

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 June 2024

DOCKET NUMBER: AR20230012989

APPLICANT REQUESTS: his under other than honorable conditions (UOTHC) discharge be upgraded.

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Statement
- DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge)
- Department of Veterans Affairs (DVA), Statement in Support of Claim
- DVA Letter
- Army Review Boards Agency (ARBA) Email

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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:

a. When he came back from the war he experienced traumatic events that he was dealing with mentally. His stepfather was leaving his mother, she was only a housewife, so he had to decide to either continue to protect his Country or to protect his family. He was the next man of the household, he had to use some of his training to provide and shelter his family. He came home and took odd jobs and factory work to get back to a functional household during the recession. It was considered absent without leave (AWOL) but he took it as being a 22-year-old man with no choice. He had to become the sole provider for his mother, brother, and sister. He served three years and received the Bronze Star Medal for meritorious service and the Army Commendation Medal for distinguished meritorious achievements. If he wasn't alarmed by family matters, he would have continued to serve his Country. Post traumatic stress disorder (PTSD) is related to his request.

b. In his Statement in Support of Claim, dated 11 April 2011, he states he served in Vietnam and injured his left leg there. He twisted his left knee when the enemy was firing mortar rounds all around them. He was treated and given surgery while in Vietnam. He has bilateral hearing loss and tinnitus from loud ammunition and mortar noise while serving in Vietnam. He was hit in the left eye by an explosion in Vietnam. Over the years his condition has gotten worse, and he has had surgery. He currently has an artificial lens in his left eye. He went AWOL to financially help his mother and siblings have food and to prevent them from being homeless.

3. The applicant enlisted the Regular Army on 26 December 1967 for 3 years. His military occupational specialty was 64A (Light Vehicle Driver).

4. He served in Vietnam from 3 June 1968 through 2 June 1969.

5. The applicant accepted nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ) on 20 February 1968 for going out of the authorized week-end pass mileage limitation, on or about 19 February 1968. His punishment consisted of forfeiture of \$15.00, restriction and extra duty.

6. The applicant was AWOL on 29 October 1969 from U.S. Army Lyster Hospital, Fort Rucker, AL, and dropped from the rolls as a deserter on 27 November 1969.

7. The Commanding Officer's AWOL Inquiry, dated 16 December 1969, shows the applicant was not known to be having any domestic or personal problems. There was no evidence of indebtedness or trouble with superiors. There was no indication of foul play or mental instability.

8. The Waiver of Rights to Counsel, dated 26 May 1970, shows the applicant did not want to consult with a lawyer and did not want to answer questions and make a statement.

9. Court martial charges were preferred against the applicant on 1 June 1970. His DD Form 458 (Charge Sheet) shows he was charged with AWOL from on or about 20 October 1969 until 20 May 1970.

10. The applicant consulted with legal counsel and was advised of the basis for the contemplated trial by court-martial; the maximum permissible punishment authorized under the UCMJ; the possible effects of a UOTHC discharge and the procedures and rights that were available to him.

a. After consulting with legal counsel, he voluntarily requested discharge under the provision of Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Personnel), Chapter 10, in for the good of the service, lieu of trial by court-martial. He

further acknowledged he understood that if his discharge request was approved, he could be deprived of many or all Army benefits, he could be ineligible for many or all benefits administered by the Veterans Administration, and he could be deprived of his rights and benefits as a veteran under both Federal and State laws and he may expect to encounter substantial prejudice in civilian life because of a dishonorable discharge.

b. He elected not to submit statements in his own behalf.

11. The separation authority's approval memorandum is not available for review.

12. The applicant was discharged on 12 June 1970. His DD Form 214 shows he was discharged under the provisions of AR 635-200, Chapter 10, for the good of the service with Separation Program Number 246 and Reenlistment Code 3B. His service was characterized as UOTHC. He completed 1 year, 10 months, and 10 days of net active service this period. He had lost time of 218 days. His awards include the National Defense Service Medal, Republic of Vietnam Campaign Medal with 1960 device, and Vietnam Service Medal.

13. The applicant was charged due to the commission of an offense punishable under the UCMJ with a punitive discharge. Such discharges are voluntary requests for discharge in lieu of trial by court-martial.

14. The applicant provides a copy of his DD Form 214 as discussed above and DVA letter, dated 24 April 2023, which states as long as his service was not considered dishonorable he would be eligible for VA benefits.

15. A review of the applicant's record and governing regulations show he meets the regulatory criteria for additional awards not currently listed on his DD Form 214 (see Administrative Notes).

16. In reaching its determination, the Board can consider the applicant's petition and service record in accordance with the published equity, injustice, or clemency determination guidance.

17. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions (UOTHC) 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 enlisted in the Regular Army on 26 December 1967; 2) The applicant deployed to Vietnam from 3 June 1968- 2 June 1969; 3) Court martial charges were preferred against the applicant on 1 June 1970 for being AWOL from 20 October

1969-20 May 1970; 4) The applicant was discharged on 12 June 1970, Chapter 10, for the good of the service. His service was characterized as UOTHC. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) and VA documentation provided by the applicant were also examined.

b. The applicant asserts he was experiencing PTSD while on active service, which mitigates his misconduct. He also reported going AWOL to address his family's needs at that time. 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 passed away on 13 September 2023. He began to engage with the VA for assistance with alcohol dependence and substance abuse in 2011. He had also been provided support for homelessness and treatment for physical concerns. The applicant was diagnosed with Major Depression in 2017 predominately related to stressors in his current situation, but he was reported to have experienced difficulties and hardships starting in childhood. He had not been diagnosed with any service-connected mental health condition including PTSD. He was not awarded any service-connected disability.

c. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient 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 that mitigates his misconduct. There is evidence the applicant has been diagnosed by the VA in 2017 with Major Depression related to current stressors.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced PTSD that mitigates his misconduct while on active service.

(3) Does the condition experience actually excuse or mitigate the discharge? No, there is insufficient evidence beyond self-report the applicant was experiencing PTSD while on active service. The applicant did go AWOL while on active service following his deployment. Going AWOL can be avoidant behavior, which is a natural sequelae to PTSD, but the presence of misconduct is not sufficient evidence of the presence of a mental health condition. However, the applicant contends he was experiencing a mental health condition that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

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 was charged with commission of an offense (AWOL) punishable under the UCMJ with a punitive discharge. After being charged, he consulted with counsel and requested discharge under the provisions of AR 635-200, Chapter 10. Such discharges are voluntary requests for discharge in lieu of trial by court-martial and carry an under other than honorable conditions discharge. The Board found no error or injustice in his separation processing.

b. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the advising official. The Board concurred with the medical official's finding insufficient evidence beyond self-report the applicant was experiencing PTSD while on active service. The applicant did go AWOL while on active service following his deployment. Going AWOL can be avoidant behavior, which is a natural sequelae to PTSD, but the presence of misconduct is not sufficient evidence of the presence of a mental health condition. Also, the applicant provided no evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination. 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:

<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:

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.



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 record and Army regulations show he meets the regulatory guidance for additional awards not currently listed on his DD Form 214; for the period ending 12 June 1970. As a result, amend the DD Form 214 by deleting the Vietnam Service Medal and adding the:

- Bronze Star Medal
- Vietnam Service Medal with three bronze service stars
- Republic of Vietnam Gallantry Cross with Palm Unit Citation

General Orders Number 6152, issued by Headquarters 101st Airborne Division on 2 June 1969, awarded the applicant the Bronze Star Medal for meritorious service in the Republic of Vietnam from 1 August 1968 to 31 March 1969.

A bronze service star is authorized with the Vietnam Service Medal for each Vietnam campaign a member is credited with participating in. Appendix B of this regulation shows that during his service in Vietnam, he participated in the following four campaigns:

- Vietnam Counteroffensive Phase IV (2 April - 30 June 1968)
- Vietnamese Counteroffensive Phase V (1 July - 1 November 1968)
- Vietnamese Counteroffensive Phase VI (2 November 1968 – 22 February 1969)

Department of the Army General Orders Number 8, dated 1974, announced award of the Republic of Vietnam Gallantry Cross with Palm Unit Citation to Headquarters, U.S. Military Assistance Command and its subordinate units for service during the period 8 February 1962 to 28 March 1973 and to Headquarters, U.S. Army Vietnam and its subordinate units for service during the period 20 July 1965 to 28 March 1973.

REFERENCES:

1. Title 10, USC, 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. Title 10, USC, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.
3. 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. Chapter 10 provided that a member who had committed an offense or offenses, for which the authorized punishment included a punitive discharge, could submit a request for discharge for the good of the service in lieu of trial by court-martial. The request could be submitted at any time after charges had been preferred and must have included the individual's admission of guilt. Although an honorable or general discharge was authorized, a UOTHC discharge was normally considered appropriate. When a Soldier is to be discharged UOTHC, the separation authority will direct an immediate reduction to private E-1, in accordance with governing regulation.

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 Discharge Review Boards (DRB) and Service 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.

5. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service DRBs and BCM/NRs on 25 July 2018, 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 court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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//