

IN THE CASE OF: ██████████

BOARD DATE: 3 April 2024

DOCKET NUMBER: AR20230011503

APPLICANT REQUESTS:

- an upgrade of his under honorable conditions (General) discharge to honorable
- change narrative reason for separation to “Secretarial Authority”
- correction of his DD Form 214 (Certificate of Release or Discharge from Active Duty) to show award of the Republic of Vietnam Gallantry Cross with Palm Unit Citation

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel’s Petition with the following enclosures:
 - Enclosure 2 – Corrected Copy DD Form 214, for the period ending 29 September 1971
 - Enclosure 3 – Army Board for Correction of Military Records (ABCMR) Decision Docket Number AR20170018103, dated 10 December 2020
 - Enclosure 4 – Photograph

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the ABCMR in Docket Numbers AR1999022486 on 8 September 1999 and AR20170018103 on 10 December 2020.

2. The applicant, through counsel, states:

a. The applicant is grateful for the upgrade of his characterization of service. However, he discovered some injustices in his record after he received his ABCMR decision, dated 8 April 2021 from his legal counsel. The applicant requests an upgrade to honorable of his characterization of service, his narrative reason be changed to “Secretarial Authority,” and award of the Republic of Vietnam Gallantry Cross with Palm Unit Citation.

b. The applicant's previous application to the Board did not contain any argument for evidence based on the Wilkie Memo due to it being submitted one year prior to the Wilkie Memo being issued. The Wilkie Memo calls for the ABCMR to "punish only to the extent necessary" and "to favor second chances in situations in which individuals have paid for their misdeeds." Finally, the Wilkie Memo advises the boards to consider "whether the punishment, including any collateral consequences, was too harsh." The applicant endured half a century of debilitating medical consequences because of his yearlong deployment to Vietnam. The applicant deserves a second chance and has more than paid for his misdeeds.

c. Paragraph 6(h) of the Wilkie Memo instructs the ABCMR to grant relief on injustice grounds if the request is "based in whole or in part on a mental health condition, including [PTSD]." [REDACTED] has endured a lifelong battle with Post Traumatic Stress Disorder (PTSD) caused by his Vietnam deployment. When he returned home from Vietnam, the applicant suffered from nightmares, flashbacks, anxiety, and depression, all symptoms of PTSD. Avoidance of stimuli is also a symptom of PTSD. Here, his misconduct, two periods of being absent without leave (AWOL), that led to his less than honorable discharge was also a symptom of his untreated PTSD.

d. Over 20 years later, the applicant was diagnosed with chronic PTSD by a Veteran Administration (VA) physician in [REDACTED] in 1998. The applicant is now 100 percent service connected at the VA for PTSD caused by his Vietnam combat experiences. The Army Review Boards Agency (ARBA) psychologist, moreover, found the applicant's "diagnosis of PTSD is a mitigating factor in his misconduct that led to his under other than honorable conditions discharge. As PTSD is associated with avoidant behaviors, there is a nexus between the applicant's PTSD and his multiple offenses of AWOL." The prior ABCMR board concurred, stating the applicant's "misconduct [is] mitigated by PTSD." Therefore, this Board should grant relief based on the applicant's VA service-connected PTSD because his mental health condition mitigates his AWOL.

e. The applicant also suffered from decades of medical consequences due to the malaria he contracted while serving in Vietnam. He was hospitalized for 19 days and returned to duty. He suffers from brain atrophy making it difficult to learn new skills. After his discharge he could only find work doing physical hard labor. His mental health challenges and financial insecurity, moreover, made it difficult to maintain close relationships with family and friends and support his family.

f. The applicant accepted his responsibility for his misconduct and pled guilty at his court-martial over 50 years ago. He is not requesting the Board to change his lost time in Block 29 of his DD Form 214. The applicant volunteered to serve his country in combat overseas, during the height of Vietnam, not only once but twice. He continues to carry physical and mental scars from his service in Vietnam. Granting all his requests in

relief is the only way to ensure that the applicant's service is properly recognized and the honor of his service is restored.

g. He seeks consideration regarding Block 28 "Narrative Reason for Separation" be corrected. Leaving the narrative reason as discharge pursuant to a General Court-Martial with a discharge characterization of general, under honorable conditions, creates a legal impossibility because a general discharge cannot be issued at any level of court-martial. Pursuant to the Rules for Court-Martial (R.C.M.) 1003(6)(8), a Bad Conduct Discharge (BCD) or Dishonorable Discharge (DD) are the only two permitted discharges at a General Court-Martial for enlisted service members. This legal impossibility would likely frustrate the Board's intent to grant the applicant clemency and only serve to unintentionally harm him.

h. The easiest way to eliminate this bar to all VA benefits and ensure this Board's grant of clemency is fully realized is to change Block 28 to "Secretarial Authority" as the reason for separation and Army Regulation (AR) 635-200, paragraph 5-3 (the separation authority for Secretarial Plenary Authority) as the authority for separation. At a minimum, changing the reason for separation to an administrative separation in Block 28 would eliminate the court-martial bar. The ABCMR intended to grant full relief to the applicant. Therefore, the only way for this Board to effectuate the prior Board's intent of granting the applicant clemency is to remove all references to a discharge pursuant to a General Court-Martial in Block 28 and replace it with "Secretarial Authority."

i. Lastly, the applicant seeks reconsideration regarding Block 13 "Decorations, Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized" of the corrected DD Form 214. Specifically, he requests that the "Republic of Vietnam Gallantry Cross with Palm Unit Citation" be added to Block 13. The award is based solely on the applicant's deployment to Vietnam. The Department of the Army General Order Number 8, dated 19 March 1974, confirmed award of the Republic of Vietnam Gallantry Cross with Palm Unit Citation to Headquarters, U.S. Military Assistance Command and all its subordinate units during the period of 8 February 1962 to 28 March 1973, and to Headquarters, U.S. Army Vietnam, and its subordinate units during the period July 20, 1965 to March 28, 1973. Counsel also provides a photocopy of a picture of the applicant in his military uniform. Counsel notes PTSD is related to the applicant's request.

3. A review of the applicant's service record shows:

a. The applicant enlisted in the Regular Army on 1 November 1966.

b. His DA Form 20 (Enlisted Qualification Record) shows in item 31 (Foreign Service) he served in the Republic of Vietnam from 20 October 1967 to 19 October 1968.

c. He was honorably discharged on 18 March 1969 for immediate reenlistment. He completed 2 years, 4 months, and 18 days of active service. He was authorized or awarded the National Defense Service Medal, Vietnam Service Medal, and Vietnam Campaign Medal with Device (1960).

d. He had an immediate reenlistment on 19 March 1969.

e. On 4 June 1969, the applicant accepted nonjudicial punishment for being AWOL from his unit without proper authority from 26 May 1969 until on or about 29 May 1969.

f. General Court-Martial Order Number 37, dated 4 March 1971, shows:

- he was found guilty of one specification of AWOL from 21 August 1969 remained so absent until on or about 8 December 1970
- his sentence, which was adjudged on 25 January 1971, included a reduction to the rank/grade of private (PVT)/E-1, forfeiture of all pay and allowances, confinement at hard labor for 8 months, and to be discharged from the service with a bad conduct discharge

g. On 4 March 1971, only so much of the sentence as provides for a bad conduct discharge, forfeiture of \$50.00 per month for 4 months, confinement at hard labor for 4 months and the reduction to private/E-1 was approved and ordered duly executed. The record of trial was forwarded for appellate review.

h. General Court-Martial Order Number 51, issued by the Department of the Army, Headquarters Fort Bragg, NC on 16 March 1971, remitted the unexecuted portion of the approved sentence to confinement at hard labor for 4 months.

i. On 20 August 1971, the U.S. Army Court of Military Review having found the approved findings of guilty, and the sentence 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 are affirmed.

j. He was discharged on 29 September 1971 with an under conditions other than honorable characterization of service and issued a DD Form 259A Discharge Certificate. He completed 2 years, 4 months, and 18 days of active service. His DD Form 214 shows he was awarded or authorized:

- National Defense Service Medal
- Vietnam Service Medal
- Vietnam Campaign Medal with Device (1960)
- Army Commendation Medal

4. The applicant was ineligible to apply to the Army Discharge Review Board based on his discharge being the result of a general court-martial.

5. The applicant petitioned the ABCMR for an upgrade to his service characterization. The ABCMR considered his request on 16 September 1999, recommended by majority vote that the applicant's discharge not be upgraded and denied his request for relief.

6. The applicant again petitioned the ABCMR for an upgrade to his service characterization. The ABCMR considered his request on 10 December 2020 and recommended that all Department of the Army records of the applicant be corrected by amending the DD Form 214, for the period ending 29 September 1971, to show an under honorable conditions (General) characterization of service.

7. The applicant was issued a DD Form 214, which shows in:

- item 13 (Decorations, Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized): National Defense Service Medal, Vietnam Service Medal, Republic of Vietnam Campaign Medal with Device 1960, Army Commendation Medal
- item 24 (Character of Service): under honorable conditions (General)
- item 26 (Separation Code): 292
- item 27 (Reenlistment Code): 3B
- item 28 (Narrative Reason for Separation): Court-Martial
- item 29 (Dates of Time Lost During this Period): 19690526-19690528 and 19690821-19710326

8. By regulation, the reason and authority for discharge will be entered by reference to the appropriate regulation, circular, bulletin, special separation directive, statute, etc., followed by the SPN and descriptive reason for transfer or discharge. The separation program designator (SPD) code is used to represent the reason for separation. SPD code 292 correlates to being discharged under AR 635-200 for court-martial (Other Than Desertion).

9. Also by regulation, a Soldier will be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial. The appellate review must be completed and the affirmed sentence ordered duly executed.

10. 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.

11. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under honorable conditions (General) discharge to honorable and a change to his narrative reason for separation. 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 1 November 1966; 2) The applicant served in the Republic of Vietnam from 20 October 1967-19 October 1968; 3) On 4 June 1969, the applicant accepted nonjudicial punishment for being AWOL from 26-29 May 1969; 4) General Court-Martial Order Number 37, dated 4 March 1971, shows the applicant was found guilty of being AWOL from 21 August 1969-8 December 1970; 5) The applicant was discharged on 29 September 1971, with an under conditions other than honorable characterization of service and issued a DD Form 259A Discharge Certificate; 6) The applicant again petitioned the ABCMR for an upgrade to his service characterization. The ABCMR considered his request on 10 December 2020 and recommended that all Department of the Army records of the applicant be corrected by amending the DD Form 214, for the period ending 29 September 1971, to show an under honorable conditions (General) characterization of service. His discharge was upgraded to a general discharge.

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 factors 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 service-connected PTSD (100% SC) since 1998.

e. 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 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 PTSD that contributed to his misconduct. He has been diagnosed and treated for service-connected PTSD since 1998 by the VA.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he was experiencing PTSD that contributed to his misconduct. He has been diagnosed and treated for service-connected PTSD since 1998 by the VA.

(3) Does the condition experience actually excuse or mitigate the discharge? Yes, there is sufficient evidence beyond self-report the applicant was experiencing PTSD while on active service. The applicant did go AWOL, which is avoidant behavior that can be a sequela to PTSD. The applicant did deploy to a combat zone, and his PTSD has been found to be related to his combat experiences. Therefore, it is recommended the applicant's discharge status be upgraded to a general under honorable conditions, and it is recommended the narrative reason for his separation be amended to Secretarial Authority.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, 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 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. One potential outcome was to deny relief based on the applicant's lengthy AWOL from 21 August 1969 to 6 December 1970, general discharge is appropriate. However, upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding sufficient evidence to support the applicant had condition or experience that mitigated his misconduct.

2. The opine noted 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 evidence the applicant has been diagnosed and treated for service-connected PTSD (100% SC) since 1998. However, the Board found sufficient evidence beyond self-report the applicant was experiencing PTSD while on active service. Although the applicant did go AWOL, he did deploy to a combat zone and there is sufficient evidence his combat experiences are related to his PTSD. Based on this, the Board granted relief to upgrade the applicant characterization of service to honorable and change his narrative reason to secretarial authority.

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.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

█	:	█	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	█	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by reissuing the applicant a DD Form 214 showing his characterization of service as honorable and the narrative reason as secretarial authority.

5/14/2024

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CHAIRPERSON

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:

A review of the applicant's records show he was awarded or authorized the following award not listed on his DD Form 214: Republic of Vietnam Gallantry Cross with Palm Unit Citation. As a result, amend his DD Form 214 to include the award.

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. 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. A member will be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial. The appellate review must be completed and the affirmed sentence ordered duly executed.

3. 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 post-traumatic stress disorder (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.

4. 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.

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

6. Department of the Army (DA) Pamphlet 672-3 (Unit Citation and Campaign Participation Credit Register) shows the applicant's unit (Company A, 326th Engineer Battalion, 101st Airborne Division (AmbI) was cited for award of the Republic of Vietnam Gallantry Cross with Palm Unit Citation, 1 March to 9 October 1971, DA General Order Number (DAGO) 6, dated 1974.

7. Section 1556 of Title 10, United States Code, 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//