

IN THE CASE OF: [REDACTED]

BOARD DATE: 3 October 2024

DOCKET NUMBER: AR20230013164

APPLICANT REQUESTS: an upgrade of his characterization of service and an in-person appearance before the Board.

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

- DD Form 149 (Application for Correction of Military Record)
- Personal Statement, 18 August 2023

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:

a. He enlisted in the Army in May 1966 at the age of 17. He was not a high school graduate and he had little to no formal social training. He enlisted to serve in the Vietnam War. His father and all his older brothers were veterans. He was a proud American and wanted to serve his country. He was told that he could not go to Vietnam until he turned 18 years of age. Five months later, after finishing basic training at Fort Jackson, SC and arriving at his first duty assignment at Fort Wainwright, AK he was 18 and he began filing "1049s" to go to Vietnam.

b. He was told that he could not go to Vietnam because his brother was already serving there. When his brother rotated back stateside, the applicant's "1049s" were ignored. He became depressed and turned to drugs and alcohol. His depression led to alcohol dependence, for which he was never treated. His condition was ignored by his superiors, and he was not offered or encouraged to take substance abuse counseling. His condition worsened to the point he was absent from guard duty one Sunday morning, and he was found drunk in the barracks. He was put in jail and held for court-martial. He was not offered or provided legal counsel. He was found guilty, served his

sentence, and was given a bad conduct discharge by the rules of the Uniform Code of Military Justice (UCMJ), that was not just or justice. He feels that he could have completed his enlistment and received an honorable discharge if he had proper substance abuse counseling and proper treatment. The bad conduct discharge was unwarranted, and in his opinion undeserved.

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

a. He enlisted in the Regular Army on 6 May 1966. The highest grade he held was specialist (SPC)/E-4.

b. On 20 January 1967, he accepted nonjudicial punishment (NJP) under the provisions of Article 15, UCMJ, for on or about 19 January 1967, failing to go at the time prescribed to his appointed place of duty, to wit: on duty high school preparatory class, Fort Wainwright Army Education Center. His punishment included reduction to private (PV2)/E-2, 14 days extra duty (2 hours per day), and restriction to the company area for 14 days.

c. On 8 February 1967, he accepted NJP under the provisions of Article 15, UCMJ for sleeping on his post while being posted as a sentinel around the maintenance area. His punishment included reduction to the grade of PVT/E-1, restriction to the unit for 14 days, and 14 days of extra duty.

d. On 16 November 1967, he accepted NJP under summarized Article 15, UCMJ, for without proper authority, absenting himself from his organization from on or about 14 November 1967 to on or about 16 November 1967. His punishment included restriction to the company area for 14 days and 14 days of extra duty.

e. On 12 February 1968, he accepted NJP under the provisions of Article 15, UCMJ, for failing to go at the time prescribed to his appointed place of duty, to wit: the mess hall for kitchen police duty. His punishment included reduction to private first class (PFC)/E-3, 14 days extra duty, restriction to the company area for 14 days, and forfeiture of \$21.00 for one month.

f. Special Court-Martial Order Number 1352, issued by Headquarters, U.S. Army Engineer Center Brigade, Fort Belvoir, VA on 23 December 1968 shows the applicant was found guilty on 17 December 1968 of without authority absenting himself from his unit from on or about 14 May 1968 to on or about 17 November 1968. The court sentenced him to be reduced to the grade of PVT/E-1, forfeiture of \$25.00 per month for six months, and to be confined at hard labor for six months.

g. Special Court-Martial Order Number 129, issued by the Army Correctional Training Facility, Fort Riley, KS on 18 February 1969 shows all the unexecuted portions

of the sentence to forfeiture of pay for the applicant was suspended until 3 April 1969, at which time, unless sooner vacated, the suspended portion of the sentence would be remitted without further action.

h. Special Court-Martial Order Number 247, issued by the U.S. Army Correctional Training Facility, Fort Riley, KS on 27 March 1969, shows effective 3 April 1969, all unexecuted portions of the applicant's sentence to confinement at hard labor and forfeiture of pay, were remitted.

i. Commanding Officer's Inquiry, dated 26 February 1970, shows the applicant's commander made a statement that the applicant was assigned to the Replacement Company, Fort Dix, NJ from Fort Riley, KS, and he went absent without leave (AWOL) effective 9 April 1969, and was subsequently dropped from the rolls (DFR) on 13 May 1969.

j. Special Orders Number 109, issued by Headquarters, U.S. Army Engineer Center and Fort Belvoir, dated 14 May 1970 show the applicant was returned to military control from an AWOL status, having been DFR of his organization, and was assigned to the Post Stockade.

k. Special Court-Martial Order Number 60, issued by Headquarters, U.S. Army Engineer Center and Fort Belvoir, Fort Belvoir, VA on 23 July 1970 shows the applicant was found guilty on 25 June 1970 of going AWOL from on or about 9 April 1969 to on or about 30 April 1970. The court sentenced the applicant to be confined at hard labor for two months, reduced to the grade of PVT/E-1, and to be discharged from the service with a bad conduct discharge. The convening authority approved the sentence, and the record of trial was forwarded to the Judge Advocate General of the Army for appellate review.

l. On 7 October 1970, the U.S. Army Court of Military Review found the findings of guilty, and sentence as approved by proper authority 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 sentence were affirmed.

m. On 23 October 1970, the applicant received a copy of the decision of the U.S. Army Court of Military Review and was fully advised and consulted with counsel as to his rights to petition the U.S. Court of Military Appeals for a grant of review with respect to any matters of law within 30 days.

n. Special Court-Martial Order Number 87, issued by Headquarters, U.S. Army Engineer Center and Fort Belvoir, Fort Belvoir, VA on 23 October 1970, shows the sentence to be reduced to the grade of PVT/E-1, confinement to hard labor for two months, and to be discharged from the service with a bad conduct discharge, was

affirmed pursuant to Article 66. The provisions of Article 71c had been complied with and the sentence would be duly executed. The portion of the sentence which provided for confinement at hard labor for two months had been served.

o. The applicant was discharged on 9 November 1970 and issued a DD Form 259A (Bad Conduct Discharge). His DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows he was discharged under the provisions of Army Regulation (AR) 635-206 (Misconduct (Fraudulent Entry, Conviction by Civil Court, and Absence Without Leave or Desertion)), by reason of other than desertion (court-martial), in the rank/grade of PV1/E-1, and his service was characterized as under conditions other than honorable. He completed 4 years and 2 months of net active service during the covered period. His DD Form 214 shows in item 30 (Remarks): 123 days lost.

4. On 26 January 1977 and 8 September 1982, the Army Discharge Review Board denied the applicant's request to change the type and nature of his discharge. The Board determined that he was properly discharged.

5. By regulation (AR 635-200), 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.

6. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, USC, Section 1552, the authority under which this Board acts, the ABCMR 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.

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 applying to the ABCMR requesting consideration of an upgrade to his bad conduct discharge (BCD) characterization of service. He contends he experienced an undiagnosed mental health condition 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 on 6 May 1966.

- The applicant accepted NJP on four occasions for the following: failing to go at the time prescribed to his appointed place of duty; sleeping on his post; being AWOL for three days in November 1967; and failing to go at the time prescribed to his appointed place of duty.
- The applicant was found guilty by a Special Court-Martial on 17 December 1968 for absenting himself from his unit from on or about 14 May 1968 to on or about 17 November 1968. He also had four additional Special Court-Martial orders related to remittance of suspended portion of sentence and being AWOL.
- The applicant was discharged on 9 November 1970 and issued a DD Form 259A (Bad Conduct Discharge). His DD Form 214 shows he was discharged under the provisions of Army Regulation (AR) 635-206 (Misconduct (Fraudulent Entry, Conviction by Civil Court, and Absence Without Leave or Desertion)), by reason of other than desertion (court-martial), and his service was characterized as under conditions other than honorable. He completed 4 years and 2 months 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 enlisted in the Army to serve in Vietnam but was not allowed to go there because his brother was there. He was stationed in Alaska where he became depressed and developed a drug and alcohol problem, which went untreated. There were no medical or mental health records included in his application. There was insufficient evidence that the applicant was diagnosed with a 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 an undiagnosed mental health condition at the time of the misconduct. However, his application did not contain any mental health records and no records were available through JLV.

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

(3) Does the condition or experience actually excuse or mitigate the discharge? No. There is insufficient evidence, beyond self-report, that the applicant was experiencing a

mental health condition while on active service. However, the applicant contends he was experiencing 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. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.
2. 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, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the applicant's mental health 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 a mental health condition. Based on a preponderance of the evidence, the Board determined 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.

3/29/2025

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. 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, set forth the basic authority for the separation of enlisted personnel.
 - a. Chapter 11 stated a Soldier would be given a bad conduct discharge pursuant only to an approved sentence of a general or a special court-martial, after completion of appellate review and after such affirmed sentence had been orderly duly executed.
 - b. 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.
 - c. 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.
3. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, U.S. Code, section 1552, the authority

under which this Board acts, the ABCMR 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.

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; TBI; sexual assault; sexual harassment. Boards were directed 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 that misconduct which 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 regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records 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. This guidance does not mandate relief but provides standards and principles to guide Boards in application of their equitable relief authority.

a. 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.

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.

7. Army Regulation 15-185 (ABCMR) 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 that what the Army did was correct.

a. 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.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//