

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 November 2024

DOCKET NUMBER: AR20240002930

APPLICANT REQUESTS: upgrade of his under conditions other than honorable discharge.

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

- DD Form 149 (Application for Correction of Military Record)
- Support letter [REDACTED]
- Support letter [REDACTED]
- Support letter [REDACTED]
- Support letter [REDACTED]
- Support letter [REDACTED]
- Support letter [REDACTED]
- Support letter [REDACTED]
- Support letter [REDACTED]

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 that he is asking for an upgrade because he is 76 years old, and his health has gotten really bad. Most of his health problems before his court-martial. He got prostate cancer, and his hearing has been gone for a long time. All he is asking for some benefits to help pay for his bills. He has not ever been in trouble and he tries to help people that needs it. So, if you can find it in your hearts, he and his family would appreciate it. Due to his prostate cancer, he took 53 treatments of radiation.
3. The applicant was inducted into the Army of the United States on 27 July 1966. He held military occupational specialty 11B (Infantryman) and 64A (Light Vehicle Driver).
4. He served in Vietnam from 3 May 1967 – 9 July 1968.

5. On 2 May 1968, he was tried before a General Court Martial (GCM) and found him guilty of assault and its specification of near Quan Loi, Republic of Vietnam, on or about 11 March 1968, and did thereby intentionally inflict grievous bodily harm upon the victim, to wit: a wound in the chest. He was sentenced to be reduced to the grade of E-1, to be confined at hard labor for one year, and to be discharged from the service with a bad conduct discharge.

6. GCM Order Number 19, issued by Headquarters, 1st Infantry Division, APO, on 8 June 1968, shows the convening authority approved the sentence and forwarded the record of trial for an appellate review.

7. On 28 January 1969, after appellate review the appellant assigned two errors:

a. The evidence is insufficient to establish beyond a reasonable doubt that the appellant intentionally inflicted grievous bodily harm in violation of article 128.

b. Excessive penalty imposed upon the appellant is not supported by the evidence.

c. The appellate agree that the first assigned error has merit.

(1). Briefly stated the facts are these: Appellant met [REDACTED] (victim) near the spot where his armored personnel carrier was parked as an observation post. After conversing with her a few moments, appellant belted on a pistol and went into some nearby woods followed by [REDACTED]. Within ten minutes, a shot was heard in the vicinity of the woods at which appellant and the victim had disappeared. Soon after, the victim emerged, followed by appellant still armed with a pistol. The victim had a gunshot wound above her right breast and also near her right shoulder blade where the round exited. These facts are corroborated; what transpired in the woods when the shooting occurred are not. For example, the victim says appellant shot her; appellant testified that she shot herself.

(2). After careful perusal of the record (including the testimony of appellant and the victim, as well as the physical aspects of the differing versions of the shooting and the apparent motives to testify as recorded), convinces us beyond reasonable doubt that appellant assaulted [REDACTED] by shooting her in the chest with a pistol; however, we are unconvinced that in so doing appellant intentionally inflicted the grievous bodily harm suffered by the victim.

d. In view of their reassessment of the sentence, infra, there is no need to discuss in detail Assigned Error II.

e. Only so much of the approved findings of guilty as finds appellant guilty of assault with a dangerous weapon, at the time and place and in the manner alleged, in Violation

of the Uniform Code of Military Justice (UCMJ), Article 128, is correct in law and fact. On the basis of the foregoing, and of the entire record, the Board finds that only so much of the sentence as provides for bad conduct discharge, confinement at hard labor for nine months and reduction to the lowest enlisted grade is correct in law and fact, appropriate, and should be approved. The findings of guilty and the sentence, both so modified, are affirmed.

8. GCM Order Number 128, issued by Headquarters, U.S. Disciplinary Barracks, Fort Leavenworth, KS, on 8 February 1969, shows having served the period of confinement adjudged 2 May 1968, by GCM, as promulgated in GCM Order Number 19, Department of the Army, Headquarters, 1st Infantry Division, APO San Francisco, dated 8 June 1968, is restored to duty pending completion of appellate review.

9. On 25 February 1969, the applicant was notified that he has 30 days to petition the Court of Military Appeals for a grant of review with respect to any matter of law.

10. GCM Order Number 34, issued by Headquarters, Fort Riley, KS, on 26 February 1969, shows only so much of the findings of guilty as finds the accused guilty of assault with a dangerous weapon at the time and place and in the manner alleged, in violation of Article 128, UCMJ, and only so much of the sentence adjudged on 2 May 1968 and promulgated in GCM Order Number 19, Headquarters, 1st Infantry Division, APO San Francisco, 8 June 1968, as provides for confinement at hard labor for nine months, bad conduct discharge and reduction to the lowest enlisted grade, have been affirmed pursuant to Article 66. That portion of the sentence to confinement at hard labor has been served and the accused was restored to duty, pending completion of appellate review, on 8 February 1969, pursuant to General Court-Martial Order Number 128, Headquarters, Fort Leavenworth, Kansas, dated 8 February 1969. Article 71(c) having been complied with and the accused having signed a request for final action on 25 February 1969, the findings of guilty and the sentence as thus modified will be duly executed.

11. On 7 March 1969, he was discharged under conditions other than honorable under the provisions of Army Regulation (AR) 635-204 (Personnel Separations - Dishonorable and Bad Conduct Discharges). He was assigned separation processing number 292. His DD Form 214 (Report of Transfer or Discharge) shows he completed 1 year, 10 months, and 5 days net service this period. He had 86 days lost time from 2 May 1968 – 26 July 1968. Also, 196 days lost subsequent to normal expiration term of service from 27 July 1968 – 7 February 1969. He was awarded or authorized:

- National Defense Service Medal
- Combat Infantryman Badge
- Marksman Marksmanship Qualification Badge (Rifle)
- Vietnam Service Medal

- Vietnam Campaign Medal

12. The applicant provides eight-character support letters:

a. [REDACTED] states he first met the applicant over 30 years ago, when he came to work for [REDACTED] and then hired him at [REDACTED]. He has always been a very hard worker and tried to always please the customers. He received driver of the month award and participated in the [REDACTED]. He has also considered him to be a friend.

b. [REDACTED] states [REDACTED] was honored to have had the applicant as one of their professional, over the road truck drivers from February of 1990 through December of 2012. During this time, he exemplified his career with numerous awards which were a testament to his commitment to highway and workplace safety. Among his many achievements were driver of the month, driver of the year, and annual certificates of highway safety for years driven from their insurance company, [REDACTED]. In addition, he was driver of the month with the [REDACTED], a distinction of being the best of his peers within the state [REDACTED]. His conduct during his tenure with [REDACTED] was of the highest standard. He was always ready to help with freight deliveries when asked, a task he fulfilled with utmost integrity.

c. [REDACTED] states he has known the applicant for 30 plus years as they both worked for [REDACTED] the applicant as a driver and [REDACTED] as service manager. He has always been diligent on vehicle maintenance and safety. He maintained his equipment to keep it in top notch condition and he always let the maintenance department know when there was a problem we needed to deal with. He is a solid citizen of [REDACTED] as he supported the different businesses and clubs in the area. He also started and maintains his honey business. He considers the applicant as a friend and would recommend him in any endeavor he is involved with.

d. [REDACTED] states he has known the applicant for over 20 years and have only had positive experiences with him. He has always paid his city bills promptly and has always been a staple in the community.

e. [REDACTED] states the applicant and his wife purchased a lot in [REDACTED] across the street from him. This lot had an old house/hospital on it, and they cleaned it up and put a new home and large shed on the lot. This made their neighborhood clean and respectable. He was a very good neighbor and would do anything for someone. They raised their children and even a couple of grandchildren. They were respected in the community, as they even played Santa and Mrs. Santa for many years as well as putting on a haunted house in the shed for the local children to get their treats.

f. [REDACTED] states he has known the applicant for about 20 years. They became acquainted while their children were in school. They spend many hours together in the gym attending their school activities. Since then, he and other friends have come to their house regularly in the morning for coffee. He has always known the applicant to be honest, trustworthy, hard-working, always looking out for the well-being of his family and friends. He was impressed to find out that the applicant took time teaching others the art of bee keeping. He also knows that he has spent hours helping his grandson fix/repair/renovate vehicles. He always has time to help other people. [REDACTED] also knows that the applicant spent time in Vietnam fighting for the country, again showing concern for others. He is a good individual that deserves to have any benefits that are available for him.

g. [REDACTED] states she has known the applicant's family since they enrolled their children in the 4-H club. Those kids are grown and gone now but they spent many happy years showing goats with them, traveling with them and coordinating on many activities over the years. He is a man of deep personal conviction, especially when it comes to family and friends. He continually goes the extra mile. Even though they no longer have the "4-H connection", they still run into him and the family at various events around the area. [REDACTED] is glad they have chosen to remain a vital part of the community.

h. [REDACTED] states he has known the applicant for the better part of his life as a kid growing up as well into his professional career as a loan officer. The applicant is not only a very good customer who has always paid his debts as agreed but also a customer that he really enjoys having at the bank. He took in his grandson in at a very young age and shaped him into the man he is today. He has always been straightforward with him, and he really appreciates that. The applicant has not had an easy life but always is willing to help anyone he can, especially when it comes to family. He is a very good man and [REDACTED] always enjoys his company when he visits the bank.

13. By regulation AR 635-204 (Personnel Separations - Dishonorable and Bad Conduct Discharge), provided for separation of enlisted personnel with dishonorable and bad conduct discharges. This regulation stated that an enlisted person would be discharged with a dishonorable discharge pursuant only to an approved sentence of general court-martial and a bad conduct discharge based on an approved sentence of a general court-martial or a special court-martial imposing a bad conduct discharge.

14. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. The Board is not empowered to set aside a conviction but is empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate.

15. In reaching its determination, the Board can consider the applicant's age at the time of his misconduct, his petition, and his service record in accordance with the published DOD guidance on equity, injustice, or clemency determination guidance.

16. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his under other than honorable conditions discharge. He contends PTSD is related to his request. 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 was inducted into the Army of the United States on 27 July 1966; 2) He served in Vietnam from 3 May 1967 – 9 July 1968; 3) On 2 May 1968, the applicant was tried before a General Court Martial (GCM) and found him guilty of assault and did thereby intentionally inflict grievous bodily harm upon the victim. This was later changed to guilty of assault with a dangerous weapon; 4) On 7 March 1969, the applicant was discharged under conditions other than honorable under the provisions of Army Regulation (AR) 635-204 (Personnel Separations - Dishonorable and Bad Conduct Discharges). He was assigned separation processing number 292.

b. The Army Review Boards 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 documentation was provided for review.

c. The applicant asserts he experienced PTSD, which mitigates his misconduct. There is insufficient evidence the applicant reported or was diagnosed with a mental health condition including PTSD while on active service.

d. A review of JLV provided insufficient evidence the applicant has been diagnosed with a service-connected mental health condition, including PTSD. In addition, he does not receive any service-connected disability for a mental health condition.

e. Based on the available information, it is the opinion of the Agency Medical 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 he experienced PTSD.

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

(3) Does the condition experience actually excuse or mitigate the misconduct? No, there is insufficient evidence beyond self-report the applicant was experiencing PTSD, while on active service. In addition, there is no nexus between the applicant's reported PTSD and his misconduct of assault with a dangerous weapon in that: 1) this type of misconduct is not a part of the natural history or sequelae of PTSD; 2) PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he 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, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was separated for conviction by court-martial. The Board reviewed the medical advisor's review finding insufficient evidence the applicant had a condition or experience that mitigated his misconduct. However, the Board majority was convinced by a preponderance of the evidence the applicant was set up and therefore his request warranted relief. The Board also noted the applicant's character reference letters submitted in support of his application. The Board minority determined there was insufficient evidence to support an upgrade of his under other than honorable conditions discharge.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant's DD Form 214, for the period ending 7 March 1969, to show his character of service as honorable.

3/28/2025

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 (AR) 635-204 (Personnel Separations - Dishonorable and Bad Conduct Discharges), in effect at the time, provided for separation of enlisted personnel with dishonorable and bad conduct discharges. This regulation stated that an enlisted person would be discharged with a dishonorable discharge pursuant only to an approved sentence of general court-martial and a bad conduct discharge based on an approved sentence of a general court-martial or a special court-martial imposing a bad conduct discharge.
3. AR 635-200 (Personnel Separations – Enlisted Personnel), in effect at the time, provided the basic authority for separation of enlisted Soldiers. It stated a member may be awarded an honorable or general discharge, if during the current enlistment period of obligated service he has been awarded a personal decoration or if warranted by the particular circumstances of a specific case:
  - a. An honorable discharge was a separation with honor and entitled the recipient to benefits provided by law. The honorable characterization was conditioned upon proper military behavior and proficient and industrious performance of duty, giving due regard to the rank or grade held and the capabilities of the individual concerned.
  - b. A general discharge was a separation from the Army under honorable conditions. When authorized, it was issued to a Soldier whose military record was satisfactory but not sufficiently meritorious to warrant an honorable discharge.
4. AR 635-5 (Personnel Separations – Separation Documents), in effect at the time, established uniform administrative procedures and separation forms to be used in connection with the relief from active duty or complete separation from the military service of commissioned officers, warrant officers, and enlisted personnel. It stated SPN 292 is used under the authority of AR 635-204 and reason of other than desertion (courts-martial).
5. Title 10, section 1552 provides 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 Army Board for Correction of Military Records 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.

6. The Acting Principal Deputy Under Secretary of Defense (Personnel and Readiness) provided clarifying guidance to Service DRBs and Service BCM/NRs on 24 February 2016 [Carson Memorandum]. The memorandum directed the BCM/NRs to waive the statute of limitations. Fairness and equity demand, in cases of such magnitude that a Veteran's petition receives full and fair review, even if brought outside of the time limit. Similarly, cases considered previously, either by DRBs or BCM/NRs, but without benefit of the application of the Supplemental Guidance, shall be, upon petition, granted de novo review utilizing the Supplemental Guidance.

7. The Under Secretary of Defense (Personnel and Readiness) provided clarifying guidance to Service DRBs and Service BCM/NRs on 25 August 2017 [Kurta Memorandum]. The memorandum directed them to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD, traumatic brain injury (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. 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.

a. Guidance documents are not limited to under other than honorable conditions discharge characterizations but rather apply to any petition seeking discharge relief including requests to change the narrative reason, re-enlistment codes, and upgrades from general to honorable characterizations.

b. An honorable discharge characterization does not require flawless military service. Many veterans are separated with an honorable characterization despite some relatively minor or infrequent misconduct.

c. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with mental health conditions, including PTSD; TBI; or behaviors commonly associated with sexual assault or sexual harassment; and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.

8. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards 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. 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. 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//