

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 20 March 2024

DOCKET NUMBER: AR20230008605

APPLICANT REQUESTS: Reconsideration of his request for upgrade of his 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)
- Veterans Affairs (VA) Form 21-4138 (Statement in Support of Claim)
- DD Form 214 (Armed Forces of the U.S. Report of Transfer or Discharge) (2)
- DD Form 215 (Correction to DD Form 214)

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR1999020600 on 29 July 1999.
2. The applicant states he was 18 when he went to Vietnam. What he saw while in Vietnam still haunts him today. He would not have done the things he did if it was not because of the nightmares. As you can tell by his military records he did not go absent without leave (AWOL) until after he returned stateside and that is when things began to get to him. He was young and the experience has never left him.
3. On his DD Form 149, the applicant notes post-traumatic stress disorder (PTSD), and other mental health issues are related to his request.
4. On 16 February 1967, the applicant enlisted in the Regular Army for 3 years. Upon completion of training, he was awarded military occupational specialty 64A (Light Vehicle Driver).
5. On 19 March 1968, the applicant accepted non-judicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ), for disobeying a lawful order by his commanding officer to lock all vehicles when unattended, on or about 18 March 1968. His punishment included forfeiture of \$29.00 pay for one month.

6. On 2 August 1968, the applicant began service in the Republic of Vietnam.
7. On 5 February 1969, the applicant accepted NJP under Article 15 of the UCMJ, for failing to go at the time prescribed to his appointed place of duty on or about 28 January 1969 and on or about 29 January 1969. His punishment included forfeiture of \$55.00 pay for one month.
8. On 13 March 1969, the applicant accepted NJP under Article 15 of the UCMJ, for failing to go at the time prescribed to his appointed place of duty on or about 4 March 1969 and on or about 5 March 1969. His punishment included forfeiture of \$50.00 pay per month for two months.
9. The applicant departed the Republic of Vietnam, on 14 May 1969.
10. On 25 May 1969, the applicant was reported as AWOL and remained absent until he returned to military authorities on 8 July 1969.
11. On 28 July 1969, the applicant was again reported as AWOL and remained absent until he returned to military authorities on 20 November 1969.
12. Before a special court-martial on 6 December 1969, at Fort Polk, LA, the applicant was found guilty of two specifications of going AWOL. The court sentenced him to confinement at hard labor for two months, and reduction to the grade of Private/E-1. However, his confinement at hard labor was suspended for four months. The sentence was approved on 12 December 1969.
13. On 7 January 1970, the applicant was reported as AWOL a third time, and remained absent until he returned to military authorities on 17 March 1970.
14. Court-martial charges were preferred against the applicant on 16 April 1970 for violations of the UCMJ. His DD Form 458 (Charge Sheet) shows he was charged with one specification of being AWOL from on or about 7 January 1970 through 17 March 1970.
15. The applicant consulted with legal counsel on 27 April 1970, and was advised of the basis for the contemplated trial by court-martial; the maximum permissible punishment authorized under the UCMJ; the possible effects of an undesirable discharge; and the procedures and rights that were available to him.
  - a. Subsequent to receiving legal counsel, the applicant voluntarily requested discharge under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10, for the good of the service (in lieu of trial by court-martial). In his request for discharge, he acknowledged he understood that if his

discharge request was approved, 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.

b. he was advised that he could submit a statement in his own behalf.

16. On 12 May 1970, the applicant's commander recommended approval of the applicant's request for discharge, and further recommended the issuance of an undesirable discharge.

17. Consistent with the chain of command's recommendations, the separation authority approved the applicant's request for discharge in lieu of trial by court-martial on 16 May 1970, and directed the issuance of a DD Form 258A (Undesirable Discharge Certificate).

18. The applicant was discharged accordingly on 26 May 1970. His DD Form 214 confirms he was discharged under the provisions of Army Regulation 635-200, paragraph 10-5, with Separation Program Number 246, for the good of the service. He was discharged in the lowest enlisted grade and his service was characterized as under other than honorable conditions (UOTHC). He was assigned Reenlistment Codes 3B and 4. He completed 2 years, 7 months, and 17 days of net active service this period with 201 days of lost time. He was not awarded or authorized any awards [See Administrative Notes].

19. The Department of Defense (DoD) directed the Services, on 4 April 1977, to review all less than fully honorable administrative discharges issued between 4 August 1964 and 28 March 1973. In the absence of compelling reasons to the contrary, this program, known as the DoD Special Discharge Review Program (SDRP), required that a discharge upgrade to either under honorable conditions or honorable be issued in the case of any individual who had either completed a normal tour of duty in Southeast Asia, been wounded in action, been awarded a military decoration other than a service medal, had received an honorable discharge from a previous period of service, or had a record of satisfactory military service of 24 months prior to discharge. Consideration of other factors, including possible personal problems that may have contributed to the acts that led to the discharge and a record of good citizenship since the time of discharge, would also be considered upon application by the individual.

20. The applicant petitioned the Army Discharge Review Board (ADRB) for an upgrade of his discharge. The ADRB considered his request on 2 November 1977, determined he was properly and equitably discharged. However, in accordance with Public Law 95-126, the ADRB reviewed the applicant's discharge and determined upgrade was warranted in accordance with the DoD SDRP. He was advised that he would not be

able to use his upgraded discharge to qualify for VA benefits. Accordingly, a DD Form 215 was issued that shows his characterization of service was warranted under the provisions of the DoD SDRP.

21. In accordance with the provisions of the DoD SDRP, the applicant's UOTHC discharge was upgraded on 25 July 1978 to an under honorable conditions (general) discharge. His previous DD Form 214 was voided, and a new DD Form 214 was issued to reflect this change.

22. The applicant petitioned the ABCMR requesting upgrade of his under honorable conditions (general) discharge. On 29 July 1999, the Board voted to deny relief and determined that the applicant had failed to submit sufficient relevant evidence to demonstrate the existence of probable error or injustice.

23. The applicant was charged due to the commission of an offense punishable under the UCMJ with a punitive discharge. Subsequent to being charged, he consulted with counsel and requested discharge under the provisions of Army Regulation 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.

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

25. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under honorable conditions (general) discharge. He contends he experienced mental health conditions including PTSD that mitigated 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 16 February 1967; 2) The applicant served in the Republic of Vietnam from 2 August 1968-14 May 1969; 3) The applicant was reported as AWOL from 25 May-8 July 1969 and again from 28 July-20 November 1969; 4) Court-martial charges were preferred against the applicant on 16 April 1970 for being AWOL again from 7 January-17 March 1970; 5) The applicant was discharged on 26 May 1970, Chapter 10-5, with Separation Program Number 246, for the good of the service. He was discharged in the lowest enlisted grade and his service was characterized as under other than honorable conditions (UOTHC); 6) The applicant petitioned the Army Discharge Review Board (ADRB) for an upgrade of his discharge. The ADRB considered his request on 2 November 1977, determined he was properly and equitably discharged. However, in accordance with Public Law 95-126, the ADRB reviewed the applicant's discharge and determined upgrade was warranted; 7) The

applicant petitioned the ABCMR requesting upgrade of his under honorable conditions (general) discharge. On 29 July 1999, they reviewed and denied the request.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service records. The VA's Joint Legacy Viewer (JLV) was also examined.

d. On his application, the applicant noted mental health conditions including PTSD were related to his request, as a contributing and mitigating factor in the circumstances that resulted in his separation. There was insufficient evidence the applicant reported or was diagnosed with a mental health condition, including PTSD while on active service. A review of JLV provided evidence the applicant has been diagnosed and treated for insomnia, depression, and anxiety. However, these mental health conditions were not attributed to his experiences in Vietnam, and he has not been diagnosed with a service-connected mental health condition, including PTSD. Also, the applicant does not receive any 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 including PTSD that contributed to his misconduct. He has been diagnosed and treated for insomnia, depression, and anxiety by the VA.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he was experiencing mental health conditions including PTSD that contributed to his misconduct.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is sufficient evidence the applicant has been diagnosed and treated for mental health conditions, not including PTSD, many years after his discharge. Avoidant behavior such as going AWOL can be a natural sequelae to some mental health conditions including PTSD; but this is not sufficient to establish a history of a condition during active service. However, the applicant contends he was experiencing a mental health condition 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 the applicant reported or was diagnosed with a mental health condition, including PTSD while on active service. The Board noted the opine review provided evidence the applicant has been diagnosed and treated for insomnia, depression, and anxiety. However, these mental health conditions were not attributed to his experiences in Vietnam, and he has not been diagnosed with a service-connected mental health condition, including PTSD.
2. The Board, based on the preponderance of evidence determined there is insufficient evidence of mitigating factors to overcome the misconduct of AWOL for the Board to weigh a clemency determination. The Board found the applicant received an upgrade of his under other than honorable conditions (UOTHC) discharge in accordance with Public Law 95-126, to an under honorable conditions (general) discharge. The Board determined the applicant's discharge characterization is warranted as he did not meet the standards of acceptable conduct and performance of duty for Army personnel to receive an honorable discharge. Furthermore, the Board determined the applicant's contentions for upgrade of his under honorable conditions (general) discharge to honorable is without merit to include reversal of the previous Board determination. 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.
4. The applicant's request for a personal appearance hearing 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 hearing is not necessary to serve the interest of equity and justice in this case.



November 1968), Counteroffensive-Phase VI (2 November 1968 to 22 February 1969), and the Tet 69 Counteroffensive 1969 (23 February 1969 to 8 June 1969).

3. Department of the Army Pamphlet 672-3 (Unit Citation and Campaign Participation Credit Register) shows DAGO Number 8, dated 1974 awarded the Republic of Vietnam Gallantry Cross with Palm Unit Citation to Headquarters, United States Army Vietnam, and its subordinate units during the period 20 July 1965 to 28 March 1973.

4. A review of the applicant's record shows his DD Form 214, for the period ending 3 June 1970, is missing important entries that affect recognition for his acts of heroism. As a result, amend the DD Form 214 by adding the following entries in item 24 (Decorations, Medals, Badges, Commendations, Citations and Campaign Ribbons Awarded or Authorized):

- Vietnam Service Medal with three bronze service stars
- Republic of Vietnam Campaign Medal with device (1960)
- National Defense Service Medal

#### REFERENCES:

1. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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.

2. 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.

a. Paragraph 2-9 states the ABCMR begins its consideration of each case with the presumption of administrative regularity. 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.



c. Paragraph 2-15a governs requests for reconsideration. This provision of the regulation allows an applicant to request reconsideration of an earlier decision of the ABCMR. The applicant must provide new relevant evidence or argument that was not considered at the time of the ABCMR's prior consideration.

3. Army Regulation 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 10 provided that a member who had 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 in lieu of trial by court-martial. The request could be submitted at any time after charges had been preferred and must have included the individual's admission of guilt. Although an honorable or general discharge was authorized, a UOTHC discharge was normally considered appropriate.

4. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Navy Records (BCM/NR), on 3 September 2014, to carefully consider the revised PTSD criteria, detailed medical considerations, and mitigating factors when taking action on applications from former service members administratively discharged UOTHC 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.

5. The Under Secretary of Defense for Personnel and Readiness provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD, 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 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//