

IN THE CASE OF: [REDACTED]

BOARD DATE: 17 October 2024

DOCKET NUMBER: AR20230009982

APPLICANT REQUESTS:

- Medical retirement due to disability
- All pay and allowances with benefits he may have been deprived of as a result of his discharge from the date of discharge to the date of the end of his last enlistment period to include:
  - Reimbursement for medical insurance
  - Quarters allowance
  - Ration allowance
  - Accumulated leave pay
  - Reimbursement for clothing allowance
  - Post exchange and commissary allowances
- Remission of his reenlistment bonus recoupment in the amount of \$5,107.69.
- Upgrade of his under honorable conditions (general) discharge to honorable; to include:
  - Correction of his narrative reason for separation to read disability, permanent (enhanced)
  - Correction of his separation code to SEJ [sic]
  - Change the separation authority to read Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation), chapter 4 or
  - Correction of his narrative reason for separation to read rehabilitation failure and correction of his separation code to JPD

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

- DD Form 149 (Application for Correction of Military Record)
- Letter from Attorney
- Agreement to Provide Legal Services

- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Exhibit A - Enlistment Documents
- Exhibit B - Enlisted Record Brief
- Exhibit C - DD Form 214
- Exhibit D - Newspaper Article Honor the Fallen
- Exhibit E - Statement in Support of Claim for Service Connection for Post-traumatic Stress Disorder (PTSD)
- Exhibit F, Exhibit G, Exhibit M, Exhibit N - Medical Documents
- Exhibit H - Military Police (MP) Report
- Exhibit I - Administrative Reprimand Packet
- Exhibit J - Noncommissioned Officer Evaluation Reports (NCOERs)
- Exhibit K - Stressful Incident Report
- Exhibit L - Character Reference Letters
- Exhibit O - Addiction Recovery Program Documents
- Exhibit P - Army Substance Abuse Program (ASAP) Documents
- Exhibit Q - Counseling Statement
- Exhibit R - Requests for Action
- Exhibit S - Separation Board Packet
- Exhibit T - Positive Urinalysis Document
- Exhibit U - Department of Veterans Affairs (VA) Documents
- Exhibit V - Memorandum Guidance to Military Boards for Correction of Military/Naval Records
- Exhibit W - Memorandum Clarification Guidance to Military Discharge Review Boards
- Exhibit X - Letter from Doctor
- Exhibit Y - Medical Evaluations
- Exhibit Z - Medical Examination
- Exhibit AA - Document on PTSD and High-Risk Behaviors in Trauma Survivors
- Exhibit BB - Memorandum Guidance to Military Discharge Review Boards
- Exhibit CC - Self-Authored Statement
- Exhibit DD - Debt Avoidance Audit

**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 defers to his attorney.
3. The applicant's attorney states, on behalf of the applicant:

- a. They request that the Board retire the applicant based on his service-connected, combat-related post-traumatic stress disorder (PTSD) that eventually became so debilitating that it resulted in him being unable to reasonably perform the duties of his rank and position.
- b. Should the Board determine he does not meet the requirements to be able to be medically retired, they would still posit that he is entitled to and has earned multiple changes to his DD Form 214 (Certificate of Release or Discharge from Active Duty) and that two alternative bases exist for the Board to provide relief.
- c. The last alternative they present to the Board is that he simply be treated, at worst, as an ASAP failure. If the Board chose this route, he should receive an honorable discharge characterization; a change in separation authority to read Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), chapter 9, a narrative reason for discharge changed to "rehabilitation failure" and his separation code changed to "JPD". While this is not their ideal relief it could technically still be appropriate in the applicant's case, and it would provide yet another avenue of approach to him finally being able to obtain the honorable discharge he seeks and deserves after all these years for his sacrifice and service.
- d. Bottom line: He spent almost three of his over 11 years of active service deployed to Iraq and Afghanistan. Like many veterans who deployed multiple times in a relatively short span of time, his mental health became worse and worse after each one of these deployments. None of his deployments were easy. He suffered a significant improvised explosive device (IED) blast to his convoy that resulted in the loss of a good friend near the middle of his first deployment, and he saw danger-close significant mortar and rocket fire within just a day or so of arriving in country on his last deployment. With mental health symptoms worsening, he found himself needing to slowly escalate and experiment when one method would become obsolete first nicotine, then alcohol and then finally using marijuana to the point he became dependent on it, which resulted in his eventual separation. He eventually became unable to control it, despite efforts to utilize rehabilitation methods. Instead of his chain of command going down a route of a medical discharge or ASAP/Rehabilitation Failure under Army Regulation 635-200, chapter 9, the command made clear their intent to separate him for misconduct despite his separation and discharge being marred with injustice, impropriety, and inequity.
- e. The applicant sacrificed significantly for this country, and he served honorably for the vast majority of his military career. He suffered from, and continues to suffer from, among other things, PTSD, depression, and anxiety and the Department of Veterans Affairs (VA) has service-connected these conditions and has deemed he is 100 percent disabled. His only instances of misconduct, particularly those alleged offenses for which he was separated, undeniably resulted from the conditions in which he was suffering

and symptoms he was trying to alleviate through self-medication efforts. The chain of command took his misconduct personally, and he had to fight and claw just to get his discharge characterized as under honorable conditions (general) and not as an under other than honorable conditions (UOTHC). At the end of the day, the command and separation board relied on limited use evidence, as defined under Army Regulation 600-85 (The Army Substance Abuse Program), which should have resulted no worse than an honorable discharge.

f. The first nine years of his career show multiple deployments and 1/1 noncommissioned officer evaluation reports (NCOER). After just barely being in the Army for a year, he was sent on his first deployment to Iraq, in April 2003, for eleven months, which was technically as part of the initial invasion. He did very well on his first deployment, and he was able to return home relatively unscathed despite experiencing a truly tremendous event. In November 2003, he was in a convoy traveling to deliver chow to a remote unit in Iraq when an IED blast took out a vehicle just in front of his. The blast killed one of his closest friends on that deployment, Specialist (SPC) [REDACTED] and it did become an identifiable event that ultimately started his ongoing issues with anxiety that persist to this day. They were attaching a copy of an article discussing the events of SPC [REDACTED] passing, as well as a record within the applicant's health/VA records where he discusses the impact of this event on his mental health.

g. Just over a year and a half later, he would again find himself deploying in support of Operation Iraqi Freedom (OIF) for a twelve month deployment, returning in late 2006. While this deployment did not entail any singular event that was as traumatic as the event that killed SPC [REDACTED] it overall was a more stressful and traumatic deployment. One of the major contributing factors for this was that a lot of his time on this deployment was not spent as a cook, which was his primary military occupational specialty (MOS), but he was asked to perform detainee operations. The day-to-day pressure, stress, and fear was far different and more severe than on his first deployment, and his anxiety, hypervigilance, irritability, nightmares, sleep issues, and feelings of hopelessness, and despair worsened. He noticed he felt markedly different, after his second deployment, and he was having difficulties adjusting upon redeployment due to adverse mental health symptoms that were also manifesting themselves physically. Like many veterans who served on multiple deployments, particularly in those early years of OIF, he sought self-medication to help alleviate the symptoms he felt.

h. At first, he turned to nicotine to help calm his nerves and anxiety. However, he became so addicted to it that it actually became concerning to him, so he sought nicotine addiction counseling as early as June 2007. Nicotine was not quite cutting it, so he needed something more. He eventually turned to alcohol to help with his mental health struggles, and he struggled with controlling his intake, knowing when to stop, and did eventually become dependent on that too. Unfortunately, this dependence resulted in him receiving a driving under the influence (DUI) in October of 2007. He made the

decision to turn back to nicotine and basically suffer in silence as his irritability, anxiousness, and short-fuse grew worse and began to adversely affect his personal relationships. However, he was still able to "Soldier-on" despite receiving a general officer memorandum of reprimand (GOMOR) for the DUI. They provided a copy of the GOMOR he received as well as multiple solid NCOERs even after the onset of his mental health-related symptoms.

i. He, already in a tough spot and finding it hard to maintain his composure and resiliency, was deployed yet again. This time, he was sent to Afghanistan for another twelve-month tour. On his second day of deployment, the base was hit with multiple rockets and indirect fire that struck just 20 yards from his sleeping quarters. This led to further downward spiraling of his mental health and resulted in him having multiple panic attacks a week, having difficulty sleeping, and when he did sleep, he would have nightmares.

j. Post-Afghanistan Deployment (Combat Deployment number three). He would return from that last deployment in April of 2011, and a once promising military career would end just two years later. His spouse, at the time, who had known him since 2004, had noticed negative changes in him and his behavior, after each deployment, but the last deployment made him almost entirely unrecognizable from the man who she knew several years earlier.

k. Immediately upon his return from Afghanistan, he tried the previous "go-to" vices: nicotine and alcohol; however, those were no longer working, and it did not take long before he turned to marijuana to self-medicate. Eventually, he was diagnosed with cannabis dependence, which should not be surprising considering what he had gone through, but also considering the high likelihood of his propensity to become addicted to substances to relieve extreme adverse effects of the mental health conditions he was experiencing. It was also no surprise that even prior to his discharge, he was diagnosed with anxiety and depression.

l. It was not as though he did not make an attempt to try to get through rehabilitation. He underwent an inpatient program to treat his substance issue for 30 days between March 2012 and April 2012. The inpatient program first diagnosed him with depression disorder and cannabis dependence as early as March 2012. He would eventually end up in the ASAP program to try to continue treatment and get his life and career back on a positive track. Little did he know that seeking treatment and rehabilitation for his dependence on marijuana would result in a very unceremonious end of his career, which he absolutely did not deserve.

m. ASAP Failure, Separation Proceedings, and Clawing his Way to Avoid Getting an UOTHC. On or about 12 July 2012, he revealed to his ASAP counselor that he was trying his best, but he admitted to continued use of alcohol and marijuana. As Army

Regulation 600-85 contemplates, the counselor and the commander met to discuss his rehabilitative potential. It was determined, at that time, that his likelihood of success or completing the program was low, and that he should be deemed an ASAP failure.

n. This should have - again, at worst - triggered initiation of separation under Army Regulation 635-200, Chapter 9 for being an ASAP failure. The command did attempt to initiate separation at this time, but the chain of command erroneously attempted to separate him under chapter 14-12c, obviously revealing that they deemed his conduct was serious misconduct. This attempt to initiate separation reflects they were trying to do this in June 2012. Had the command done this properly, he would have been separated in a matter of a few weeks, and it is highly possible, based on his record, he would have received an honorable discharge, at this time. Specifically, Army Regulation 635-200, paragraph 9-4 expressly authorizes either an honorable or under honorable conditions (general) discharge.

n. However, as his company commander indicated in his sworn testimony before the administrative separation board, the commander specifically did not pursue initiation of separation under Chapter 9 because he was under the mistaken belief that he would have had to give him an honorable discharge, and he "was not advised that a chapter 9 could be characterized as a general under honorable conditions [discharge]. I know that now." As the records indicate, Captain (CPT) [REDACTED] made it known as early as the first attempt to separate him, that he "should be separated for commission of a serious offense because he had committed crimes."

o. Because the command was not able to separate him for any "serious misconduct" just yet, he continued in ASAP and remained in the Army. He was asked to submit to another urinalysis on 7 August 2012. During this urinalysis the Unit Prevention Leader (UPL) and observer claimed he was "acting peculiar" during the collection efforts. The UPL and observer notified CPT [REDACTED] of this, and CPT [REDACTED] seized the opportunity to order him to submit to a second test. This is very significant, and the attorney would like to break it down as clearly as possible for the Board to understand the importance of this:

(1) His 7 August 2012 urinalysis was conducted on him specifically because he was in ASAP. This means this urinalysis was coded with test code "RO". An RO test code means that the test could only be used for separation purposes, but it could not be used for disciplinary proceedings or for consideration for determining discharge characterization.

(2) Use of an RO-coded test would be "limited use evidence," which if used against a servicemember, would result in an automatic characterization of honorable.

(3) The allegation that he tampered with or provided an "adulterated" sample was key for many reasons: it gave the command the window, arguably (by them) to conduct a second urinalysis, but this time they deemed it was for "probable cause" (PO). A positive urinalysis for a PO-coded test does not have the same limits imposed on it as does the RO-coded test. In addition to a positive test with a PO code being able to be used as "serious misconduct," the allegation of tampering with a test is also an offense in and of itself.

(4) The observer and UPL made this claim simply based on allegations that he was failing to follow instructions immediately, but neither had witnessed him actually do anything to the first test.

p. None of this actually makes sense because he had already admitted, on 12 July 2012, that he was using marijuana. The timing of the test was less than 30 days after this admission; as can be seen on the "charge" in the separation hearing: "that between on or about 8 July 2012 and 7 August 2012 [the applicant] wrongfully used [THC]." He already knew he was going to test positive on that urinalysis, and he had already alerted his counselor and his chain of command that this was going to happen. He had no motive, incentive, or reason to tamper with any test.

q. Because he did not tamper with any test, his urinalysis should have been coded as RO, and the use of such test, if at all, should have warranted an honorable discharge. Again, this would actually be the chain of command's second strike, as the first one was reusing and/or failing to properly initiate separation under Chapter 9 several weeks or even months earlier. The facts and evidence are clear that CPT █ acted immaturely, unprofessionally, and outside his position and rank to personally ensure the applicant received a chapter 14-12c. The applicant was a servicemember with documented mental health issues resulting from his over 35 months of deployments to Iraq and Afghanistan, and this is how he was treated on his way out. CPT █ even had the audacity to seek an UOTHC for the applicant for, essentially, using marijuana to self-medicate his symptoms that, since his separation, have been properly diagnosed as PTSD (as well as anxiety and depression) making up over 70 percent of his 100 percent disability rating.

r. If there is any doubt left how this command handled the applicant's case poorly and improperly, one need only review CPT █ testimony in full, or pretty much any document signed by CPT █. Even his senior rater remarks on the applicant's last NCOER were inappropriate; CPT █ gave him a "4/4" but also indicated he is "unable to attend school due to mandatory scheduled appointments." The appointments CPT █ is referring to, of course, would be the applicant's ASAP and behavioral health appointments. Inclusion of such a remark was wholly inappropriate and far less than what he deserved when his military career ended.

s. Arguments of error. As mentioned, the applicant, if separated at all, should have been separated under Chapter 9 of Army Regulation 635-200. The regulation does not allow for a commander who had consulted with ASAP personnel, in accordance with Army Regulation 600-85, to then delay or forego initiation of separation simply so he could concoct an allegation or wait for someone with severe mental health and dependency issues to inevitably slip up again.

t. Then when the applicant allegedly adulterated his first urinalysis, which was coded as an RO test, no one even mentioned to the applicant the reason why he was being called in for a second test. In fact, CPT █ stated no one told him, presuming the applicant "knew why" he was being recalled. However, the applicant simply did not think anything of it because any number of issues found, during or after the test, could cause a retest. If he were confronted at that time or any time prior to his initiation of separation, he would have denied such an allegation and demanded to see proof, which, of course, did not exist.

u. Additionally, the record also reflects that it is more likely than not that these tests were properly coded as RO tests. Army Regulation 600-85, table 10-1 clearly indicates RO-coded tests cannot be used or considered when determining the characterization of discharge; his RO-coded tests absolutely were used in the separation board's consideration when it recommended an under honorable conditions (general) discharge.

v. Department of Defense (DoD) guidance requires "liberal consideration" be given to his upgrade request due to his diagnosis of PTSD, anxiety, and depression. Over eight years ago, the DoD issued the first of four memoranda providing guidance to the military correction boards on how PTSD, traumatic brain injury (TBI), military sexual trauma, and other mental health conditions should factor into their decision-making regarding military discharge upgrades. The general guidance is that a veteran's application should be given "liberal consideration" when it is established that a mental health condition played a role or was the proximate cause of the discharge. The applicant is precisely the type of veteran who was an intended beneficiary of the memoranda by the DoD encouraging a "benefit of the doubt" approach by records review boards.

w. Most insightful and applicable is the 2017 memorandum released by A.M. Kurta as the Acting Under Secretary of Defense for Personnel and Readiness, titled "Clarifying Guidance to Military Discharge Review Boards (DRB) and Board for Correction of Military/Naval Records (BCM/NR) Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment," or commonly known as the "Kurta Memorandum." When comparing the guidance directly against the applicant's service and medical/mental health records, it is clear he should not be prejudiced in the form of an under honorable

(general) conditions characterization as a result of his mental health condition, at the time of discharge.

x. The Kurta Memorandum provided clarifying guidance to review boards in regard to the Secretary of Defense's initial guidance of "liberal consideration." Specifically, the memorandum sought:

Invisible wounds, however, are some of the most difficult cases [BCM/NRs and DRBs] review and there are frequently limited records for the boards to consider, often through no fault of the veteran, in resolving appeals for relief. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the...mental health condition was not diagnosed until years later. This clarifying guidance ensures fair and consistent standards of review for veterans with mental health conditions

y. In this type of request, the Kurta Memorandum states that the discharge relief sought by veterans, such as the applicant, will involve four questions:

- Did the veteran have a condition or experience that may excuse or mitigate the discharge?
- Did that condition exist/experience occur during military service?
- Does the condition or experience actually excuse or mitigate the discharge?
- Does that condition or experience outweigh the discharge?

z. After a review of his service and medical/mental health records, it is clear all answers are resoundingly in the affirmative and point to him receiving the discharge upgrade relief he is requesting.

aa. Did the veteran have a condition or experience that may excuse or mitigate the discharge? The guidance by the memorandum goes on to clarify: "Absent clear evidence to the contrary, a diagnoses rendered by a licensed psychiatrist or psychologist is evidence the veteran had a condition that may excuse or mitigate the discharge." In the applicant's case, he received a diagnosis of PTSD that was at least partially linked to a combat deployment by a licensed clinical professional. Based on the letters of support, the symptoms reported and observed and diagnoses, while still in service and the VA diagnoses and service connection for his mental health conditions. He absolutely suffered from PTSD, anxiety, and depression, at the time of the misconduct and at the time of his discharge.

ab. Did the condition exist/experience occur during military service? The guidance by the memorandum goes on to clarify:

A diagnosis made by a licensed psychiatrist or psychologist that the condition existed, during military service will receive liberal consideration.

A determination made by the VA that a veteran's mental health condition, including PTSD; TBI; sexual assault; or sexual harassment is connected to military service, while not binding on the DoD, is persuasive evidence that the condition existed or experience occurred, during military service.

Liberal consideration is not required for cases involving pre-existing conditions, which are determined not to have been aggravated by military service.

In the applicant's case, there was no related prior or pre-existing condition documented in his medical records, and the VA subsequently made a determination and assigned a rating specifically related to his disorder(s)/condition(s). Specifically, a full review of his medical and mental health records reveal no mental health-related issues whatsoever until he began to pen up about his PTSD symptoms. His deployments to Iraq and Afghanistan occurred prior to the misconduct, the PTSD was service-connected to his combat deployments, and symptoms of his PTSD remained prevalent all the way through several years after he had been separated to this very day.

ac. Does the condition or experience actually excuse or mitigate the discharge? The guidance by the memorandum goes on to clarify: "Conditions or experiences that may reasonably have existed, at the time of discharge, will be liberally considered as excusing or mitigating the discharge."

ad. In the applicant's case, it is clear from his mental health records that the conditions existed, at the time of his misconduct and at the time of his discharge; therefore, his request must be liberally considered as excusing or mitigating his discharge. More importantly and even more relevant, is that his condition absolutely existed and was a major contributing factor to the misconduct that ultimately led to his discharge.

ae. However, after suffering from multiple traumatic events, while deployed, he was no longer able to survive without the support of addictive and controlled substances to help him cope with his PTSD symptoms. He tried to use legal methods to help him cope, but the more deployment time he faced, the more severe his symptoms got. The more severe his symptoms got, the more he literally needed a dug and/or medication to help him cope. When you combine excessive, depression symptoms, he was at an incredibly high risk of risky behavior and poor decision-making. Had he not suffered

from PTSD, there is no sign or indication in his record that would indicate he would become dependent on alcohol or marijuana. Had he not become dependent on marijuana, he could have avoided having to go to ASAP and eventually become an ASAP failure. Reckless decisions and poor decision-making are common in individuals suffering from PTSD.

af. Does the condition or experience outweigh the discharge? The guidance by the memorandum goes on to clarify:

In some cases, the severity of misconduct may outweigh any mitigation from mental health conditions, including PTSD, TBI, sexual assault, or sexual harassment.

Premeditated misconduct is not generally excused by mental health conditions, including PTSD, TBI or by a sexual assault or sexual harassment experience. However, substance-seeking behavior and efforts to self-medicate symptoms of a mental health condition may warrant consideration. Review boards will exercise caution in assessing the causal relationship between asserted conditions or experiences, and premeditated misconduct.

Liberal consideration includes, but is not limited to the following concepts: 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.

ag. The applicant's offense was a non-violent offense. While he obviously used marijuana more than once, it absolutely was used to alleviate intense symptoms he felt from his service-connected mental health conditions. It is now undeniable, widely accepted, and common knowledge that marijuana is prescribed to treat individuals who suffer from PTSD. After just a quick Google search, it was easy to find several scholarly articles and significant coverage from reputable news sources to support: "Those who took low doses of THC showed measurable signs of reduced fear and anxiety in situations designed to trigger fear." The nexus and relationship between the mental health condition and the misconduct is the exact scenario contemplated and clarified by the Kurta Memorandum. As such, the applicant deserves his characterization be upgraded to an honorable discharge.

ah. The Wilkie Memorandum and post-military considerations. The last memorandum released by the DoD that was designed to provide guidance to review boards was published by the Under Secretary of Defense, Robert Wilkie, in his

25 July 2018, memorandum for the secretaries of the military departments addressing "Guidance to Military DBRs and BCM/NRs Regarding Equity, Injustice, or Clemency Determinations" subsequently referred to as the Wilkie Memorandum. The purpose of the Wilkie Memorandum was to provide standards for DBRs and BCM/NRs in determining whether relief is warranted on the basis of equity, injustice, or clemency. The ultimate goal was to establish these standards specifically for equity for DRBs and relief for injustice for BCM/NRs in order to ensure fundamental fairness. The Wilkie Memorandum states, "In determining whether to grant relief on the basis of equity, an injustice, or clemency grounds, DBRs and BCM/NRs shall consider the following..." and lists 30 factors or conditions which boards must consider and weigh when reviewing veterans' petitions for upgrade. In the applicant's case, several of the factors specifically listed under paragraph 6 of the Wilkie Memorandum attachment 1 apply and are directly on point and must be considered and applied.

ai. "It is consistent with military custom and practice to honor sacrifices and achievements, to punish only to the extent necessary, to rehabilitate to the greatest extent possible, and to favor second chances in situations in which individuals have paid for their misdeeds." In the applicant's case, he should have been granted an opportunity to continue rehabilitation efforts and remain in the service. Even before he ran into issues with certain substances, he had shown a commitment to utilizing addiction counseling. After spending almost three years of his life in an imminent-danger combat zone, he was definitively denied the benefit of the doubt and treated harshly.

aj. "The relative severity of some misconduct can change over time, thereby changing the relative weight of the misconduct in the case of mitigating evidence in a case. For example, marijuana use is still unlawful in the military, but it is now legal under state law in some states and it may be viewed, in context of mitigating evidence, as less severe today than it was decades ago." Considering the only offense he clearly committed was his use of marijuana, this Wilkie Memorandum factor is particularly relevant and should be given significant weight by this Board.

ak. "Request for relief based in whole or in part on a mental health condition, including PTSD, TBI, or a sexual assault or sexual harassment experience, should be considered for relief on equitable, injustice, or clemency grounds whenever there is insufficient evidence to warrant relief for an error or impropriety." The applicant's request for relief is absolutely based, at least in part, on his PTSD, so they request that it be considered for relief on equitable, injustice, and clemency grounds.

al. "Relief is generally more appropriate for nonviolent offenses than for violent offenses." Again, none of his alleged misconduct was even remotely close to being a violent offense. In addition to the above, based on the Wilkie Memorandum guidance,

they also specifically ask the Board to consider and apply the following subparagraphs from paragraph 7 in its consideration.

am. "An applicant's candor" The applicant has been nothing but honest and forthright through all of this. In fact, the only reason he had such a large target on his back and became an ASAP failure in the June/July 2012 timeframe was because he had volunteered information about his marijuana and alcohol use. In response to his 11 July 2012 counseling after he admitted marijuana use he stated, "I have admitted to needing help. I am diagnosed with cannabis dependency and currently in treatment. I have relapsed and command views this as misconduct."

an. "Whether the punishment, including any collateral consequences, was too harsh." Again, the applicant will suffer lifelong issues because of his PTSD, anxiety, and depression, and he has recently been deemed 100 percent disabled due to service-connected injuries and disorders. Anything in addition to the invisible wounds he suffers from that keep him from being able to maintain steady employment, relationships, and live a normal life should be found to be too harsh.

ao. Now, on the 20th anniversary of the initial invasion of Iraq, it is well-documented that the invisible emotional scars and trauma from that war specifically will never go away. The applicant has a life sentence of emotional and mental health due to spending almost two years in that country, sacrificing his chance at a normal, symptom-free life. Anything less than an honorable discharge seems an unduly harsh punishment, especially for this insignificant, minor misconduct.

ap. "Positive or negative post-conviction conduct, including any arrests, criminal charges, or any convictions since the incident at issue." The applicant has kept an entirely clean record since his discharge without even receiving a parking ticket.

aq. "Length of time since misconduct." It has been over ten years since the misconduct that led to his discharge, but it has been almost twenty years since he suffered unimaginable trauma on his first deployment - trauma that he has been living with ever since.

ar. "The degree to which the requested relief is necessary for the applicant." He can use all of the assistance he can get, at this point. As he describes within his personal statement, he has been struggling off and on with homelessness since his discharge. While his under honorable conditions (general) discharge does entitle him to VA disability compensation, further benefits, including combat-related special compensation pay could be unlocked as a benefit to him should he be medically retired.

as. "Character references and letters of recommendation." They are providing multiple letters of support for the applicant. A common theme from these individuals is

that he was a caring, compassionate, and considerate man who was ambitious and passionate about his military career. Unfortunately, however, the individuals who provided letters also detail the very noticeable differences they observed in him and his behavior, worsening, after each deployment. This makes it all the more apparent that he will never be who he once was, and there is no one more hurt, frustrated, or disappointed than he himself. He knows he is not the person he used to be, and it requires constant work and commitment to treatment to even be a remote semblance of who he once was. This is not, however, his fault nor is it a reflection of who he was or even is as a person to this day.

at. The fair outcome here would be for the Board to determine the applicant is deserving of a medical retirement, which should entail among all the other request relief, specific repayment of the debt he was forced to repay for premature separation from service. This is one of the most clear and obvious cases for finding the nexus between everything needed to grant the relief requested and directed by law, guidance, and precedent. He served honorably prior to and throughout his three deployments. His deployments changed him and resulted in severe PTSD. His PTSD led to substance-seeking and self-medicating for coping purposes. The substances he needed were unlawful and resulted in misconduct. The misconduct led to his separation and resulting derogatory marks on his DD Form 214. Therefore, for the reasons stated, it is clear his case is the exact type of discharge upgrade request that was contemplated by the DoD's guidance.

au. Regardless of which path the Board decides to follow as the most appropriate means to grant relief for the applicant, they do believe that, at a minimum, all roads lead to at least an upgrade in the characterization of discharge to honorable.

4. The applicant provides the following documents:

a. His Enlisted Record Brief, which shows he had service in Afghanistan from 11 May 2010 through 29 April 2011 and Iraq from 27 November 2005 through 12 November 2006 and from 29 April 2003 through 27 March 2004. He was promoted to the rank of SSG effective 1 November 2006. His expiration term of service was 15 October 2014.

b. Newspaper article regarding the death of SPC █ which is available for the Board's review.

c. A Statement in Support of Claim for Service Connection for PTSD, states he was on a routine convoy that had seven vehicles. He was in the last vehicle. The first two vehicles were hit by an IED. The blast was not very big but there was shrapnel due to the debris the IED was hidden in. His best friend SPC █ was killed by the debris. The applicant's first sergeant (1SG) had him escort the SPC's body to the medical center.

He had just borrowed movies from SPC █ hours before. He had played the day in his mind everyday since. He is taking medication for symptoms, lack of sleep, and nightmares. He is being treated by mental health.

d. Medical documents are available for the Board's review and will be reviewed by the Army Review Boards Agency medical department who will provide a medical advisory for the Board's consideration.

e. A Stressful Incident Report, which states the second day he arrived in Afghanistan the compound started receiving indirect fire from mortar rounds. There were 20 minutes of rockets being fired and sirens going off. Mortar rounds were landing 20 yards from his sleeping quarters. There was no defense for that kind of attack and he did not want to die like that. He would wake up three to five times a week with a panic attack.

f. Character reference letters, which state in pertinent part:

(1) From his ex-wife, who met the applicant in October 2004 and they were married in November 2005. He was a caring, compassionate, loving, considerate, and social person who was ambitious and passionate about his military career. His superiors found him to be trustworthy and those under his leadership admired and respected him. After his return from his 2005 deployment, his wife began to witness changes in both his physical and mental health. He would often complain about joint pain, particularly in his shoulder and ankles. His mental health began to change as well. He would wake up in the middle of the night due to night sweats. He also twitched and jerked a lot, while sleeping. He became irritable, even hypervigilant at times. He would seclude himself for long periods of time. It was like his emotion tank was running low. He began to exhibit a lack of interest in some of the things he once enjoyed. By his return from his 2010-2011 deployment, it was even more obvious that changes had taken place both physically and mentally. He also seemed to withdraw emotionally even more. He became increasingly irritable. He would have multiple run-ins with the law resulting in arrests. He was no longer recognizable to who he had been in 2004.

(2) From █ who met the applicant when they were around 16 years old. The applicant was always energetic and active. The author first started to notice a change in the applicant's character years ago when he would surprise the applicant when he was home visiting his parents. The author was the only one the applicant would socialize with. The author's biggest concern for the applicant was when he would take risks with drug use. He was smoking marijuana without anyone around him as if it was necessary and not so much recreational. The author could sense that whatever problems he was going through were mental and his fear of that was greater than facing trouble from using the drugs. The author has to help the applicant with chores and to remind him to

keep up with his hygiene. His social and work life does not seem to be improving since he has been out of the military.

(3) From [REDACTED] who was married to the applicant from April 2013 until June 2017. She met him while he worked at the dining facility in Fort Campbell, Kentucky and visited him, while he was in [REDACTED] Hospital for his anxiety, depression, and chemical dependency on cannabis. They were married after he got out of the hospital and learned she was pregnant. His first daughter's mother passed away after they were married. He was dealing with that loss while also going through the separation process from the military. His command had intentions of him receiving an UOTHC discharge. He was processing his medical transition out of the Army, he had a six year old daughter who he could not support financially or emotionally. The author felt the applicant was depressed. The applicant would have nightmares that he called intense dreams. He would wake up in a pool of sweat a few times a week. On the very worst days, he had anxiety attacks that he would try to conceal.

g. ASAP documents which show he was enrolled in ASAP. His record of civilian arrests/convictions shows he was arrested for an outstanding warrant (drug related) on 6 January 2012. His performance in the program was good.

h. Letter from the VA, 19 May 2022, which shows he was 100 percent service-connected for PTSD, effective 24 November 2021 and 10 percent service connected for allergic rhinitis, effective 24 November 2021.

i. Letter from his doctor, 23 February 2023, states the applicant has been treated by the doctor for diagnoses of PTSD with panic features and mood disorder. He has had symptoms of periodic panic episodes with palpitation, sweating, and fear of dying. He was present when a friend was killed by an IED and has described survivor guilt. He tried to avoid triggers for memories, has reported periodic upsetting memories, and periodic nightmares. He has problems trusting others and has decreased outside activities with hypervigilance and significant irritability, which have caused difficulty in work settings. He has had periods of elevated mood, energy, racing thoughts, and poor sleep. He had has periodic significant suicidal thoughts.

j. A self-authored statement, states in effect:

(1) He served in the U.S. Army from 17 April 2002 until his untimely discharge on 3 May 2013. He is grateful for his time in the service and appreciates the opportunity to serve. The purpose of the letter is to request an upgrade of his discharge. He intends to illustrate circumstances that will prove the discharge given was inappropriate for his situation. In his 10 year tenure with the military, he spent more than 36 of those months in hostile territory. His DD Form 214 will reflect his rank as staff sergeant, which he

received within four years of his enlistment. He hopes the Board will agree that this speaks directly to his ambition, focus, and tenacity as a Soldier.

(2) His first deployment occurred in 2003, less than 18 months after he joined the service. He enlisted as a 92G (Food Service Specialist). His convoy was hit by an IED, while on a routine meal run. His good friend [REDACTED] was injured and killed. That day and his death play a significant impact on the applicant's mental health. He immediately looked for professional help for his mental stability. Those efforts resulted in no assistance, only to deploy again to Iraq in 2006. He was cross-trained as a military police officer to perform detainee operations. His assignment was holding prisoners and in-process them into the Biometric Automated Tool Set. That was the most horrifying job ever. Daily he would have to psychologically prepare himself to come face-to-face with terrorists who he knew hated him. These were recently captured individuals waiting to be interrogated for or attempting to kill Americans. One of the detainees was trying to pronounce his last name. He has no idea of the extent of their capabilities and resources, so this frightened him. The training provided only taught them how to manage the detainees physically, not on a psychological level. His final deployment to Afghanistan in 2010 would only add further mental trauma. The very first night arriving at the theater, their living quarters were under attack by local mortar fire. He was not trying to hide his faults or shift accountability for his action.

(3) By January 2012, he dealt with civilian authorities due to self-destructive behavior. He utilized the Army's "open door" policy to confide in his chain of command. He was referred to ASAP after admitting to needing further professional and medical assistance. During the intake, he was diagnosed with a medical condition called cannabis dependency in remission. His entire command group signed documentation in agreement for him to seek rehabilitation efforts. At this time, separation and adverse action were undoubtedly at the commander's discretion. Due to the nature of his character and history of good conduct over the last decade, rehabilitation was the agreed course of action. In March 2012, his condition became chronic to the extent that the command group agreed and signed off on his treatment for inpatient care at a neighboring psychological facility. He was admitted to [REDACTED] for 30 days for drug addiction, anxiety, and depression.

(4) His support team was no longer available when he was released from [REDACTED] in April. His first sergeant (1SG) had completed a permanent change of station and a sergeant first class (SFC) filled the position. The date he met SFC [REDACTED] he knew he would not get the same support. His first words of introduction were "[The applicant], you are playing the victim. You can stop smoking marijuana if you want." This event occurred on the first day of him being released from the hospital.

(5) Furthermore, the SFC's perception of the applicant's addiction and substance abuse does not reflect the valuable information he was presented, during the

treatment. He became a victim of the SFC's personal beliefs and not the Army regulation. According to the professionals who are trained to diagnose and treat addicts, they teach that addiction is a disease. Addiction being a disease is why addicts celebrate their sobriety. The Army Values were nowhere to be found, during his involvement with SFC █. He had zero misconduct from 2010 until 2 May 2013, just SFC █ initiated only encounters. He had more DA Forms 4856 (Developmental Counseling Form) from the SFC in six months than his entire ten years of service. The SFC did not attempt to disguise his disdain for the applicant. The SFC's actions are why the applicant is appalled that the SFC was enabled for so long. The SFC practically begged the applicant to sign an Article 15. In return, the SFC would not seek to take rank or money. The applicant knew these were attempts to satisfy the SFC's need for the applicant to have misconduct on his record. SFC █ was part of the meetings where he told the applicant, "SFC B- is out to get you." The applicant asked SFC █ why separation had not been initiated. He responded, "Command will not sign off on any chapter where you will receive benefits."

(6) The applicant remained in the Army for twelve months after being released from Cumberland. Once he became an ASAP patient, his name and social security number would automatically be generated as par to the UPL's urinalysis. He has taken countless unit prevention urinalysis testing over his Army tenure. Cannabis stays in the bloodstream for at least 30 days, according to medical professionals, at the time. He would have traces of marijuana in his system on every test. He has no motive to conceal his addiction or the results of the urinalysis. He must reiterated he has zero reasons to conceal results. He did not need to tamper with testing after a full year after consistently being positive. SFC █ walked by casually one day and whispered. "Hey, [the applicant], your levels are going up. How is the treatment going?" The applicant remembers thinking to himself when did this guy become a medical professional? Once again, for the applicant to tamper with a urinalysis procedure that would not assist him in any form or fashion would be a vain accusation. It is called the burden of proof, and his command failed to establish a motive's foundation. Individual's tamper for favorable outcomes. What would have been favorable for him by providing a negative sample?

(7) During a normal routine company urinalysis some months later in 2013, he was asked to provide a sample as he was normally accustomed to doing. After providing his sample, ten minutes later, he was called by SFC █ and asked to return and provide an additional sample. He was brief and told that he had been accused of tampering and needed to provide an additional sample. He gladly agreed. Had he had an alternative motive, he would have requested to speak to the Judge Advocate General (JAG) because they were already informed that he felt discrimination by SFC █

(8) He was offered an Administrative Separation Board, which he used. He explained that he had zero motive to tamper with a military proceeding, during the

board. The end does not justify the means. However, this accusation alone gave SFC █ all the misconduct he needed to seek alternative separation, which is what happened.

(9) He has sought counsel to assist him with correcting his records. He will not stop seeking justice until he has exhausted all appeal option, including but not limited to the National Association for the Advancement of Colored People. He believes SFC █ racially targeted him and he knows that discrimination exists and is prevalent within the U.S. military. The Equity Action Plan released in 2022 by the VA illustrates that it is not just him who is undeserved.

(10) He is still unsure how the tampering accusation equates to "drug abuse," which is annotated on his DD Form 214. Documentation will prove by his command's testimony that he was indeed an ASAP failure. At that time, there was zero misconduct. The opportunity to separate him with the appropriate and necessary resources that would contribute to the continuity of care was robbed of him because of one leader's efforts that were not corrected. He is asking the Board to be that correction. He is currently homeless and still struggling with his medical condition. Correcting his records will provide him access to the necessary resources and quality of care that is warranted for his sacrifice to his country. He should receive full medical retirement benefits as his discharge results were consistent with medical concerns rather than misconduct.

k. Memorandum for Record Debt Avoidance Audit, shows he is indebted to the U.S. government for reenlistment bonus recoupment in the amount of \$5,107.69.

5. The applicant's service record contains the following documents:

a. DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States) shows he enlisted in the Regular Army and entered active duty on 18 April 2002. He remained in the Regular Army through immediate reenlistments.

b. Memorandum Administrative Reprimand, 21 November 2007 shows he was reprimanded for receiving a DUI on 13 October 2007. His blood alcohol content was .17 percent. On 29 November 2007, he acknowledged receipt of the reprimand and elected to submit matters in his own behalf. On 3 December 2007, he submitted a memorandum in rebuttal, which states, in effect:

(1) He respectfully requested the reprimand be filed in the restricted portion of his military records personnel jacket.

(2) He accepts full responsibility for his misconduct and the resulting punishment. He is very fortunate that nobody was hurt because of his recklessness. He is also fortunate that his wife and his chain of command have forgiven him for his lack of

good judgement. His supervisors have demonstrated their full support as he is undergoing his recovery process. It is his prayer that his career will not be ruined because of his actions. This was an incident not his identity.

(3) He was actively enrolled in the Fort Lee, Virginia ASAP. He will be enrolling in the Virginia Substance Abuse Program located in [REDACTED] in January 2008 (at his own expense). He has been ordered by the court to report to the United States Probation Office. Mr. [REDACTED] is his probation officer and has already submitted a request for his early release.

(4) If requested, he would really appreciate an opportunity to talk to the issuing authority about any concern he might have. He has had a solid career of five years with absolutely no adverse action as a warrior and noncommissioned officer. He has learned a great deal from this mistake.

c. His chain of command recommended the reprimand be filed in his official military personnel file (OMPF). On 21 December 2007, the issuing authority filed the reprimand in his OMPF.

d. DA Form 4789 (Statement of Selective Reenlistment Bonus), 16 October 2008, shows he understood he was getting a selective reenlistment bonus for his reenlistment in the MOS 92G for a period of 6 years. He had been advised if he did not complete the full period of service, he would not get any more installments of the bonus, and he would have to pay back as much of the bonus as he already received for the unexpired part of the period of obligated service. The form does not indicate the amount of the reenlistment bonus.

e. On 17 December 2008, he requested that the administrative reprimand be transferred from his performance fiche to his restricted fiche of his OMPF. On 12 March 2009, the Department of the Army Suitability Evaluation Board (DASEB) stated in order for the reprimand to be transferred, he must show that it has served its intended purpose and that its transfer would be in the best interest of the Army. He failed to meet this threshold of proof. He failed to provide any supporting statements from his previous or current chain of command recommending transfer of the reprimand. The evidence presented does not provide substantial evidence that the document in question has served its intended purpose and that its transfer would be in the best interest of the Army. Therefore, by unanimous vote, the DASEB determined the overall merits of the case do not warrant the relief requested.

f. On 10 August 2009, he again requested that the administrative reprimand be transferred from his performance fiche to his restricted fiche of his OMPF. On 28 January 2010, the DASEB informed him after careful consideration, the DASEB voted to deny the transfer of the administrative reprimand.

- g. His ASAP enrollment documents, which show he was arrested for drugs. His performance and behavior were rated good.
- h. DA Form 268 (Report to Suspend Favorable Personnel Action (Flag)), shows he was flagged for adverse action on 3 March 2012.
- i. [REDACTED] Hospital document shows he was admitted to the hospital on 20 March 2012 and was released on 17 April 2012. He was diagnosed with cannabis dependence continuous and depression. He received a certificate for completion of the Addiction Recovery Program.
- j. Memorandum Commander's notification and required response to a positive rehabilitation urine test report, 7 September 2012, shows he tested positive on a urinalysis collected on 7 August 2012. The supporting documents for the test are available for the Board's review.
- k. DA Forms 4856 (Development Counseling Form) show he was counseled on:
  - (1) 8 June 2012, for the events that occurred on 6 January 2012 (simple possession/possession of drug paraphernalia) and on 3 February 2012 (trafficking marijuana). He was arrested for two separate drug related incidents on two separate dates that were less than 90 days apart. The applicant disagreed with the counseling stating he was diagnosed with dependency of the drug and the charge for simple possession was issued in November 2011. The incidents were more than 90 days apart. He signed the form.
  - (2) 11 July 2012, for being an ASAP failure and use of marijuana. The applicant disagreed with the counseling stating he admitted to needing help. He is diagnosed with cannabis dependency and currently in treatment. He has relapsed and command views that as misconduct. He would like to use the inspector general (IG) and equal opportunity (EO) as a resource in this matter. He signed the form.
  - (3) 23 August 2012, elimination counseling for commission of a serious offense. The applicant disagreed with the chapter and signed the form.
  - (4) 28 September 2012, to explain where he needed to be for duty. He agreed with the counseling and signed the form.
  - (5) 4 October 2012, for failing to be at his appointed place of duty. The applicant disagreed with the counseling stating when is this going to stop. He is tired. He spoke with IG, trial defense service, JAG, and EO. This is an attempt that has been anticipated. He would not sign anymore counseling statements from 1SG [REDACTED]

(6) 15 April 2013, due to the fact that he was facing separation from the Army under chapter 14-12c. He was paid a bonus at his last reenlistment, if separated he would be required to pay back any and all bonus payments that he was paid for the most recent reenlistment contract. This recoupment is estimated at \$5,107.69. He agreed with the counseling and signed the form.

I. DA Form 2808 (Report of Medical Examination), 6 September 2012, shows he was diagnosed with anxiety and depression. His Report of Medical History shows he was being treated for anxiety/depression. He abused marijuana and was diagnosed with dependency.

m. DA Form 3822 (Report of Mental States Evaluation), 26 September 2012, shows he was diagnosed with anxiety disorder and cannabis dependence. He could understand and participate in administrative proceedings, could appreciate the difference between right and wrong, and met medical retention requirements and did not qualify for a medical evaluation board (MEB). He had been screened for PTSD and TBI, which were both negative.

n. Memorandum for Record, suspected adulteration of urinalysis sample, 5 December 2012, signed by CPT [REDACTED] states while conducting a monthly 10 percent urinalysis on 7 August 2012, the applicant was directed to provide a sample as a part of his monitoring following a previous positive sample under a rehabilitation (RO) basis code. While observing the collection, Sergeant [REDACTED] noted strange behavior on the part of the applicant. He notified the UPL who in turn notified the CPT. The CPT directed the applicant to provide a second sample. Both samples were submitted for testing under the RO code. The first sample tested negative, but the second sample tested positive for THC. The second sample should have been tested under a probable cause (PO) code as there was probable cause to suspect adulteration.

o. DA Form 268 (Report to Suspend Favorable Personnel Actions (Flag)), 11 December 2012 shows he was flagged for involuntary separation.

p. In an undated memorandum, his commander initiated action to involuntarily separate him due to commission of a serious offense. The reason for his proposed action were on 7 August 2012, the applicant adulterated a urinalysis sample; between 8 July 2012 and 7 August 2012, he wrongfully used THC; and on diverse occasions between 24 September 2012 and 4 October 2012, he failed to go at the time prescribed to his appointed place of duty. The commander was recommending he receive an UOTHC discharge; however, the separation authority would make the final determination in his case. On 11 December 2012, the applicant acknowledged receipt of the initiation of separation.

q. On 12 December 2012, he had been advised by his attorney on the basis of the contemplated action to separate him and its effects; of the rights available to him; and the effect of any action taken by him in waiving his rights. He requested to have his case heard by an administrative separation board, he requested representation at the administrative separation board, and he elected to submit statements in his own behalf. The statement was not available for the Board's review.

r. His chain of command recommended he be separated with an UOTHC discharge. On 5 March 2013, he was notified of board proceedings. On 20 March 2013, the administrative board was completed. The board recommended he be separated from the Army with an under honorable conditions (general) discharge. On 8 April 2013, the appropriate approval authority approved his separation with an under honorable conditions (general) discharge. The summarized proceedings of the separation board are available for the Board's review.

s. On 2 May 2013, he was discharged accordingly. He had completed 11 years and 15 days of active duty service. He had continuous honorable active service from 18 April 2002 through 15 October 2008. He had immediate reenlistments from 23 March 2007 through 15 October 2008 and 15 October 2008 through 2 May 2013. He had service in Iraq from 29 April 2003 through 27 March 2004 and 27 November 2005 through 12 November 2006 and service in Afghanistan from 11 May 2010 through 29 April 2011. He was discharged for misconduct (drug abuse), his character of service was under honorable conditions (general), his separation code was JKK, and his reentry code was 4.

6. Soldiers can be discharged for various types of misconduct. The issuance of a discharge UOTHC was normally considered appropriate for separations under the provisions of chapter 14. In a case in which an UOTHC is authorized by regulation, 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. Paragraph 14-12c provided for the separation of a Soldier due to commission of a serious military or civil offense if the specific circumstances of the offense warrant separation and a punitive discharge would be authorized for the same or a closely related offense under the Manual for Court-Martial.

#### MEDICAL REVIEW:

1. The applicant is applying to the ABCMR requesting medical retirement due to disability, pay and allowance benefits he may have been deprived as a result of his discharge, and upgrade of his under honorable conditions (general) discharge to honorable. He also requests correction of his narrative reason for separation, correction

of his separation code, and change the separation authority. On his DD Form 214 the applicant indicated Posttraumatic Stress Disorder and Other Mental Health Issues are 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 enlisted in the Regular Army (RA) on 18 April 2002, 2) he was reprimanded on 21 November 2007 for driving under the influence (DUI) on 13 October 2007 and his blood alcohol content (BAC) was noted to be .17%. In his rebuttal, the applicant stated he was enrolled in the Army Substance Abuse Program (ASAP) at Ft. Lee (now known as Ft. Gregg-Adams) and was going to voluntarily enroll in the Virginia Substance Abuse Program in January 2008 at his own expense, 3) an ASAP enrollment form dated 11 January 2012 shows he was arrested for an outstanding warrant that was drug related on 06 January 2012. His performance and behavior being rated as 'good, 4) the applicant tested positive on a urinalysis collected on 07 August 2012, 5) the applicant was counseled between 08 June 2012 and 15 April 2013 for the following: simple possession/possession of drug paraphernalia and trafficking marijuana, being arrested for two separate drug-related incidents, for being an ASAP failure and use of marijuana, elimination counseling for commission of a serious offense, to explain where he needed to be for duty, for failing to be at his appointed place of duty, and for facing separation from the Army under Chapter 14-12c, 6) a Memorandum for Record (MFR) dated 05 December 2012 shows that while conducting a monthly 10% urinalysis on 07 August 2012 the observer for his collection noted strange behavior and thus notified the Executive Officer (XO) who directed the applicant to provide a second sample. The first sample tested negative, but the second sample tested positive for THC, 7) in an undated memorandum the applicant's commander initiated action to separate the applicant due to commission of a serious offense. The reasons for his proposed action were noted as the adulteration of a urinalysis sample, wrongful use of THC, and failing to go at the time prescribed to his appointed place of duty. On 02 May 2013 he was discharged under the provisions of AR 635-200, paragraph 14-12c(2). He was discharged for misconduct (drug abuse), his character of service was under honorable conditions (general), with a separation code of JKK, and reentry code of '4.' 9) he had several deployments during his career (Iraq: 29 April 2003 to 27 March 2004; 27 November 2005 to 12 November 2006 and Afghanistan: 11 May 2010 to 29 April 2011).

2. The Army Review Boards Agency (ARBA) Medical Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. The VA's Joint Legacy Viewer (JLV) was also examined. Documentation available via the Veterans Benefits Management System (VBMS) was also reviewed. Lack of citation or discussion in this section should not be interpreted as lack of consideration.
3. In-service medical records were available for review in JLV from 08 June 2007 through 24 June 2013.

- The applicant completed an intake through the Army Substance Abuse Program (ASAP) on 31 October 2007. He was referred for alcohol and drug abuse prevention training (ADAPT) and was not diagnosed with a condition.
- On 11 December 2009 he was referred to BH during a Soldier Readiness Processing (SRP) visit due to his responses on the health readiness survey. It was documented that he endorsed having relationship and financial issues. He also endorsed experiencing troubling thoughts, images, and memories of combat, though denied that they were intrusive or disruptive. He also reported experiencing nightmares since 2007. He denied any previous history of BH counseling or medication management aside from his ASAP classes in 2007. He denied experiencing suicidal or homicidal (SI/HI) ideation and reported he was not interested in BH. The applicant was not diagnosed with a BH condition and was released without limitations. He was referred to BH again during SRP on 13 April 2010 due to positive responses on the health readiness survey. He again reported relationship and financial issues, feeling overwhelmed, increased anger, increased use of alcohol, hyper startle response, inconsistent sleep pattern, occupational stress, feeling trapped due to his stressors, and loss of motivation. He denied experiencing SI/HI. He was not diagnosed with any BH conditions, was released without limitations, and was referred to BH for a follow-up evaluation. His stressors were reaffirmed at BH appointment on 05 May 2010, and it was noted that he would follow-up with BH prior to his pending deployment; however, there were no follow-up BH records available for review until 11 January 2012 when he was command referred to ASAP after being arrested by civil authorities for simple possession and possession of drug paraphernalia.
- At the time of his ASAP evaluation on 11 January 2012, the provider noted that the applicant had a chronic use of marijuana, and his last reported use was May 2011. His drug test results showed that he tested positive for marijuana and opiates. He also endorsed in drinking in excess in September 2011 due to relationship problems. The applicant was diagnosed with Cannabis Dependence Opioid Related Disorder, Rule out Abuse, and Alcohol Related Disorder, Rule Out Abuse. Beginning 23 January 2012, the applicant started group therapy through ASAP and continued to attend on a weekly basis. On 12 March 2012, the applicant was evaluated by psychiatry and the applicant reported he had been feeling depressed everyday since returning from Afghanistan approximately 1 year ago. He also endorsed feeling anxious, sleep problems, irritability and restlessness, and decreased appetite. The applicant was diagnosed with Anxiety Disorder NOS, Depression NOS R/O substance induced, and Cannabis Dependence. The provider noted that due to the applicant's continued cravings inpatient rehabilitation was recommended. He completed a civilian inpatient rehabilitation treatment program from 20 March 2012 through 17 April 2012 and his diagnoses at the time of discharge were documented as Cannabis Dependence, Continuous and Depressive Disorder. In the discharge summary it

was documented that he had been smoking marijuana prior to his deployment on a regular basis but not daily for about 14 years. Following his return from deployment, his use was noted as daily.

- Following his discharge from the inpatient rehabilitation treatment program, the applicant continued his BH treatment through ASAP. It was documented on 18 April 2012 that he was not enrolled in the high interest program. The applicant presented to sick call on 25 April 2012 due to having trouble sleeping since his discharge from inpatient and it was documented he was prescribed Trazodone (for sleep) while in the hospital. The applicant met with psychiatry on 27 April 2012 and was started on Mirtazapine (antidepressant). Due to undesired side effects, Mirtazapine was discontinued on 08 May 2012, and he was started on Seroquel (antipsychotic) for anxiety, sleep, and paranoia.
- It was documented on 25 May 2012 that his ASAP provider was evaluating the applicant's appropriateness for eye movement desensitization reprocessing (EMDR) treatment, a treatment used to address trauma-related symptoms. The applicant disclosed on 04 June 2012 that he had relapsed. On 18 June 2012, he completed an intake with a new ASAP provider for treatment of his combat-related symptoms with EMDR. It was documented that he had lost two close friends and endorsed flashbacks and nightmares related to those events. He identified the most problematic event as having occurred during his first tour in Iraq when his friend was blown up by an IED and was pronounced brain dead. He expressed a desire to resolve his combat-related issues prior to separation and noted he felt guarded, a need to be vigilant, nightmares, anger, irritability, exaggerated startle response, and avoidance of speaking about combat experiences. On 10 July 2012, the applicant reported he was dissatisfied with the lack of care he was receiving and reported he drank alcohol over the weekend which resulted in his provider scheduling a rehabilitation team meeting (RTM) with his command. The provider recommended that command give the applicant a UPL urinalysis (UA) and escort him to the hospital for a medical UA. During a psychiatry appointment on 13 July 2012, it was documented that the applicant reported he was pending a chapter 9 separation. The provider diagnosed the applicant with Anxiety Disorder NOS, R/O Generalized Anxiety Disorder (GAD) and Major Depressive Disorder (MDD) and his medications were continued. A consult was submitted to the on-post BH clinic requesting EMDR treatment for combat-related stress on 16 July 2012. He completed his initial appointment through the Adult BH clinic on 27 July 2012 and his symptoms were documented as anxiety, nervous, fears something bad is going to happen to him, sleep problems, vivid dreams involving death or leading to death 3-5 times per week. He was diagnosed with Cannabis Dependence with R/O of cannabis-induced anxiety disorder, R/O Anxiety Disorder NOS.
- On 02 August 2012, the applicant attended a primary care appointment requesting renewal of his profile noting it was for BH medication. He stated he needed it extended because he could not drive or do other things because of the

medication. The provider documented the applicant's profile had already been extended a few days prior [Advisor's Note: A copy of the profile was unavailable for review to this Advisor]. On 06 August 2012, the applicant started supportive counseling through BH and noted that he was no longer being seen by ASAP due to continued relapses though they were allowing him to walk-in on a weekly basis for the aftercare group. The provider noted he would be seen by BH on an as-needed basis. During a psychiatry appointment on 22 August 2012, he was continued on Seroquel and Trazodone and was on Paxil (antidepressant). On 18 September 2012, the applicant discontinued BH treatment and stated he wanted to focus on ASAP treatment at that time. On 29 October 2012, the applicant requested to be released from ASAP due to pending chapter separation and continued use of substances without plans to maintain abstinence. His last BH note was documented on 05 November 2012 as an RTM. It was noted that he was discharged from ASAP due to treatment failure, that he was pending a Chapter 14 separation, and that he had continued to use marijuana and alcohol with no plans to stop using marijuana. His final diagnosis was noted as Cannabis Dependence.

- The applicant provided several medical records as part of his application. He completed a Mental Status Evaluation (MSE) on 26 September 2012 for the purposes of Chapter 14-12 separation. All domains of his MSE were noted to be within normal limits (WNL) with the exception of impulsivity which was documented to be 'frequently impulsive.' The provider further documented he screened negative for PTSD and TBI and that his psychiatric history was based on substance abuse. He was diagnosed with Anxiety Disorder NOS and Cannabis Dependence. The provider marked that he did not document require any duty limitations. It was documented that he was psychiatrically cleared for separation, that he met medical retention standards, and did not qualify for a medical board.

4. Review of JLV shows the applicant is 100% service-connected through the VA for PTSD. He is also service-connected for numerous physical health conditions. He completed several BH Compensation and Pension (C&P) evaluations through the VA. At the time of his BH C&P examination on 04 March 2014 he was diagnosed with PTSD without panic attacks and Cannabis Use Disorder. The stressor associated with his diagnosis of PTSD was identified as witnessing the death of his friend in an IED explosion during a convoy in Iraq. It was documented that his diagnosis of PTSD was a progression of his original diagnoses of Anxiety and Depressive Disorders diagnosed at the time of his initial C&P examination completed on 07 July 2013. The applicant has continued to seek BH treatment through the VA through the present day with his last BH note dated 29 August 2024.

5. Based on the available information, it is the opinion of the Agency Medical Advisor that there is sufficient evidence that the applicant had a potentially mitigating condition

while in-service. Review of his in-service medical records shows that he was diagnosed with Anxiety Disorder NOS, Depressive Disorder NOS, Cannabis Dependence, Opioid Related Disorder, and Alcohol Related Disorder. It is of note that alcohol and substance use disorders do not constitute mitigating conditions and fall under the purview of administrative separation. Since being discharged from the military, the applicant has been diagnosed and 100% service-connected through the VA for PTSD.

#### 6. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant was diagnosed with Anxiety Disorder NOS and Depressive Disorder NOS in-service. He is 100% service-connected through the VA for PTSD.

(2) Did the condition exist or experience occur during military service? Yes, the applicant was diagnosed with Anxiety Disorder NOS and Depressive Disorder NOS in-service. He is 100% service-connected through the VA for PTSD

(3) Does the condition or experience actually excuse or mitigate the discharge? Partially. Review of available in-service medical records show that the applicant was diagnosed with two potentially mitigating BH conditions, Anxiety Disorder NOS and Depressive Disorder NOS. Since being discharged from the military, he has been diagnosed and 100% service-connected through the VA with PTSD. His in-service diagnoses of Anxiety Disorder NOS and Depressive Disorder NOS are subsumed by his diagnosis of PTSD. Self-medicating with substances is a common form of coping and an avoidance behavior often associated with anxiety and trauma-related conditions. As such, there is a nexus between the applicant's misconduct of wrongful use of THC, failing to go at the time prescribed to his place of duty, avoidance behaviors and his diagnosis of PTSD. However, adulteration of a urinalysis sample is not part of the natural history and sequelae associated with PTSD. Furthermore, PTSD does not interfere with the ability to distinguish between right and wrong and act in accordance with the right. As such, BH mitigation is partially supported.

Regarding his request for disability, although the applicant was diagnosed with Anxiety Disorder NOS and Depressive Disorder NOS while in-service, there is no indication based on the available records that his conditions fell below medical retention standards nor met the Medical Retention Determination Point (MRDP). The applicant was psychiatrically cleared by BH as part of his chapter separation processing, noting at the time of the evaluation that he met medical retention standards and did not require a referral to the MEB. Although the applicant has been service-connected for PTSD since being discharged from the military, it is of note that VA ratings are based on different standards and parameters and do not address whether a condition met or failed Army retention criteria or if it was a ratable condition during the period of service. A

subsequent VA disability rating does not imply failure to meet Army retention standards at the time of service or that a different diagnosis rendered on active duty is inaccurate. As such, there is insufficient evidence to warrant a referral to IDES for consideration of military disability/retirement.

**BOARD DISCUSSION:**

1. The Board found relief is not warranted.
2. The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the counsel's statement, the applicant's statement, his record of service to include deployment, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the applicant's mental health claim and the review and conclusions of the ARBA Medical Advisor. The Board found the letters of support provided by the applicant insufficient in support of a clemency determination. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding his misconduct being only partially mitigated by mental health conditions and there being no evidence of any medical conditions that would have been a basis for referring him to the Disability Evaluation System. While there may once have been a basis for discharging him as a rehabilitation failure, the Board found the decision to process him for discharge as a result of his misconduct was fully supported by the evidence. Based on a preponderance of the evidence, the Board determined the character of service the applicant received upon separation and the reason for his separation and associated codes were not in error or unjust.
3. In the absence of a basis for changing his discharge, the Board determined there is no basis for additional pay and allowances or remission of the debt he incurred as a result of bonus recoupment.

BOARD VOTE:

Mbr 1    Mbr 2    Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

3/31/2025

 X

CHAIRPERSON  


I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations) prescribed the policy for enlisted separations.
  - a. An honorable discharge is a separation with honor and entitles a Soldier to full Federal rights and benefits provided by law. The honorable characterization is appropriate when the quality of the Soldier'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 9 contains the authority and outlines the procedures for discharging Soldiers because of alcohol or other drug abuse. A member who has been referred to the ADAPCP for alcohol/drug abuse may be separated because of inability or refusal to participate in, cooperate in, or successfully complete such a program if there is a lack of potential for continued Army service and rehabilitation efforts are no longer practical. Nothing in this chapter prevents separation of a Soldier who has been referred to such a program under any other provisions of this regulation. Initiation of separation proceedings is required for Soldiers designated as alcohol/drug rehabilitation failures. The service of Soldiers discharged under this chapter will be characterized as honorable or under honorable conditions unless the Soldier is in entry-level status.

d. Chapter 14 of the regulation dealt with separation for various types of misconduct. The issuance of a discharge under other than honorable conditions (UOTHC) was normally considered appropriate for separations under the provisions of chapter 14. In a case in which an UOTHC is authorized by regulation, 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. Paragraph 14-12c provided for the separation of a Soldier due to commission of a serious military or civil offense if the specific circumstances of the offense warrant separation and a punitive discharge would be authorized for the same or a closely related offense under the Manual for Court-Martial.

3. Army Regulation 635-5-1 (Personnel Separations – Separation Program Designator (SPD) Codes), in effect at the time, prescribes the specific authorities, reasons for separating Soldiers from active duty, and the SPD codes to be entered on DD Form 214. It shows code:

- JKK is used for discharge for misconduct (drug abuse)
- SFJ is used for disability permanent
- JPD is used for alcohol rehabilitation failure
- JPC is used for drug rehabilitation failure

4. Army Regulation 601-210 (Regular Army and Reserve Components Enlistment Program) table 3-1 (U.S. Army reentry eligibility codes) states:

- a. RE-1: Applies to: Person completing his or her term of active service who is considered qualified to reenter the U.S. Army.
- b. RE-3: Applies to: Person who is not considered fully qualified for reentry or continuous service at time of separation or disqualification is waivable.
- c. RE-4: Applies to: Person separated from last period of service with a nonwaivable disqualification.
- d. RE-4R: Applies to: A person who retired for length of service with 15 or more years active federal service.

5. 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 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.

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 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 (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.

7. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (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.

8. Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) states:

a. The mere presence of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier reasonably may be expected to perform because of their office, grade, rank, or rating.

b. An enlisted Soldier may not be referred for, or continue, physical disability processing when action has been started under any regulatory provision which authorizes a characterization of service of under other than honorable conditions.

c. Exceptions to paragraph b above are if the case comes within the limitations above, the commander exercising general court-martial jurisdiction over the Soldier may abate the administrative separation. This authority may not be delegated. A copy of the decision, signed by the General Court Martial Convening Authority (GCMCA), must be forwarded with the disability case file to the PEB. A case file may be referred in this way if the GCMCA finds the following:

(1) The disability is the cause, or a substantial contributing cause, of the misconduct that might result in a discharge under other than honorable conditions.

(2) Other circumstances warrant disability processing instead of alternate administrative separation.

9. Title 38, USC, section 1110 (General - Basic Entitlement): For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of

a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

10. Title 38, USC, section 1131 (Peacetime Disability Compensation - Basic Entitlement): For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

11. Title 31, U.S. Code, section 3702 (Authority to Settle Claims), also known as the Barring Statute, prohibits the payment of a claim against the U.S. Government unless the claim has been received by the Comptroller General within 6 years after the claim accrues. Among the important public policy considerations behind statutes of limitations, including the 6-year limitation for filing claims contained in this section of Title 31, U.S. Code, is relieving the U.S. Government of the need to retain, access, and review old records for the purpose of settling stale claims which are often difficult to prove or disprove.

12. Army Regulation 600-4 (Remission or Cancellation of Indebtedness) in accordance with the authority of Title 10 USC, section 4837, the Secretary of the Army may remit or cancel a Soldier's debt to the U.S. Army if such action is in the best interests of the United States. Indebtedness to the U.S. Army that may not be canceled under Title 10 USC, section 4837 when the debt is incurred while not on active duty or in an active status.

13. Army Regulation 600-85 (The Army Substance Abuse Program) governs the Army Substance Abuse Program. It identifies Army policy on alcohol and other drug abuse, and it identifies assigned responsibilities for implementing the program.

a. Paragraph 4-5 (Purposes for conducting drug testing) states there are nine purposes for ordering urinalysis testing of Soldiers. Among the nine purposes are the following:

(1) Inspection random (IR): random drug testing is a scientifically valid system of selecting a portion of a command for testing without individualized suspicion that a particular individual is using illicit drugs. Each Soldier will have an equal chance of being selected for drug testing each time this type of inspection is conducted.

(2) Rehabilitation (RO): production of a specimen is required as a part of the alcohol or other drug rehabilitation program. The rehabilitation team will determine the frequency, which will then be included in the rehabilitation plan.

b. Chapter 10 addresses legal and administrative actions and procedures involving drug and alcohol use by Soldiers and civilian corps members. Participation in the Army Substance Abuse Program (ASAP) rehabilitation program need not interfere with normal command administrative actions.

c. Table 10-1 (Use of Soldiers' confirmed test result) summarizes how a Soldier's confirmed positive drug test results may be used. This table serves as guidance only; the facts of each case will dictate the appropriate actions that a commander should pursue. Commanders should consult with their servicing legal advisor prior to initiating adverse action against a Soldier after receiving a positive drug test result. Refer to paragraph 4-5 of this regulation for an explanation of the drug testing codes used in Table 10-1. Table 10-1 shows the following:

(1) Search or seizure: Random sample (IR); usable in disciplinary proceedings: yes; usable as basis for separation: yes; usable for characterization of service: yes.

(2) Search or seizure: Rehabilitation testing (RO); usable in disciplinary proceedings: no; usable as basis for separation: no; usable for characterization of service: no.

d. Paragraph, 10-11 (Limited use policy) states the objectives of the Limited Use Policy are to facilitate the identification (ID) of Soldiers, who abuse alcohol and other drugs by encouraging ID through self-referral to facilitate the rehabilitation of those abusers who demonstrate the potential for rehabilitation and retention. When applied properly, the Limited Use Policy does not conflict with the Army's mission or standards of discipline. It is not intended to protect a member who is attempting to avoid disciplinary or adverse administrative action.

e. Paragraph 10-12 (Definition of the limited use policy) (a) states, unless waived under the circumstances listed in paragraph 10-13d of this regulation, Limited Use Policy prohibits the use by the government of protected evidence against a Soldier in actions under the UCMJ or on the issue of characterization of service in administrative proceedings. Additionally, the policy limits the characterization of discharge to

“Honorable” if protected evidence is used. Protected evidence under this policy is limited to:

- (1) Results of command-directed drug or alcohol testing that are inadmissible under the Military Rules of Evidence (MRE). Commanders are encouraged to use drug or alcohol testing when there is a reasonable suspicion that a Soldier is using a controlled substance or has a blood alcohol level of .05 percent or above while on duty. This information will assist a commander in his or her determination of the need for counseling, rehabilitation, or medical treatment. Competence for duty tests may be directed if, for example a Soldier exhibits aberrant, bizarre, or uncharacteristic behavior, but PO to believe the Soldier has violated the UCMJ through the abuse of alcohol or drugs is absent. Competence for duty test results may be used as a basis for administrative action to include separation, but shall not be used as a basis for an action under the UCMJ or be used to characterize a Soldier’s service.
- (2) Results of a drug or alcohol test collected solely as part of a safety mishap investigation undertaken for accident analysis and the development of countermeasures is further described in paragraph 4-5.
- (3) Information concerning drug or alcohol abuse or possession of drugs incidental to personal use, including the results of a drug or alcohol test, collected as a result of a Soldier’s emergency medical care solely for an actual or possible alcohol or other drug overdose. To qualify for Limited Use protection, Soldiers must inform their unit commander of the facts and circumstances concerning the actual or possible overdose. The commander must receive this information as soon after receipt of the emergency treatment as is reasonably possible. If treatment takes place at a civilian facility, the Soldier must give written consent to the treating civilian physician or facility for release of information to the Soldier’s unit commander concerning the emergency treatment rendered. If the medical treatment resulted from an apprehension by military or civilian law enforcement authorities, or if the admission for treatment resulted from other than abuse of alcohol or drugs, such as for injuries resulting from a traffic accident, the limited use protection will not be available to the Soldier.
- (4) A Soldier’s self-referral to the ASAP.
- (5) Admissions and other information concerning alcohol or other drug abuse or possession of drugs incidental to personal use occurring prior to the date of initial referral to the ASAP and provided by Soldiers as part of their initial entry into the ASAP. This includes an enrolled Soldier’s admission to a physician or ASAP counselor concerning alcohol or other drug abuse incidental to personal use occurring prior to the initial date of referral to the ASAP.

(6) Drug or alcohol test results, if the Soldier voluntarily submits to a DOD or Army rehabilitation program before the Soldier has received an order to submit for a lawful drug or alcohol test. Voluntary submission includes Soldiers communicating to a member of their chain of command that they desire to be entered into a rehabilitation program. This limited use protection will not apply to test results, which indicate alcohol or other drug abuse occurring after the voluntary submission to the rehabilitation program. Examples: The unit commander has ordered a urinalysis on Monday for all members of the unit (an inspection under MRE 313 (Inspections and inventories in the Armed Forces)). Before receiving an order (or having knowledge of a pending test) to appear for the urinalysis, a Soldier approaches the platoon sergeant, admits having used illegal drugs over the weekend, and indicates a desire to receive help. Later that day, the Soldier is ordered to and provides a specimen for the urinalysis, which results in a positive report for cocaine use. Those results are protected by the limited use policy unless there is some evidence that demonstrates the use reflected by the test occurred after the admission was made to the platoon sergeant. Later that week, the commander orders another unit inspection for the following Monday. The inspection is conducted properly under MRE 313, and the Soldier once again has a positive result for cocaine. These test results, as interpreted by an Army FTDTL expert, indicate the Soldier had used cocaine after admitting use to the platoon sergeant. This test result is not protected by the Limited Use Policy.

(7) The results of a drug or alcohol test administered solely as a required part of a DOD or Army rehabilitation or treatment program.

f. Paragraph 10-12b states the Limited Use Policy does not prevent a counselor from revealing, to the commander or appropriate authority or others having a need to know, knowledge of certain illegal acts which may compromise or have an adverse impact on mission, national security, or the health and welfare of others. The unit commander will report the information to the appropriate authority. Likewise, information that the client presently possesses illegal drugs or that the client committed an offense while under the influence of alcohol or illegal drugs, other than prior illegal possession incident to the prior use, is not covered under this policy. Limited use is automatic. It is not granted, and it cannot be vacated or withdrawn. It may be waived in the situations described in paragraph 10-13d of this regulation.

g. Paragraph 10-12c states an order from competent authority to submit to urinalysis or breath or blood alcohol test is presumed a lawful order. Soldiers who fail to obey such orders may be the subject of appropriate disciplinary action under the UCMJ.

h. Paragraph 10-12d states the Limited Use Policy does not preclude the following:

(1) The introduction of evidence for impeachment or rebuttal purposes in any proceeding in which the evidence of drug abuse (or lack thereof) has first been

introduced by the Soldier. This rebuttal or impeachment may include evidence that test data indicate the presence of a controlled substance or alcohol, although not in sufficient quantity to meet the cutoff level for a positive result that has been established by DOD.

(2) The initiation of disciplinary or other action based on independently derived evidence, including evidence of continued drug abuse after initial entry into the ASAP.

i. Paragraph 10-12e states if the command is made aware of a Soldier's illegal drug use through the Soldier's self-referral and admissions, the requirement to initiate separation proceedings pursuant to the appropriate enlisted or officer separation regulation will not apply. The unit commander may initiate a separation action; however, the information is protected by the Limited Use Policy.

j. Paragraph 10-13, (Implementation of the limited use policy) (a) states unit commanders will explain the Limited Use Policy to Soldiers during the commander's interview as set forth in paragraphs 7–9, 15–14, and 16–11 of this regulation. Commanders will not make any agreement, or compromise, or expand the Limited Use Policy in any way.

k. Paragraph 10-13b states one or more military associates of an actual or possible alcohol or drug overdose victim might be reluctant to assist the victim in obtaining emergency treatment from a Medical Treatment Facility (MTF) because they themselves are abusers of alcohol or other drugs. An assisting person may fear that adverse personal consequences could result from becoming involved. Although Limited Use protection is not extended automatically to such a person, the availability of the following options to those Soldiers and their commanders should reduce reluctance to assist the victim:

(1) Soldiers may seek help for their own alcohol or other drug problem from:

- Their unit commander.
- The physician at the MTF.
- Any other agency or individual described in chapter 7 of this regulation.

(2) If the unit commander suspects a Soldier of alcohol or other drug abuse, or possession of drugs incidental to personal use, solely because of a Soldier's assistance to an actual or possible alcohol or drug overdose victim, and there is no reason to believe the Soldier provided illegal drugs to the victim, the commander should consult with the supporting legal office and thereafter may:

- Inform the Soldier of these suspicions.

- Ensure the Soldier is aware of the rehabilitation services available and the Limited Use Policy.

(3) If the Soldier admits to alcohol or other drug abuse and volunteers for help, the Limited Use Policy becomes effective as of the time the Soldier asks for help.

I. Paragraph 10-13c states Soldiers will receive an honorable discharge regardless of their overall performance of duty, if discharge is based on a proceeding where the Government initially introduces limited use evidence except as authorized in paragraph 10-13d(1) of this regulation. The “Government” includes the following:

(1) The unit commander or intermediate commanders (in a recommendation for discharge or in documents forwarded with such a recommendation).

(2) Any member of the board of officers or an administrative separation board adjudicating the case.

(3) The investigating officer or recorder presenting the case before the board.

(4) The separation authority.

m. Paragraph 10-13d states, alternatively, if Limited Use evidence is improperly introduced by the Government before the board convenes, the elimination proceeding may be reinitiated, excluding all reference to the evidence protected by the Limited Use Policy. If the Limited Use evidence is improperly introduced by the Government after the board convenes, only a general court-martial convening authority may set aside the board proceeding and refer the case to a new board for rehearing. The normal rules governing re-hearings and permissible actions thereafter will apply in accordance with the appropriate enlisted or officer separation regulations.

14. Title 10, U.S. Code, section 1556 requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//