

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 10 May 2024

DOCKET NUMBER: AR20230011029

APPLICANT REQUESTS: an upgrade of his under conditions other than honorable discharge to under honorable conditions (General).

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Statement
- Court Name Change Order
- Civilian Education Documents

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AC91-05891 on 20 March 1991.

2. The applicant states:

a. After Vietnam, he returned suffering from insomnia, depression, and nightmares when he was asleep. He was drinking and doing drugs when awake. After his daughter was born, things got really bad. He forged some initials on a personal check to get it cashed. Though he paid it 3 weeks later, the bank pressed charges. He was sentenced in civilian court, which led to an undesirable discharge. He received help from a friend, the unit chaplain and promised that he would stop drinking and get himself together.

b. While in Vietnam, other members of his unit began shooting grenades at civilians that were fishing. He took photographs and tried to curtail these actions; but his team leader would not listen. He also witnessed two members of his company, digging up civilian graves to rob them of potential gold. He turned over the photographs to his company commander and first sergeant, who investigated these incidents. He is unaware of the outcome of the investigation; however, he was subjected to harassment and threats by members of the company.

c. Following his release, he attended college, and returned to Pennsylvania. He stayed clear of drugs; however, alcohol was the only thing that gave some relief from the bad dreams of Vietnam. The dreams are nightmares and all along made him feel like everything he did in Vietnam was wrong. In 1984, he was accused and arrested for a murder/robbery, a crime he did not commit. Despite being sentenced to a natural life imprisonment, he sought higher education and graduated from college.

d. He was young when he entered the service, often misguided by older Soldiers and he just didn't handle it well. It caused him to drink, and to do drugs. He has experienced the effects of agent orange, agent blue, and depression. He believes it was unfair to give him an undesirable discharge after all he did right. He thanks the Board for consideration of his application.

e. He annotates post-traumatic stress disorder (PTSD) and reprisal/whistleblower as issues/conditions related to his request.

3. On 30 March 1970, the applicant enlisted into the Regular Army. He was honorably discharged on 8 December 1970. His DD Form 214 (Armed Forces of the U.S. Report of Transfer or Discharge) shows he completed 8 months and 9 days of active service.

4. The applicant reenlisted in the Regular Army on 9 December 1970.

5. He served in the Republic of Vietnam from 24 May 1971 to 1 February 1972.

6. On or about 28 October 1972, the applicant was reported as absent without leave (AWOL) until he returned to military authorities on or about 31 October 1972.

7. On 7 November 1972, the applicant accepted nonjudicial punishment under Article 15 of the Uniform Code of Military Justice, for being AWOL.

8. Before a special court-martial on 24 January 1973, at Fort Amador, Canal Zone, the applicant was found guilty of one specification of willfully disobeying a lawful order from his superior noncommissioned officer, on or about 10 November 1972. The court sentenced the applicant to reduction in grade to E-1, confinement at hard labor for 60 days, and forfeiture of \$25.00 per month for 4 months. The sentence was approved on 5 February 1973.

9. A letter issued by the Commander, U.S. Army Personnel Control Facility, Fort Knox, KY on 9 May 1973, notified the applicant's commander that the applicant was confined.. Additionally, he noted the appropriate civil authorities would be contacted to ascertain the applicant's status. In the event the applicant remained in civil custody, attention was invited to Section VI, Army Regulation 635-206 (Personnel Separations – Discharge – Misconduct (Fraudulent Entry, Conviction by Civil Court, AWOL, Desertion)).

10. The applicant's record is void of a separation packet containing the specific facts and circumstances surrounding his discharge processing. However, a memorandum issued by the Assistant Adjutant, Headquarters, U.S. Army South, Fort Amador, Canal Zone, on 30 July 1973, noted the separation authority directed the applicant's separation under the provisions of Army Regulation 635-206.

11. The applicant was discharged on 27 August 1973. His DD Form 214, as amended by his DD Form 215 (Correction to DD Form 214) shows he was discharged under the provisions of Army Regulation 635-206, with Separation Program Number 284 (Misconduct) and Reentry Code 4. He was discharged in the lowest enlisted grade and his service was characterized as under conditions other than honorable. He completed 2 years, 8 months, and 19 days of active service with 181 days of lost time. He was awarded or authorized the National Defense Service Medal, Vietnam Service Medal, and the Parachutist Badge.

12. The applicant petitioned the ABCMR requesting upgrade of his discharge. On 20 March 1991, the Board voted to deny relief and determined that the applicant had not presented and the records do not contain sufficient justification to conclude that it would be in the interest of justice to excuse the failure to file within the time prescribed by law.

13. The applicant provides:

a. A self-authored letter, detailing his experiences while deployed, his mental health, the events that led to his discharge, and his life following separation from the Army.

b. Civilian education documents which highlight his post-service educational accomplishments.

14. 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.

15. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade to his characterization of service from under other than honorable conditions (UOTHC) to under honorable conditions (general). He contends he experienced undiagnosed 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:

- The applicant enlisted into the Regular Army on 30 March 1970 and was honorably discharged on 8 December 1970. He then reenlisted on 9 December 1970, and he served in Vietnam from 24 May 1971 to 1 February 1972.
- The applicant accepted NJP under Article 15 of the UCMJ for an episode of AWOL in October 1972. Before a special court-martial on 24 January 1973 the applicant was found guilty of one specification of willfully disobeying a lawful order from his superior noncommissioned officer, which occurred in November 1972.
- A letter issued on 9 May 1973, noted that the applicant was confined at the Federal Youth Center, Ashland, KY. The applicant's record is void of a separation packet containing the specific facts and circumstances surrounding his discharge processing. However, a memorandum issued by the Assistant Adjutant, Headquarters, U.S. Army South, Fort Amador, Canal Zone, on 30 July 1973, noted the separation authority directed the applicant's separation under the provisions of Army Regulation 635-206.
- The applicant was discharged on 27 August 1973. He completed 2 years, 8 months, and 19 days of net active service.

c. Review of Available Records: The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts he had undiagnosed PTSD at the time of his misconduct. The applicant provided no medical or mental health records, and the application did not include a separation packet containing the specific facts surrounding his discharge. There was insufficient evidence that the applicant was diagnosed with PTSD while on active service.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed that the applicant received services from VA while incarcerated in 1999 and 2000. The documentation is brief but discusses PTSD related symptoms, adjustment disorder, and substance abuse. There is not a diagnosis of PTSD or any other mental health condition, and the records appear to be for the purpose of preparing for adjustment to parole.

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support that the applicant had a condition or experience that mitigates his misconduct.

Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts he had PTSD as related to his tour in Vietnam at the time of the misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition while on active service. However, no diagnosis or treatment records, from his time in service or after discharge, were provided.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. Without knowledge of the basis for separation, no decision regarding mitigation under liberal consideration can be made.

The applicant asserts mitigation due to PTSD resulting from his time in Vietnam, and there is some brief documentation of symptoms in VA records. However, in the absence of information from a separation packet containing the basis for separation, no decision regarding mitigation under liberal consideration can be made. However, his assertion of PTSD is sufficient to merit consideration by the board.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, the Board found that relief was warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition, and executed a comprehensive review based on law, policy, regulation, and published DoD guidance for liberal consideration of discharge upgrade requests. The evidence shows the applicant was discharged from active duty due to misconduct. The Board found no error or injustice in his separation processing. However, the Board majority found based upon the infrequency of the applicant's misconduct, portion of honorable service, and assertion of PTSD, that an upgrade to under honorable conditions (General) was warranted. The Board minority found no error or injustice in the separation processing of the applicant and the characterization of service received upon separation.

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:

1. The Board determined the evidence presented is sufficient to warrant relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant's DD Form 214, for the period ending 27 August 1973 to show in:

- item 11c (Reason and Authority): no change
- item 13a (Character of Service): under honorable conditions (General)
- item 13b (Type of Certificate Issued): DD Form 257A
- item 15 (Reenlistment Code): no change

2. The Board further determined that 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 his characterization of service to honorable.

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I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. 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) sets forth procedures for processing requests for the correction of military records. 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 (Personnel Separations – Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel. This regulation provides 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.

4. Army Regulation 635-206, in effect at the time, set forth the basic authority for the separation of enlisted personnel for misconduct. Section VI, (Conviction by Civil Court) of this regulation prescribes the standards and procedures for processing cases of individuals who, during their current term of active military service, have been initially convicted or adjudged juvenile offenders by a domestic court of the U.S. or its territorial possessions, or convicted by a foreign tribunal. If discharge is desired and the individual is not physically in the custody of the civil authorities, a recommendation for discharge may be submitted to Headquarters, Department of the Army. It provided that an

undesirable discharge was normally considered appropriate for members separated under this regulation.

5. 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.

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//