

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 17 April 2024

DOCKET NUMBER: AR20230009914

APPLICANT REQUESTS: reconsideration of his request to upgrade his under other than honorable conditions (UOTHC) (undesirable) discharge due to post-traumatic stress disorder (PTSD) and a military sexual assault (MST).

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)

FACTS:

1. Incorporated herein by reference are military records, which were summarized in the previous consideration of the applicant's cases by the Army Board for Correction of Military Records (ABCMR) in Dockets Number:

- AR20110024677 on 14 June 2012
- AR20190009599 on 19 September 2019.

2. The applicant states that he suffers from PTSD and sexual assault/harassment, which is new evidence. He is requesting an upgrade of his discharge because he was unable to confront his accuser. He was not given the location, time, or date of the assault. He was not given any documents of any kind.

3. The applicant's service record contains the following documents:

a. The applicant's enlistment documents are not available for the Board's review. His DA Form 20 (Enlisted Qualification Record) shows in item 38 (Record of Assignment) he enlisted in the Regular Army on 27 October 1967.

b. An undated document titled "Summary of the Evidence" describes an incident between the applicant and another Soldier. The applicant picked up an object he thought was a stick but it was an entrenching tool. He hit the other Soldier with the object and the hit killed the other Soldier. The applicant did not mean to kill him. The entire document is available for the Board's consideration.

c. An unsigned, undated statement from the applicant states in the presence of his defense counsel, he had been furnished a copy of the review of the Staff Judge Advocate in his case. His counsel had advised him of his right to submit material to the Convening Authority in explanation or rebuttal of the matters contained in the document. The applicant did not desire to do so.

d. General Court-Martial Order Number 52, published by Headquarters, 82d Airborne Division, dated 26 September 1968 shows on 3 July 1968 the applicant was tried by general court-martial and found guilty of Article 119 (Involuntary Manslaughter). He was sentenced to be dishonorably discharged from the service, forfeiture of all pay and allowances, to be confined at hard labor for two years, and to be reduced to the grade of private/E-1. On 25 September 1968, the Convening Authority approved the sentence.

e. On 6 February 1969, the applicant completed an Application for Restoration of Duty stating he requested to be restored to duty in order to earn a discharge under honorable conditions.

f. DD Form 1478 (Prisoner's Admission Summary Data), dated 7 February 1969 shows the applicant had a sentence of two years in confinement. He was eligible for parole on 2 January 1969 and 2 March 1969. His confinement began on 3 July 1969 and his minimum release date was 8 February 1970 and his maximum release date was 2 July 1970. The applicant was jailed for involuntary manslaughter and had no prior offenses. The applicant's psychiatric examination diagnosed him with passive-aggressive personality, chronic, moderate, manifested by passive obstructionism, sullenness, failure to work towards group goals, immaturity, impulsivity, and lack of good judgment. The applicant's immaturity would appear to contraindicate restoration, at that time although reevaluation after his initial exposure to the disciplinary barracks might well be warranted. Parole was not desired. Restoration was desired but not recommended. It was recommended restoration be reconsidered in August 1969.

g. DA form 1479 (Prisoner Assignment and Clemency Board Action), dated 12 February 1969 shows the recommended program was planned on the basis and preparation for return to duty. Three members viewed the applicant as an excellent candidate for retraining and restoration because of his genuine desire for same. He possessed excellent military bearing, neatness, and courtesy and could return to a unit and be an asset. Two members opposed restoration at that time and recommended that restoration be reconsidered in June 1969.

h. DD Form 1477 (Prisoner's Progress Summary Data), dated 13 February 1969 stated the applicant's attitude, conduct, and adjustment had been excellent. There had been no violations of rules. Clemency was not indicated, at that time.

i. Parole Statement, dated 2 March 1969 states the applicant did not desire parole because he wanted to go back to duty. If he was not restored, he did not want parole.

j. Factual Data for Restoration, Clemency, and Parole Review, dated 13 March 1969 shows the applicant had no previous court-martial convictions and no Article 15s (nonjudicial punishment (NJP)).

k. Clemency and Parole Action Record, dated 19 March 1969 shows no clemency was recommended. The applicant was somewhat arrogant in attitude and at times verbally aggressive throughout the evaluation. They would reconsider restoration in June 1969.

l. Restoration Action Record, dated 19 March 1969 states the psychiatrist and U.S. Disciplinary Barracks (USDB) restoration officer did not recommend restoration to duty with a reconsideration in August 1969.

m. Memorandum subject Clemency, dated 1 April 1969 shows restoration to duty and clemency had been disapproved.

n. Memorandum subject Application for Restoration to Duty, dated 11 June 1969 shows the applicant requested restoration to duty in order to earn a discharge under honorable conditions.

o. DD Form 1477 (Prisoner's Summary Data), dated 12 June 1969 shows the applicant was granted temporary parole on 3 June 1969 to 9 June 1969 to attend his mother's funeral. He returned to the USDB on 9 June 1969.

p. DD Form 1479 (Prisoner Assignment and Clemency Board Action), dated 20 June 1969 states the applicant was making a good adjustment in general but had not been there long enough to adequately evaluate him. As of 30 April 1969, the applicant had received seven days abatement. His psychiatric diagnosis was unchanged. Restoration and clemency was recommended. There was no psychiatric objection to parole but clemency appeared to be the preferred means of disposition. The parole officer's evaluation states parole was not considered. The restoration officer's evaluation states restoration was desired and was recommended, at that time. Five members voted for restoration stating restoration was strongly recommended, at that time. The board recommended remission of the unexecuted portion of the applicant's sentence to confinement because he should be returned to duty as soon as possible.

q. United States Army Judiciary decision, dated 10 April 1969 states the Board of Review having found the findings of guilty and sentence as approved by proper authority correct in law and fact and having determined on the basis of the entire record, that they should be approved, such findings of guilty and the sentence were affirmed.

r. General Court-Martial Order Number 699, published by Headquarters, USDB, dated 16 July 1969 states the sentence to dishonorable discharge, forfeiture of all pay and allowances becoming due on and after the date of the convening authority's action, confinement at hard labor for two years, and reduction to the grade of private/E-1 adjudged on 3 July 1968, had been affirmed and the sentence would be duly executed. The applicant would be confined in the USDB and the confinement would be served therein.

s. Current Data for Restoration, Clemency, and Parole Review, dated 30 July 1969, states his diagnosis was unchanged and the psychiatrist recommended restoration and clemency.

t. Special Orders Number 156, published by Headquarters, USDB, dated 8 August 1969 shows the applicant was dishonorably discharged for conviction by general court-martial effective 11 August 1969.

u. DD form 214 (Armed Forces of the United States Report of Transfer or Discharge), for the period ending 11 August 1969 shows the applicant was dishonorably discharged in accordance with Army Regulation 635-200 (Separation Code 292 and Reenlistment Code 4). He had 6 months and 11 days of net service this period. He had 461 days lost from 8 May 1968 through 11 August 1969.

v. Restoration Action Record, dated 13 August 1969 shows if the applicant was approved for restoration, he would have to enlist for the unserved portion of his enlistment. Restoration was recommended to the Secretary of the Army.

w. Document, dated 17 September 1979 states the Secretary of the Army directed the applicant be restored to duty. He would be transferred to Fort Riley, Kansas for corrective training.

x. Undated document, subject Restoration to Duty, states upon successful completion of the required period of training, the unexecuted portion of the applicant's sentence to confinement would be remitted at which time he would be restored to duty to complete a new term of service equal to the unserved portion of his prior enlistment. If the applicant was restored to duty he would be advised that it leaves unaffected the prior discharge and the period of service covered by it, insofar as entitlement to veterans' benefits.

y. DD Form 4 (Enlistment Contract - Armed Forces of the United States) shows upon his restoration to duty, the applicant enlisted in the Regular Army on 17 November 1969.

z. DA Form 20 shows in item 38 (Record of Assignments) the applicant had enlisted service in the Regular Army from 27 October 1967 through 11 August 1969. On 29 July 1971 he was a prisoner at the U.S. Army Correctional Holding Detachment in the Republic of Vietnam.

aa. DA Form 2627-1 (Record of Proceedings Under Article 15) shows the applicant accepted NJP for unlawfully biting a sergeant on the left ear lobe with his teeth. His punishment included 14 days restriction and extra duty and forfeiture of seven days' pay. The applicant did not appeal his punishment.

ab. Special Court-Martial Order Number 15, published by Headquarters, 96th Maintenance Battalion, dated 25 June 1971 shows the applicant was found guilty at a special court-martial on 18 June 1971 of

- On specification of failing to obey a lawful order by being in an off limits area,
- One specification of assaulting a staff sergeant by unlawfully striking him with his fists on his shoulder and neck
- One specification of wrongfully possessing heroin

The court sentenced him to confinement at hard labor for three months, forfeiture of \$50 per month for six months, and reduction to private/E-1. On 25 June 1971, the convening authority stated the sentence was approved and would be duly executed but that the execution of that portion adjudging confinement for three months, was suspended for three months, at which time, unless the suspension was vacated, the suspended portion of the sentence would be remitted without further action.

ac. Special Court-Martial Order Number 21, published by Headquarters, U.S. Army, Transportation Terminal Unit, dated 20 Jul 1971 states so much of the published order in Special Court-Martial Order Number 15, as suspends execution of the sentence to confinement at hard labor for three months in the applicant's case was vacated. The unexecuted portion of the sentence to confinement at hard labor for three months would be duly executed. The applicant would be confined in the U.S. Army Vietnam Installation Stockade and the confinement would be served therein.

ad. DA Form 3082-R (Statement of Medical Condition), dated 14 October 1971 states there had been no change in the applicant's medical condition.

ae. DD Form 214, for the period ending 14 October 1971 shows the applicant received an undesirable [UOTHC] discharge. He had completed 1 year, 8 months, and 5 days of active-duty service with 6 months and 11 days of prior active duty service. He had 83 days lost from 15 January 1971 through 22 January 1971 and 29 July 1971 through 13 October 1971. His SPN code was 28B.

af. A letter from the Army Discharge Review Board (ADRB), dated 26 September 1977 states the ADRB, after careful consideration of the applicant's military records, and all other available evidence, determined the applicant was properly discharged. Accordingly, the Secretary of the Army directed the applicant be advised his request for a change in the type and nature of his discharge had been denied.

ag. The applicant's service record was void of his separation packet and documentation showing he suffered from PTSD or sexual assault/harassment.

4. In the applicant's previous case, AR20110024677, wherein the applicant requested upgrade of his undesirable [UOTHC] discharge, the Board stated the evidence presented did not demonstrate the existence of a probable error or injustice. Therefore, the Board determined that the overall merits of the case were insufficient as a basis for correction of the applicant's records.

5. In the applicant's previous case, AR20190009599, wherein the applicant requested reconsideration of his request to upgrade his UOTHC discharge, the Board stated they carefully considered the applicant's request, supporting documents, evidence in the records and published Department of Defense guidance for consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service, to include service in Vietnam, the frequency and nature of his misconduct, and the reason for this separation. The Board found insufficient evidence of in-service mitigation to overcome the misconduct and the applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. Based on a preponderance of evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust and found relief was not warranted.

6. Based on the applicant's assertion he suffered from PTSD and sexual assault/harassment, the ARBA Medical Section provided a medical review for the Board's consideration

7. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting reconsideration of his previous request for an upgrade his under other than honorable conditions (UOTHC) (undesirable) discharge. He contends in this application that he experienced military sexual trauma (MST) and PTSD that mitigates 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 27 October 1967; 2) General Court-Martial

Order, dated 26 September 1968, shows on 3 July 1968 the applicant found guilty involuntary manslaughter. He was sentenced to be dishonorably discharged; 3) On 8 August 1969, the applicant was dishonorably discharged for conviction by general court-martial; 4) Restoration Action Record, dated 13 August 1969, shows if the applicant was approved for restoration, he would have to enlist for the unserved portion of his enlistment. Restoration was recommended to the Secretary of the Army; 5) Upon his restoration to duty, the applicant enlisted in the Regular Army on 17 November 1969; 6) There was evidence the applicant accepted nonjudicial punishment for biting a sergeant on his ear; 7) A Special Court-Martial Order, dated 25 June 1971 shows the applicant was found guilty of being in an off limits area, assaulting a staff sergeant by striking him on his shoulders and neck, and possession of heroin. The applicant was deployed to Vietnam during this misconduct; 8) The applicant was discharged on 14 October 1971 with an undesirable [UOTHC] discharge. He had completed 1 year, 8 months, and 5 days of active-duty service with 6 months and 11 days of prior active-duty service. He had 83 days lost from 15 January 1971 through 22 January 1971 and 29 July 1971 through 13 October 1971. His SPN code was 28B; 9) The Board reviewed and denied the applicant's previous requests for an upgrade in 2012 and 2019.

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

d. On his application, the applicant noted MST and PTSD are related to his request as contributing and mitigating factors in the circumstances that resulted in his separation. There was evidence the applicant was provided a psychiatric evaluation while incarcerated for involuntary manslaughter. He was found to be sullen, angry, impulsive, and diagnosed with a passive aggressive personality. There was insufficient evidence the applicant reported or was diagnosed with a mental health condition beyond a personality disorder or reported MST as a part of this evaluation.

e. A review of JLV provided evidence the applicant began engaging in care at the VA in 2014. He does not receive any service-connected disability. He started behavioral health treatment in 2022. He was reporting increased anger and frustration serving as his wife's primary caregiver. The applicant also reported symptoms consistent with PTSD as a result of being deployed to Vietnam, but he did not report being exposed to combat. He later described being "grabbed by his private parts" by a sergeant during an argument, which resulted in him killing him. The information provided by the applicant to the VA was inconsistent with the applicant's military service record. It did not, however, appear to be a deliberate attempt to evade the truth. It instead appeared to be a difficulty with an accurate recall of events, due to the applicant's cognitive functioning and stress of his current life situation. The applicant has been diagnosed with PTSD related to his report of MST and his experiences in Vietnam.

f. Based on the available information, it is the opinion of the Agency BH Advisor that there is sufficient evidence to support the applicant had condition or experience that partially mitigates his misconduct. The applicant does contend he was experienced MST and PTSD that mitigates his misconduct, and per Liberal Consideration his contention alone is sufficient for the board's consideration.

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 MST and PTSD, that contributed to his misconduct. The VA has diagnosed the applicant with PTSD due to his report of MST and experiences in Vietnam.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he was experiencing MST and PTSD that contributed to his misconduct while on active service. The VA has diagnosed the applicant with PTSD due to his report of MST and experiences in Vietnam.

(3) Does the condition experience actually excuse or mitigate the discharge? Partially, there is evidence the applicant reported MST to the VA in 2022. However, there is uncertainty to when the applicant reported experiencing MST in relation to his repeated misconduct. The applicant has a repeated history of significantly violent behavior to include involuntary manslaughter. There is no nexus between MST and PTSD and the applicant's repeated events of violent behavior: 1) this type of misconduct is not part of the natural history or sequelae of MST and PTSD; 2) MST and PTSD do not affect one's ability to distinguish right from wrong and act in accordance with the right. Yet, the applicant also was found in possession of heroin. Drug use can be an avoidant behavior that is a natural sequelae to MST and PTSD. This behavior is mitigatable per Liberal Consideration. Lastly, per Liberal Consideration, the applicant contention alone that he experienced MST and PTSD which mitigated his misconduct 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 medical review, the Board

considered the advising official finding sufficient evidence to support the applicant had condition or experience that partially mitigates his misconduct. The opine noted the applicant has a repeated history of significantly violent behavior to include involuntary manslaughter. However, there is no nexus between MST and PTSD and the applicant's repeated events of violent behavior.

2. The Board noted based on the opine. there was insufficient evidence the applicant reported or was diagnosed with a mental health condition beyond a personality disorder or reported MST as a part of this evaluation. The Board determined, notwithstanding the advising official partial mitigation, there is insufficient evidence of in-service mitigating factors to overcome the serious misconduct of killing another Soldier. Additionally, the record is absent any indication the applicant could not distinguish between right and wrong. ABCMR 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. Based on a preponderance of evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust based on his pattern of misconduct.

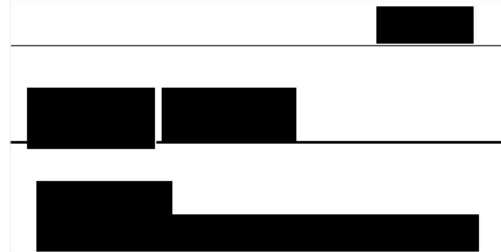
BOARD VOTE:

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.



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. Army Regulation (AR) 635-212 (Personnel Separations – Discharge Unfitness and Unsuitability), in effect at the time, set forth the policy for administrative separation 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. An undesirable discharge was normally issued unless the particular circumstances warranted a general or an honorable discharge.

2. AR 635-200 (Personnel Separations - Enlisted Personnel) in effect at the time, set forth the basic policy for the separation of enlisted personnel. A member may be awarded an honorable or general discharge, if during the current enlistment period of obligated service he has been awarded a personal decoration or if warranted by the particular circumstances of a specific case.

a. An honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization will be conditioned upon military behavior and proficient performance of duty during the member's current enlistment of current period of service with due consideration for the member's age, length of service, grade, and general aptitude.

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. An undesirable discharge [UOTHC] is an administrative separation from the service under conditions other than honorable. It may be issued for unfitness, misconduct, homosexuality, or for security reasons.

3. AR 635-5 (Personnel Separation – Separation Documents), in effect at the time, prescribed the separation documents that will be furnished each individual who is separated from the Army, including active duty for training personnel, and established standardized procedures for the preparation and distribution of these documents. It stated that SPN 28B was designated under the authority of AR 635-212 for unfitness – frequent involvement in incidents of a discreditable nature with civil or military authorities.

4. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to carefully consider the revised PTSD criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged under other than honorable conditions 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. 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 DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD; traumatic brain injury (TBI); 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. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

6. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (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, BCM/NRs 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.

7. Title 10, U.S. Code, section 1556 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.

//NOTHING FOLLOWS//