

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 23 October 2024

DOCKET NUMBER: AR20240002626

APPLICANT REQUESTS:

- an upgrade of his discharge under conditions other than honorable (UOTHC) to under honorable conditions (General)
- restoration of his pay and allowances
- restoration of his awards and decorations
- removal of derogatory information from his Official Military Personnel File (OMPF)
- to appear before the Board via video/telephone

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

- DD Form 149 (Application for Correction of Military Record)
- Self-authored statement (4 pages)
- National Personnel Records Center letter, dated 22 November 2022
- OMPF (15 pages)
- Military Health Record (20 pages)
- Military Dental Record (6 pages)
- VA Form 21-4142 (Authorization to Disclose Information to the Department of Veterans Affairs (VA) (3 pages)
- VA Form 21-4142a (General Release for Medical Provider Information to the VA (2 pages)
- Veterans Legal Group - Discharge Upgrade Questionnaire (6 pages)
- Home-and Community Based-Based Services Manual Plan of Treatment (POT) (15 pages)
- Metropolitan Life Insurance Company - Statement of Dependent Eligibility Beyond Limiting Age in Plan Due to Mental or Physical Handicap (2 pages)
- VA Health Record (271 pages)

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 his discharge should be upgraded because everyone involved in his court-martial was Caucasian and he was a victim of racial discrimination. He provides a 4-page statement which is available in its entirety for the Board's consideration.

a. The applicant describes how he was physically beaten by Private (PVT) J\_\_\_\_, a large, Caucasian, Soldier in the off-limits part of town called Bien Hoa while serving in Vietnam. Fortunately, some Vietnamese children scared off his assailant by shouting that the military police were coming. The applicant's wounds were treated at a medical facility, and he was prescribed morphine for the pain.

b. The morphine was not easing his pain well enough. So, the applicant decided to resort to the drug he had come to rely upon to cope with the constant stress, fear, anxiety, and depression the war caused. He decided to return to Bien Hoa to get some Opium. He took his M-14 rifle with him because he was going back into a war zone. He did not expect to see PVT J again that day because his unit was located eight miles away. This offered him some relief and allowed him to focus on recovering from his injuries. He let his guard down and relaxed with some Opium and a friendly game of Mahjong with a local national. He took the magazine out of his M-14 and buttoned it in his back pocket. He then leaned the rifle against a nearby wall where he could keep an eye on it.

c. The applicant later learned that following the incident, PVT J had gone to the Enlisted Club where he bragged about how he "fixed that nigger good." According to witnesses, he drank a lot and also took some barbiturate pills. It was common knowledge in Vietnam that barbiturates when mixed with alcohol could lead to extreme violence. Witnesses stated the PVT J left the club slurring he was "gonna go finish what [he] started!" Implying that he planned to kill the applicant.

d. By this time, hours had passed since the earlier altercation, and he harbored no animosity towards PVT J. But suddenly, the serenity of his Mahjong game was interrupted when he glanced toward an entryway and saw a figure lurking in the distance. While he remained seated, still peacefully playing, his eyes adjusted to the darkness outside just enough to allow him to come to the sickening realization that it was PVT J. He immediately thought of running, then he remembered his rifle. At first, PVT J did not see him reach for anything, but as he move towards the rifle, PVT J's gaze followed. PVT J charged at him, and it became a race to the M-14. He got there first and grabbed what he genuinely believed to be an empty weapon because he had buttoned the ammo in the back pocket of his uniform earlier. He point the seemingly unloaded M-14 at PVT J and told him "Back up mother\_\_\_\_\_!" As he attempted to

intimidate this mountain of a man, he held the rifle steady and stood his ground, refusing to be victimized again. All the while not realizing there was a live round in the rifle's chamber. Again, he shouted "Back up mother\_\_\_\_\_! I'm warning you!" But his warning went unheeded. In his inebriated state, PVT J lunged at him, and the weapon fired.

e. The rifle was only meant to deter PVT J from assaulting and possibly killing him. It was meant to intimidate since he thought his rifle was empty. However, PVT J was hopped up on drugs, alcohol, adrenaline, and hatred so, he was not going to be easily deterred. PVT J lunged, grabbed at the rifle, and placed his hand on the trigger in the process. The rifle went off almost immediately and the round hit PVT J. They both stood there with horrified looks of surprise on their faces.

f. The autopsy report corroborated the fact that this was self-defense and an accidental discharge. But these findings were never presented at the applicant's court-martial. To the White men presiding over his case and deciding his future, he was nothing more than a nigger who killed a White Soldier. It did not matter whether this was the truth.

g. The applicant admits that he is no saint and is guilty of many things in his life. He went absent without leave (AWOL) briefly because he was more concerned with partying than dodging bullets and mortar fire. Shortly thereafter, he let drugs take hold of his life, especially during the 1970s and 1980s. He even committed petty theft to support his drug habit that began years prior as a coping mechanism in the jungles of Vietnam. His addiction led to the dissolution of his first marriage and created an estranged relationship with his children. It took him years to fix what he allowed drugs to take from him. He is not perfect, but he is not a murderer, and his life was forever changed by the events of 1968.

h. Since his discharged, the medical treatment he has received from the VA for chronic obstructive pulmonary disease (COPD) and liver cancer saved his life. His COPD, cancer, high blood pressure, tinnitus, post-traumatic stress disorder (PTSD), exposure to Agent Orange, and numerous other ailments stem from his service in Vietnam.

i. He almost died serving his country in Vietnam, but he signed up for that. At no point did he sign up to be harassed and assaulted daily by White Soldiers with whom he was serving. To think he almost died at the hands of the enemy and by the hand of a fellow Soldier proves he was not safe anywhere.

j. He has devoted his life to being a better person, caring for his disabled wife, coaching his child's Little League games, and volunteering at his church. He does not want to die with a tarnished legacy.

3. On 14 March 1966, the applicant enlisted in the Regular Army in the rank/grade of PVT/E-1 for a period of 3 years. Upon completion of training, he was awarded military occupational specialty (MOS) 67A (Aircraft Maintenance Crewman) and assigned to a unit in Germany. He was advanced to private first class (PFC)/E-3 on 27 October 1966.

4. On 10 March 1967, the applicant was assigned to a unit in the Republic of Vietnam.

5. Special Court-Martial Order Number 27 issued by Headquarters, 145th Combat Aviation Battalion on 21 October 1967 is not present in the applicant's available record. However, his DA Form 20B (Insert Sheet to DA Form 20 (Enlisted Qualification Record) - Record of Court-Martial Conviction) shows this order reflects:

a. The applicant was arraigned and convicted by a Special Court-Martial for the following offenses in violation of the Uniform Code of Military Justice (UCMJ).

(1) being AWOL from on or about 9 August 1967 to 10 August 1967 and from on or about 11 August 1967 to 15 August 1967.

(2) escaping from confinement on or about 6 September 1967 and on or about 24 September 1967.

b. His punishment included confinement at hard labor for 6 months; forfeiture of \$60.00 per month for 6 months; and reduction to PVT/E-1. The sentence was adjudged and approved on 21 October 1967.

6. Special Court-Martial Order Number 30 issued by Headquarters, 145th Combat Aviation Battalion on 21 December 1967 shows, effective 22 December 1967, the unexecuted portion of the sentence to be confined at hard labor for 6 months, was suspended for 4 months, at which time, unless the suspension was sooner vacated, the unexecuted portion of the sentence would be remitted without further action.

7. The specific facts and circumstances that led to the vacation of the applicant's suspended punishment are not present in his available record. However, Special Court-Martial Order Number 32 issued by Headquarters, 145th Combat Aviation Battalion on 29 December 1967 shows, effective 29 December 1967, the unexecuted portion of the sentence to be confined at hard labor for 6 months was vacated and ordered to be duly executed.

8. General Court-Martial Order Number 25, issued by Headquarters, The Support Troops, U.S. Army Vietnam on 18 September 1968, shows:

a. The applicant was arraigned before a General Court-Martial and found guilty of violating Article 118, of the UCMJ by on or about 27 May 1968, willfully and unlawfully killing PVT/E-2 J, by means of shooting him with a rifle.

b. He was sentenced to forfeit all pay and allowances; to be confined at hard labor for 5 years; to be discharged from the service with a Bad Conduct Discharge (BCD); and to be reduce to PVT/E-1. The sentence was adjudged on 30 July 1968.

c. On 18 September 1968, only so much of the sentence as provided for confinement at hard labor for 2 years; discharge from the service with a BCD; forfeiture of all pay and allowances; and reduction to PVT/E-1 were approved. The forfeiture of all pay and allowances would apply to pay and allowances becoming due on or after the date of this action. Pending completion of appellate review, the applicant would be confined in the U.S. Disciplinary Barracks, Fort Leavenworth, KS.

d. On 11 February 1969, the sentence was affirmed.

9. General Court-Martial Order Number 507, issued by Headquarters, U.S. Disciplinary Barracks Fort Leavenworth, KS on 22 May 1969, acknowledged the sentence was affirmed and ordered it to be duly executed. The applicant would be confined in the U.S. Disciplinary Barracks, Fort Leavenworth, KS, or elsewhere as competent authority may direct.

10. The applicant's DA Form 20 shows in:

a. Block 30 (Overseas Service) of the applicant's DA Form 20 shows he served in U.S. Army Pacific Command - Vietnam from 2 April 1967 through 6 September 1968. It also indicates 374 days of that period was lost time.

b. Block 38 (Record of Assignments) shows the applicant was assigned to:

(1) 335th Assault Helicopter Company in the Republic of Vietnam for duty in MOS 11B (Light Weapons Infantryman) as a security guard from 10 March 1967 to 21 December 1967.

(2) 68th Assault Helicopter Company for duty in MOS 11B as a door gunner from 22 December 1967 until he departed Vietnam.

c. Block 39 (Campaigns) shows the applicant participated in the Vietnam Counter-Offensive Phase II campaign.

d. Block 41 (Awards and Decorations) shows he was awarded or authorized the:

- National Defense Service Medal
- Vietnam Service Medal
- Republic of Vietnam Campaign Medal with Device (1960)
- Overseas Service Bar (which is an item of uniform wear, not an award or decoration)

11. The applicant's DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows he was discharged in the rank/grade of PVT/E-1 under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), paragraph 11-1b, with a characterization of service of UOTHC. He was assigned Separation Program Number "292" and Reentry Eligibility Code "4." His date of rank was 18 September 1968. He completed 1 year, 5 months, and 17 days of net service during this period and was not awarded any decorations or medals. He did not complete his first full term of enlistment. Block 24 (Decorations, Medals, Badges, Commendations, Citations and Campaign Ribbons Awarded or Authorized) shows the entry "NA", indicating "Not Applicable." He did not complete his first full term of service and had time lost as follows:

- 1 day, 9 August 1967
- 4 days, from 11 through 14 August 1967
- 116 days, from 29 August 1967 through 22 December 1967
- 151 days, from 29 December 1967 through 27 May 1968
- 290 days, from 28 May 1968 through 13 March 1969
- 95 days lost subsequent to normal expiration term of service from 14 March 1969 through 16 June 1969

12. The applicant underwent a separation medical examination of 3 February 1970.

a. His Standard Form 89 (Report of Medical History) shows he self-reported being in "Excellent" health and made no indication that he was experiencing any type of medical or psychiatric difficulties at the time other than pain in his knees when standing.

b. His Standard Form 88 (Report of Medical Examination) shows he had no defects or diagnoses, and he was deemed to be qualified for punitive discharge.

13. The applicant's record is void of any indication that he was promoted subsequent to his reduction to PV1/E-1 on 18 September 1968.

14. The applicant provides the following documents which are available in their entirety for the Board's consideration.

- a. The applicant's Military Health Record.

b. The applicant's Military Dental Record.

c. A VA Form 21-4142 shows the applicant gave written authorization for the VA to obtain his treatment records.

d. A VA Form 21-4142a shows the applicant provided the VA the name of the facility where he had received treatment from the VA.

e. A Veterans Legal Institute - Discharge Upgrade Questionnaire the applicant completed when he applied for assistance with submitting his request for an upgrade of his discharge.

f. A Home-and Community Based-Based Services Manual POT shows a plan for treating the applicant's conditions of Fibrosis of the liver, COPD, Traumatic Brain Injury, and Chronic PTSD.

g. A Metropolitan Life Insurance Company - Statement of Dependent Eligibility Beyond Limiting Age in Plan Due to Mental or Physical Handicap shows one of the applicant's children listed him as a dependent on her insurance policy.

h. The applicant's VA Health Record which shows the treatment he has received and medications he has been prescribed by the VA.

15. On 18 June 2024, in response to a written request, a member of the Army Criminal Investigation Division, Quantico, VA informed a staff member of the Case Management Division of the Army Review Boards Agency (ARBA), that a search of the Army criminal file indexes revealed no Sexual Assault records pertaining to the applicant.

16. Army Regulation 635-200, provides 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.

17. By law, 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.

18. In reaching its determination, the Board can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance. By regulation, an applicant is not entitled to a hearing

before the Board. Hearings may be authorized by a panel of the Board or by the Director of the ABCMR.

19. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an upgrade of his Under Other than Honorable characterization of service and several administrative actions outside the purview of this advisory. He contends his discharge should be upgraded as he was a victim of racial discrimination during the Court Martial, suffering from combat trauma, and acting in self-defense.

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 14 March 1966.
- The applicant served in Vietnam from 02 April 1967 to 06 September 1968; however, there were three periods of AWOL during that time.
- On 21 October 1967, he was convicted by a Special Court Martial of being AWOL from 09 August to 10 August and 11 August to 15 August 1967 and escaping confinement from 06 September to 24 September 1967.
- On 18 September 1968, he was convicted by a General Court-Martial of willfully and unlawfully killing a PVT by means of shooting him with a rifle on 27 May 1968.

c. Review of Available Records: The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents contained in the applicant's file.

(1) The applicant's service record does not reflect an award, loss time, or any other indication he was a POW; the applicant has asserted multiple times to the VA he was a POW.

(2) In June 1968, he was seen for substance withdrawal. A follow up noted "multiple offenses with attempted escape." The separation physical is void of any reported or observed behavioral health symptoms, conditions, or treatment.

d. The separation file is void of a Chapter Mental Status Exam. However, this is not required for a Court Martial.

e. The VA's Joint Legacy Viewer (JLV) was also reviewed.

(1) In June 2014, the applicant requested help with sleep noting difficulty since combat. The applicant reported having a General discharge after "a fellow Soldier was



killed by the gun of this man (applicant) in a fight.” He asserted multiple traumatic events related to engaging in direct combat for which he started using heroin. He indicated a need for a PTSD service connection and VA medical care. The applicant indicated receiving a PTSD diagnosis and medication when incarcerated in 2006; these records were not obtained. He reported a total of 15 years of incarceration with the last release in 2007 asserting all were drug related to include robbery. He reported still using heroin. Based on the applicant’s self-report, the provider diagnosed PTSD and Heroin Dependence, in remission. The applicant started receiving housing services and non-VA Methadone treatment for his drug addiction.

(2) In February 2016, while in VA housing, he tested positive for marijuana. Although he had a medical marijuana card, use was not permitted in the program. Additionally, the “veteran tried to bribe a US Vets VSA to not complete the UA and he would pay him in lieu of completing the test.” In March, he was discharged from housing due to rule violations.

(3) In August 2016, he sought help for Opioid Dependence. He reported childhood and combat trauma. He was referred to the substance program, but in August “expressed that he does not want opiate treatment.”

(4) The applicant returned for psychiatric care. He reported hospitalizations for suicidal statements, but “he was faking in order to be locked up to abstain from substances” and obtain housing. He attended follow ups through November focusing on coping skills.

(5) In May 2017, the applicant requested relationship therapy. During the session, he asserted being a POW after his helicopter was “brought down.” He reported being held by “rejects of the NVA” in a “makeshift camp in Cambodia” for 9 months. He contended his “captors shared IV Opium with him.” He reported his captors developed trust with him and allowed him to prepare the IV giving him the opportunity to overdose and kill his captors. He was diagnosed with Cannabis Use Disorder and Opioid Use Disorder. The provider did not diagnose PTSD. In the one follow up, the provider noted “he has had no symptoms of PTSD,” specifically highlighting the applicant watched a very graphic and vivid documentary which included “many helicopter scenes and scenes of jungle makeshift prison camps” for which he did not respond with trauma or any anxiety but “was riveted.” He did not return.

(6) In May 2019, he returned to psychiatry reporting “He is not troubled by memories or nightmares of trauma events.” Additionally, “He is not depressed and enjoys socializing at church each week.” He discussed psychosocial stressors. He did not return.

(7) In April 2021, his primary care referred him to behavioral health. However, "Pt didn't feel he had any MH issues needing attention currently." He denied any trauma, depression, or related symptoms. He received sleep aid refills and not diagnosed.

(8) In February 2023, he requested housing assistance as he was being evicted. He denied any legal or substance history. He was ineligible for available programs as he was not actively homeless. He was provided non-VA resources.

(9) In August 2023, he reported nightmares. He indicated he'd had "20 years remission" before symptoms returned after COVID. The provider noted PTSD, Opioid Dependence in remission because of Methadone treatment, and Marijuana Use.

(10) In October, he was evaluated by the VA trauma program. He reported being a POW for 9 months after being captured near Hamburger Hill. He reported captivity involved "building rest stations for NVA convoys traveling the Ho Chi Mihn trail." He reported he "led an escape, helped prisoners return (to) safety, after traveling on foot for 3.5 days they arrived at a USMC base." The applicant reported shooting another Soldier "in self-defense," but noted he "fired 6 rounds" himself. He reported the murder conviction was changed to manslaughter reducing his jail time. Based on endorsing prompted symptoms, he was diagnosed with PTSD and enrolled into the trauma program. However, during the follow up reported a desire for group, versus individual, care as he could "listen" to the other Veterans experiences and then "bounce ideas off" of them. He ultimately declined any trauma services, individual or group.

(11) In September 2024, the applicant requested to transfer his Methadone treatment to the VA as he was losing the insurance covering the non-VA clinic. The provider requested records. In follow up, the applicant reported any lingering combat symptoms were "not bothersome."

f. The applicant submitted records from medical clinics, not behavioral health, reflecting self-reported diagnoses of PTSD and TBI with medications for substance dependence and sleep. The records indicate the applicant asserts multiple trauma and cognitive symptoms which he has denied to the VA and for which providers have not found support.

g. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is not sufficient evidence to support the upgrade from a behavioral health standpoint. While the applicant has held a VA PTSD diagnosis at various times, the diagnosis has always been based on self-report with some providers raising concerns for the accuracy. Nonetheless, even in accepting the diagnosis at face

value, there is no indication trauma symptoms contributed to the basis for separation and murder is not a natural progression of PTSD. Regarding the applicant's assertion of self-defense, he has provided varying stories about what occurred most recently admitting he "fired 6 rounds" into the Soldier contradicting the ARBA application in which he asserted only one round was accidentally discharged. Although this alone does not negate his overarching claim the other Soldier was going to harm him, the incongruent reports along with other documentation raising concerns for reliability, e.g., contending he was a POW, suggests the event was more involved than what is being presented. Without objective documentation specifically detailing the event, i.e., MP report or investigation, it is impossible to assess whether or not the act was in self-defense as asserted.

h. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? No. There is insufficient evidence to conclude the applicant was experiencing trauma symptoms at the time of the misconduct or, if present, contributed to the basis for separation.

(2) Did the condition exist or experience occur during military service? No. There is insufficient evidence to conclude the applicant was experiencing trauma symptoms at the time of the misconduct or, if present, contributed to the basis for separation.

(3) Does the condition or experience actually excuse or mitigate the discharge? N/A

BOARD DISCUSSION:

1. 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 record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding in sufficient evidence to support the upgrade from a behavioral health standpoint. While the applicant has held a VA PTSD diagnosis at various times, the diagnosis has always been based on self-report with some providers raising concerns for the accuracy. The opine found insufficient evidence to conclude the applicant was experiencing trauma symptoms at the time of the misconduct or, if present, contributed to the basis for separation.

2. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the serious misconduct. The applicant provided no character letters of support for the Board to weigh a clemency determination. ABCMR 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. The Board found insufficient evidence of an error or injustice which would warrant a correction of the applicant's record that warrants removal of derogatory information from his Official Military Personnel File (OMPF) or restoration of the applicant's rank. The Board noted, without objective documentation specifically detailing the event, i.e., MP report or investigation, it is impossible to assess whether or not the act was in self-defense as asserted. Based on the preponderance of available evidence, the Board determined relief is not warranted.

3. Prior to closing the case, the Board did note the analyst of record administrative notes below, and recommended the correction be completed to more accurately depict the military service of the applicant.

4. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

Except for the correction addressed in Administrative Note(s) below, the Board found 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):

1. Army Regulation 635-5 (Separation Documents), in effect at the time, stated the DD Form 214 was required to list all of a separating Soldier's awards and decorations.
2. The evidence of record shows he served in U.S. Army Pacific Command - Vietnam from 2 April 1967 through 6 September 1968. Based on this service, he qualified for award of the Vietnam Service Medal and the Republic of Vietnam Campaign Medal with Device (1960).
  - a. During this period, he participated in the following five campaigns:
    - Counteroffensive Phase II - (1 July 1966 to 31 May 1967)
    - Counteroffensive Phase III - (1 June 1967 to 29 January 1968)
    - Tet Counteroffensive - (30 January 1968 to 1 April 1968)
    - Counteroffensive Phase IV - (2 April 1968 to 30 June 1968)
    - Counteroffensive Phase V - (1 July 1968 to 1 November 1968)
  - b. The units to which he was assigned were awarded the following unit awards:
    - Presidential Unit Citation
    - Meritorious Unit Commendation
    - Republic of Vietnam Gallantry Cross with Palm Unit Citation

3. Based on the foregoing, amend the applicant's DD Form 214 for the period ending 16 June 1969 by adding the following entries in Block 24 (Decorations, Medals, Badges, Commendations, Citations and Campaign Ribbons Awarded or Authorized):

- Vietnam Service Medal with 1 silver service star
- Republic of Vietnam Campaign Medal with Device (1960)
- Presidential Unit Citation
- Meritorious Unit Commendation
- Republic of Vietnam Gallantry Cross with Palm Unit Citation

#### REFERENCES:

1. Title 10, U.S. Code, Section 1552(b), provides that applications for correction of military records must be filed within three 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 three-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Title 10, USC, Section 1552(b), provides, with respect to courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under the UCMJ, action to correct any military record of the Secretary's Department may extend only to actions taken by reviewing authorities under the UCMJ or action on the sentence of a court-martial for purposes of clemency. The Secretary of the Army shall make such corrections by acting through boards of civilians within the executive part of the Army.

3. Title 10, U.S. Code, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Court-martial convictions stand as adjudged or modified by appeal through the judicial process, 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. Title 10, U.S. Code, 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.

5. 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 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. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing. 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.

6. Army Regulation 600-8-22 (Military Awards) prescribes Department of the Army policy, criteria, and administrative instructions concerning individual and unit military awards.

a. The National Defense Service Medal is awarded for honorable active service for any period between 27 July 1950 and 27 July 1954, 1 January 1961 and 14 August 1974, 2 August 1990 and 30 November 1995, and 11 September 2001 and a date to be determined.

b. The Vietnam Service Medal is awarded to all members of the Armed Forces of the United States for qualifying service in Vietnam after 3 July 1965 through 28 March 1973. Qualifying service included attachment to or assignment for 1 or more days with an organization participating in or directly supporting military operations. This same regulation states a bronze service star will be awarded for wear on the Vietnam Service Medal for participation in each credited campaign. A silver service star is authorized in lieu of five bronze service stars.

c. The Republic of Vietnam Campaign Medal with Device (1960) was awarded by the Government of Vietnam to all members of the Armed Forces of the United States for qualifying service in Vietnam during the period 1 March 1961 through 28 March 1973. Qualifying service included assignment in Vietnam for 6 months or more.

d. The Presidential Unit Citation (known as the Distinguished Unit Citation until 3 November 1966) is awarded for extraordinary heroism in action. A unit must display such gallantry, determination, and esprit de corps in accomplishing its mission as would warrant award of the Distinguished Service Cross to an individual.

e. The Meritorious Unit Commendation is awarded to units for exceptionally meritorious conduct in the performance of outstanding services for at least 6 continuous months during the period of military operations against an armed enemy occurring on or after 1 January 1944. Units based in the continental United States are excluded from this award, as are other units outside the area of operations.

7. Department of the Army Pamphlet 672-3 (Unit Citation and Campaign Participation Credit Register) shows:

a. The applicant participated in the below listed campaigns during his period of service in Vietnam:

- Counteroffensive Phase II - (1 July 1966 to 31 May 1967)
- Counteroffensive Phase III - (1 June 1967 to 29 January 1968)
- Tet Counteroffensive - (30 January 1968 to 1 April 1968)
- Counteroffensive Phase IV - (2 April 1968 to 30 June 1968)
- Counteroffensive Phase V - (1 July 1968 to 1 November 1968)

b. The 335th Aviation Company, the applicant's unit of assignment in Vietnam from 10 March 1967 to 21 December 1967 was awarded the following during his tenure:

- Presidential Unit Citation for the period 6 - 23 November 1967
- Meritorious Unit Commendation for the period 1 February - 31 December 1967
- Republic of Vietnam Gallantry Cross with Palm Unit Citation for the periods 1 March 1966 - 26 March 1967 and 27 March 1967 - 17 May 1968

c. The 68th Aviation Company, the applicant's unit of assignment in Vietnam from 22 December 1967 to 17 October 1968 was awarded the following during his tenure:

- Meritorious Unit Commendation for the period 1 January 1967 - 31 December 1967
- Republic of Vietnam Gallantry Cross with Palm Unit Citation for the period 27 March 1967 - 17 May 1968

8. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. An honorable discharge was separation with honor. Issuance of an honorable discharge certificate was appropriate when the quality of the Soldier's service generally met the standards of acceptable conduct and performance of duty or was otherwise so meritorious that any other characterization would clearly be inappropriate.

b. A general discharge was a separation from the Army under honorable conditions. When authorized, separation authorities could issue a general discharge to Soldiers whose military record was satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. A discharge under other than honorable conditions is an administrative separation from the Service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, homosexual conduct, security reasons, or in lieu of trial by court martial in the following circumstances.



(1) An under other than honorable conditions discharge will be directed only by a commander exercising general court-martial authority, a general officer in command who has a judge advocate or legal advisor available to his/her command, higher authority, or the commander exercising special court-martial convening authority over the Soldier who submitted a request for discharge in lieu of court-martial (see chapter 10) when delegated authority to approve such requests.

(2) When the reason for separation is based upon one or more acts or omissions that constitutes a significant departure from the conduct expected of Soldiers of the Army. Examples of factors that may be considered include the following:

- Use of force or violence to produce bodily injury or death
- Abuse of a position of trust
- Disregard by a superior of customary superior-subordinate relationships
- Acts or omissions that endanger the security of the United States or the health and welfare of other Soldiers of the Army
- Deliberate acts or omissions that seriously endanger the health and safety of other persons

d. A BCD will be given to a Soldier pursuant only to an approved sentence of a general or special court-martial. The appellate review had to have been completed and the affirmed sentence then ordered duly executed. Questions concerning the finality of appellate review should be referred to the servicing staff judge advocate.

9. The Manual for Courts-Martial United States (2012 Edition) consist of the Preamble, the Rules for Courts-Martial, the Military Rules of Evidence, the Punitive Articles, and Nonjudicial Punishment Procedures and should be consistently applied with the purpose of military law.

a. Rule 706 (Inquiry into the mental capacity or mental responsibility of the accused). If it appears to any commander who considers the disposition of charges, or to any investigating officer, trial counsel, defense counsel, military judge, or member that there is reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis of the belief or observation shall be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused. The submission may be accompanied by an application for a mental examination under this rule.

b. Article 71(c) of the UCMJ stipulates that if a sentence extends to death, dismissal, or dishonorable or bad-conduct discharge and if the right of the accused to appellate review is not waived and an appeal is not withdrawn, that part of the sentence

extending to death, dismissal, or a dishonorable or bad-conduct discharge may not be executed until there is final judgment as to the legality of the proceedings. A judgement as to legality of the proceedings is final in such cases when review is completed by a Court of Military Review.

10. 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 post-traumatic stress disorder (PTSD) criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged UOTHC 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.

11. 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; 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.

12. 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//