

1. Applicant's Name: [REDACTED]

- a. **Application Date:** 7 October 2020
- b. **Date Received:** 13 October 2020
- c. **Counsel:** None

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

a. **Applicant's Requests and Issues:** The current characterization of service for the period under review is General (Under Honorable Conditions). The applicant requests an upgrade to honorable and a narrative reason change.

b. The applicant seeks relief contending, the upgrade will enable them to attend school; they purchased the stuff (K2) from a convenient store and did not know it was illegal and have never used anything since.

c. **Board Type and Decision:** In a records review conducted on 08 March 2024, and by a 5-0 vote, the board determined that the characterization was inequitable based on in-service mitigating factors (Quality, Combat) and one time use (wrongful use/possession of a controlled substance (K2)). Therefore, the board voted to grant relief in the form of an upgrade of 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 change the reentry code to RE-3.

3. DISCHARGE DETAILS:

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

b. **Date of Discharge:** 29 August 2011

c. Separation Facts:

(1) **Date of Notification of Intent to Separate:** 14 July 2011

(2) **Basis for Separation:** wrongfully possessing K2, a Schedule 1 controlled substance

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

(4) **Legal Consultation Date:** 19 July 2011

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

(6) **Separation Decision Date / Characterization:** 28 July 2011 / General (Under Honorable Conditions)

4. SERVICE DETAILS:

a. **Date / Period of Enlistment:** 29 July 2009 / 3 years, 22 weeks

b. Age at Enlistment / Education / GT Score: 20 / High School Diploma / 95

c. Highest Grade Achieved / MOS / Total Service: PFC / 88M1O Motor Transport Op / 1 year, 7 months.

d. Prior Service / Characterizations: None

e. Overseas Service / Combat Service: SWA / Iraq (2 July 2010 – 2 March 2011)

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

g. Performance Ratings: NA

h. Disciplinary Action(s) / Evidentiary Record:

(1) On 9 April 2009, the applicant enlisted in the United States Army Reserve's Delayed Entry Program; on 29 July 2009, they enlisted in the Regular Army for 3 years and 22 weeks, as a PVT.

(2) The Enlisted Record Brief provides on 29 July 2010, they promoted to PFC. They were deployed in support of Operation New Dawn (Iraq) from July 2010 to March 2011. On 1 June 2011, the applicant was detained and charged with wrongful use/possession of a controlled substance (K2) and released; as a result, on 2 June 2011, they were flagged, Suspend Favorable Personnel Actions (FLAG), for adverse action (AA).

(3) On 9 June 2011, they accepted nonjudicial punishment (NJP) in violation of Article 86, UCMJ, for having been absent from required place of duty on 20 April 2011, without authority, at 1130 until after 1300 hours; on 29 October 2010, in violation of Article 91, UCMJ, for disrespectful demeanor towards SGT, their noncommissioned officer, by turning their back to SGT and walking off when they asked the applicant a question; In violation of Article 112a, UCMJ, on 12 May 2011, they wrongfully possessed a scheduled 1 controlled substance (K2). Their punishment imposed a reduction to PVT; forfeiture of \$733.00 pay; extra duty for 45 days; and restriction to the specified limits for 45 days. They did not appeal.

(4) On 14 July 2011, their company commander notified the applicant of their intent to initiate separation proceedings IAW AR 635-200, Chapter 14-12c (2), Misconduct (Drug Abuse) for wrongfully possessing K2 on 12 May 2011. The applicant acknowledged receipt of the separation notice and on 19 July 2011, elected to consult with legal and elected not to submit a statement on their behalf. Defense counsel acknowledged their consultation.

(a) On 20 and 28 July 2011, the battalion commander concurred, and the separation approval authority approved the discharge, with a General (Under Honorable Conditions) characterization of service.

(b) On 18 August 2011, they were issued separation orders. A DD Form 214 (Certificate of Release or Discharge from Active Duty) reflects the applicant was discharged accordingly on 29 August 2011, with 2 years, 4 months, and 22 days of net service. The applicant has not completed their first full term of service.

i. Lost Time / Mode of Return: None

j. Behavioral Health Condition(s):

(1) Applicant provided: None

(2) AMHRR Listed: None

5. APPLICANT-PROVIDED EVIDENCE: DD Form 293 (Application for the Review of Discharge); DD Form 214 (Certificate of Release or Discharge from Active Duty); Seven Character Letters

6. POST SERVICE ACCOMPLISHMENTS: None submitted with this 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), 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.

(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 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 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the SPD codes to be entered on the DD Form 214. It identifies the SPD code of "JKK" as the appropriate code to assign enlisted Soldiers who are discharged under the provisions of Army Regulation 635-200, Chapter 14-12c (2), Misconduct (Drug Abuse).

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:

(1) 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.

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

(3) 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.

g. Army Regulation 600-85 (Army Substance Abuse Program (ASAP)), provided a comprehensive alcohol and drug abuse prevention and control policies, procedures, and responsibilities for Soldiers for ASAP services. The ASAP is a command program that emphasizes readiness and personal responsibility. 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 mission.

(1) Unit commanders must intervene early and refer all Soldiers suspected or identified as alcohol and/or drug abusers to the ASAP. The unit commander should recommend enrollment based on the Soldier's potential for continued military service in terms of professional skills, behavior, and potential for advancement.

(2) ASAP participation is mandatory for all Soldiers who are command referred. Failure to attend a mandatory counseling session may constitute a violation of Article 86 (Absence Without Leave) of the UCMJ.

(3) Alcohol and/or other drug abusers, and in some cases dependent alcohol users, may be enrolled in the ASAP when such enrollment is clinically recommended. Soldiers who fail to participate adequately in, or to respond successfully to, rehabilitation will be processed for administrative separation and not be provided another opportunity for rehabilitation except under the most extraordinary circumstances, as determined by the Clinical Director in consultation with the unit commander.

(4) All Soldiers who are identified as drug abusers, without exception, will be referred to the ASAP counseling center for screening; be considered for disciplinary action under the UCMJ, as appropriate; and be processed for administrative separation in accordance with Army Regulation 635-200.

h. Manual for Courts-Martial (2008 Edition), United States, states military law consists of the statutes governing the military establishment and regulations issued thereunder, the constitutional powers of the President and regulations issued thereunder, and the inherent authority of military commanders. Military law includes jurisdiction exercised by courts-martial and the jurisdiction exercised by commanders with respect to nonjudicial punishment. The purpose of military law is to promote justice, to assist in maintaining good orders and discipline in the Armed Forces.

(1) Article 86 (failure to go, going from place of duty) states in subparagraph the maximum punishment consists of forfeiture of two-thirds pay and allowances and one month confinement.

(2) Article 91 (insubordinate conduct toward noncommissioned officer) states in subparagraph the maximum punishment consists of dishonorable discharge, forfeiture of all pay and allowances and five years.

(3) Article 112a (wrongful use, possession, etc. of controlled substances) states in subparagraph the maximum punishment consists of dishonorable discharge, forfeiture of all pay and allowances and confinement for five years.

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 and a narrative reason change. A review of the record provides there was administrative irregularity in the proper retention of official military records, specifically, the required referral to ASAP within 4 days of their wrongful use/possession.

b. The available evidence provides the applicant enlisted in the RA for 3 years, promoted to PFC, and deployed to Iraq for eight months (2010 – 2011). Three months post-deployment, they were charged with wrongful possession of K2, consequently, flagged (FLAG) for adverse action. They accepted NJP, for being absent from duty, disrespect towards their noncommissioned officer (SGT), and for wrongful possession of K2. Consequently, they were demoted to PVT and separation proceedings were initiated IAW AR 635-200, Chapter 14-12c (2), Misconduct (Drug Abuse) with a General (Under Honorable Conditions) characterization of service. The applicant consulted with defense counsel and elected not to submit a statement on their behalf.

c. A mental examination is required within 4 days from the incident involving their wrongful use; due to the lack of evidence, it is unknown if they attended the required ASAP screening. The applicant completed 2 years, 1 month, and 1 day of their 3 year, 22 weeks contractual obligation prior to their discharge.

d. AR 635-200, Chapter 14 establishes policy and prescribes procedures for separating members 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 discharge 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 impeded 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? **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: the applicant was diagnosed in-service with Bereavement without Complications, Adjustment Disorder with Grief Reaction, Malingering, Personality Disorder NOS, and Hallucinogen Abuse.

(2) Did the condition exist, or experience occur during military service? **Yes.** The applicant was diagnosed in-service with Bereavement without Complications, Adjustment Disorder with Grief Reaction, Malingering, Personality Disorder NOS, and Hallucinogen Abuse.

(3) Does the condition or experience actually excuse or mitigate the discharge? **No.** The Board's Medical Advisor applied liberal consideration and opined that bereavement and Adjustment Disorder are low level conditions not impacting knowledge of right from wrong, consequences, and ability to make conscious choices. While the applicant's Personality Disorder provides context, it is also not mitigating for the same reasons. Regarding the assertion of naivete, she was well-versed as her family is heavily drug involved with parent and siblings incarcerated for possession and dealing.

(4) Does the condition or experience outweigh the discharge. **No.** Despite the board's application of liberal consideration, the Board considered the opinion of the Board's Medical Advisor, a voting member, that the available evidence did not support a conclusion that the applicant's Adjustment Disorder outweighed the basis for applicant's separation – wrongfully possessing K2, a Schedule 1 controlled substance/disrespect to an NCO – for the aforementioned reasons.

b. Response to Contention(s):

(1) The applicant requests an upgrade to Honorable and a narrative reason change. The board considered the request during proceedings and granted an upgrade based on the applicant's in-service mitigating factors (length, combat) and one time use outweighing the misconduct of failure to report to wrongfully possessing K2, a schedule 1 controlled substance/disrespect to an NCO. Therefore, the prior characterization is no longer appropriate.

(2) The applicant contends the upgrade will enable them to attend school; they purchased the stuff (K2) from a convenient store and did not know it was illegal and have never used anything since. The Board considered this contention and determined that eligibility for Veteran's benefits, to include educational benefits under the Post-9/11 or Montgomery GI Bill, healthcare, or VA loans, do not fall within the purview of the Army Discharge Review Board.

Accordingly, the applicant should contact a local office of the Department of Veterans Affairs for further assistance.

c. The board determined the discharge is inequitable based on the applicant's in-service mitigating factors (length, combat) and one time use outweighing the misconduct of failure to report and wrongfully possessing K2, a schedule 1 controlled substance/disrespect to an NCO. Therefore, the board voted to grant relief in the form of an upgrade of the characterization of service to honorable and changed to the separation authority to AR 635-200, paragraph 14-12a. the narrative reason to misconduct (Minor Infractions), with a corresponding separation code of JKN and the reentry code to RE-3.

d. Rationale for Decision:

(1) The board voted to change the applicant's characterization of service to honorable based on the applicant's in-service mitigating factors of length and combat and one time use outweigh the applicant's misconduct - wrongfully possessing K2, a Schedule 1 controlled substance/disrespect to an NCO. Thus, the prior characterization is no longer appropriate.

(2) The board voted to change the narrative reason 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.

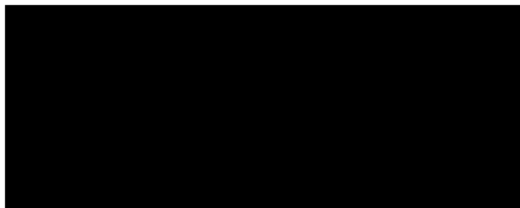
(3) The Board voted to change the RE code to RE-3.

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: RE-3
- e. Change Authority to: AR 635-200, paragraph 14-12a

Authenticating Official:

3/19/2024



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