

1. Applicant's Name:

- a. **Application Date:** 26 April 2021
- b. **Date Received:** 26 April 2021
- c. **Counsel:** None

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

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

The applicant seeks relief contending, in effect, the investigations and notifications during the separation proceedings, based on charges of sexual harassment and a lewd act were done improperly. The issues included: command influence was used; the investigations were not properly reviewed; and regulations and case law were not followed. Based on the actions of the Commanders, the case should have been dismissed and the applicant's service should have continued to complete the medical evaluation board.

b. **Board Type and Decision:** In a records review conducted on 29 February 2024, and by a 4-1 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 (Serious Offense) / AR 635-200, Chapter 14-12c / JKQ / RE-3 / General (Under Honorable Conditions)

b. **Date of Discharge:** 6 February 2015

c. Separation Facts:

(1) **Date of Notification of Intent to Separate:** 15 May 2014

(2) **Basis for Separation:** The applicant was informed of the following reasons: The applicant violated AR 600-20, paragraph 7-5 and intentionally displayed a photograph of E. B.'s bare breast as the profile picture on a public forum.

(3) **Recommended Characterization:** Under Other Than Honorable Conditions

(4) **Legal Consultation Date:** 19 May 2014

(5) **Administrative Separation Board:** On 17 September 2014, the applicant was notified to appear before an administrative separation board and advised of rights.

On 16, 27, and 28 October 2014, the administrative separation board convened, and the applicant appeared with counsel. On 28 October 2014, the Board determined the allegation of violation of AR 600-20, paragraph 7-5, in the notification of proposed separation was supported

by a preponderance of the evidence and the allegation of intentionally displaying of E. B.'s breasts as the profile picture in a public forum in the notification of proposed separation was supported by a preponderance of the evidence and the findings warranted the applicant's separation. The board recommended the applicant's discharge with characterization of service of under other than honorable conditions.

On 20 January 2015, the separation authority approved the findings and recommendations of the administrative separation board.

(6) Separation Decision Date / Characterization: 20 January 2015 / Under Other Than Honorable Conditions / The GCMCA reviewed and considered all matters presented in the findings and recommendations of the administrative separation board and the IDES (Integrated Disability Evaluation System) packet.

4. SERVICE DETAILS:

- a. **Date / Period of Enlistment:** 3 February 2011 / 6 years
- b. **Age at Enlistment / Education / GT Score:** 28 / High School Graduate / 86
- c. **Highest Grade Achieved / MOS / Total Service:** E-5 / 92G10, Food Service Specialist / 11 years, 8 months, 28 days
- d. **Prior Service / Characterizations:** RA, 9 May 2003 – 2 January 2005 / HD
RA, 3 January 2005 – 7 February 2008 / HD
RA, 8 February 2008 – 18 February 2010 / HD
RA, 19 February 2010 – 2 February 2011 / HD
- e. **Overseas Service / Combat Service:** Germany, Alaska, SWA / Iraq (15 February 2004 – 15 February 2005; 22 August 2006 – 10 September 2007; 31 January 2011 – 6 December 2011
- f. **Awards and Decorations:** ARCOM-2, AAM-2, MUC, AGCM-3, NDSM, GWOTEM, GWOTSM, ICM-3CS, NCOPDR, ASR, OSR-4
- g. **Performance Ratings:** 1 December 2010 – 22 August 2013 / Fully Capable
4 November 2013 – 3 November 2014 / Marginal
- h. **Disciplinary Action(s) / Evidentiary Record:** Memorandum Of Reprimand, 3 March 2014, reflects the applicant was creating a hostile work environment which compromised the leadership ability, the performance of a junior Soldier, which negatively affected the Soldier emotionally and psychologically; violating the standards of an NCO and discrediting the US Army; and a formal investigation on 9 October 2013, concluding the applicant engaged in behavior which directly affected a junior Soldier.

Report of Proceedings by Investigating Officer/Board of Officers, 28 October 2014, reflects the board found: between 1 February and 1 March 2014, the applicant committed a violation of paragraph 7-5, AR 600-20, and the allegation was supported by preponderance of evidence, which warranted separation. The board recommended separation from the US Army, with an under other than honorable characterization of service.

Summarized Administrative Separation Board Proceedings with the Board's Findings and Recommendations, undated, reflect the administrative separation board found: the allegation of violation of paragraph 7-5, AR 600-20, in the notification of proposed separation was supported

by a preponderance of evidence; and the allegation intentionally displaying of E. B.'s breasts as the profile picture in a public forum in the notification of proposed separation was supported by a preponderance of evidence. The board recommended the separation of the applicant with an under other than honorable characterization of service.

Memorandum, 21 November 2014, rendered by the trial defense counsel, presented there were legal, procedural, and substantive errors during the applicant's administrative separation board; overwhelming testimony and facts supported the applicant as an exemplary Soldier; requested the applicant to complete the MEB process for medical separation; and indicated the applicant received punishment for the allegations by a relief for cause NCOER and a letter of reprimand.

Memorandum, 17 December 2014, rendered by the Administrative Law Attorney, advised in view of the errors identified, they were ultimately harmless as they did not materially prejudice a substantial right of the applicant according to AR 635-200, paragraph 2-6. The underlying misconduct did constitute a serious offense under the UCMJ.

i. Lost Time / Mode of Return: None

j. Behavioral Health Condition(s):

(1) Applicant provided: None

(2) AMHRR Listed: Report of Mental Status Evaluation, 11 March 2014, reflects the applicant was cleared from a behavioral health standpoint 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 applicant had been screened for PTSD and mTBI with negative results. The applicant was diagnosed with: Depression with Anxiety, per history.

Report of Medical History, 27 March 2014, the examining medical physician noted in the comments section: The applicant was undergoing MEB for PTSD and other behavioral health diagnoses: anxiety, adjustment disorder.

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: Online application; two Memoranda for Record (TDS); Separation Packet (portion); seven third-party statements; Report of AR 15-6 packet; AR 15-6 Rebuttal memorandum; and DD Form 214.

6. POST SERVICE ACCOMPLISHMENTS: None submitted 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 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 3-7a 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.

(3) 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.

(4) 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.

(5) 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.

(6) 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.

(7) Paragraph 14-12c prescribes a Soldier is subject to action per this section for commission of a serious military or civilian offense, if the specific circumstances of the offense warrant separation and a punitive discharge is, or would be, authorized for the same or a closely related offense under the Manual for Courts-Martial.

e. 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 "JKQ" as the appropriate code to assign enlisted Soldiers who are discharged under the provisions of Army Regulation 635-200, Chapter 14, paragraph 12c, misconduct (serious offense).

f. 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-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.

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 investigations and notifications during the separation proceedings, based on charges of sexual harassment and a lewd act were done improperly; command influence was used; the investigations were not properly reviewed; and regulations and case laws were not followed. The applicant's AMHRR does not contain any indication or evidence of arbitrary or capricious actions by the command.

The applicant contends the case should have been dismissed and the medical evaluation board in process at the time should have been completed. The Department of Defense disability regulations do not preclude a disciplinary separation while undergoing a medical board. Appropriate regulations stipulate separations for misconduct take precedence over potential separations for other reasons. Whenever a member is being processed through the Physical Evaluation Board and is subsequently processed for an involuntary administrative separation or referred to a court-martial for misconduct, the disability evaluation is suspended. The Physical Evaluation Board case remains in suspense pending the outcome of the non-disability proceedings. If the action includes either a punitive or administrative discharge for misconduct, the medical process is stopped, and the board report is filed in the member's medical record.

The applicant's evidence indicates the trial defense counsel, on behalf of the applicant, offered overwhelming testimony and facts in the separation board proceedings supported the applicant as an exemplary Soldier. The Board considered the applicant's service accomplishments and the quality of service according to the DODI 1332.28.

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: Adjustment Disorder, PTSD, Depression, Generalized Anxiety Disorder.

(2) Did the condition exist or experience occur during military service? **Yes.** The Board's Medical Advisor found that the applicant was diagnosed in service with an Adjustment Disorder, Generalized Anxiety Disorder, Depression, and PTSD. The VA has also service connected the applicant's PTSD.

(3) Does the condition or experience actually excuse or mitigate the discharge? **No.** The Board's Medical Advisor applied liberal consideration and opined that the applicant was diagnosed in service with an Adjustment Disorder, Generalized Anxiety Disorder, Depression, and PTSD. The VA has also service connected the applicant's PTSD. However, there is no natural sequela between an Adjustment Disorder, Generalized Anxiety Disorder, Depression, or PTSD and intentionally displaying a lewd photograph as a profile picture on a public forum since none of these conditions interfere with the ability to distinguish between right and wrong and act in accordance with the right.

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

b. Response to Contention(s):

(1) The applicant contends the investigations and notifications during the separation proceedings, based on charges of sexual harassment and a lewd act were done improperly; command influence was used; the investigations were not properly reviewed; and regulations and case laws were not followed. The Board considered this contention and determined 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. In light of the current evidence of record, the Board determined the applicant's discharge was appropriate.

(2) The applicant contends the case should have been dismissed and the medical evaluation board in process at the time should have been completed. The Board considered this contention and determined the applicant's discharge is proper and equitable. The applicant's misconduct of intentionally displaying a lewd photograph as a profile picture on a public forum is not mitigated or excused by any of the applicant's experiences or conditions and the command's actions were proper and equitable.

(3) The applicant's evidence indicates the trial defense counsel, on behalf of the applicant, offered overwhelming testimony and facts in the separation board proceedings supported the applicant as an exemplary Soldier. The Board considered the applicant's 11 years of service, including 3 combat tours in Iraq and the numerous awards received by the applicant but determined that these factors did not outweigh the applicant intentionally displaying a lewd photograph as a profile picture on a public forum.

c. The Board determined that the discharge is, at this time, proper and equitable, considering 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 PTSD did not excuse or mitigate the offenses of intentionally displaying a lewd photograph as a profile picture on a public forum. The Board also considered the applicant's contention regarding the investigations and notifications during the separation proceedings, based on charges of sexual harassment and a lewd act being done improperly 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.

(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:

3/14/2024

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