

1. Applicant's Name: [REDACTED]

- a. **Application Date:** 27 September 2020
- b. **Date Received:** 5 October 2020
- c. **Counsel:** James Phillips

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 honorable conditions (general). The applicant requests an upgrade to honorable, a separation code change, a reentry code change to one, and a narrative reason change to secretarial authority.

The applicant through counsel states, they were wrongfully found guilty at an Article 15 for wrongful possession of an illegal substance. Hemp was not illegal or outside of the legal authority at the time of the discharge. Their discharge is both substantively and procedurally defective. The discharge was unfair at the time and remains so now. They are requesting an honorable discharge with benefits.

The applicant bought legal hemp and had it in their vehicle, they legally purchased the hemp at a CBD store. They were told the substance was legal and they relied on that professional assessment. When the substance was tested by CID there was a trace amount of THC detected. The trace amount would not have amounted to possession if it had been taken to trial. The applicant accepted an erroneous Article 15 which is in error. The subsequent discharge based on that misconduct was both procedurally and substantively error.

b. Board Type and Decision: In a records review conducted on 29 March 2024, and by a 5-0 vote, the board determined that the characterization of service was inequitable based on the applicant's post-service accomplishments, and the time elapsed since the misconduct. Accordingly, the board voted to grant relief in the form of an upgrade to the characterization of service to Honorable and changed to the separation authority to AR 635-200, paragraph 14-12a, the narrative reason for separation to Misconduct (Minor Infractions), with a corresponding separation code of JKN. The board determined the RE code is proper and equitable and voted not to change it.

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 / JKQ / RE-3 / Under Honorable Conditions (General).

b. Date of Discharge: 27 November 2019

c. Separation Facts:

(1) Date of Notification of Intent to Separate: 16 September 2019

(2) Basis for Separation: On 28 April 2019 the applicant wrongfully possessed less than 30 grams of marijuana.

(3) **Recommended Characterization:** General, under honorable conditions.

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

(5) **Administrative Separation Board:** N/A

(6) **Separation Decision Date / Characterization:** 24 October 2019 / General, under honorable conditions.

4. SERVICE DETAILS:

a. **Date / Period of Enlistment:** 20 February 2018 / 3 years, 16 weeks.

b. **Age at Enlistment / Education / GT Score:** 19 / High School Graduate / 95

c. **Highest Grade Achieved / MOS / Total Service:** E-2 / 12B10 Combat Engineer / 1 year, 9 months, 8 days.

d. **Prior Service / Characterizations:** None.

e. **Overseas Service / Combat Service:** None.

f. **Awards and Decorations:** NDSM, GWTSM, ASR

g. **Performance Ratings:** N/A

h. **Disciplinary Action(s) / Evidentiary Record:**

(1) A Military Police sworn statement provides on 29 April 2019 they noticed marijuana sitting on the passenger seat of the applicant's vehicle. They smelled alcohol emitting from the applicant and asked them if they had been drinking. The applicant stated they had two beers and just finished smoking marijuana. A field sobriety test was conducted; it was negative.

(2) A Field Test Analysis of Suspected Controlled Substances document provides a field test was conducted on 29 April 2019; small immeasurable quantity of a green and brown in color, vegetation-type substance tested positive to THC.

(3) On 2 May 2019 the applicant was command referred for a substance use disorder evaluation.

(4) A Developmental Counseling Form dated 16 May 2019 provides the applicant was counseled informing them they were being recommended for UCMJ action after they were found in possession of marijuana by the Fort Campbell Military Police.

(5) A Report of Mental Status Evaluation document dated 4 June 2019, provides the applicant received a separation evaluation that cleared them for administrative actions. They were screened for substance use disorder and had a full SUDCC evaluation scheduled for 17 June 2019.

(6) A Report of Medical Examination document dated 25 July 2019, provides the applicant received a separation medical examination.

(7) A memorandum, 2D Brigade Combat Team, 101st Airborne Division, Fort Campbell, Kentucky subject: Notification of separation under AR 635-200, Chapter 14-12c dated 16 September 2019 provides the applicant's immediate commander notified them of their intent to separate them for commission of a serious offense; they wrongfully possessed less than 30 grams of marijuana. The commander recommended a general, under honorable conditions characterization of service. The applicant acknowledged the commander's notification and basis for separation.

(8) A Commander's Report dated 10 October 2019 provides description of rehabilitation attempts: "SM was given multiple opportunities through corrective training and rehabilitative efforts made by [applicant's] leadership to correct [their] misconduct".

(9) On 16 October 2019 the chain of command endorsed and concurred with the commander's recommendation and on 24 October 2022 the appropriate authority approved the applicant's involuntary separation and directed a general, under honorable conditions characterization of service.

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

j. **Behavioral Health Condition(s):** None.

(1) **Applicant provided:**

(2) **AMHRR Listed:**

5. APPLICANT-PROVIDED EVIDENCE: DD Form 293 (Discharge Review) application, a nine page legal brief, DD Form 214, a notification of driving privileges document provides the applicant's driving privileges were suspended for 12 months, an incomplete UCMJ document (void of signatures, punishment type, dates and etc.) ERB, lab reports (non-relating to the misconduct) three emails (Findlaw FirmSite) from a prior service member to the applicant's counsel (non-relating to the applicant or their discharge) and documents within their separation packet in support of their petition.

6. POST SERVICE ACCOMPLISHMENTS: The events that took place are no longer relevant in the applicant's life; they since have lived in a responsible manner.

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), dated 25 September 2019, 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 provides the authorized types of characterization of service or description of separation.

(1) 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.

(2) 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.

(3) An 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.

(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. 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. A soldier subject to this discharge under this regulation will be considered and processed for discharge even though he/she has filed an appeal or has stated his/her intention to do so. Paragraph 14-12c, states 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.

(5) Chapter 15 provides explicitly for separation under the prerogative of the Secretary of the Army. Secretarial plenary separation authority is exercised sparingly and seldom delegated. Ordinarily, it is used when no other provision of this regulation applies, and early separation is clearly in the Army's best interest. Separations under this paragraph are effective only if approved in writing by the Secretary of the Army or the Secretary's approved designee as announced in updated memoranda. Secretarial separation authority is normally exercised on a case-by-case basis.

e. Army Regulation 600-85 (Army Substance Abuse Program (ASAP)) governs the program and identifies Army policy on alcohol and other drug abuse, and responsibilities. The ASAP is a command program that emphasizes readiness and personal responsibility. It provides the ultimate decision regarding separation or retention of abusers is the responsibility of the Soldier's chain of command. Abuse of alcohol or the use of illicit drugs by military personnel is inconsistent with Army values and the standards of performance, discipline, and readiness necessary to accomplish the Army's missions. Individuals who do not self-refer for treatment and are subsequently identified as positive for controlled substances for which they do not have a valid prescription may be considered in violation of the UCMJ for drug misuse/abuse.

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 "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).

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.

h. Appendix 12, Maximum Punishment Chart in the Manual for Courts-Martial provides that wrongful use of marijuana includes a punitive discharge, confinement from 2-5 years, and total forfeiture or pay.

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

a. The applicant requests an upgrade to honorable, a separation code change, a reentry code change, and a narrative reason change. The applicant's DD-214 provides that the applicant received a General (under honorable conditions) characterization of service, rather than an under other than honorable conditions (UOTCH) which is normally considered appropriate for a soldier discharged under CH 14 for misconduct.

b. Based on the available evidence the applicant enlisted in the army at the age of 19, approximately 14 months after their enlistment the applicant was sitting in their vehicle (after hours), the military police arrived to check on them, smoke exited their vehicle and the officer seen marijuana on their passenger seat. The applicant passed the field sobriety test. A field test analysis was conducted and the substance that was found on their passenger seat tested positive for THC. The applicant was command referred for a substance use disorder evaluation and were processed for administrative separation due to possessing 30 grams of marijuana.

c. The applicant was notified of the intent to separate them for misconduct (serious offense), they acknowledged they understood the basis for separation under the provisions AR 635-200, CH 14-12c. The AMHRR is void of documentation to support if the applicant waived or consulted with counsel and completed their election of rights. The applicant received the required medical and mental health separation examinations. A properly constituted DD Form 214 shows they were discharged with an under honorable conditions (general) characterization of service on 27 November 2019; seven months after they were in possession of 30 grams of marijuana.

d. Chapter 14 establishes policy and prescribes procedures for members being separated for misconduct. Specific categories include minor disciplinary infractions, a pattern of misconduct, commission of a serious offense and convictions by civil authorities. Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impracticable or is unlikely to succeed. 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.

e. Published Department of Defense guidance indicates that the guidance is not intended to interfere or impede on the board's statutory independence. The board will determine the relative weight of the action that led to the discharge and whether it supports relief or not. In reaching its determination, the board shall consider the applicant's petition, available records and/or submitted documents in support of the petition.

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? **No.** The Board's Medical Advisor reviewed DoD and VA medical records and found no mitigating BH diagnoses on the applicant. The applicant provided no documents or testimony of a condition or experience, that, when applying liberal consideration, could have excused, or mitigated a discharge.

(2) Did the condition exist, or experience occur during military service? **N/A**

(3) Does the condition or experience actually excuse or mitigate the discharge? **N/A**

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

b. Response to Contention(s):

(1) The applicant requests an upgrade to Honorable, a separation code change, a reentry code change to one, and a narrative reason change to secretarial authority. The board considered the request during proceedings and an upgrade is warranted based on the time elapsed since the misconduct, one time misconduct of (wrongful use of hemp), and post-service accomplishments outweighing the misconduct. Therefore, the board voted to upgrade the characterization to Honorable and the narrative reason for separation to Misconduct (Minor Infractions), with a corresponding separation code of JKN. The board determined the RE code is proper and equitable and voted not to change it.

(2) The applicant through counsel contends the underlying basis of their separation was procedurally defective at the time of discharge. The board considered this contention during proceedings, and the contention was addressed by granting an upgrade based on the information outlined above in paragraph 9b (1).

(3) The applicant through counsel contends the adverse action, to include the administrative discharge was unfair at the time and inequitable. The board considered this contention during proceedings, but ultimately did not address the contention due to an upgrade being granted based off the applicant's one time misconduct of (wrongful use of hemp), the time elapsed since the misconduct and post-service accomplishments as outlined in 9b (1).

(4) The applicant through counsel contends they were never offered or provided rehabilitation and the results of their investigation were never reviewed prior to their discharge. The board considered this contention during proceedings, and the contention was addressed by granting an upgrade based on the information outlined above in paragraph 9b (1).

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c. The Board determined that the discharge is inequitable based on the applicant's post-service accomplishments, the time elapsed since the misconduct and the applicant's one time misconduct of (wrongful use of hemp). Therefore, the board voted to grant relief in the form of an upgrade to the characterization of service to Honorable and changed to the separation authority to AR 635-200, paragraph 14-12a, the narrative reason for separation to Misconduct (Minor Infractions), with a corresponding separation code of JKN and no changes to the reentry code.

d. Rationale for Decision:

(1) The board voted to change the applicant's characterization of service to Honorable because the applicant's one time misconduct of (wrongful use of hemp), post-service accomplishments, and the time elapsed outweighed the misconduct. Thus, the prior characterization is no longer appropriate.

(2) The board voted to change the reason for discharge to Misconduct (Minor Infractions) under the same pretexts, thus the reason for discharge is no longer appropriate. The SPD code associated with the new reason for discharge is JKN.

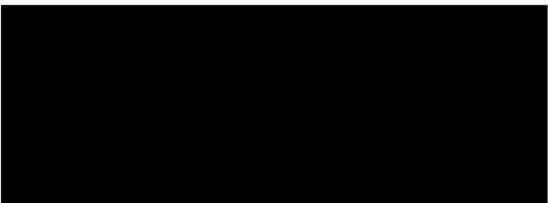
(3) The RE code will not change, as the current code is consistent with the procedural and substantive requirements of the regulation.

10. BOARD ACTION DIRECTED:

- a. Issue a New DD-214 / Separation Order: Yes
- b. Change Characterization to: Honorable
- c. Change Reason / SPD code to: Misconduct (Minor Infractions)/ JKN
- d. Change RE Code to: No Change
- e. Change Authority to: AR 635-200, Chapter 14-12a

Authenticating Official:

4/29/2024



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