinent part, above.

17. Administrative separations under the provisions of Army Regulation 635-200, Chapter 10 are voluntary requests for discharge for the good of the service, in lieu of trial by court-martial. An UOTHC character of service is normally considered appropriate.

18. The Board should consider the applicant's argument and/or evidence in accordance with the published equity, injustice, or clemency determination guidance.

19. MEDICAL REVIEW:

a. Background: The applicant is requesting a reconsideration of his previous request for an upgrade of his under other than honorable conditions (UOTHC) discharge. He contends PTSD mitigates his discharge.

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

- ARBA staff member requested the applicant's official military personnel file (OMPF) from the National Archives and Records Administration (NARA), his record is currently signed out and is unavailable for review at this time.
- Applicant enlisted in the RA on 27 February 1969.
- Applicant was honorably discharged on 12 April 1971, for the purpose of immediate reenlistment. He reenlisted on 13 April 1971 for a 3-year period.
- Applicant served in the Republic of Vietnam from 22 June 1971 to 30 April 1972.
- Court-martial charges were preferred against the applicant on 27 June 1973 for violations of the Uniform Code of Military Justice. The relevant DD Form 458 (Charge Sheet) shows the applicant was charged with being absent without authority (AWOL), from Fort Riley, KS, on or about 1 December 1972 until on or about 25 June 1973. The applicant had two prior instances of AWOL, per documentation from the VA.
- Applicant was discharged on 17 July 1973, under the provisions of Army Regulation 635-200, Chapter 10. His DD Form 214 confirms his service was

characterized as UOTHC, with separation program number 246 and reenlistment code RE-4.

- Army Discharge Review Board reviewed the applicant's request for an upgrade of his characterization of service on or about 1 June 1984. After careful consideration, the Board determined the applicant was properly and equitably discharged. The Board denied his request.

c. The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant's completed DD Form 149, DD Form 214, ABCMR Record of Proceedings (ROP), legal brief, VA Decision letter, self-authored statement, letters of support, and documents from his service record and separation packet. The VA electronic medical record and DoD health record were reviewed through Joint Longitudinal View (JLV). Lack of citation or discussion in this section should not be interpreted as lack of consideration.

d. In a self-authored statement, the applicant states, he was deployed to Vietnam. He was subjected to Agent Orange and heavy enemy attacks. The most traumatic event he experienced was on an evening when he, his close friend, and a local girl, went to a restaurant. As they were chatting, the restaurant exploded. He and his friend crawled out of the explosion to find the girl's head caved in, and her body lying lifeless under the rubble. He tried to drag her body to get help, but he was forced to leave her. They made their way back to base under enemy fire. He was ordered to secure his post at the armory, which he lawfully obeyed. Several other incidents run through his mind to this day. When he left Vietnam, he and his friend were sent to Fort Riley, KS. He thought he could manage the terrible things that happened in Vietnam because he and his friend were together. His friend went home one weekend, rolled his car, broke his neck, and never came back. He has not been able to talk with anyone about Vietnam since. Shortly after losing his friend, he was notified he was being sent to Korea. His wife went back to Oregon. He followed her to try to salvage his life and be with family, which led to his discharge. After being discharged, he began drinking heavily and his care for life decreased. His marriage ended in divorce. He suffered alone with post-traumatic stress disorder (PTSD) until meeting and marrying his wife of 41 years. They developed many successful businesses, to include a restaurant where they tried to create a sense of community for the people they loved. They are now retired. He is still active in the military community and provides support where he can. He regrets giving up his military career. At the time, he did not know how the war affected him or how to deal with it upon coming home.

e. Due to the period of service, no active-duty electronic medical records were available for review. Hardcopy documentation submitted by the applicant shows he underwent a medical examination on 3 July 1973. The applicant denied having medical problems but endorsed headaches, dizziness or fainting spells, shortness of breath, frequent trouble sleeping, and depression or excessive worry. The examining provider determined he was medically qualified for separation. No medical documentation from

his time of service evidences a behavioral health diagnosis. No VA electronic medical records were available for review, the applicant is not service connected, and he did not submit any medical documentation post-military service substantiating his assertion of PTSD. In addition, the letters of support submitted by the applicant do not support a diagnosis of PTSD. They describe a successful businessman with a great personality who readily makes friends, is jovial, well-adjusted, and attentive.

f. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support the applicant had a behavioral health diagnosis that mitigates his misconduct. However, per Liberal Consideration guidelines, the applicant's self-assertion of PTSD merits consideration by the Board

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 asserts a mitigating condition.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts PTSD and the service record indicates he served in Vietnam.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is insufficient evidence of any mitigating BH condition. There is no evidence of any in-service BH diagnoses, the VA has not service-connected the applicant for any BH condition, and there is no VA electronic record indicating he has been treated for PTSD. And while the applicant self-asserted PTSD, he did not provide any medical documentation substantiating any BH diagnosis including PTSD. However, per Liberal Consideration guidelines, the applicant's self-assertion of PTSD merits consideration by the Board.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation.

a. The applicant was charged with commission of an offense (AWOL) punishable under the UCMJ with a punitive discharge. After being charged, he consulted with counsel and requested discharge under the provisions of AR 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial and carry an under other than honorable conditions discharge. The Board found no error or injustice in his separation processing. Additionally, the Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the advising official. The Board concurred with the medical advisory opinion finding insufficient evidence to support the applicant had condition or experience that mitigated his misconduct.

b. The Board also noted that the applicant had a previous honorable discharge and had served in Vietnam. Additionally, he provides statements of support in which the authors speak of family engagement, entrepreneurship, and mentorship. Additionally, the authors state that he is active with the American Legion and has volunteered to support many Veterans over the years. He was a young man who was scared to death when he was sent to Vietnam, but he comported himself honorable during his tour of duty. He has since made amends with himself and his fellow Veterans.

c. Given his AWOL (1 December 1972 until on or about 25 June 1973), the Board determined his service clearly did not rise to the level required for an honorable characterization; however, a general, under honorable conditions characterization of service is appropriate under published DoD guidance for liberal consideration of discharge upgrade requests. The Board also determined that such upgrade did not change the underlying reason for his separation, and that there would be no change to the narrative reason for separation and/or corresponding codes.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant's DD Form 214 for the period ending 17 July 1973, showing:

- Character of Service: Under Honorable Conditions (General)
- Separation Authority: No Change
- Separation Code: No Change
- Reentry Code: No Change
- Narrative Reason for Separation: No Change

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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, 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. Section 1556 of Title 10, USC, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.
3. Army Regulation 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. The ABCMR is not an investigative body and decides cases based on the evidence presented in the military records provided and the independent evidence submitted with the application.
4. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.
 - a. Chapter 10 of that regulation provides, in pertinent part, that a member who has committed an offense or offenses for which the authorized punishment includes a punitive discharge may, submit a request for discharge for the good of the service in lieu of trial by court-martial. The request may be submitted at any time after charges have been preferred and must include the individual's admission of guilt. Although an honorable or general discharge is authorized, a discharge under other than honorable conditions is normally considered appropriate.
 - b. 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.

c. 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.

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 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. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences.

6. 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, 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//