

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 11 June 2024

DOCKET NUMBER: AR20230011740

APPLICANT REQUESTS: in effect, clemency and a change to his bad conduct discharge (BCD) to a more favorable characterization.

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

- DD Form 149 (Application for Correction of Military Record), 7 August 2023
- DD Form 259A (BCD Certificate), 16 October 1972
- Department of Veterans Affairs (VA) benefits letter, undated

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states, in effect, someone changed his second discharge into a dishonorable discharge. He questions why this was. He served his country with pride and honor. No one at the time took into consideration that he recently returned from combat in Vietnam. Post-Traumatic Stress Disorder (PTSD) was not discussed at that time. He accepted his punishment and at the advice of his attorney, he accepted a pre-trial agreement.
3. The applicant provided a copy of a VA disability benefits letter showing he was receiving a disability benefits rating of 60 percent (%) for his first period of honorable service.
4. A review of the applicant's available service records shows:
 - a. On 23 May 1968, he enlisted in the Regular Army (RA) for a period of 3 years.
 - b. His records are void a DD Form 214 showing his honorable service for this first period of active duty. However, he was issued a Certification of Service for this period.

c. An NA Form 13038 (Certification of Military Service) subsequently issued to him from the National Archives, shows he was honorably discharged from the Regular Army for his service from 23 May 1968 to 10 September 1970, in grade/rank of sergeant (SGT)/E-5.

d. On 11 September 1970, he reenlisted in the RA for a period of 4 years beginning at grade/pay grade SGT/E-5 and in the military occupational specialty 95B (Military Policeman).

e. The findings of a U.S. Army Criminal Investigation Division, Report of Investigation, a DA Form 458 (Charge Sheet) showing the charges and specifications referred against the applicant; a notification of rights memorandum; his election of rights memorandum; his chain of command approval memoranda, in connection with a special court-martial; the subsequent transcription of the record of trial; and general courts-martial orders showing the findings, sentence, and date adjudged by the court, are not contained in the available records.

f. A DA Form 2599 (Notice of Change-Prisoners), issued by the U.S. Disciplinary Barracks, Fort Leavenworth, shows on 1 May 1972, he was adjudged prisoner status as the result of the issuance of General Court Martial Order (GCMO) Number 8, dated 22 June 1972. The date the sentence was adjudged was 25 April 1972 and the sentence duration was 9 months.

g. A memorandum issued by the Staff Judge Advocate (SJA), Headquarters (HQ), U.S. Army Korea Support Command (USAKORSCOM), subject: Review of the Staff Judge Advocate, dated 22 June 1972, to the Commanding General, USAKORSCOM, showing:

(1) The SJA reviewed the record of trial by general court-martial convened in Seoul, Korea; the sentence of the court, provided a summary of the evidence, and wrote an opinion as to the general courts-martial.

(2) The accused was informed of his right to be tried by a court of members or by a military judge alone and the differences in the legal procedures that would result. The accused elected to be tried by a court of members.

(3) The sentence adjudged by the court was a BCD, 1 year of confinement, and total forfeiture of pay and allowances.

(4) The charges consisted of:

(a) Charge I, Article 95, of the UCMJ, Specification: resisting apprehension by an armed forces policemen in the execution of his military police duties; plea: not guilty; finding: withdrawn by CA prior to findings.

(b) Charge II, Article 128, UCMJ, Specification 1: assaulting a military policeman in the execution of his duties by kicking him in the face; pleas: NG, but guilty of assault and battery; findings: amended by CA prior to findings to conform to plea; guilty of assault and battery.

(c) Charge II, Article 128, UCMJ, Specification 2; assaulting a military policeman in the execution of his duties by kicking and striking him; pleas, NG, but guilty of assault and battery; findings: amended by CA prior to findings to conform to plea; guilty of assault and battery.

(d) Charge III, Article 80, UCMJ, Specification, attempt to murder 1st Sergeant JWA____, by shooting him with a .45 caliber pistol; pleas: NG, but guilty of assault with a dangerous weapon; findings: amended by CA prior to findings to conform to plea; guilty of assault with a dangerous weapon.

(e) Charge IV, Article 134, UCMJ, Specification; communicating a threat to kill Sergeant First Class JFF____, pleas: NG; findings: withdrawn by CA prior to findings.

(f) Charge V, Article 121, UCMJ, Specification; wrongfully appropriate an M151 Jeep of a value of about \$3000.00; pleas: G; Findings: G.

(g) Charge V, Article 121, UCMJ, Specification; wrongfully appropriate two .45 caliber pistols of a value of about \$100.00; pleas: G; Findings: G.

h. On 8 August 1972, the United States Army Court of Military Review having found the approved findings of guilty and sentence correct, and having determined on the basis of the entire record that they should be approved, such findings of guilty and the sentence of the court were affirmed.

i. His DA Form 20 (Enlisted Personnel Record) shows he:

- competed foreign service in Vietnam, 11 November 1968 to 10 November 1969
- completed foreign service in Korea from 18 January 1970 to an unspecified date
- was confined at U.S. Disciplinary Barracks, Fort Leavenworth beginning on 1 May 1972
- was awarded or authorized: National Defense Service Medal, Vietnam Service Medal, Republic of Vietnam Campaign Medal with Device (1960),

Combat Infantryman Badge, Bronze Star Medal, Armed Forces Expeditionary Medal (AFEM)-Korea

j. On 16 October 1972, he was discharged. His DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows in:

- item 5a (Grade, Rate, or Rank) – private (P)/E-1
- item 11c (Reason and Authority) – Army Regulation 635-200, paragraph 11-1b, separation program number 292;
- item 13a (Character of Service) – under conditions other than honorable;
- item 15 (Reenlistment Code) – RE-4;
- item 22a(1) (Net Service this Period) – 1 year, 4 months, and 8 days;
- item 22a(2) (Other Service) – 2 years, 3 months, and 18 days;
- item 22a(3) (Total) – 3 years, 7 months, and 26 days;
- item 24 (Decorations, Medals, Badges, Commendations, Citations, and Campaign Ribbons Awarded or Authorized – AFEM-Korea; and
- item 26a (Non-pay Periods Time Lost) – 272 days lost under Title 10, U.S.C., 972 from 19 January 1972 through 16 October 1972.

5. On 7 December 2023, the Director, Case Management Division, requested the applicant provide medical documents in support of his issue for PTSD.

6. On the same date, the applicant responded by email, which reads, in effect, he was not applying for PTSD compensation but was requesting an upgrade of his discharge. He further stated his medical documents were filed at the Altoona VA and he provided no additional information with his response.

7. 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.

8. MEDICAL REVIEW:

a. Background: The applicant is requesting an upgrade of his bad conduct discharge (BCD) to a more favorable characterization. He contends PTSD mitigates his discharge.

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 23 May 1968 and reenlisted on 11 September 1970.
- Applicant completed foreign service in Vietnam from 11 November 1968 to 10 November 1969.

- A DA Form 2599 (Notice of Change-Prisoners), issued by the U.S. Disciplinary Barracks, Fort Leavenworth, shows on 1 May 1972, he was adjudged prisoner status as the result of the issuance of General Court Martial Order (GCMO) Number 8, dated 22 June 1972. The date the sentence was adjudged was 25 April 1972 and the sentence duration was 9 months.
- A memorandum issued by the Staff Judge Advocate (SJA), Headquarters (HQ), U.S. Army Korea Support Command (USAKORSCOM), subject: Review of the Staff Judge Advocate, dated 22 June 1972, to the Commanding General, USAKORSCOM, showing charges consisted of:
 - (a) Charge I, Article 95, of the UCMJ, Specification: resisting apprehension by an armed forces policemen in the execution of his military police duties; plea: not guilty; finding: withdrawn by CA prior to findings.
 - (b) Charge II, Article 128, UCMJ, Specification 1: assaulting a military policeman in the execution of his duties by kicking him in the face; pleas: NG, but guilty of assault and battery; findings: amended by CA prior to findings to conform to plea; guilty of assault and battery.
 - (c) Charge II, Article 128, UCMJ, Specification 2; assaulting a military policeman in the execution of his duties by kicking and striking him; pleas, NG, but guilty of assault and battery; findings: amended by CA prior to findings to conform to plea; guilty of assault and battery.
 - (d) Charge III, Article 80, UCMJ, Specification, attempt to murder 1st Sergeant JWA___, by shooting him with a .45 caliber pistol; pleas: NG, but guilty of assault with a dangerous weapon; findings: amended by CA prior to findings to conform to plea; guilty of assault with a dangerous weapon.
 - (e) Charge IV, Article 134, UCMJ, Specification; communicating a threat to kill Sergeant First Class JFF___, pleas: NG; findings: withdrawn by CA prior to findings.
 - (f) Charge V, Article 121, UCMJ, Specification; wrongfully appropriate an M151 Jeep of a value of about \$3000.00; pleas: G; Findings: G.
 - (g) Charge V, Article 121, UCMJ, Specification; wrongfully appropriate two .45 caliber pistols of a value of about \$100.00; pleas: G; Findings: G.
- On 8 August 1972, the United States Army Court of Military Review having found the approved findings of guilty and sentence correct, and having determined on the basis of the entire record that they should be approved, such findings of guilty and the sentence of the court were affirmed.
- Applicant was discharged 16 October 1972 with a bad conduct discharge under the provisions of Army Regulation 635-200, paragraph 11-1b, separation program number 292 and reenlistment code 4.

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 states that someone changed his second discharge into a dishonorable discharge. He questions why this was. He served his country with pride and honor. No one at the time took into consideration that he recently returned from combat in Vietnam. Post-Traumatic Stress Disorder (PTSD) was not discussed at that time. He accepted his punishment and at the advice of his attorney, he accepted a pre-trial agreement. Due to the period of service, no active-duty electronic medical records were available for review. Hardcopy documentation shows a Current Data for Restoration, Clemency and Parole Review form which indicates the applicant had no significant mental health issues and there was no indication of any psychiatric diagnosis that would provide a basis for clemency. His profile was listed as 111111. He was described as having an: "explosive personality, manifested by extreme structure and rigidity alternating with episodic explosiveness and assaultiveness, and complicated by impulsivity, lack of insight, and poor judgment".

d. The VA's Joint Legacy Viewer (JLV) was reviewed and indicates the applicant is 50% service connected for PTSD. The applicant initially sought BH services via the VA in October 2007. He participated briefly in five sessions, with a clinical social worker, but reportedly opted not to follow-up due to difficulty meeting the copay (\$50). There is no evidence of any further BH services. However, in December 2023, he self-referred and participated in a screening session, where he reported his PTSD symptoms were triggered and he was experiencing disruptive dreams. The applicant did not follow-up with any further services.

e. Two Compensation and Pension Examinations are present in the applicant's VA electronic medical record, one dated 26 July 2008 and the other 21 April 2009. Both examinations diagnosed the applicant with Posttraumatic Stress Disorder (PTSD) and serve as the basis for his service connection.

f. Based on the information available, it is the opinion of the Agency Behavioral Health Advisor that there is sufficient evidence to support the applicant had an experience and subsequent behavioral health condition during military service. However, his BH condition of PTSD does not mitigate his discharge.

g. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts a mitigating condition, PTSD.

(2) Did the condition exist or experience occur during military service? Yes. The record indicates the applicant was deployed to Vietnam from 11 November 1968 to 10 November 1969. PTSD is documented in his VA treatment record as well as in two Compensation and Pension Examinations.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant was court-martialed for assaulting a military policeman in the execution of his duties by kicking him in the face and then assaulting a second military policeman in the execution of his duties by kicking and striking him, charged as assault and battery; attempt to murder 1st Sergeant JWA____, by shooting him with a .45 caliber pistol, charged as assault with a dangerous weapon; wrongfully appropriate an MP M151 Jeep of a value of about \$3000.00; and wrongfully appropriate two .45 caliber pistols of a value of about \$100.00. Although he is diagnosed with PTSD, this BH condition would not mitigate his discharge. Assault, attempted murder, and theft are not part of the natural history or sequelae of PTSD, or any other behavioral health condition, as such, his BH condition would not mitigate his discharge under Liberal Consideration. In addition, PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right.

BOARD DISCUSSION:

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 request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests.

a. The applicant's trial by a court-martial was warranted by the gravity of the offenses charged (resisting apprehension by an armed forces policemen, assault and battery, assault with a dangerous weapon, and wrongful appropriation of a Jeep and two .45 caliber pistols). His conviction and discharge were conducted in accordance with applicable laws and regulations and the discharge appropriately characterizes the misconduct for which he was convicted. He was given a bad conduct discharge pursuant to an approved sentence of a court-martial. The appellate review was completed, and the affirmed sentence was ordered duly executed. All requirements of law and regulation were met with respect to the conduct of the court-martial and the appellate review process, and the rights of the applicant were fully protected. The Board found no error or injustice in the separation processing.

b. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewing official. The Board concurred with the medical official's finding sufficient evidence to support the applicant had an experience and subsequent behavioral health condition during military service. However, his behavioral health (BH) condition does not mitigate his discharge. Assault, attempted murder, and theft are not part of the natural history or sequelae of PTSD, or any other behavioral health condition, as such, his BH condition would not mitigate his discharge under Liberal Consideration. In addition, PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right. Also, the applicant provided evidence of post-service achievements or letters of reference in support of a clemency determination; however, the Board determined such evidence did not outweigh his serious misconduct. Therefore, the 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.

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.

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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. 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 15-185 (Army Board for Correction of Military Records) 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 the principle that government officials properly discharged their official duties unless there is evidence showing otherwise. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

2. By law (10 USC 1552), court-martial convictions stand as adjudged or modified by appeal through the judicial process. This Board is not empowered to set aside a conviction. Rather, it 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. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed. The ABCMR does not have authority to set aside a conviction by a court-martial.

3. Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, set policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons.

a. Chapter 1-9 provided:

(1) An honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier'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. Only the honorable characterization may be awarded a member upon completion of his/her period of enlistment or period for which called or ordered to active duty or active duty training or where required under specific reasons for separation unless an entry level status separation (uncharacterized) is warranted.

(2) 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. A characterization of under honorable conditions may be issued only when the reason for separation specifically allows such characterization. It will not be issued to Soldiers solely upon separation at expiration of their period of enlistment, military service obligation, or period for which called or ordered to active duty.

b. Chapter 11, paragraph 11-2, provided that an enlisted person will be given a bad conduct discharge pursuant only to an approved sentence of a general or special courts-martial, after completion of appellate review and after such affirmed sentence has been ordered duly executed.

4. Army Regulation 635-5 (Separation Documents), then in effect, prescribed the separation documents that would be furnished each individual who was separated from the Army, including Active Duty Training (ACDUTRA) personnel, and established standardized procedures for the preparation and distribution of these documents.

a. A DD Form 214 will be issued at the time of separation to each member of the Regular Army and to each member of the Reserve Components, and the Army of the United States without component, called or ordered to active duty for ACDUTRA for a period of 90 days or more.

b. Appendix A. Separation Program Number and Authority Governing Separation.

(1) The separation program number "292" corresponded to the authority, Army Regulation 635-200, chapter 11, and the narrative reason "Other than desertion (Court-Martial)."

(2) The separation program number "290" corresponded to the authority Army Regulation 635-200, chapter 11, and the narrative reason "Desertion (Court-Martial)."

5. 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.

6. The acting Under Secretary of Defense for Personnel and Readiness provided clarifying guidance on 25 August 2017, which expanded the 2014 Secretary of Defense

memorandum, that directed the BCM/NRs and DRBs to give liberal consideration to veterans looking to upgrade their less-than-honorable discharges by expanding review of discharges involving diagnosed, undiagnosed, or misdiagnosed mental health conditions, including PTSD; traumatic brain injury; or who reported sexual assault or sexual harassment.

7. 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.

8. 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//