

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 22 March 2024

DOCKET NUMBER: AR20230008669

APPLICANT REQUESTS: an upgrade of his under conditions other than honorable discharge.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
DD Form 149 (Application for Correction of Military Record)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, 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 correction should be made so he can have access to Veterans Affairs benefits due to exposure to Agent Orange while in Vietnam.
3. On 16 May 1966, the applicant enlisted in the Regular Army. Upon completion of training, he was awarded MOS 76U (Communications Electronics Repair Parts Specialist).
4. On 28 December 1966, the applicant began service in the Republic of Vietnam.
5. On 26 December 1967, the applicant accepted nonjudicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ), for possessing a privately owned weapon in Vietnam; violating curfew; and being off base without a legal off duty pass. His punishment included reduction in grade to E-2, and forfeiture of \$50.00 per month for 2 months.
6. On 16 June 1968, the applicant accepted NJP under Article 15 of the UCMJ, for failing to go at the prescribed time to his appointed place of duty.
7. The applicant departed the Republic of Vietnam, on 5 August 1968.

8. On 2 December 1968, the applicant was reported as absent without leave (AWOL) and remained absent until he returned to military authorities on 24 December 1968.
9. On 30 December 1968, the applicant was again reported as AWOL for the day.
10. On 4 February 1969, the applicant was reported as AWOL and remained absent until he returned to military authorities on 10 August 1969.
11. On 18 August 1969, the applicant was reported as AWOL and remained absent until he returned to military authorities on 24 August 1969.
12. On 25 September 1969, the applicant was reported as AWOL and remained absent until he returned to military authorities on 30 September 1969.
13. Before a general court-martial on 23 October 1969, at Schofield Barracks, HI, the applicant was found guilty of three specifications of AWOL. The court sentenced the applicant to a bad conduct discharge (BCD), forfeiture of all pay and allowances, and confinement at hard labor for one year. The sentence was approved on 11 December 1969, and the record of trial was forwarded for appellate review.
14. On 6 February 1970, the U.S. Army Court of Military Review affirmed the findings of guilty and only so much of the sentence as provided for BCD, forfeiture of all pay and allowances, and confinement at hard labor for 8 months.
15. On 6 April 1970, the applicant underwent a medical examination. He was deemed medically qualified for administrative separation.
16. General Court-Martial Order Number 365, issued by Headquarters U.S. Disciplinary Barracks, Fort Leavenworth, KS on 8 April 1970, noted that the applicant's sentence had been affirmed and ordered the remaining sentence to be duly executed.
17. The applicant was discharged on 27 April 1970. His DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows he was discharged under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), paragraph 11-1b, with Separation Program Number 292 (court-martial) and reenlistment code RE-4. His service was characterized as under conditions other than honorable. He was credited with 2 years, 5 months, and 29 days of active service with 535 days of lost time.
18. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, U.S. Code, 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.

19. 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.

20. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting an upgrade of his 27 April 1970 discharge characterized as under conditions other than honorable. He states the reason for correction is "So as to access VHA benefits due to exposure to Agent Orange exposure while in Vietnam." He did not identify any potentially mitigating conditions in block 14 of his DD Form 149.

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 for the period of Service under consideration shows he entered the regular Army on 16 May 1966 and was discharged from the U.S Disciplinary Barracks at Fort Leavenworth, Kanas on 27 April 1970 under the provisions provided in paragraph 11-1b of AR 635-200, Personnel Management – Enlisted Personnel: Discharge pursuant to an approved sentence of a general court-martial. The separation program number 292 denotes "Other Than Desertion (Courts-Martial)."

d. No medical documentation was submitted with application and there are no encounters in clinical encounters of diagnoses JLV.

e. His Enlisted Qualification Record (DA Form 20) shows eight periods of absence without leave (AWOL) and four periods of confinement.

f. The applicant received an Article 15 on 26 December 1967 for violating curfew polices in Saigon, being apprehended by military police with a legal off duty pass, and wrongfully possessing a privately owned weapon in the Republic of Vietnam.

g. A Record of Court-Martial Conviction (DA Form 20B) shows that in addition to being convicted of multiple periods of AWOL, he was convicted of four offences which occurred on 7 July 1968: Disrespect towards his superior officer, operating a vehicle in a reckless manner, disorderly conduct in the American Division Provost Marshal's office, and wrongfully and unlawfully leaving the scene of an accident.

h. There is no probative evidence the applicant had a mental health or other medical condition which would have then contributed to or would now mitigate his multiple UCMJ violations; or that would have failed the medical retention standards of chapter 3, AR 40-501, Standards of Medical Fitness, and been a cause for referral to the DES prior to his discharge. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of her office, grade, rank, or rating prior to his discharge.

i. It is the opinion of the ARBA medical advisor that a discharge upgrade is not warranted.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? NO

(2) Did the condition exist or experience occur during military service? N/A

(3) Does the condition or experience actually excuse or mitigate the discharge? N/A

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 request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests.

2. The Board reviewed and noted the applicant provided no documentation for consideration of post-service achievements or statements in support of his application. The Board determined that an upgrade to the applicant's characterization of service was not warranted.

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 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.

[REDACTED]

[REDACTED]

[REDACTED]

[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 NOTE(S):

1. Army Regulation 635-5 (Separation Documents), in effect at the time, stated the DD Form 214 was to list all decorations, service medals, campaign credits, and badges awarded or authorized.

2. Army Regulation 600-8-22 (Military Awards) states a bronze service star will be awarded, for wear on the Vietnam Service Medal, for participation in each campaign. Recognized campaigns for Vietnam include Vietnam Counteroffensive-Phase III (1 June 1967 to 29 January 1968), Tet Counteroffensive (30 January 1968 to 1 April 1968), Counteroffensive-Phase IV (2 April 1968 to 30 June 1968), and Counteroffensive-Phase V (1 July 1968 to 1 November 1968).

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 27 April 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 one bronze service star
- Republic of Vietnam Campaign Medal with Device (1960)
- Republic of Vietnam Gallantry Cross with Palm Unit Citation
- National Defense Service Medal

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

4. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, U.S. Code, 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.

5. The Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR), on 3 September 2014, to carefully consider the revised post-traumatic stress disorder (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.

6. 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.

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.

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//

