

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 16 April 2024

DOCKET NUMBER: AR20230010176

APPLICANT REQUESTS:

- reconsideration of his previous request to have his other than honorable characterization of service upgraded to honorable
- amend item 11c (Reason and Authority) of his DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) to read "secretarial discretion"

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

- DD Form 149 (Application for Correction of Military Record)
- Self-authored statement
- Letter of support
- Veterans Affairs (VA) claim documents and medical records
- Independent Medical Evaluation
- Background check
- "Project 100,000" New standards program
- "The Vietnam Drug User Returns"
- Memorandum, "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder"
- Memorandum, "Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment"
- Memorandum, "Guidance to Military Discharge Review Boards and Boards of Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations"
- Mayo Clinic overview of Post-traumatic stress disorder

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 AR20120015691 on 14 March 2013.

2. The applicant states:

a. His characterization of discharge should be changed to honorable or general and the narrative reason should be changed to “secretarial discretion.” He says the misconduct is mitigated by PTSD and he has been sufficiently punished for the mistake he made.

b. Prior to his service, he did not have any issues with marijuana or any other drugs and he started using drugs while in Vietnam. Drugs were readily available, a lot of people were using them, and it was cheap.

c. Since leaving the service, he has not had any legal troubles outside of traffic tickets. He continued to have issues with drug use, but not to the point of criminal charges. As a result of his drug use, he has admitted himself for rehabilitative treatment on three occasions. His drug use led to him and his wife divorcing, but they remarried in 2006 and he has been sober and drug-free since 2010.

d. His options for employment were limited based on his discharge, making it hard to provide for his family. He has worked as a truck driver once he left the Army and eventually became self-employed. In order to cope with things he often threw himself into his work.

3. The applicant provides:

a. A letter of support from his attorney that outlines the events that led to the applicant’s discharge from the Army, how his service in Vietnam led to his PTSD, that he used marijuana to cope with the stress of PTSD, and how PTSD was not a well-known condition or a diagnosis. The letter goes on to state how despite his severe trauma from his service he has gone on to lead a productive life. He discusses how for decades the applicant was denied VA benefits; thus he has not had access to assistance and treatment provided by the VA. The applicant has recently been granted VA benefits after almost 40 years and his PTSD is considered 100% disabling. His attorney argues that due to the fact PTSD was not a diagnosis and not well-known at the time of his separation, this should be considered in mitigation of his misconduct.

b. His entire VA record, to include medical records.

c. An Independent Medical Evaluation (IME), conducted by a Clinical Neuropsychologist/Psychologist that evaluates the applicant’s medical and mental history, along with military service and personal life, according to his spouse. She states that based on her review of the medical evidence and lay statement evidence from the applicant during their clinical interview, it is her opinion that he met the VA’s definition of insanity at the time of his in-service misconduct.

d. A background check for the applicant, conducted on 9 January 2023 that shows no derogatory information.

e. Information pertaining to "Project 100,000" that discusses the program implemented to accept men formerly rejected from military service. The program was initiated to accept a portion of the men who were being disqualified for military service under previous mental health standards and some men with physical defects that were correctable within a short period of time.

f. A report titled "The Vietnam Drug User Returns," that is based upon case records and follow-up interviews of 965 United States servicemen returning from Vietnam.

g. Secretary of Defense memorandum, Subject: "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder."

h. Secretary of Defense memorandum, Subject: "Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment."

i. Secretary of Defense memorandum, Subject: "Guidance to Military Discharge Review Boards and Boards of Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations."

j. A printout from the Mayo Clinic's website that describes the symptoms, causes, diagnosis and treatment of PTSD.

4. A review of the applicant's service records contain sufficient information to support he is eligible for additional awards not annotated on his DD Form 214. As a result, these awards will be added administratively. The Board will consider the portion of the request pertaining to reconsideration of his previous request to have his other than honorable characterization of service upgraded to honorable and to amend item 11c of his DD Form 214 to read "secretarial discretion."

5. Review of the applicant's service record shows:

a. He enlisted in the Regular Army on 14 February 1969. He served in the Republic of Vietnam from 15 July 1969 to 13 July 1970. His DA Form 20 (Enlisted Qualification Record) shows in item 33 (Appointments and Reductions) his dates of rank, as follows:

- Private/E-1 – 14 February 1969
- Private/E-2 – 14 June 1969

- Private First Class/E-3 – 19 July 1969
- Specialist/E-4 – 7 November 1969
- Private/E-1 – 14 January 1971

b. There is no Charge Sheet available; however, his record contains a DA Form 268 (Report for Suspension of Favorable Personnel Action), dated 31 October 1970, that shows he was flagged pending court-martial proceedings for violation of Article 134 of the Uniform Code of Military Justice (UCMJ) for the wrongful possession of marijuana.

e. He consulted with legal counsel and was advised of the basis for trial by court-martial for an offense punishable by a bad conduct or dishonorable discharge, the maximum permissible punishment authorized under the UCMJ, the possible effects of a request for discharge, and the procedures and rights available to him. After consulting with legal counsel, he requested discharge for the good of the service in lieu of trial by court-martial under the provisions of Army Regulation 635-200 (Personnel Separations - Enlisted Personnel), chapter 10.

f. In his request for discharge, he acknowledged he understood if the discharge request were approved, he might be discharged under other than honorable conditions and be furnished an Undesirable Discharge Certificate. He also acknowledged he understood he might be deprived of many or all Army benefits, he might be ineligible for many or all benefits administered by the VA, he might be deprived of his rights and benefits as a veteran under both Federal and State laws, and he might expect to encounter substantial prejudice in civilian life.

g. On 5 January 1971, in addition to his request for discharge, the applicant submitted a statement on his behalf, wherein he stated he was promoted to private/E-2 and received an excellent rating on his efficiency report when he was in advanced individual training. On 14 July 1969, he landed in Vietnam and was promoted to private first class/E-3 within 3 days. He was promoted again to specialist four/E-4 within 4 months following his previous promotion. He was wounded four times in Vietnam, earned the Combat Infantryman Badge and the Bronze Star Medal, and was in the Cambodian invasion. He further stated he was in trouble for the wrongful possession of marijuana on 31 October 1970. Prior to that he never received an Article 15, he had been a well-behaved Soldier, performed his duties to the best of his abilities, and thought he had learned his lesson with drugs.

h. His immediate commander recommended approval of his request for discharge with a general discharge. The commander stated the applicant's conduct and efficiency were "fair" and he required supervision in order to perform his duties. He further stated the applicant had served 1 year honorably in Vietnam and was awarded the Bronze Star Medal.

i. His intermediate commander concurred with the recommendation of the immediate commander. He stated that although the applicant had not received any previous judicial or nonjudicial punishment, his behavior in the unit had been characterized by generally immature and undistinguished performance. Prior to his arrest on narcotics violation charges, his performance was well below that required for minimally successful completion of a tour in the military.

j. His brigade commander concurred with the recommendation of the immediate and intermediate commanders to approve the applicant's request for discharge. However, he stated due to the gravity of the offense, he recommended the issuance of an Undesirable Discharge Certificate. He further stated that with the ever-rising problem of drug abuse growing larger, the people who were engaged in the practice of selling marijuana and other drugs must be singled out and removed from military settings as quickly as possible.

k. On 14 January 1971, the separation authority approved the applicant's request for discharge under the provisions of Army Regulation 635-200, chapter 10, and directed the issuance of an Undesirable Discharge Certificate. On 3 February 1971, he was discharged accordingly.

l. He was discharged in the rank/grade of private/E1, under the provisions of Army Regulation 635-200, chapter 10, for the good of the service in lieu of trial by court-martial with an under other than honorable conditions character of service. He was assigned Separation Program Number (SPN) 246 and Reenlistment Code 4. He completed 1 year, 11 months, and 19 days of net active service. He was awarded or authorized the following:

- National Defense Service Medal
- Vietnam Service Medal
- Vietnam Campaign Medal
- Combat Infantryman Badge
- Two overseas service bars

6. On 14 March 2013, the Board denied the applicant's original request to upgrade his discharge to honorable. They concluded that the applicant voluntarily requested a discharge in lieu of trial by court-martial, therefore his separation was accomplished in compliance with applicable regulations with no indication of procedural errors which would have jeopardized his rights. Additionally, he wrongfully possessed marijuana during his time in service, apparently for the purpose of selling. Based on his misconduct, his service did not meet the standards of acceptable conduct and performance of duty for Army personnel.

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

9. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting reconsideration of his previous request to upgrade his discharge from under other than honorable conditions (UOTHC) to honorable and a change of his narrative reason for separation. He contends he experienced 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 14 February 1969; 2) The applicant served in the Republic of Vietnam from 15 July 1969 -13 July 1970, where he had earned the Combat Infantryman Badge and Bronze Star; 3) On 31 October 1970, the applicant was flagged pending court-martial proceedings for the wrongful possession of marijuana; 4) On 3 February 1971, the applicant was discharged, Chapter 10, for the good of the service in lieu of trial by court-martial with an under other than honorable conditions character of service; 5) On 14 March 2013, the Board denied the applicant's original request to upgrade his discharge to honorable. They concluded that the applicant voluntarily requested a discharge in lieu of trial by court-martial, therefore his separation was accomplished in compliance with applicable regulations with no indication of procedural errors which would have jeopardized his rights. Additionally, he wrongfully possessed marijuana during his time in service, apparently for the purpose of selling. Based on his misconduct, his service did not meet the standards of acceptable conduct and performance of duty for Army personnel.

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) and hardcopy medical records and VA documents provided by the applicant were also examined.

d. The applicant asserts he was experiencing PTSD, which mitigates his misconduct. There is insufficient evidence the applicant reported or was diagnosed with a mental health condition, including PTSD while on active service. A review of JLV provided sufficient evidence the applicant has been diagnosed and treated for PTSD related to his combat experiences in Vietnam, and he has been awarded 100% service-connected disability for this mental health condition as of 2011.

e. The applicant also provided the results of a Board of Veterans' Appeals, dated 31 July 2020. In the document, it was noted: "On October 31, 1970, the appellant was apprehended by members of the military police and investigators of the Criminal Investigation Division for possession of marijuana. The appellant was found in possession of: one partially burned hand rolled cigarette containing .06 grams of

marijuana; one plastic bag containing 24.75 grams of marijuana; one metal holder with suspected marijuana residue; 41 plastic bags containing a total of 333.40 grams of marijuana; and one brown paper bag containing .02 grams of marijuana.” The applicant was noted to have been experiencing PTSD as the result of his combat experiences, but he was not found met the criteria of insanity at the time of his crimes. 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.

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 PTSD while on active service, and he has been diagnosed with service-connect PTSD as a result of his combat experiences in Vietnam.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he was experiencing PTSD while on active service, and he has been diagnosed with service-connect PTSD as a result of his combat experiences in Vietnam.

(3) Does the condition or experience actually excuse or mitigate the discharge? Partially, there is sufficient evidence the applicant has been diagnosed with PTSD related to his combat experiences. The applicant’s misconduct of drug use could be a natural sequela to his PTSD. Specifically, drug use is often an attempt to self-medicate to avoid negative emotions. However, the applicant also was in possession of a large amount of marijuana with evidence of intent to distribute. There is no nexus between PTSD and the sale of illegal drugs in that: 1) this type of misconduct is not a part of the natural history or sequelae of PTSD; 2) PTSD does not affect one’s ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board’s consideration.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was partially 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.

a. Discharge Upgrade: Grant. The applicant was charged with commission of an offense 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. 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 reviewer's finding sufficient evidence to support the applicant had condition or experience that partially mitigated his misconduct. Given his service in Vietnam and combat awards, and given the medical mitigation, the determined his service 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.

b. Narrative Reason: Deny. The Board noted that the applicant's narrative reason for separation was assigned based on the fact that he was discharged under chapter 10 of AR 635-200 in lieu of trial by court-martial. Absent his AWOL, there would have been no reason to prefer court-martial charges against him and absent the court-martial charges, there would have been no reason for him to submit a request for voluntary discharge in lieu of court-martial. The underlying reason for his discharge was his AWOL and court-martial charges. The only valid narrative reason for separation permitted under chapter 10 is "In Lieu of Court-Martial" and the appropriate separation code associated with this discharge was at the time 246.

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 Board determined the evidence presented is sufficient to warrant partial amendment of the ABCMR's decision in Docket Number AR20120015691 on 14 March 2013. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected in addition to the corrections addressed in Administrative Note(s) below, by amending the applicant's DD Form 214 for the period ending 3 February 1971 to show:

- 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

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to upgrading the characterization of his discharge to honorable.



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):

The applicant' service records contain evidence substantiating the following administrative corrections to the applicant's DD Form 214 without Board action. As a result, amend his DD Form 214, for the period ending 3 February 1971, by adding:

- Bronze Star Medal
- 4 bronze service stars to his previously awarded Vietnam Service Medal
- Republic of Vietnam Gallantry Cross with Palm Unit Citation
- Expert Marksmanship Qualification Badge with Rifle Bar (M-16)

REFERENCES:

1. 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, which is that what the Army did was correct.

2. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 1-9d (Honorable Discharge) states an honorable discharge is a separation with honor. Issuance of an honorable discharge will be conditioned upon proper 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. Paragraph 1-9e (General Discharge) states a general discharge is a separation from the Army under honorable conditions of an individual whose military record is not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 10 of this regulation states an individual who has committed an offense or offenses, the punishment for which, includes a bad conduct or dishonorable discharge, may submit a request for discharge for the good of the service. An Undesirable Discharge Certificate will normally be furnished an individual who is discharged for the good of the service.

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, which is that what the Army did was correct.

4. Department of the Army Pamphlet 672-3 (Unit and Campaign Participation Credit Register) shows:

a. Department of the Army General Orders (DAGO) 8, dated 1974, announced award of the Republic of Vietnam Gallantry Cross with Palm Unit Citation for service in Vietnam to Headquarters, United States Army Vietnam and its subordinate units during the period 20 July 1965 to 28 March 1973.

b. A bronze service star is worn on the appropriate service ribbon, to include the Vietnam Service Medal, for each credited campaign. During his service in Vietnam, the applicant participated in the Vietnam Summer-Fall, from 9 June 1969 to 31 October 1969, the Vietnam Winter-Spring, from 1 November 1969 to 30 April 1970, the DA Sanctuary Counteroffensive from 1 May 1970 to 30 June 1970 and Vietnam Counteroffensive, Phase VII from 1 July 1970 to 30 June 1971.

5. General Orders Number 5562, issued by Headquarters, 25th Infantry Division on 26 May 1970, issued award of the Bronze Star Medal to the applicant for meritorious service in connection with military operations against a hostile force from July 1969 to July 1970.

6. Special Orders Number 322, issued by Headquarters, 3d Armored Cavalry, issued award of the Expert Marksmanship Qualification Badge with Rifle Bar (M-16) on 20 November 1970.

7. 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, sexual assault, or sexual harassment. 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.

8. 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 regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice. This guidance does not mandate relief but provides standards and principles to guide Boards in application of their equitable relief authority.

a. 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//