

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 June 2024

DOCKET NUMBER: AR20230012907

APPLICANT REQUESTS: reconsideration of his previous requests for an upgrade of his under other than honorable conditions (UOTHC) character of service.

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge), for the period 6 February 1972
- Statement of support, undated

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous considerations of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Numbers AC91-10446 on 22 April 1992 and AR20170006378 on 8 July 2019.
2. The applicant states, in effect, he would like an upgrade of his characterization of service so he can apply for full health benefits. The applicant notes post-traumatic stress disorder (PTSD) as a condition related to his request.
3. The applicant enlisted in the Regular Army on 29 October 1970 for a 3-year period. Upon completion of initial entry training, he was awarded military occupational specialty 76P (Stock Control and Accounting Specialist). The highest rank he attained was private first class/E-3.
4. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ), on 17 March 1971, for being disorderly in the day room, on or about 14 March 1971. His punishment consisted of forfeiture of \$25.00 pay for one month.

5. The applicant served in the Republic of Vietnam from 12 July 1971 to 14 January 1972.

6. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the UCMJ on two additional occasions:

a. On 8 September 1971, for disrespect towards a noncommissioned officer, on or about 7 September 1971, and for being drunk and disorderly, on or about 9 September 1971. His punishment consisted of reduction to private/E-2 and forfeiture of \$40.00 pay.

b. On 14 November 1971, for absenting himself from his prescribed place of duty and failure to obey a lawful order from his officer in charge, on or about 11 November 1981. His punishment consisted of reduction to private/E-1 and forfeiture of a portion of his pay for one month.

7. The applicant's record is void of a separation packet containing the specific facts and circumstances surrounding his discharge processing. However, his DD Form 214 shows he was discharged on 6 February 1972, under the provisions of Army Regulation (AR) 635-212 (Personnel Separations - Discharge Unfitness and Unsuitability), paragraph 6a(1), by reason of unfitness. His service was characterized as UOTHC. He was credited with 1 year, 1 month, and 8 days of net active service, with 30 days of lost time from 7 January 1972 to 6 February 1972.

8. The ABCMR reviewed the applicant's request for an upgrade of his undesirable discharge on 22 April 1992. After careful consideration, the Board determined the applicant did not present sufficient justification to conclude it would be in the best interest of justice to grant relief or excuse the failure to file within the time prescribed.

9. The ABCMR reconsidered the applicant's request for an upgrade of his undesirable discharge on 8 July 2019. After careful consideration, the Board determined that due to the relatively short term of honorable service completed prior to a pattern of misconduct, the characterization of service received at the time of discharge was appropriate. The Board denied his request for relief.

10. The applicant provides an undated statement of support from the individual who assisted him in preparing his application. The individual states, as a prior marine, he believes the punishment outweighs the "crime." An upgrade to at least under honorable conditions (general) would allow the applicant to receive full health benefits from the Department of Veterans Affairs.

11. Regulatory guidance in effect at the time stated that individuals would be discharged by reason of unfitness when their records were characterized by one or more of the following: frequent incidents of a discreditable nature with civil or military

authorities, sexual perversion, drug addiction, an established pattern of shirking, and/or an established pattern showing dishonorable failure to pay just debts. An undesirable discharge was normally issued.

12. The Board should consider the applicant's statement in accordance with the published equity, injustice, or clemency determination guidance.

13. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting reconsideration 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 29 October 1970.
- The applicant received NJP for being disorderly in the day room on 14 March 1971. He deployed to Vietnam from 12 July 1971 to 14 January 1972. In September 1971 he received two additional NJPs for disrespect toward an NCO and being drunk and disorderly, and in November 1971 for absenting himself from his prescribed place of duty and failure to obey a lawful order.
- The applicant's record is void of a separation packet containing the specific facts and circumstances surrounding his discharge processing. However, his DD Form 214 shows he was discharged on 6 February 1972, under the provisions of Army Regulation (AR) 635-212, paragraph 6a(1), by reason of unfitness. He was credited with 1 year, 1 month, and 8 days of net active service.

c. Review of Available Records: The Army Review Boards Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts he needs health benefits, and he checked the box indicating PTSD as a condition related to his request. No medical or mental health records were provided. There was insufficient evidence that the applicant was diagnosed with PTSD or another psychiatric condition while on active service.

d. The VA's Joint Legacy Viewer (JLV) was also reviewed and showed no history of mental health related treatment or diagnoses.

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.

f. 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 at the time of the misconduct. There were no medical or mental health records provided by the applicant and no documentation of a mental health history was found in JLV.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing PTSD while on active service.

(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.

g. There is insufficient evidence, beyond self-report, that the applicant was experiencing PTSD while on active service, and there are no medical or mental health records indicating a mental health diagnosis since his discharge. However, the applicant contends he was experiencing PTSD, and per Liberal Consideration his assertion is sufficient for the board's consideration.

BOARD DISCUSSION:

1. The Board carefully considered the applicant's request, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement, his record of service to include deployment, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the applicant's PTSD claim and the review and conclusions of the ARBA Behavioral Health Advisor. The applicant provided no evidence of post-service achievements or letters of reference in support of a clemency determination. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding his misconduct not being mitigated by PTSD. Based on a preponderance of the evidence, a majority of the Board determined the character of service the applicant received upon separation was not in error or unjust.

2. The member in the minority found the character of service the applicant received to be too harsh when considered against the misconduct documented in his record. The member in the minority determined the applicant's character of service should be changed to under honorable conditions (general).

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 that the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Numbers AC91-10446 on 22 April 1992 and AR20170006378 on 8 July 2019.

12/19/2024

X

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.

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 the 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 ABCMR applicants (and/or their counsel) prior to adjudication.

2. AR 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation provides that the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

3. AR 635-200 (Personnel Separations – Enlisted Personnel), then in effect, provided the criteria governing the issuance of honorable, general, and undesirable discharge certificates.

a. Paragraph 1-9d provided that an honorable discharge was a separation with honor and entitled the recipient to benefits provided by law. The honorable characterization was appropriate when the quality of the member's service generally had met the standards of acceptable conduct and performance of duty for Army personnel or was otherwise so meritorious that any other characterization would be clearly inappropriate.

b. Paragraph 1-9e provided that a general discharge was a separation from the Army under honorable conditions. When authorized, it was issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

4. AR 635-212, then in effect, provided the policy and procedures for administrative separation of enlisted personnel for unfitness and unsuitability. It provided that individuals would be discharged by reason of unfitness when their records were characterized by one or more of the following: frequent incidents of a discreditable nature with civil or military authorities, sexual perversion, drug addiction, an established pattern of shirking, and/or an established pattern showing dishonorable failure to pay just debts. This regulation also prescribed that an undesirable discharge was normally issued.

5. 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 Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) 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 to 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.

6. 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//