

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 21 May 2025

DOCKET NUMBER: AR20240011649

APPLICANT REQUESTS:

- upgrade of his under other than honorable conditions discharge to honorable
- a personal appearance hearing before the Board via video/telephone

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

DD Form 149 (Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552)

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 suffers from severe post-traumatic stress disorder (PTSD) which was not diagnosed or treated during his military service. He served in Vietnam and the laws for such a diagnosis has changed.
3. On his DD Form 149, the applicant indicates PTSD is related to his request.
4. The applicant enlisted in the Regular Army on 4 February 1970 for a period of 3 years. He was promoted to the rank/grade of specialist four/E-4 effective 24 February 1971.
5. He accepted nonjudicial punishment (NJP) on 25 April 1971, under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ), in that on or about 22 April 1971, he did without authority fail to go at the time prescribed to his appointed place of duty, in the Republic of Vietnam in violation of Article 86, UCMJ. His punishment was reduction to the grade of private first class/E-3 and forfeiture of \$42 pay for one month.

6. The applicant accepted NJP on 9 May 1971, under the provisions of Article 15 of the UCMJ, in that on or about 8 May 1971, he did after being posted as a sentinel of Eagle Fort Sector, Republic of Vietnam, was found sleeping at his post, in violation of Article 113, UCMJ. His punishment was reduction to the grade of private/E-2 and forfeiture of \$42 pay for one month.

7. Special Court-Martial Order Number 21, issued by Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, NC on 14 February 1972, shows he plead not guilty and was found guilty of violating two specifications of Article 134 of the UCMJ; specifically, in that he did, on or about:

a. 27 October 1971, wrongfully have in his possession 0.76 grams, more or less, of a habit forming narcotic drug, to wit: heroin, and

b. 27 October 1971, wrongfully sell a habit forming narcotic drug, to wit: heroin.

c. He was sentenced to be discharged from the service with a bad conduct discharge, to be confined at hard labor for 2 years, and to forfeit pay per month except \$25 for a like period. The sentence was adjudged on 11 January 1972.

d. Action. The finding of guilty as to specification one was disapproved. Only so much of the sentence as provides for a bad conduct discharge, confinement at hard labor for 18 months, and forfeiture of \$250 per month for 18 months is approved. The record of trial is forwarded to the Judge Advocate General of the Army for review by a Court of Military Review. Pending completion of appellate review, the accused will be confined in the U.S. Disciplinary Barracks, Fort Leavenworth, KS, or elsewhere as component authority may direct.

8. Court-martial charges were preferred against him on 1 May 1972, for violations of the UCMJ. His DD Form 458 (Charge Sheet) shows, he was charged with one specification of violation of Article 86, in that he did on or about 18 August 1971, without proper authority, absent himself from his unit, and did remain so absent until on or about (Note: There is no ending date).

9. The U.S. Army Court of Military Review on 23 August 1972 affirmed the findings of guilty and so much of the sentence as provides for a bad conduct discharge, confinement at hard labor for one year, and forfeiture of \$250 pay per month for one year was affirmed.

10. General Court-Martial Order Number 1422, issued by U.S. Disciplinary Barracks, Fort Leavenworth, KS on 11 December 1972, noted that his sentence had been affirmed and ordered the bad conduct discharge be duly executed.

11. The applicant was discharged on 19 December 1972, under the provisions of Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), paragraph 11-1(b), as a result of court-martial. His DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows he completed 2 years, 7 months, and 10 days of total active service. It further shows in:

- item 5a (Grade, Rate or Rank) – Private
- item 5b (Pay Grade) – E-1
- item 13a (Character of Service) – Under Conditions Other Than Honorable
- item 22c (Foreign and/or Sea Service) – 1 year
- item 26a (Non-Pay Periods Time Lost) – 352 days of lost time
- item 30 (Remarks) – Vietnam – 11 July 1970 through 10 July 1971

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

13. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an upgrade of his other than honorable discharge. He contends he experienced PTSD that mitigates his misconduct. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following: 1) The applicant enlisted in the Regular Army on 04 February 1970; 2) The applicant was deployed to Vietnam between 11 July 1970 and 10 July 1971; 3) On 25 April 1971 he accepted NJP for failure to go to his place of duty, and again on 09 May 1971 for falling asleep at his post; 4) Per a 14 February 1972 special court-marital order, the applicant was found guilty of possessing and selling heroin; 5) On 01 May 1972 court martial charges were preferred against the subject for going AWOL between 18 August 1971 and an unknown date; 6) On 19 December 1972, the applicant was discharged, Chapter 11-1(b), as a result of court-martial. His service was characterized as under other than honorable conditions. He completed 2 years, 7 months, and 10 days of net active service with 352 days of lost time.

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the available supporting documents and the available military service records. The VA's Joint Legacy Viewer (JLV) was also reviewed. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

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

- d. A review of JLV provided insufficient evidence the applicant has been diagnosed by the VA with service-connected PTSD, and he does not receive any service-connected disability for PTSD.
- 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 diagnosed mental health condition or experience including PTSD 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, which mitigates his misconduct.
 - (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. The applicant did engage in avoidant behavior such as using illegal drugs, failing to be at his place duty, and going AWOL for an extended period of time, which could be a natural sequelae to PTSD. However, the presence of misconduct is not sufficient evidence of the presence of a mental health condition. In addition, there is no nexus between the applicant's reported PTSD and the selling of illegal drugs in that: 1) this type of misconduct is not a part of the diagnosis or natural sequelae of PTSD; 2) PTSD does not impact one's ability to distinguish right from wrong. However, the applicant contends he experienced mental health condition or experience while on active service, which mitigates his misconduct. The applicant's contention alone is sufficient for consideration per the Liberal Consideration Policy.

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 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 diagnosed mental health condition or experience including PTSD that mitigates his misconduct.

Kurta Questions:

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2. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the misconduct of AWOL and possession and selling of narcotic drugs. The Board noted, the applicant' provided no post service achievements or character letters of support for to weigh a clemency determination. The Board agreed the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief, specifically an upgrade of the under other than honorable conditions (UOTHC) discharge to honorable. Therefore, the Board denied relief.

3. Prior to closing the case, the Board did note the analyst of record administrative notes below, and recommended the correction is 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):

The applicant is authorized administrative correction of his DD Form 214 for the period ending 19 December 1972 without Board action to show the following awards:

- two bronze service stars with his already awarded Vietnam Service Medal
- Republic of Vietnam Gallantry Cross with Palm Unit Citation
- Republic of Vietnam Civil Actions Honor Medal First Class Unit Citation

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. Section 1556 of Title 10, U.S. 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 ABCMR applicants (and/or their counsel) prior to adjudication
3. Army Regulation 15-185 (Army Board for Correction of Military Records) 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. The applicant has the burden of proving an error or injustice by a preponderance of evidence. The ABCMR may, in its discretion, hold a hearing (sometimes referred to as an evidentiary hearing or an administrative hearing) or request additional evidence or opinions. 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.
4. Army Regulation 635-200 (Personnel Separations), 15 July 1966, set forth the basic authority for the separation of enlisted personnel:
 - a. An honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.
 - b. A general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 11 provided that an enlisted person would be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial, after completion of appellate review, and after such affirmed sentence has been ordered duly executed. The service of Soldiers sentenced to a bad conduct discharge was to be characterized as under conditions other than honorable.

5. 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.

6. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) 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 under other than honorable conditions 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.

7. 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.

8. The Under-Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, 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 grounds.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, Boards shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

//NOTHING FOLLOWS//