

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 July 2024

DOCKET NUMBER: AR20230013193

APPLICANT REQUESTS: the spouse of a former service member (FSM) requests an upgrade of her husband's under other than honorable conditions (UOTHC) discharge to honorable. Additionally, she requests an appearance before the Board via video or telephone.

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

- DD Form 149 (Application for Correction of Military Record)
- memorandum, Subject: Accelerated Advancement..., dated 16 May 1968
- DA Form 4980-10 (Purple Heart Certificate), dated 15 March 1969
- General Orders Number 1187, Purple Heart, dated 20 February 1968
- DA Form 4980-14 (Army Commendation (ARCOM) Medal Certificate), with narrative, dated 15 September 1969
- DD Form 214, (Report of Separation from Active Duty), for the period ending 16 May 1975
- DD Form 258A (Undesirable Discharge Certificate), dated 16 May 1975
- Special Orders Number 139, U.S. Army Training Center, Engineer, Fort Leonard Wood, MO, dated 19 May 1975
- Certificate of Marriage, dated [REDACTED]
- Certificate of Death, dated [REDACTED]
- five statements of support, dated 28 March 2019 to 1 April 2019

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 her husband was a wartime Veteran with undiagnosed post-traumatic stress disorder (PTSD) and toxic exposure due to his time served in Vietnam. He was a Purple Heart recipient. His family would like to bury him with dignity at Great Lakes National Cemetery as a Soldier who fought for this country. The applicant notes

PTSD, traumatic brain injury (TBI), and other mental health as conditions related to the request.

3. The FSM enlisted in the Regular Army on 12 March 1968 for a 3-year period. Upon completion of initial entry training, he was awarded military occupational specialty 11B (Light Weapons Infantry). The highest rank he attained was specialist four/E-4.

4. The FSM served in the Republic of Vietnam from 27 September 1968 to 26 March 1970.

5. The FSM accepted non-judicial punishment, under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ), on 21 December 1968, for absenting himself from his place of duty without proper authority, on or about 20 December 1968. His punishment consisted of forfeiture of \$44.00 pay.

6. The FSM was awarded the Purple Heart on 15 March 1969 for wounds received in connection with military operations against a hostile force in the Republic of Vietnam, on 9 December 1968.

7. Court-martial charges were preferred against the FSM on 6 September 1969, for a violation of the UCMJ. The relevant DD Form 458 (Charge Sheet) shows he was charged with going absent without leave (AWOL) on or about 4 August 1969. He continued to remain AWOL at the time the charges were preferred.

8. The FSM appeared before the Circuit Court [REDACTED], on 17 April 1972, where he was found guilty of attempted breaking and entering. On 18 May 1972, he was sentenced to be committed to the State prison for a period of not less than four and one half years, nor more than five years.

9. The FSM appeared before the same court on 7 March 1974, where he was convicted of breaking and entering. On 27 March 1974, he was sentenced to be committed to the State prison for a period of not less than 4 years, 8 months, nor more than 10 years. He was credited with 402 days for time spent in custody, prior to sentencing.

10. On 19 September 1974, the Federal Bureau of Investigations notified the U.S. Army that the FSM was presently confined at the State prison of Southern Michigan. His earliest release date was June 1976.

11. A memorandum from Headquarters, U.S. Army Training Doctrine Command, Fort Monroe, VA, dated 9 January 1975, notified the Commander, U.S. Army Training Center, Engineer, Fort Leonard Wood, MO, the FSM was confined by civil authorities in their geographical area of responsibility and requested they take appropriate action.

12. On 14 April 1975, the FSM acknowledged notification of the proposed action to discharge him from the Army, under the provisions of Army Regulation (AR) 635-206 (Personnel Separations – Discharge – Misconduct [Fraudulent Entry, Conviction by Civil Court, AWOL, Desertion]), by reason of conviction by civil authorities. He further acknowledged understanding that he may be issued an undesirable discharge; waived consideration of his case by a board officers and representation by counsel; and elected not to submit a statement in his own behalf.

13. The immediate commander formally recommended the FSM's separation from service, on 29 April 1975, under the provisions of AR 635-206, Section VI. The commander noted the FSM's conviction by civil authorities for a serious offense, intentional AWOL, and excessive time lost in service as specific reasons for the proposed action. He further stated the FSM's relationship to authority was evidently based on hostility and aggression and recommended the FSM be discharged as soon as possible.

14. On that same date, the intermediate commander concurred with the recommended separation action, and further recommended the issuance of an undesirable discharge.

15. The separation authority approved the recommended discharge, and further directed the FSM be reduced to the lowest enlisted grade, and the issuance of a DD Form 258A (Undesirable Discharge Certificate).

16. The FSM was discharged on 16 May 1975, under the provisions of AR 635-206, Section VI. His DD Form 214 confirms his service was characterized as UOTHC. He was credited with 1 year, 4 months, and 22 days of net active service, with 575 days of lost time and 1,537 days of lost time subsequent to normal expiration term of service.

17. Regulatory guidance, in effect at the time, provided that an undesirable discharge was normally considered appropriate for members separated by reason of conviction by a civil court.

18. The applicant provides the following:

a. Eight pages of documents from the FSM's service record, to include a DA Form 4980-14, dated 15 September 1969, and narrative, which shows the FSM was awarded the Army Commendation Medal for exceptionally meritorious service in support of military operations in the Republic of Vietnam from September 1968 to September 1969.

b. A Certificate of Marriage, dated [REDACTED], shows her marriage to the FSM, and the FSM's Certificate of Death is dated [REDACTED].

c. In five statements of support, dated 28 March 2019 to 1 April 2019, the authors attest to the FSM's influential role in his family. He was a loving father and grandfather, who took wonderful care of his wife and children. He mentored others in the electrical trade and was eager to share his knowledge and assist others. He freely volunteered his time and talents with his church. He was a loving, kind, understanding, supportive man, who always had his children's best interest at heart.

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

20. MEDICAL REVIEW:

a. The applicant, who is a spouse of a former service member (FSM), is applying to the ABCMR requesting an upgrade of the FSM's discharge of under other than honorable conditions (UOTHC). She contends the FSM experienced a traumatic brain injury (TBI) and mental health conditions including 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 FSM enlisted in the Regular Army on 12 March 1968; 2) The FSM served in the Republic of Vietnam from 27 September 1968-26 March 1970; 3) Court martial charges were preferred against the FSM on 6 September 1969 for going AWOL on 04 August 1969; 4) The FSM appeared before [REDACTED], on 17 April 1972, where he was found guilty of attempted breaking and entering; 5) On 19 September 1974, the FBI notified the U.S. Army that the FSM was presently confined at the State prison [REDACTED]. His earliest release date was June 1976; 6) The applicant was discharged on 16 May 1975, Section VI-Conviction by civil authorities. His service was characterized as UOTHC.

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. No additional medical records were provided.

c. The applicant asserts the FSM experienced a TBI and mental health conditions including PTSD, which mitigate his misconduct. There is insufficient evidence the FSM reported or was diagnosed with a TBI or mental health condition including PTSD while on active service. He was awarded a Purple Heart on 20 February 1968 for injuries received in combat, but the injuries were not specified in the documentation provided for review.

d. A review of JLV provided insufficient evidence the FSM has been diagnosed with a TBI or mental health condition including PTSD by the VA. He also did not receive any service-connected disability. No additional medical documentation was provided for review

e. 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 mitigates his misconduct.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant asserts the FSM experienced a TBI and mental health conditions including PTSD while on active service that mitigates his misconduct.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts the FSM experienced a TBI and mental health conditions including PTSD while on active service that mitigates his misconduct.

(3) Does the condition experience actually excuse or mitigate the misconduct? No, there is insufficient evidence beyond self-report the applicant experiencing a TBI or mental health condition including PTSD, while on active service. In addition, there is no nexus between his reported TBI and mental health conditions including PTSD and his misconduct of breaking and entering: 1) this type of misconduct is not a part of the natural history or sequelae of reported TBI or mental health condition including PTSD; 2) His reported TBI and mental health conditions including PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends the FSM 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:

After reviewing the application and all supporting documents, to include the DoD guidance on liberal consideration when reviewing discharge upgrade requests, the Board determined relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the serious nature of some of the misconduct, the pattern of misconduct leading to the applicant's separation and the findings in the medical review of a lack of mitigation for such misconduct, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the FSM's characterization of service.

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.

1/7/2025

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, 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. Section 1556 of Title 10, USC, requires the Secretary of the Army to ensure that an applicant seeking corrective action by 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.

3. AR 15-185 (ABCMR), paragraph 2-11 states applicants do not have the right to a hearing before the ABCMR. The Director of the ABCMR may grant a formal hearing whenever justice requires.

4. AR 635-200 (Personnel Separations – Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel. This regulation provides 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.

5. AR 635-206, in effect at the time, set forth the basic authority for the separation of enlisted personnel for misconduct. Section VI, paragraph 33 (Conviction by Civil Court) of this regulation prescribes the standards and procedures for processing cases of individuals who, during their current term of active military service, have been initially convicted or adjudged juvenile offenders by a domestic court of the United States or its territorial possessions, or convicted by a foreign tribunal. If discharge is desired and the individual is not physically in the custody of the civil authorities, a recommendation for discharge may be submitted to Headquarters, Department of the Army. It provided that an undesirable discharge was normally considered appropriate for members separated under this regulation.

6. 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; TBI; sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. 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.

7. 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, 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.

//NOTHING FOLLOWS//