

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 3 July 2024

DOCKET NUMBER: AR20230011604

APPLICANT REQUESTS: reconsideration of his prior request for an upgrade of his under other than honorable conditions discharge.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge)

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 AR20190006984 on 11 February 2020.
2. The applicant states he is requesting an upgrade of his under other than honorable conditions discharge. He further noted he was a Vietnam Veteran, and his health was declining. Specifically, the applicant cites post-traumatic stress disorder (PTSD) as a significant factor.
3. The applicant provides a DD Form 214, indicating he was discharged on 19 February 1971 from active duty with an under other than honorable conditions discharge "For the Good of the Service".
4. A review of the applicant's service record shows:
 - a. On 27 May 1968, he was inducted into the Army of the United States and subsequently, enlisted in the Regular Army on 31 May 1968, for a period of three years.
 - b. He served in Vietnam from 12 December 1968 to 11 December 1969.
 - c. He accepted nonjudicial punishment (NJP) on 25 April 1969, for one specification of failure to obey a lawful regulation by being observed wearing a fatigue shirt with no

display of rank on or about 18 April 1969. His punishment included reduction to the rank of private first class/E-3 (suspended).

d. He accepted NJP on 16 September 1969, for one specification of swimming in an unauthorized area and one specification of wrongfully leaving the limits of the Americal Combat Center without proper authority on or about 8 September 1969.

e. He accepted NJP on 15 November 1969, for one specification of being absent from his appointed place of duty on or about 14 November 1969. His punishment included reduction to the rank of private first class/E-3 (suspended).

f. On 28 July 1970, while absent without leave (AWOL), the applicant was apprehended by military authorities and charged with conspiracy to commit larceny, larceny, destruction of private property, and unlawfully carrying concealed weapons.

g. On 30 November 1970, court-martial charges were preferred against the applicant for:

- four specifications of absenting himself without authority for the below periods:
 - 21 May 1970 - 31 May 1970
 - 13 June 1970 - 28 July 1970
 - 6 November 1970 - 18 November 1970
 - 18 November 1970 - 30 November 1970
- one specification of conspiracy to commit larceny on or about 28 July 1970
- one specification of destruction of private property on or about 28 July 1970
- one specification of larceny on or about 28 July 1970
- one specification of unlawful carry of a concealed weapon on or about 28 July 1970
- one specification of escaping military police custody on or about 18 November 1970

h. The Transmittal of Court-Martial Charges dated 8 December 1970, indicates the immediate commander recommended the applicant be eliminated from service by a general court-martial. It also shows that the applicant was advised of his rights and declined to submit a request for discharge for the good of the service.

i. On 9 February 1971, the separation authority approved discharge for separation under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 10, Discharge for the Good of the Service. He was reduced to the lowest enlisted grade and issued an Undesirable Discharge Certificate.

j. The DD Form 214 shows he was discharged from active duty on 19 February 1971 with an under other than honorable conditions characterization of service under the provisions of AR 635-200, Chapter 10. The reason for separation listed "For the Good of the Service" with reentry code 3. He completed 2 years, 5 months, and 24 days of active service with 85 days of lost time. It also shows he was awarded or authorized two overseas bars.

5. A review of the applicant's record confirms he is eligible awards that are not recorded on his DD Form 214. The awards will be added to his DD Form 214 as administrative corrections and will not be considered by the Board.

6. On 30 January 2024, the applicant was notified by the Army Review Boards Agency that he was required to provide a copy of medical documentation to support his claim of fused bones. The applicant was provided 30 days to submit supporting documentation with a suspense of 30 March 2023 [sic]. The applicant has not provided a response to date.

7. The ABCMR rendered a decision in the following cases:

a. Docket Number AR20090016028 was reviewed on 17 February 2010, the Board concluded that the type of discharge and the reason for separation were appropriate based on the known facts. The Board determined that the overall merits of the case did not provide a sufficient basis for correcting the records of the individual concerned.

b. Docket Number AR20160006586 was reviewed on 8 February 2018, the Board concurred with the medical advisor who found the applicant's AWOLs, with the exception of the AWOL involved in his deliberate escape from custody, are mitigated. The larceny and being armed with a concealed weapon are not mitigated. The clinical psychologist found insufficient evidence of a medical disability or condition which would support a change to the character or reason for the applicant's discharge in the case. The Board denied the applicant's requested relief.

8. There is no evidence the applicant has applied to the Army Discharge Review Board for review of his discharge within that board's 15-year statute of limitations.

9. By regulation (AR 635-200), an individual who has committed an offense or offenses, the punishment for which, under the Uniform Code of Military Justice and the Manual for Courts-Martial, 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. If warranted, however, the discharge authority may direct an honorable or general discharge.

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 reconsideration of his prior requests for an upgrade of his under other than honorable conditions discharge. He contends he experienced PTSD that mitigates his misconduct. 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 was inducted into the Army of the United States and subsequently, enlisted in the Regular Army on 31 May 1968; 2) He served in Vietnam from 12 December 1968 to 11 December 1969; 3) On 30 November 1970, court-martial charges were preferred against the applicant for: A) four specifications of going AWOL between May-November 1970; B) one specification of conspiracy to commit larceny; C) one specification of destruction of private property; one specification of larceny; D) one specification of unlawful carrying of a concealed weapon; and E) one specification of escaping military police custody on 18 November; 4) The applicant was discharged on 19 February 1971, Chapter 10-"For the Good of the Service. His characterization of service was under other than honorable conditions. He completed 2 years, 5 months, and 24 days of active service with 85 days of lost time; 5) The applicant's requests for a discharge upgrade were reviewed and denied previously in 2010 and 2018.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's available military service records. The VA's Joint Legacy Viewer (JLV) was also examined.

c. The applicant asserts he was experiencing PTSD while on active service, which mitigates his misconduct. There is insufficient evidence the applicant reported or was diagnosed with a mental health disorder including PTSD while on active service.

d. A review of JLV provided evidence the applicant has been engaged with the VA for medical and behavioral health treatment since 2003. He has been awarded treatment for a few service-connected physical concerns and PTSD since 2021.

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

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant asserts he experienced PTSD which mitigates his

discharge. There is sufficient evidence the applicant has been diagnosed with service-connected PTSD in 2021.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced PTSD that mitigates his conduct while on active service. The applicant was diagnosed with service-connected PTSD by the VA in 2021.

(3) Does the condition experience actually excuse or mitigate the discharge? Partially, there is sufficient evidence beyond self-report the applicant has been diagnosed with service-connected PTSD by the VA in 2021. The applicant did engage in repeated AWOL behavior, which could be avoidant behavior and a natural sequelae to PTSD. However, there is not nexus between PTSD and the applicant's other misconduct of conspiracy to commit larceny, committing larceny, destruction of private property, unlawfully carrying a concealed weapon, and escaping military police custody on 18 November and the period of AWOL that followed in that: 1) these types 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 a 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:

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 the medical review, the Board concurred with the advising official finding sufficient evidence to support the applicant had a condition or experience that partially mitigates his misconduct. The opine noted, partially there is sufficient evidence beyond self-report the applicant has been diagnosed with service-connected PTSD by the VA in 2021

2. The Board determined the applicant provided no post service achievements or character letters of support for the Board to weigh a clemency determination. The Board agreed there is insufficient evidence of in-service mitigating factors to overcome the misconduct of committing larceny, destruction of private property, unlawfully carrying a concealed weapon. The applicant's repeated AWOL behavior, which could be avoidant behavior and a natural sequelae to PTSD does not outweigh the severity of his crimes. Furthermore, the Board determined there is not nexus between PTSD and the applicant's other misconduct of conspiracy to commit larceny and escaping military

police custody. Therefore, the Board found reversal of the previous Board determination is without merit and denied relief

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:

<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:

Except for the correction addressed in Administrative Note(s) below, the Board found 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 to amend the decision of the ABCMR set forth in Docket Number AR20190006984 on 11 February 2020.

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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.

ADMINISTRATIVE NOTE(S):

A review of the applicant's records shows he is authorized additional awards not listed on his DD Form 214 for the period ending 19 February 1971. As a result, amend his DD Form 214 to show the following:

- Expert Marksmanship Qualification Badge with Rifle Bar (M-14)
- Expert Marksmanship Qualification Badge with Rifle Bar (M-16)
- Army Commendation Medal

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, sets for the authority for separation of enlisted personnel and the criteria governing the issuance of Honorable, General, and Undesirable Discharge Certificates.

a. An honorable 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 or 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 of an individual whose military record is not sufficiently meritorious to warrant an honorable discharge. A general discharge may be issued if an individual has been convicted of an offense by general-court-martial or has been convicted by more than one special court-martial in the current enlistment period or obligated service or any extension thereof.

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

d. Chapter 10 of this regulation states an individual who has committed an offense or offenses, the punishment for which, under the Uniform Code of Military Justice and the Manual for Courts-Martial, 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. If warranted, however, the discharge authority may direct an honorable or general discharge.

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 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 based on 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. 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//