

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 period under review is under other than honorable conditions. The applicant requests an upgrade to honorable.

The applicant seeks relief contending, in effect, was denied the right to speak with counsel on their behalf and was not allowed to obtain any information submitted against the applicant. The applicant was denied the right to an appearance before the administrative separation board. The applicant did not undergo a full mental examination as outlined in AR 40-501. The applicant did not visit the Army Education Center as required by law under 10 USC1046.

b. **Board Type and Decision:** In a records review conducted on 5 December 2023, 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 (Civil Conviction) / AR 635-200, Chapter 14, Sec II / JKB / RE-3 / Under Other Than Honorable Conditions

b. **Date of Discharge:** 9 June 2006

c. Separation Facts:

(1) **Date of Notification of Intent to Separate:** 8 February 2006

(2) **Basis for Separation:** The applicant was informed of the following reasons: On 17 January 2006, the applicant was sentenced to five years for armed robbery.

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

(4) **Legal Consultation Date:** NIF

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

(6) **Separation Decision Date / Characterization:** 30 May 2006 / Under Other Than Honorable Conditions

4. SERVICE DETAILS:

a. **Date / Period of Enlistment:** 31 August 2005 / 4 years

- b. **Age at Enlistment / Education / GT Score:** 33 / some college / 102
- c. **Highest Grade Achieved / MOS / Total Service:** E-5 / 25P20, Microwave System Operator-Maintainer / 4 years, 2 days
- d. **Prior Service / Characterizations:** RA, 1 October 2001 – 30 August 2005 / HD
- e. **Overseas Service / Combat Service:** None / The applicant states serving in Afghanistan and Iraq.
- f. **Awards and Decorations:** ARCOM, AGCM, NDSM, GWOTSM, NCOPDR, ASR
- g. **Performance Ratings:** September 2004 – July 2005 / Fully Capable
- h. **Disciplinary Action(s) / Evidentiary Record:** The State of Arizona Superior Court document, 16 January 2006, reflects the applicant plead guilty for an armed robbery committed on 3 October 2005, and was sentenced to five years with consecutive community supervision. The applicant was given credit for 106 days served prior to sentencing.

On 8 February 2006, the applicants' company commander initiated an administrative separation in accordance with AR 635-200, Chapter 14-5 (civilian conviction), which the applicant acknowledged receipt and indicated that the applicant was advised that the applicant had a right to consult with counsel prior to making applicant's election of rights. The undated SJA memorandum to the Separation Authority states that the applicant elected not to seek counsel prior to the applicant's incarceration. This memorandum reflects that: on 24 February 2006, Wilmont Arizona State Prison received the applicants' election of rights memorandum; the applicant personally signed for the correspondence; the applicant was given 30 days to make the applicant's election of rights; the applicant received notice with the election of rights indicating that if the applicant failed to make the applicant's election of rights, the applicant would waive the applicant's rights, including the right to an administrative separation board. The SJA's memorandum states that the applicant did not make any election of rights, thereby waiving the applicant's right to an administrative separation board.

Tucson Mail and Property Inmate Legal Mail Log (undated), reflects the applicant received taped mail. The Department of Corrections replied to SPC D., on 13 March 2006, stating legal log is with inmate Lewis.

- i. **Lost Time / Mode of Return:** 8 months, 6 days (CCA, 3 October 2005 – 9 June 2006) / NIF

j. Behavioral Health Condition(s):

(1) **Applicant provided:** Post-conviction mental evaluation, 3 April 2007, reflects a diagnosis of Axis I: PTSD in partial remission and major depressive disorder in full remission.

(2) **AMHRR Listed:** None

5. APPLICANT-PROVIDED EVIDENCE: DD Form 214; DD Form 293; ERB; self-authored letter; Separation file; Letter of Lateness, 13 March 2006; Memorandum for Record, 4 April 2006; Memorandum for Record, 11 April 2006; Memorandum Thru 22 May 2006; two Trial Defense letters; Arizona Board of Executive Clemency.

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 40-501 (Standards of Medical Fitness) Table 8-2, Schedule of Separation medical examination reflects discharge in absentia (officers and enlisted Soldiers) Civil confinement are not required.

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

(1) Paragraph 2-14 Civil Confinement prescribes a Soldier confined by civil authorities will receive notice under the notification procedure or the administrative board procedure, as appropriate. The notice will be delivered personally to the Soldier or sent by certified mail, return receipt requested. When a Soldier refuses to acknowledge receipt of notice, the individual who mails the notice will prepare a Sworn Affidavit of Service by Mail that will be inserted in the Soldier's personnel file with PS Form 3800 (Receipt for Certified Mail). If delivered personally, the Soldier will acknowledge receipt in writing. If the Soldier does not acknowledge receipt, the notice will be sent by mail as provided above. The notice will state that the action has been suspended until a specific date (not less than 30 days from the date of delivery) to give the Soldier, the opportunity to exercise the rights set forth in the notice. When warranted by the distance involved or other circumstances, a period in excess may be allowed for the Soldier to reply. If the Soldier does not reply by the given date, the separation authority will take appropriate action under paragraph 2-3. The name and address of the appointed military counsel for consultation will be specified in the notice. When entitled to an administrative board, the Soldier will be notified that the hearing by a board of officers will proceed in his/her absence and that counsel will represent him/her.

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

(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 3-7c states Under Other Than Honorable Conditions discharge is an administrative separation from the Service under conditions other than honorable and it may be issued for misconduct, fraudulent entry, security reasons, or in lieu of trial by court martial based on certain circumstances or patterns of behavior or acts or omissions that constitute a significant departure from the conduct expected of Soldiers in the Army.

(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 14-3 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.

(8) Section II, Paragraph 14-5 prescribes conditions which subject a Soldier to discharge and reduction in grade. A Soldier may be considered for discharge when initially convicted by civil authorities, or when action is taken that is tantamount to a finding of guilty, if one of the following conditions is present. This includes similar adjudication in juvenile proceedings: 1) A punitive discharge authorized for the same or a closely related offense under the MCM 2002, as amended; 2) The sentence by civil authorities includes confinement for 6 months or more, without regard to suspension or probation. Adjudication in juvenile proceedings includes adjudication as a juvenile delinquent, wayward minor, or youthful offender; Initiation of separation action is not mandatory. Although the conditions established in a (1) or (2), above, are present, the immediate commander must also consider whether the specific circumstances of the offense warrant separation. If the immediate commander initiates separation action, the case will be processed through the chain of command to the separation authority for appropriate action. A Soldier convicted by a civil court or adjudged a juvenile offender by a civil court will be reduced or considered for reduction.

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 "JKB" as the appropriate code to assign enlisted Soldiers who are discharged under the provisions of Army Regulation 635-200, Chapter 14, section II, Misconduct (Civil Conviction).

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-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 of 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) does not include complete facts and circumstances concerning the events which led to the discharge from the Army. The applicant's AMHRR does contain a properly constituted DD Form 214 (Certificate of Release or Discharge from Active Duty), which was not authenticated by the applicant's signature. The

applicant's DD Form 214 indicates the applicant was discharged under the provisions of AR 635-200, Chapter 14, SEC II, by reason of Misconduct (Civil Conviction), with a characterization of service of under other than honorable.

Army Regulation 635-200 stipulates a Soldier may be separated when initially convicted by civil authorities, or when action is taken tantamount to a finding of guilty, if a punitive discharge authorized for the same or a closely related offense under the Manual for Courts Martial or the sentence by civil authorities includes confinement for six months or more, without regard to suspension or probation. At the time of the applicant's discharge, the applicant had been confined by civilian authorities for eight (8) months and six (6) days, was convicted of Armed Robbery and was sentenced to five years confinement with consecutive supervision pursuant to A.R.S. 603(I).

The applicant contends being denied the right to speak with counsel on the applicant's behalf and was not allowed to obtain any information submitted against the applicant and being denied the right to an appearance before the administrative separation board. The applicant provided a Memorandum for US Army Intelligence Center and Fort Huachuca, undated, reflecting on 8 February 2006, the applicants' company commander initiated an administrative separation. The applicant acknowledged the applicant's right to counsel before making the applicant's behalf election of rights. On 24 February 2006, Wilmont Arizona State Prison received the applicant's election of rights memorandum, and the applicant personally signed for the correspondence. The applicant was given 30 days to make an election of rights. The memorandum the applicant received with the election of rights stated if the applicant failed to make the applicant's behalf election of rights they would waive, including the applicant's behalf right to an administrative separation board. According to the SJA memorandum, as of 24 May 2006, the applicant did not make any election of rights, thereby waiving their right to an administrative separation board. Also, the Tucson Mail and Property Inmate Legal Mail Log, reflects the applicant received taped mail. The Department of Corrections replied to SPC D., on 13 March 2006, stating legal log is with inmate Lewis. The applicant's AMHRR does not contain any indication or evidence of arbitrary or capricious actions by the command.

The applicant contends not undergoing a full mental examination as outlined in AR 40-501. The applicant did not submit any evidence, other than the applicant's statement, to support the contention. AR 40-501, Table 8-2, Schedule of Separation medical examination, reflects discharge in absentia (officers and enlisted Soldiers) Civil confinement are not required.

The applicant contends did not visit the Army Education Center as required by law under 10 USC1046. The applicant did not submit any evidence, other than the applicant's statement, to support the contention.

9. BOARD DISCUSSION AND DETERMINATION:

a. As directed by the 2017 memo signed by [REDACTED] 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: PTSD, and MDD.

(2) Did the condition exist or experience occur during military service? **Yes.** The Board's Medical Advisor found applicant was diagnosed with PTSD in partial remission, and

MDD in full remission, during a Post-conviction Mental Health Evaluation. The medical evidence indicates the diagnoses reportedly had onset during military service.

(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's PTSD/MDD does not mitigate the applicant's civilian conviction for armed robbery because there is no nexus or natural sequela between PTSD/MDD and armed robbery and neither condition would have rendered applicant unable to appreciate the difference between right and wrong and adhere to the right.

(4) Does the condition or experience outweigh the discharge? **No.** After applying liberal consideration, including the Board Medical Advisor opine, the Board determined that the applicant's PTSD and MDD did not outweigh the medically unmitigated offense of – civil conviction for armed robbery.

b. Response to Contention(s):

(1) The applicant contends denied the right to speak with counsel on their behalf and was not allowed to obtain any information submitted against the applicant. The applicant contends being denied the right to an appearance before the administrative separation board. The Board considered this contention and determined, by the evidence of record, that the applicant received an election of rights memorandum on 24 February 2006 from the Staff Judge Advocate's Office through the Wilmont Arizona State Prison, that the applicant personally signed for the correspondence, and the applicant failed to return the election of rights memorandum within 30 days thereby waiving any rights to Trial Defense Services, to include the applicant's right to an administrative separation board.

(2) The applicant contends not undergoing a full mental examination as outlined in AR 40-501. The Board considered this contention and determined that, based on the applicant's civilian incarceration at the time of separation, the applicant was not entitled to medical examination. Therefore, no change is warranted.

(3) The applicant contends not visiting the Army Education Center as required by law under 10 USC1046. The Board considered this contention and determined that the applicant's contention is unclear as 10 USC 1046 does not apply to the Army Education Center. Therefore, no change is warranted.

c. The Board determined that the discharge is, at this time, proper and equitable, in light of the current evidence of record. The applicant has exhausted their appeal options available with ADRB. However, the applicant may still apply to the Army Board for Correction of Military Records. 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, the applicant's PTSD and MDD did not outweigh the applicant's medically unmitigated armed robbery offense. The Board considered the applicant's contention regarding denial to speak with counsel and found that the applicant received an election of rights memorandum on 24 February 2006 from the Staff Judge Advocate's Office, through the Wilmont Arizona State Prison, that the applicant personally signed for the correspondence, and the applicant failed to return the election of rights

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memorandum within 30 days thereby waiving any rights to Trial Defense Services, to include the applicant's right to an administrative separation board. 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 Under Other Than Honorable Conditions discharge was proper and equitable as the applicant's conduct fell below that level of satisfactory service warranting a General discharge or 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:

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