

**1. Applicant's Name:**

- a. **Application Date:** 26 April 2021
- b. **Date Received:** 26 April 2021
- c. **Counsel:** Yes

**2. REQUEST, ISSUES, BOARD TYPE, AND DECISION:**

a. **Applicant's Requests and Issues:** The current characterization of service for the period under review is general (under honorable conditions). The applicant requests an upgrade to honorable.

The applicant seeks relief contending, in effect, the separation from the Army on a non-honorable discharge barring the applicant from reenlistment was predicated on evidence prohibited from such use by Army regulations and built upon a deeply flawed summary court-martial process. The applicant respectfully requests the Board change the character of their discharge to honorable, and to alter the reason for separation and reenlistment code to allow the applicant to rejoin the Army.

b. **Board Type and Decision:** In a records review conducted on 21 August 2024, and by a 5-0 vote, the Board denied the request upon finding the separation was both proper and equitable.

*Please see Section 9 of this document for more detail regarding the Board's decision.*

*(Board member names available upon request)*

**3. DISCHARGE DETAILS:**

a. **Reason / Authority / Codes / Characterization:** Misconduct (Drug Abuse) / AR 635-200, Chapter 14-12c (2) / JKK / RE-4 / General (Under Honorable Conditions)

b. **Date of Discharge:** 24 May 2012

c. **Separation Facts:**

(1) **Date of Notification of Intent to Separate:** 9 April 2012

(2) **Basis for Separation:** The applicant was informed of the following reasons: Between on or about 28 October and 28 November 2011, the applicant wrongfully used JWH-018 (Spice).

(3) **Recommended Characterization:** General (Under Honorable Conditions)

(4) **Legal Consultation Date:** 30 April 2012

(5) **Administrative Separation Board:** NA

(6) **Separation Decision Date / Characterization:** undated / General (Under Honorable Conditions)

**4. SERVICE DETAILS:**

- a. **Date / Period of Enlistment:** 24 August 2009 / 5 years
- b. **Age at Enlistment / Education / GT Score:** 18 / High School Graduate / 100
- c. **Highest Grade Achieved / MOS / Total Service:** E-4 / 15P10, Aviation Operations Specialist / 2 years, 9 months, 1 day
- d. **Prior Service / Characterizations:** None
- e. **Overseas Service / Combat Service:** None
- f. **Awards and Decorations:** NDSM, GWOTSM, ASR
- g. **Performance Ratings:** NA
- h. **Disciplinary Action(s) / Evidentiary Record:** Puget Sound Region MTF, 9 December 2011, the applicant tested positive for JWH-018 (Spice).

Memorandum For Commander, 30 April 2012, reflects defense counsel reviewed the applicant's administrative separation packet, and found there was evidence of limited use which could not be used in any non-judicial, judicial, or even administrative separations. It clearly states in the packet from CPT F., the urinalysis on 28 November 2011, was taken at Madigan after the applicant was found face down suffering from a seizure and treated for possible drug use. This is indicative language the applicant was seen at Madigan Army Medical Center (MAMC) Emergency Room for a possible drug overdose. The applicant was then given a urinalysis while at MAMC for medical purposes only which was and later sent it to Pennsylvania (NMS labs) without a chain of custody document, which further indicates this was limited use evidence. Any specimen without a chain of custody document is not reliable and again was indicative of Limited Use Evidence.

Memorandum for Record from the applicant's commander, 9 May 2012, reflects the applicant was treated for lacerations on their head sustained by a fall on 27 November 2011. The applicant was found lying on the sidewalk and appeared to be in distress and exhibited signs of having a seizure. A biochemical drug test was requested on the order of CPT J. C. the 4-6 ARS, Squadron Physician, to ascertain whether the applicant had any substances in their systems which would explain the symptoms of the seizure the applicant was presenting. The results of the drug test indicated between on or about 28 October 2011, and on or about 28 November 2011, the applicant wrongfully used JWH-018 (Spice), a schedule I controlled substance. The applicant has maintained through both Nonjudicial and Judicial action they are protected from the results of this biochemical drug test by the Limited Use Policy per AR 600-85. However, this is incorrect, AR 600-85, 6-4(3) states, "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." From 27 November 2011 to the present, the applicant has without remorse or personal accountability denied ever using Spice and therefore is not protected by the Limited Use Policy per AR 600-85.

Record of Trial by Summary Court-Martial, reflects the applicant was charged with:

Charge: violation of Article 121: Specification: between on or about 1 December 2010 and on or about 31 January 2011, violate a lawful general regulation, to wit: Policy Statement #25, paragraph 5a, dated 29 April 2010, by wrongfully using a substance with the intent to induce a condition of intoxication, excitement, or stupefaction of the central nervous system. Plea: Not Guilty; Finding: Guilty.

The sentence adjudged: Forfeiture \$944 pay per month for one month; reduction to E-1; restriction for two months.

Developmental Counseling Forms, for receiving positive results on a urinalysis.

**i. Lost Time / Mode of Return:** None

**j. Behavioral Health Condition(s):**

**(1) Applicant provided:** None

**(2) AMHRR Listed:** Report of Mental Status Evaluation, 20 April 2012, reflects the applicant was cleared for any administrative actions deemed appropriate by the command. The applicant could understand and participate in administrative proceedings; could appreciate the difference between right and wrong; and met medical retention requirements. The command was advised to consider the influence of these conditions.

*The ARBA's medical advisor reviewed DoD and VA medical records and not solely those documents listed in 4j(1) and (2) above.*

**5. APPLICANT-PROVIDED EVIDENCE:** Two DD Forms 214; DD Form 293, lawyers brief; personal file; medical records.

**6. POST SERVICE ACCOMPLISHMENTS:** None provided with the application.

**7. STATUTORY, REGULATORY AND POLICY REFERENCE(s):**

**a.** Section 1553, Title 10, United States Code (Review of Discharge or Dismissal) provides for the creation, composition, and scope of review conducted by a Discharge Review Board(s) within established governing standards. As amended by Sections 521 and 525 of the National Defense Authorization Act for Fiscal Year 2020, 10 USC 1553 provides specific guidance to the Military Boards for Correction of Military/Naval Records and Discharge Review Boards when considering discharge upgrade requests by Veterans claiming Post Traumatic Stress Disorder (PTSD), Traumatic Brain Injury (TBI), sexual trauma, intimate partner violence (IPV), or spousal abuse, as a basis for discharge review. The amended guidance provides that Boards will include, as a voting board member, a physician trained in mental health disorders, a clinical psychologist, or a psychiatrist when the discharge upgrade claim asserts a mental health condition, including PTSD, TBI, sexual trauma, IPV, or spousal abuse, as a basis for the discharge. Further, the guidance provides that Military Boards for Correction of Military/Naval Records and Discharge Review Boards will develop and provide specialized training specific to sexual trauma, IPV, spousal abuse, as well as the various responses of individuals to trauma.

**b.** Multiple Department of Defense Policy Guidance Memoranda published between 2014 and 2018. The documents are commonly referred to by the signatory authorities' last names (2014 Secretary of Defense Guidance [Hagel memo], 2016 Acting Principal Deputy Under Secretary of Defense for Personnel and Readiness [Carson memo], 2017 Official Performing

the Duties of the Under Secretary of Defense for Personnel and Readiness [Kurta memo], and 2018 Under Secretary of Defense for Personnel and Readiness [Wilkie memo].

(1) Individually and collectively, these documents provide further clarification to the Military Discharge Review Boards and Boards for Correction of Military/Naval Records when considering requests by Veterans for modification of their discharge due to mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment. Liberal consideration will be given to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment. Special consideration will be given to Department of Veterans Affairs (VA) determinations that document a mental health condition, including PTSD; TBI; or sexual assault/harassment potentially contributed to the circumstances resulting in a less than honorable discharge characterization. Special consideration will also be given in cases where a civilian provider confers diagnoses of a mental health condition, including PTSD; TBI; or sexual assault/harassment if the case records contain narratives supporting symptomatology at the time of service or when any other evidence which may reasonably indicate that a mental health condition, including PTSD; TBI; or sexual assault/harassment existed at the time of discharge might have mitigated the misconduct that caused a discharge of lesser characterization.

(2) Conditions documented in the service record that can reasonably be determined to have existed at the time of discharge will be considered to have existed at the time of discharge. In cases in which a mental health condition, including PTSD; TBI; or sexual assault/harassment may be reasonably determined to have existed at the time of discharge, those conditions will be considered potential mitigating factors in the misconduct that caused the characterization of service in question. All Boards will exercise caution in weighing evidence of mitigation in cases in which serious misconduct precipitated a discharge with a less than Honorable characterization of service. Potentially mitigating evidence of the existence of undiagnosed combat related PTSD, PTSD-related conditions due to TBI or sexual assault/harassment as causative factors in the misconduct resulting in discharge will be carefully weighed against the severity of the misconduct. PTSD is not a likely cause of premeditated misconduct. Caution shall be exercised in weighing evidence of mitigation in all cases of misconduct by carefully considering the likely causal relationship of symptoms to the misconduct.

c. Army Regulation 15-180 (Army Discharge Review Board), sets forth the policies and procedures under which the Army Discharge Review Board is authorized to review the character, reason, and authority of any Servicemember discharged from active military service within 15 years of the Servicemember's date of discharge. Additionally, it prescribes actions and composition of the Army Discharge Review Board under Public Law 95-126; Section 1553, Title 10 United States Code; and Department of Defense Directive 1332.41 and Instruction 1332.28.

d. Army Regulation 600-85, (The Army Substance Abuse Program), paragraph 10-12a defines the Limited Use Policy and states unless waived under the circumstances listed in paragraph 10-13d, 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 includes: Results of command-directed drug or alcohol testing that are inadmissible under the MRE; 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; 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; A Soldier's self-referral to BH for SUD treatment; 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 treatment and provided by Soldiers as part of their initial entry into SUD treatment; Drug or alcohol test results, if the Soldier voluntarily submits to a DoD or Army SUD treatment before the Soldier has received an order to submit for a lawful drug or alcohol test; and, the results of a drug or alcohol test administered solely as a required part of a DoD or Army SUD treatment program. Paragraph 11-1 reflects the mission of the U.S. Army Forensic Toxicology Drug Testing Laboratories (FTDTL) is to deter drug abuse by forensically identifying drugs of abuse in DOD personnel, to assist commanders, MREs, and military lawyers in interpreting laboratory results, and to provide litigation and expert witness support for all adverse actions. The FTDTLs will detect drug use by measuring the parent drug or drug metabolite concentration in Soldiers' and civilian corps members' urine. Each specimen will be tracked under a strict chain of custody procedure.

e. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), provides the basic authority for the separation of enlisted personnel.

(1) Chapter 3, Section II provides the authorized types of characterization of service or description of separation.

(2) Paragraph 3-5c, provides the reasons for separation, including the specific circumstances that form the basis for the separation, will be considered on the issue of characterization. As a general matter, characterization will be based upon a pattern of behavior other than an isolated incident. There are circumstances, however, in which the conduct or performance of duty reflected by a single incident provides the basis for characterization.

(3) Paragraph 3-7a states an Honorable discharge is a separation with honor and 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.

(4) Paragraph 3-7b states a General discharge is a separation from the Army under honorable conditions and is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

(5) Paragraph 3-8a states a Soldier is entitled to an honorable characterization of service if limited-use evidence (see AR 600-85) is initially introduced by the Government in the discharge proceedings, and the discharge is based upon those proceedings. The separation authority will consult with the servicing Judge Advocate in cases involving limited use evidence.

(6) Chapter 14 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions, a pattern of misconduct, and commission of a serious offense, to include abuse of illegal drugs, convictions by civil authorities and desertion or being absent without leave. Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impractical or unlikely to succeed.

(7) Paragraph 14-2c, prescribes Commanders will not take action prescribed in this chapter instead of disciplinary action solely to spare an individual who may have committed serious misconduct from the harsher penalties that may be imposed under the UCMJ.

(8) Paragraph 14-3 prescribes a discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter. However, the separation authority may direct a general discharge if such is merited by the Soldier's overall record.

(9) Paragraph 14-12c(2) terms abuse of illegal drugs as serious misconduct. It continues; however, by recognizing relevant facts may mitigate the nature of the offense. Therefore, a single drug abuse offense may be combined with one or more minor disciplinary infractions or incidents of other misconduct and processed for separation under paragraph 14-12a or 14-12b as appropriate.

f. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes), provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the SPD codes to be entered on the DD Form 214. It identifies the SPD code of "JKK" as the appropriate code to assign enlisted Soldiers who are discharged under the provisions of Army Regulation 635-200, Chapter 14, misconduct (drug abuse).

g. Army Regulation 601-210, (Regular Army and Reserve Components Enlistment Program), governs eligibility criteria, policies, and procedures for enlistment and processing of persons into the Regular Army, the U.S. Army Reserve, and Army National Guard for enlistment per DODI 1304.26. It also prescribes the appointment, reassignment, management, and mobilization of Reserve Officers' Training Corps cadets under the Simultaneous Membership Program. Chapter 4 provides the criteria and procedures for waiverable and nonwaiverable separations. Table 3-1, defines reentry eligibility (RE) codes:

RE-1 Applies to: Person completing his or her term of active service who is considered qualified to reenter the U.S. Army. Eligibility: Qualified for enlistment if all other criteria are met.

RE-3 Applies to: Person who is not considered fully qualified for reentry or continuous service at time of separation, but disqualification is waiverable. Eligibility: Ineligible unless a waiver is granted.

RE-4 Applies to: Person separated from last period of service with a nonwaiverable disqualification. This includes anyone with a DA imposed bar to reenlistment in effect at time of separation or separated for any reason (except length of service retirement) with 18 or more years active Federal service. Eligibility: Ineligible for enlistment.

**8. SUMMARY OF FACT(S):** The Army Discharge Review Board considers applications for upgrade as instructed by Department of Defense Instruction 1332.28.

The applicant requests an upgrade to honorable. The applicant's Army Military Human Resources Record (AMHRR), the issues, and documents submitted with the application were carefully reviewed.

The applicant contends the narrative reason for the discharge needs to be changed. The applicant was separated under the provisions of Chapter 14, paragraph 14-12c(2), AR 635-200 with a general (under honorable conditions) discharge. The narrative reason specified by Army Regulations for a discharge under this paragraph is "Misconduct (Drug Abuse)," and the separation code is "JKK." Army Regulation 635-8 (Separation Processing and Documents), governs preparation of the DD Form 214, and dictates the entry of the narrative reason for separation, entered in block 28 and separation code, entered in block 26 of the form, will be as listed in tables 2-2 or 2-3 of AR 635-5-1 (Separation Program Designator (SPD) Codes). The regulation stipulates no deviation is authorized. There is no provision for any other reason to be entered under this regulation.

The applicant contends the separation from the Army on a non-honorable discharge barring the applicant from reenlistment was predicated on evidence prohibited from such use by Army

regulations and built upon a deeply flawed summary court-martial process. The applicant provided a Memorandum For Commander from the defense counsel, 30 April 2012, states a review of the applicant's administrative separation packet found there was evidence of limited use which could not be used in any non-judicial, judicial, or even administrative separations. It clearly states in the packet from CPT F., the urinalysis on 28 November 2011, was taken at Madigan after the applicant was found face down suffering from a seizure and treated for possible drug use. This is indicative language the applicant was seen at Madigan Army Medical Center (MAMC) Emergency Room for a possible drug overdose. The applicant was then given a urinalysis while at MAMC for medical purposes only, which was later sent to Pennsylvania (NMS labs) without a chain of custody document, which further indicates this was limited use evidence. Any specimen without a chain of custody document is not reliable and again is indicative of Limited Use Evidence. Memorandum for Record from the applicant's commander, 9 May 2012, reflects 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. Army Regulation 600-85, Chapter 11-1, reflects each specimen will be tracked under a strict chain of custody procedure. The AMHRR is void of any evidence the applicant informed the unit commander of the facts and circumstances of the drug-related medical emergency. The Limited Use Policy is intended to facilitate early identification and care of Soldiers with substance abuse disorders. AR 600-85, paragraph 10-11. AR 600-85 emphasizes strict chain of custody procedures for military urinalysis from the moment a specimen is collected until testing at the FDTL. There is a DD Form to document every step of the process. However, the regulation is silent as to chain of custody documentation for the results of testing done incident to emergency medical treatment.

The applicant desires to rejoin the Military Service. Soldiers processed for separation are assigned reentry codes based on their service records or the reason for discharge. Based on Army Regulation 601-210, the applicant was appropriately assigned an RE code of "4." An RE code of "4" cannot be waived, and the applicant is no longer eligible for reenlistment. matter. A DD Form 149 may also be obtained from a Veterans' Service Organization.

#### **9. BOARD DISCUSSION AND DETERMINATION:**

**a.** As directed by the 2017 memo signed by A.M. Kurta, the board considered the following factors:

**(1)** Did the applicant have a condition or experience that may excuse or mitigate the discharge? **Yes.** The Board's Medical Advisor, a voting member, reviewed the applicant's DOD and VA health records, applicant's statement, and/or civilian provider documentation and found that the applicant has the following potentially-mitigating diagnoses/experiences: Concussion.

**(2)** Did the condition exist or experience occur during military service? **Yes.** The Board's Medical Advisor found that the applicant suffered a Concussion on 27 November 2011.

**(3)** Does the condition or experience actually excuse or mitigate the discharge? **No.** The Board's Medical Advisor applied liberal consideration and opined that there is evidence that the applicant suffered a Concussion on 27 November 2011. While a Concussion can have a

nexus with self-medication, the applicant's Concussion occurred after the Spice use that led to the separation. Given the timing of the Concussion, it did not contribute to the Spice use that led to the separation and therefore, provides no mitigation. There is no evidence of any other BH conditions existing during military service.

**(4)** Does the condition or experience outweigh the discharge? **N/A.**

**b. Response to Contention(s):**

**(1)** The applicant contends the narrative reason for the discharge needs to be changed. The Board considered this contention and determined the applicant's narrative reason for discharge is appropriate as the applicant's was separated for spice use and there are no conditions or experiences that would excuse or mitigate the applicant's spice use basis for discharge.

**(2)** The applicant contends the separation from the Army on a non-honorable discharge barring the applicant from reenlistment was predicated on evidence prohibited from such use by Army regulations and built upon a deeply flawed summary court-martial process. The Board considered this contention and determined the applicant's discharge is proper and equitable. The applicant was separated for a medical test failure between on or about 28 October 2011 and 28 November 2011, there are no mitigating conditions or experiences that excuse or outweigh the applicant's basis for separation. Thus, the Board voted not to upgrade the applicant's discharge.

**(3)** The applicant desires to rejoin the military service. The Board considered this contention and determined that a change to the applicant's RE code is not warranted based on the severity of the applicant's spice drug abuse. Recruiters can best advise a former service member as to the Army's needs at the time and are required to process waivers of reentry eligibility (RE) codes, if appropriate.

**c.** The Board determined that the discharge is, at this time, proper and equitable, in light of the current evidence of record. However, the applicant may request a personal appearance hearing to address the issues before the Board. The applicant is responsible for satisfying the burden of proof and providing documents or other evidence sufficient to support the applicant's contention(s) that the discharge was improper or inequitable.

**d. Rationale for Decision:**

**(1)** The Board voted not to change the applicant's characterization of service because, despite applying liberal consideration of all the evidence before the Board, the applicant's Concussion did not excuse or mitigate the offenses of spice drug abuse basis for separation. The Board also considered the applicant's contention regarding flawed summary court-martial process, prohibited evidence use and found that totality of the applicant's record does not warrant a discharge upgrade. The discharge was consistent with the procedural and substantive requirements of the regulation, was within the discretion of the separation authority, and the applicant was provided full administrative due process. Therefore, the applicant's General discharge was proper and equitable as the applicant's misconduct fell below that level of meritorious service warranted for an upgrade to Honorable discharge.

**(2)** The Board voted not to change the applicant's reason for discharge or accompanying SPD code under the same pretexts, and the reason the applicant was discharged was both proper and equitable.



# ARMY DISCHARGE REVIEW BOARD CASE REPORT AND DIRECTIVE

AR20210001204

(3) The RE code will not change, as the current code is consistent with the procedural and substantive requirements of the regulation.

## 10. BOARD ACTION DIRECTED:

- a. Issue a New DD-214 / Separation Order: No
- b. Change Characterization to: No Change
- c. Change Reason / SPD Code to: No Change
- d. Change RE Code to: No Change
- e. Change Authority to: No Change

## Authenticating Official:

11/16/2024

X

Presiding Officer, COL, U.S. ARMY  
Army Discharge Review Board

### Legend:

AWOL – Absent Without Leave  
AMHRR – Army Military Human  
Resource Record  
BCD – Bad Conduct Discharge  
BH – Behavioral Health  
CG – Company Grade Article 15  
CID – Criminal Investigation  
Division  
ELS – Entry Level Status  
FG – Field Grade Article 15

GD – General Discharge  
HS – High School  
HD – Honorable Discharge  
IADT – Initial Active Duty Training  
MP – Military Police  
MST – Military Sexual Trauma  
N/A – Not applicable  
NCO – Noncommissioned Officer  
NIF – Not in File  
NOS – Not Otherwise Specified

OAD – Ordered to Active Duty  
OBH (I) – Other Behavioral  
Health (Issues)  
OMPF – Official Military  
Personnel File  
PTSD – Post-Traumatic Stress  
Disorder  
RE – Re-entry  
SCM – Summary Court Martial  
SPCM – Special Court Martial

SPD – Separation Program  
Designator  
TBI – Traumatic Brain Injury  
UNC – Uncharacterized  
Discharge  
UOTHC – Under Other Than  
Honorable Conditions  
VA – Department of Veterans  
Affairs