

1. Applicant's Name: [REDACTED]**a. Application Date:** 26 April 2021**b. Date Received:** 26 April 2021**c. Counsel:** [REDACTED]**2. REQUEST, ISSUES, BOARD TYPE, AND DECISION:**

a. Applicant's Requests and Issues: The current characterization of service for the period under review is under other than honorable conditions. The applicant, through counsel, requests an upgrade to honorable and a narrative reason change to "Secretarial Authority."

The applicant seeks relief contending, in effect, serving honorably for all but 12 weeks, including 14 months in Iraq, where the applicant served as a Bradley Mechanic and on the battalion commander's personal security detachment. On 12 December 2009, the applicant was incarcerated pending court-martial charges. The applicant recorded a hip-hop song protesting the Army's "stop loss" policy. The policy elicited a great deal of opposition. The Secretary of Defense opposed stop-loss and announced in March 2009 it would be phased out over two years. The plan was to stop extending Soldiers beyond the enlistment dates by August 2009. The applicant was facing redeployment under the policy several months after the date.

There is no evidence the allegations interfered with the applicant's duties. The charges involved only speech, including alleged threats, which all who heard did not take seriously. In July 2009, the applicant provided copies to the command as well as the Pentagon. Colonel (COL) T. B., Chief of the Army's Enlisted System Division, contacted the applicant's command, requesting a determination be made as to whether psychiatric or emotional support was needed, out of the applicant's well-being, not because others were in danger. No evaluation was ever conducted by the applicant's command, and it was later found the applicant may have been suffering from post-traumatic stress disorder (PTSD) and/or traumatic brain injury (TBI). The only evaluation conducted was by a civilian, independent of the Army. The applicant carried out the duties without incident until the arrest on 12 December 2009.

The applicant's command initiated court martial proceedings, months later. The Article 32 Investigating Officer recommended 5 of the 11 charges be referred to a special court martial, which was endorsed by the company and battalion commanders. The convening authority referred the charges to a general court martial. The court-martial was held, over the applicant's objection, in Kuwait, which limited the availability of witnesses to testify on the applicant's behalf and made it impossible for people to attend the proceedings. The case had generated media interest and several people, including reporters, desired to attend. Given these limitations and the state of the law, the applicant requested a discharge in lieu of court martial and was discharged on 29 April 2010, two months past the applicant's original date of discharge.

A central issue is where freedom of expression ends and speech unaccompanied by any overt act becomes unlawful. Historically, First Amendment cases have addressed this issue, at least in the civilian context. While it is true courts give the military broad discretion to maintain discipline, these cases are instructive about the importance of free speech in the United States, which every military member is sworn to uphold as part of the Constitution. Counsel further cites

various court cases regarding freedom of speech in the applicant's defense. The applicant further details the contentions in a self-authored statement submitted with the application.

b. Board Type and Decision: In a records review conducted on 17 May 2023, and by a 5-0 vote, the Board determined that the characterization of service was inequitable based on the applicant's length and quality of service, to include combat service outweighing the discharge. Accordingly, the Board voted to grant relief in the form of an upgrade to the characterization of service to General, Under Honorable Conditions. The Board determined the narrative reason and SPD code, were proper and equitable and voted not to change them. The RE code will not change, due to applicant's PTSD and TBI diagnoses warranting consideration prior to reentry of military service.

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: In Lieu of Trial by Court-Martial / AR 635-200, Chapter 10 / KFS / RE-4 / Under Other Than Honorable Conditions

b. Date of Discharge: 29 April 2010

c. Separation Facts: The applicant's Army Military Human Resource Record (AMHRR) is void of the complete case separation file. However, the applicant provided documents which are described below in 3c(1).

(1) Date and Charges Preferred (DD Form 458, Charge Sheet): On 7 January and 4 February 2010, the applicant was charged with:

Charge I: Violating Article 134, UCMJ:

Specification 1: On divers occasions, between 8 July and 8 December 2009, wrongfully make statements to members of the battalion the applicant would engage in acts of violence against member of the unit, said conduct being prejudicial to the good order and discipline of the armed forces.

Specification 2: On divers occasions between 8 July and 8 December 2009, distribute to Soldiers in the unit original songs wrongfully threatening acts of violence against members of the applicant's unit, said conduct being prejudicial to the order and discipline of the armed forces.

Specification 3: On divers occasions, wrongfully communicate to Private First Class (PFC) J. Y., the applicant "would go on a rampage," or words to the effect, said conduct being prejudicial to the good order and discipline of the armed forces.

Specifications 4 and 5 were dismissed.

Additional Charge:

Specification 1: On 16 July 2009, wrongfully communicate to Colonel (COL) T. B. a threat the applicant was going to shoot Soldiers in the rank of sergeant first class and above if the applicant deployed with the applicant's unit to Iraq, or words to the effect, and under the

circumstances, the conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Specification 2: On divers occasions between on 1 July and 11 December 2009, wrongfully communicate to PFC A. S. a threat the applicant would shoot Lieutenant Colonel (LTC) G. S. if the applicant deployed with the unit to Iraq, or words to the effect, and under the circumstances, the applicant's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Specifications 3 through 6 were dismissed.

On 26 March 2010, the charges were referred to a general court-martial.

(2) Legal Consultation Date: 30 March 2010

(3) Basis for Separation: Pursuant to the applicant's request for discharge under the provisions of AR 635-200, Chapter 10, in lieu of trial by court-martial.

(4) Recommended Characterization: NIF

(5) Separation Decision Date / Characterization: 16 April 2010 / Under Other Than Honorable Conditions

4. SERVICE DETAILS:

a. Date / Period of Enlistment: 16 August 2006 / 3 years, 28 weeks / The AMHRR reflects the applicant was retained in service 72 days for the convenience of the government.

b. Age at Enlistment / Education / GT Score: 30 / GED / 96

c. Highest Grade Achieved / MOS / Total Service: E-4 / 91M10, Bradley Fighting Vehicle / 3 years, 8 months, 14 days

d. Prior Service / Characterizations: None

e. Overseas Service / Combat Service: SWA / Iraq (24 October 2007 – 5 December 2008); Kuwait (27 February 2010 – 20 April 2010)

f. Awards and Decorations: ARCOM, AGCM, NDSM, GWOTSM, ICM-CS, ASR, OSR

g. Performance Ratings: NA

h. Disciplinary Action(s) / Evidentiary Record: The applicant provided:

The Investigating Officer's Report, dated 23 March 2010, reflecting during a 32b Investigation, the investigating officer (IO) found:

Sufficient evidence to support the charge and specifications 1 through 3 and 5, but recommended specification 5 be dismissed. There was not enough evidence to support specification 4. There was sufficient evidence to support The additional charge, specifications 1 and 2, but not enough evidence to support specifications 3 through 6.

The applicant possessed the intent to harm not only own self but to other Servicemembers according to the statements of select member of the applicant's chain of command, peers, and stop loss music compact disc. The applicant stated in a letter to the Pentagon, the applicant was willing to go to jail to avoid the stop-loss policy. The applicant's unit, specifically the maintenance team, did not feel comfortable deploying with the applicant to Iraq because of the applicant's recent actions.

The chain of command took the necessary precautions to ensure the safety of other Soldiers specifically in an environment where weapons and ammunition would be readily available. The applicant's decision-making was affected by the issues with the stop-loss and compounded by the applicant's personal family issues. There was no evidence the applicant did not have the mental capacity to participate in any further trial proceedings and was mentally responsible to face charges for any offenses committed. The applicant's character of service before July 2009 appeared to be reputable with no major issues. The IO recommended the applicant's case be referred to a special court-martial.

Memorandum, subject: Advice on Disposition of Court-Martial Charges [Applicant], dated 26 March 2010, reflecting the Staff Judge Advocate (SJA) indicated the Investing Officer, company and battalion commanders recommended trial by special court-martial empowered to adjudge a bad conduct discharge. The brigade commander recommended trial by general court-martial. The SJA recommended specifications 1, 2, and 3 of the original charge and specifications 1 and 2 of the additional charge be tried by general court-martial. The SJA further recommended the remaining specifications be dismissed without prejudice.

Direction of the Convening Authority, dated 28 March 2010, reflecting the applicant's court-martial charges were referred to a trial by general court-martial.

The applicant's DD Form 214, reflects the applicant had completed the first full term of service. The applicant was retained in service 72 days for the convenience of the government. The applicant was discharged under the authority of AR 635-200, Chapter 10, with a narrative reason of In Lieu of Trial by Court-Martial. The DD Form 214 was authenticated with the applicant's signature. The applicant's AMHRR also contains the DD Form 214.

i. Lost Time / Mode of Return: None

j. Behavioral Health Condition(s):

(1) Applicant provided: Russian Rivers Counselors psychiatric assessment, dated 28 March 2010, reflects the psychiatrist provided suggested diagnoses PTSD; major depressive disorder, recurrent; traumatic brain injury (rule out); family, relationship problems, legal issues, and current incarceration; and global assessment of functioning (GAF) 45 for the applicant.

Memorandum, subject: Request for General (Under Honorable Conditions) Discharge Under Chapter 10, AR 635-200 for [Applicant], dated 30 March 2010, reflecting the applicant was diagnosed with depression and PTSD by Army doctors at Winn Army Community Hospital, Fort Stewart and civilian personnel have since diagnosed the applicant PTSD and the need for more testing for TBI.

(2) AMHRR Listed: Russian Rivers Counselors psychiatric assessment and the memorandum as described in previous paragraph 4j(1).

5. APPLICANT-PROVIDED EVIDENCE: Two DD Forms 149; DD Form 214; DD Form 293; Legal Brief; attorney letter; self- authored statement; psychiatric assessment; separation documents; and four third party character references.

6. POST SERVICE ACCOMPLISHMENTS: The applicant continued to serve the military as a civilian fitness Recreational Assistant and Sports Field Maintenance Tractor Operator in Germany and on Fort Bragg and has been a Commercial Tractor Trailer Operator since 6 June 2019.

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 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) 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.

(5) Chapter 10 provides, in pertinent part, that a member who has committed an offense or offenses for which the authorized punishment includes a punitive discharge may submit a request for a discharge for the good of the Service in lieu of trial by court-martial. The request may be submitted at any time after charges have been preferred and must include the individual's admission of guilt.

(6) Paragraph 10-8a stipulates a discharge under other than honorable conditions normally is appropriate for a Soldier who is discharged in lieu of trial by court-martial. However, the separation authority may direct a general discharge if such is merited by the Soldier's overall record during the current enlistment. (See chap 3, sec II.)

(7) Paragraph 10b stipulates Soldiers who have completed entry-level status, characterization of service as honorable is not authorized unless the Soldier's record is otherwise so meritorious that any other characterization clearly would be improper.

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 "KFS" as the appropriate code to assign enlisted Soldiers who are discharged under the provisions of Army Regulation 635-200, Chapter 10, In Lieu of Trial by Court-Martial.

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 waivable and nonwaivable separations. Table 3-1, defines reentry eligibility (RE) codes. RE-4 Applies to: Person separated from last period of service with a nonwaivable 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) includes partial 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 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 10, by reason of In Lieu of Trial by Court-Martial, with a characterization of service of under other than honorable conditions. The applicant provided additional separation documents, which provide details of the circumstances surrounding the events which led to the discharge from the Army.

The evidence in the applicant's Army Military Human Resource Record (AMHRR) confirms the applicant was charged with the commission of an offense punishable under the UCMJ with a punitive discharge. The applicant, in consultation with legal counsel, voluntarily requested, in writing, a discharge under the provisions of AR 635-200, Chapter 10, in lieu of trial by court-martial. In this request, the applicant admitted guilt to the offense, or a lesser included offense, and indicated an understanding an under other than honorable conditions discharge could be received, and the discharge would have a significant effect on eligibility for veterans' benefits. The under other than honorable conditions discharge received by the applicant was normal and appropriate under the regulatory guidance.

The applicant contends the narrative reason for the discharge needs change to "Secretarial Authority." The applicant was separated under the provisions of Chapter 10, AR 635-200, with an under other than honorable conditions discharge. The narrative reason specified by Army Regulations for a discharge under this paragraph is "In Lieu of Trial by Court-Martial," and the separation code is "KFS." Army Regulation 635-8, Separation Processing and Documents, governs the 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 claims the offenses leading to the discharge were minor. The AMHRR indicates the applicant committed many discrediting offenses. Army Regulation 635-200, stipulates circumstances in which the conduct or performance of duty reflected by a single incident provides the basis for a characterization.

The applicant contends being overcharged by the command and the case was referred to a general court-martial despite numerous recommendations that the applicant be tried by special court-martial. The applicant provided documents reflecting the Article 32 Investigating Officer and the company and battalion commanders recommended trial by special court-martial. The brigade commander recommended trial by general court-martial. The convening authority was advised by the SJA, the convening authority's legal advisor, and agreed with the legal advisor's recommendation to refer five of the specifications to a trial by general court-martial. The applicant's AMHRR does not contain any indication or evidence of arbitrary or capricious actions by the command.

The applicant contends the charges only involved speech and did not interfere with the applicant's job performance. The Investigating Officer's Report stated the applicant's unit, specifically the maintenance team, did not feel comfortable deploying with the applicant to Iraq because of the applicant's recent actions.

The applicant contends, subsequent Supreme Court case law raises the possibility that the standard under which the applicant was going to be tried unconstitutionally limited a potential for defense of lack of *mens rea*. The applicant provided documents reflecting the charges against the applicant were investigated and referred to trial by court-martial.

The applicant contends good service, including the combat tour to Iraq, and serving over the applicant's initial enlistment period. The third-party statements provided with the application speak highly of the applicant and recognize the applicant's good military service and/or good conduct after leaving the Army

The applicant contends serving the military as a civilian fitness Recreational Assistant and Sports Field Maintenance Tractor Operator in Germany and on Fort Bragg and being a Commercial Tractor Trailer Operator since 6 June 2019. The Army Discharge Review Board is authorized to consider post-service factors in the recharacterization of a discharge. No law or regulation provides for the upgrade of an unfavorable discharge based solely on the passage of time or good conduct in civilian life after leaving the service. The Board reviews each discharge on a case-by-case basis to determine if post-service accomplishments help demonstrate previous in-service misconduct was an aberration and not indicative of the member's overall character.

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: Depression and Anxiety. Additionally, the applicant asserts PTSD and TBI, which may be sufficient evidence to establish the existence of a condition that could mitigate or excuse the discharge.

(2) Did the condition exist or experience occur during military service? **Yes.** The Board's Medical Advisor found the applicant's anxiety, depression, and asserted PTSD and TBI existed during 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 has medical evidence of depression and anxiety while on Active Duty, with providers noting exposure to trauma from prior deployment to Iraq and associated post-traumatic symptoms. Applicant asserts the presence of PTSD and TBI; the evidence of such disorders in the available medical records appears somewhat speculative at best, noting "suggested" diagnosis of PTSD and Major Depressive Disorder, and rule-out diagnoses of TBI. The complete case separation file is not available, but applicant was discharged in lieu of court-martial and a charge sheet listing numerous offenses is noted. None of these conditions, to include PTSD, major depression and/or mild TBI (all of which the advisor will presume under liberal consideration as diagnosed and fully present), would result in the inability to differentiate right from wrong and adhere to the right. There is no evidence to support psychiatric mitigation for the various charges associated with making threats against others that led to applicant's discharge, regardless of whether such threats were associated with artistic/musical expression.

(4) Does the condition or experience outweigh the discharge? **No.** After applying liberal consideration to the evidence, including the Board Medical Advisor opine, the Board determined that the applicant's Adjustment Disorders, Depression, Anxiety, Major Depression, PTSD and TBI did not outweigh the applicant's medically unmitigated basis for applicant's separation – making threatening statements, making songs threatening fellow soldiers, threatening a rampage, threatening to shoot multiple unit leaders, and threatening to shoot an officer.

b. Response to Contention(s):

(1) The applicant contends the narrative reason for the discharge needs to change to "Secretarial Authority." The Board considered this contention and determined that a narrative reason change to "Secretarial Authority" is not warranted as the applicant's request for a discharge in lieu of court-martial was approved by the Separation Authority for the applicant's multiple offenses referenced in paragraph 9b(4) above. Further, the Board determined, based on the Board Medical Advisor opine, that the applicant's behavioral health conditions did not mitigate or excuse the applicant's misconduct. Therefore, a narrative reason change to "Secretarial Authority", which is exercised sparingly when no other authority is available, is not warranted because "Discharge in lieu of Court-martial" applies in this case. In this case, the charges were dismissed because the applicant requested to be discharged under the provisions of Chapter 10, AR 635-200, in lieu of trial by court-martial and the convening authority approved that request. There was no evidence presented to the Board to convince the Board of any mitigating circumstances.

(2) The applicant contends PTSD and other mental health conditions affected behavior which ultimately led to the discharge. The Board considered this contention and determined that a discharge upgrade to GD is warranted based on the applicant's characterization of service being too harsh, the applicant's length, quality, and combat service and the applicant's post-service accomplishments.

(3) The applicant claims the offenses leading to the discharge were minor. The Board considered this contention and determined that a discharge upgrade to GD is warranted based on the applicant's characterization of service being too harsh, the applicant's length, quality, and combat service and the applicant's post-service accomplishments.

(4) The applicant contends being overcharged by the command and the case was referred to a general court-martial despite numerous recommendations the applicant be tried by special court-martial. The Board considered this contention and determined that a discharge upgrade to GD is warranted based on the applicant's characterization of service being too harsh, the applicant's length, quality, and combat service and the applicant's post-service accomplishments.

(5) The applicant contends the charges only involved speech and did not interfere with the applicant's job performance. The Board considered this contention and determined that a discharge upgrade to GD is warranted based on the applicant's characterization of service being too harsh, the applicant's length, quality, and combat service and the applicant's post-service accomplishments.

(6) The applicant contends, subsequent Supreme Court case law raises the possibility the standard under which the applicant was going to be tried unconstitutionally limited a potential for defense of lack of *mens rea*. The Board considered this contention and determined that an upgrade is not warranted as the applicant voluntary request for a discharge in lieu of court-martial discharge was approved resulting in the applicant's administrative discharge rather than the applicant's case being referred to court-martial which is the proper forum for the applicant to assert a defense that the applicant lacked mens rea to commit the offenses charged. The Board found that, despite the applicant's voluntary request for an administrative discharge, the applicant's official record includes evidence supporting the applicant possessed the requisite intent to commit the offenses as reflected in the applicant's IO investigation and the SJA's Advice to the convention authority referenced in paragraph 4h, above. Therefore, no relief is warranted based on this contention.

(7) The applicant contends good service, including the combat tour to Iraq, and serving over the applicant's initial enlistment period. The Board recognizes and appreciates the applicant's willingness to serve and considered this contention during board proceedings along with the totality of the applicant's service record. The Board voted that a discharge upgrade to GD is warranted based on the applicant's characterization of service being too harsh, the applicant's length, quality, and combat service and the applicant's post-service accomplishments.

(8) The applicant contends serving the military as a civilian fitness Recreational Assistant and Sports Field Maintenance Tractor Operator in Germany and on Fort Bragg and being a Commercial Tractor Trailer Operator since 6 June 2019. The Board considered this contention and determined the applicant's civilian fitness recreational assistant and sports field maintenance tractor operator in Germany and on Fort Bragg and being a commercial tractor trailer operator do not outweigh the misconduct. However, The Board voted that a discharge upgrade to GD is warranted based on the applicant's characterization of service being too harsh, the applicant's length, quality, and combat service and the applicant's post-service accomplishments.

c. The Board determined that the characterization of service was inequitable based on the applicant's length and quality of service, to include combat service outweighing the discharge. Accordingly, the Board voted to grant relief in the form of an upgrade to the characterization of service to General, Under Honorable Conditions. The Board determined the narrative reason and SPD code, were proper and equitable and voted not to change them. The RE code will not change, due to applicant's PTSD and TBI diagnoses warranting consideration prior to reentry of military service. However, the applicant may request a personal appearance hearing to address further 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 to change the applicant's characterization of service to General, Under Honorable Conditions because characterization of service was too harsh based on the applicant's length and quality of service, to include combat service, and post service accomplishments. Thus, the prior characterization is no longer appropriate.

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

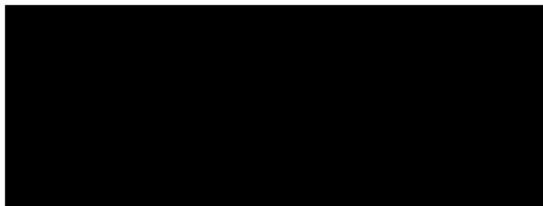
(3) The RE code will not change, as the current code is consistent with the procedural and substantive requirements of the regulation.

10. BOARD ACTION DIRECTED:

- a. Issue a New DD-214: Yes**
- b. Change Characterization to: General, Under Honorable Conditions**
- c. Change Reason / SPD Code to: No Change**
- d. Change RE Code to: No Change**
- e. Change Authority to: No Change**

Authenticating Official:

12/29/2023



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