

1. Applicant's Name: [REDACTED]**a. Application Date:** 8 March 2021**b. Date Received:** 15 March 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 general (under honorable conditions). The applicant through counsel requests an upgrade to honorable, and changes to the RE code to 1 and narrative reason to "Convenience of the Government."

b. The applicant through counsel seeks relief contending, in effect, the applicant's discharge was due to a positive urinalysis following an incident involving a fellow servicemember, the applicant, and Lysergic acid diethylamide (LSD). The fellow servicemember had an adverse reaction, experiencing multiple seizures and a psychotic break. The applicant attempted to take care of the fellow servicemember, but it quickly became evident that the fellow servicemember needed an ambulance. The following morning, the company first sergeant (1SG) escorted the applicant to a urinalysis, which showed positive for LSD. This urinalysis was a violation of the applicant's rights, as they did not have anything relating the applicant to the incident other than being a friend of the fellow servicemember who was taken by the ambulance. Thus, there was no probable cause for the urinalysis and the applicant was unjustly separated from the Army.

(1) Counsel contends, Private First Class (PFC) S__ confessed to police that PFC S__ was high on acid. From that fact alone, the company commander assumed everyone "associated" with PFC S__ was "guilty by association," and that is not probable cause. This included all the occupants of barracks room 209 (the applicant and Specialist (SPC) D__) and PFC S__'s roommate. There are no particularized facts relied upon by the company commander that would lead to a reasonable belief that the applicant had used drugs. Therefore, the evidence is protected, and, under the limited use policy, the applicant should have received an honorable discharge characterization. In addition:

(a) Protected evidence includes results of command directed drug testing that are inadmissible under the Military Rules of Evidence (MRE). A commander may order a Soldier to provide a urine sample for the purpose of testing for the presence of drugs if there is a probable cause determination. Probable cause exists when there is a reasonable belief that the persons has committed a crime and that evidence of the crime may be obtained by the urine test. MRE 312(d) and 315.

(b) Under the provision of AR 600-85 (The Army Substance Abuse Program), paragraph 10-12a (1), the urinalysis that served as the basis for the separation of the applicant resulted from a command directed urinalysis without probable cause. It was therefore protected evidence and, per the limited use policy in the regulation and AR 635-200, a characterization of honorable is warranted.

(2) Counsel contends, the commander did not advise the applicant of the applicant's Article 31(b) rights or complete a DA Form 3881 (Rights Warning Procedure/Waiver Certificate).

c. Board Type and Decision: In a records review conducted on 9 May 2025, and by a 3-2 vote, the Board determined the discharge was improper based on a Limited Use Violation. Therefore, the Board voted to grant relief in the form of an upgrade of the characterization of service to Honorable and changed the separation authority to AR 635-200, paragraph 14-12a. There will be no change to the narrative reason for separation or the reentry code. *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 (Drug Abuse) / AR 635-200, Chapter 14-12c (2) / JKK / RE-4 / General (Under Honorable Conditions)

b. Date of Discharge: 23 February 2021

c. Separation Facts: The applicant's AMHRR contains the case separation file. However, the applicant provided the case separation file which are described below in 3c (1) through (6).

(1) Date of Notification of Intent to Separate: 17 November 2020

(2) Basis for Separation: The applicant was informed of the following reasons: Between on or about 2 June 2020 and 5 June 2020, the applicant wrongfully used LSD, a Schedule I controlled substance.

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

(4) Legal Consultation Date: NIF

(5) Administrative Separation Board: NA

(6) Separation Decision Date / Characterization: 19 January 2012 / General (Under Honorable Conditions)

4. SERVICE DETAILS:

a. Date / Period of Enlistment: 14 August 2018 / 4 years

b. Age at Enlistment / Education / GT Score: 18 / High School Graduate / 123

c. Highest Grade Achieved / MOS / Total Service: E-4 / 68W1V, Health Care Specialist / 2 years, 6 months, and 10 days

d. Prior Service / Characterizations: None

e. Overseas Service / Combat Service: None

f. Awards and Decorations: NDSM, GWOTSM, ASR

g. Performance Ratings: NA

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

(1) DD Form 2624, Specimen Custody Document - Drug Testing, shows the applicant received a Probable Cause (PO) urinalysis test on 6 June 2020.

(2) Company Commander Memorandum For Record, subject: Probable Cause Command Directed Urinalysis, 8 June 2020, states on 5 June 2020, PFC H__ S__ was detained by the Fort Bragg Military Police Department for acting erratic. During the apprehension, PFC S__ announced that PFC S__ was high on acid. Furthermore, PFC S__ was associated with barracks room 209 (not PFC S__'s assigned room) during the apprehension and therefore the occupants are seen (seen) guilty by association. Lastly, PFC S__'s roommate will be tested for association. The applicant and three Soldiers was listed to be tested.

(3) PFC S__'s Sworn Statement, 11 June 2020, states in part, PFC S__ did not recall telling the 1SG that PFC S__ took LSD. PFC S__ told the 1SG that C__ and the applicant were involved in the events of Friday night, 5 June 2020. C__ received whatever the substance was from a third party.

(4) The applicant has two Sworn Statements, 17 June 2020, that state in part, the applicant and C__ was watching television in D__'s room on the night of 5 June 2020. The following morning, 1SG K__ came to get the applicant and C__ for a urinalysis.

(5) Forensic Toxicology Exam Final Report, 6 July 2020, shows the applicant tested positive for 2-Oxo-3-hydroxy- LSD.

(6) DD Form 3881 (Rights Warning Procedure/Waiver Certificate), 10 August 2020, shows the applicant was going to be questioned by the company commander for military police involvement on 5 and 6 June 2020.

(7) The applicant's Sworn Statement, 10 August 2020, states the applicant did not use an illegal substance on the night of 5 or 6 June 2020, and did not procure illegal substances.

(8) DD Form 3881 (Rights Warning Procedure/Waiver Certificate), 18 August 2020, shows the applicant was going to be questioned for a positive urinalysis. The applicant did not want to give up the applicant's rights and requested a lawyer.

(9) Developmental Counseling Form, 18 August 2020, shows the applicant was counseled for testing positive for a probable cause urinalysis conducted on 6 June 2020. In addition, the applicant was counseled on the following:

- initiation of an involuntary separation/field initiated (BA) and drug abuse adverse action (UA) flags
- referral to Substance Use Disorder Clinical Care
- initiation of a FG ROP under Article 15, UCMJ
- initiation of separation from service
- initiation of local suspension of the applicant's security clearance per AR 380-67 (Personnel Security Program)
- if the applicant did not waive the applicant's rights on the DD Form 3881 (Rights Warning Procedure/Waiver Certificate), the applicant would only speak to a lawyer/legal representative about what the applicant was accused of

(10) DA Form 268 (Report to Suspend Favorable Personnel Actions (Flag)), 18 August 2020, shows the applicant was flagged for involuntary separation/field initiated (BA), effective 18 August 2020.

(11) The applicant's Enlisted Record Brief, 18 August 2020, shows the applicant was flagged for drug abuse adverse action (UA), effective 18 August 2020; and was ineligible for reenlistment due to pending separation (9V).

(12) Company Commander Memorandum For Record, subject: Letter of Intent, 25 August 2020, shows the applicant was being considered for an administrative separation under provisions of AR 635-200, Chapter 14-12c(2), Abuse of Illegal Drugs.

(13) Report of Mental Status Evaluation, 3 September 2020, shows the applicant was cleared for any administrative actions deemed appropriate by the command. The applicant could understand and participate in administrative proceedings; could appreciate the difference between right and wrong; and met medical retention requirements. The applicant had been screened for PTSD and TBI with negative results. The medical record did not contain substantial evidence to show the applicant currently met criteria for a condition requiring referral to the Integrated Disability Evaluation System, but had not yet received a diagnosis. The applicant was cleared for administrative action from a behavioral health perspective. The applicant was diagnosed with other problem related to employment.

(14) FG ROP under Article 15, UCMJ, 23 September 2020, for wrongfully using LSD between on or about 2 June 2020 and on or about 5 June 2020. The punishment consisted of a reduction to E-1; forfeiture of \$866.00 pay; extra duty and restriction for 45 days; and an oral reprimand.

(15) Alpha Company, Special Warfare Medical Group (Airborne), Fort Bragg, NC, memorandum (Separation Notification to Applicant), subject: Separation Under AR 635-200, Chapter 14-12c (2), Misconduct-Abuse of Illegal Drugs, (Applicant), 17 November 2020, shows the company commander initiated action to separate the applicant for using LSD, a Schedule I controlled substance. On this same date the applicant acknowledged receipt of the notification.

(16) Attorney Letter to Group Judge-Advocate, subject: AR 600-85 Limited Use Evidence - (Applicant), 3 December 2020, states the forensic toxicology report, 6 July 2020, is limited use evidence per AR 600-85, paragraph 10-12a (1) as resulting from a command directed urinalysis without probable cause, per the regulation, the limited use policy limits the characterization of discharge to "Honorable" if protected evidence is used.

(a) The facts as set forth in the commander's memorandum, subject: Probable Cause Command Directed Urinalysis, 8 June 2020, identifies the applicant in the memorandum as "needing to be tested" along with PFC S__ and two other Soldiers.

(b) Protected evidence includes results of command directed drug testing that are inadmissible under the MRE. A commander may order a Soldier to provide a urine sample for the purpose of testing for the presence of drugs if there is a probable cause determination. Probable cause exists when there is a reasonable belief that the persons has committed a crime and that evidence of the crime may be obtained by the urine test. MRE 312(d) and 315. Here a Soldier confessed to police that he was high on acid. From that fact alone, the commander assumed everyone "associated" with PFC S__ was "guilty by association." There simply was no facts cited by the company commander except "guilty by association" through PFC S__'s physical proximity to the applicant when the military police arrived and questioned PFC S__.

(c) There were insufficient facts set forth in the company commander's memorandum to support a finding of probable cause. Therefore, the evidence is protected, and, under the limited use policy, the applicant must be given an honorable discharge characterization.

(17) Applicant's personal statement, subject: Requests for Retention, (Applicant), 3 December 2020, shows the applicant requested to be retained on active duty. Stating the applicant made mistakes as a young person and accepted the consequences of the applicant's actions.

(18) The Richardson Firm, K__ R. P__, email (Applicant) - Chapter 14-12c), 11 December 2020, the applicant's attorney requested a copy of the DD Form 3881 (pertaining to conversation between company commander and the applicant) from the Group Judge Advocate in order to prepare additional matters.

(19) US Army John F. Kennedy Special Warfare Center and School - US Army Special Operations Center of Excellence, Major A__ S. C__, Chief of Administrative Law, email (Applicant) - Chapter 14-12c), 16 December 2020, informed K__ R. P__ that there was no DD Form 3881 for 6 June.

(20) Company Commander Memorandum For Record, subject: Clarification Memo for Probable Cause Urinalysis for (Applicant), 8 December 2019 (2020), states after talking to PFC J__ C__, the applicant, SPC D__ and PFC S__ on the morning of 6 June, no one had a coherent description of the events that unfolded the night before. The company commander felt there was sufficient enough evidence to conduct a probable cause urinalysis since PFC S__ alluded to taking LSD and due to the fact that PFC S__ admitted to hanging out with PFC C__, the applicant, and SPC D__ on the night of 5 June. The unit judge advocate agreed that the company commander had more than enough evidence to conduct a probable cause urinalysis on the individuals that were tested.

(21) Attorney Letter, Supplemental Submission - AR 600-85 Limited Use Evidence - (Applicant), 4 January 2021, states after review of the company commander's "Clarification Memo," it further shows there was insufficient evidence for probable cause to order the applicant to provide a urine sample. The memorandum set forth only two clear facts, 1) that PFC S__ admitted to using LSD on 5 June, and 2) that PFC S__ had been in a barracks room on 5 June with PFC C__, the applicant, and SPC D__.

(a) The company commander admits to questioning PFC C__, the applicant, and SPC D__ on 6 June: At the time the company commander spoke with the applicant, the company commander did not suspect the applicant of having committed any crime under the UCMJ. This is because the company commander did not advise the applicant of the applicant's rights under Article 31, UCMJ or cause the applicant to be advised by any other questioner. Article 31 (b) mandates that: No person subject to this chapter may interrogate or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(b) The company commander assumed that the applicant was "guilty by association" and that is not probable cause. Therefore, the evidence is protected, and, under the limited use policy, the applicant must be given an honorable discharge characterization.

(22) Fourth Battalion, 1st Special Warfare Training Group (Airborne), Fort Bragg, NC, memorandum (Separation Recommendation to the Separation Authority), subject: Separation

Under AR 635-200, Chapter 14-12c (2), Misconduct-Abuse of Illegal Drugs, (Applicant), 14 January 2021, shows the battalion commander recommended to the separation authority that the applicant be discharged with a general (under honorable conditions) characterization.

i. Lost Time / Mode of Return: None

j. Behavioral Health Condition(s):

(1) Applicant provided: None

(2) AMHRR Listed: None

The ARBA's medical advisor reviewed DoD and VA medical records.

5. APPLICANT-PROVIDED EVIDENCE: DD Form 293; DD Form 149; Attorney memorandum with all listed enclosures a-g (including Enlisted Record Brief, case separation packet, and letter of recommendation).

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 27-10 (Military Justice), prescribes the policies and procedures pertaining to the administration of military justice and implements the Manual for Courts-Martial, United States, 2019 (MCM), and the rules for courts-martial (RCMs) contained in the MCM. Appendix C states, under the provisions of Article 31 of the UCMJ, you are not required to make any statement or provide any information concerning the alleged offense(s). If you do, it may be used against you in these proceedings or in a trial by court-martial. You have the right to consult with a lawyer.

e. Army Regulation 600-85, (The Army Substance Abuse Program), paragraph 10-12a defines the Limited Use Policy and states unless waived under the circumstances listed in paragraph 10-13d, Limited Use Policy prohibits the use by the government of protected evidence against a Soldier in actions under the UCMJ or on the issue of characterization of service in administrative proceedings. Additionally, the policy limits the characterization of discharge to "Honorable" if protected evidence is used. Protected evidence under this policy includes: Results of command-directed drug or alcohol testing that are inadmissible under the MRE.

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

(1) Paragraph 3-5c, provides the reasons for separation, including the specific circumstances that form the basis for the separation, will be considered on the issue of characterization. As a general matter, characterization will be based upon a pattern of behavior other than an isolated incident. There are circumstances, however, in which the conduct or performance of duty reflected by a single incident provides the basis for characterization.

(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 3-8a states a Soldier is entitled to an honorable characterization of service if limited-use evidence (see AR 600-85) is initially introduced by the Government in the discharge proceedings, and the discharge is based upon those proceedings. The separation authority will consult with the servicing Judge Advocate in cases involving limited use evidence.

(5) 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.

(6) Paragraph 14-3 prescribes a discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter. However, the separation authority may direct a general discharge if such is merited by the Soldier's overall record.

(7) Paragraph 14-12c(2) terms abuse of illegal drugs as serious misconduct. It continues; however, by recognizing relevant facts may mitigate the nature of the offense. Therefore, a single drug abuse offense may be combined with one or more minor disciplinary infractions or incidents of other misconduct and processed for separation under paragraph 14-12a or 14-12b as appropriate.

(8) 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.

g. Army Regulation 635-5-1 (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, misconduct (drug abuse).

h. 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:

(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.

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 changes to the RE code to 1 and narrative reason to "Convenience of the Government." The applicant's AMHRR, the issues, and documents submitted with the application were carefully reviewed.

b. The applicant's DD Form 214 shows the applicant served 2 years, 6 months, and 10 days. The applicant received a FG ROP under Article 15, UCMJ for wrongfully using LSD. The applicant's DD Form 214 shows the applicant was discharged under the provisions of AR 635-200, Chapter 14, paragraph 14-12c(2), by reason of Misconduct (Drug Abuse), with a characterization of service of general (under honorable conditions).

c. The applicant through counsel contends the narrative reason for the discharge should be changed to "Convenience of the Government." The applicant was separated under the provisions of Chapter 14, paragraph 14-12c(2), AR 635-200 with a general (under honorable conditions) discharge. The narrative reason specified by Army Regulations for a discharge under this paragraph is "Misconduct (Drug Abuse)," and the separation code is "JKK." Army Regulation 635-8 (Separation Processing and Documents), governs 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 (SPD Codes). The regulation stipulates no deviation is authorized. There is no provision for any other reason to be entered under this regulation.

d. The applicant through counsel requests the RE code to be changed to 1. Soldiers processed for separation are assigned reentry codes based on their service records or the reason for discharge. Based on Army Regulation 601-210, the applicant was appropriately assigned an RE code of "4." An RE code of "4" cannot be waived, and the applicant is no longer eligible for reenlistment.

e. Counsel contends, PFC S__ confessed to police that PFC S__ was high on acid. From that fact alone, the company commander assumed everyone "associated" with PFC S__ was "guilty by association," and that is not probable cause. This included all the occupants of barracks room 209 (the applicant and SPC D__'s room and not PFC S__'s assigned room) and PFC S__'s roommate. There are no particularized facts relied upon by the company commander that would lead to a reasonable belief that the applicant had used drugs. Therefore, the evidence is protected, and, under the limited use policy, the applicant should have received an honorable discharge characterization. In addition:

(1) Protected evidence includes results of command directed drug testing that are inadmissible under the MRE. A commander may order a Soldier to provide a urine sample for the purpose of testing for the presence of drugs if there is a probable cause determination. Probable cause exists when there is a reasonable belief that the persons has committed a crime and that evidence of the crime may be obtained by the urine test. MRE 312(d) and 315.

(2) Under the provision of AR 600-85 (The Army Substance Abuse Program), paragraph 10-12a (1), the urinalysis that served as the basis for the separation of the applicant resulted from a command directed urinalysis without probable cause. It was therefore protected evidence and, per the limited use policy in the regulation and AR 635-200, a characterization of honorable is warranted.

f. Counsel contends, the company commander did not advise the applicant of the applicant's Article 31(b) rights or complete a DA Form 3881 (Rights Warning Procedure/Waiver Certificate).

(1) The applicant provided:

(a) The Richardson Firm, K__ R. P__, email (Applicant) - Chapter 14-12c), 11 December 2020, shows the applicant's attorney requested a copy of the DD Form 3881 (pertaining to conversation between company commander and the applicant) from the Group Judge Advocate in order to prepare additional matters.

(b) US Army John F. Kennedy Special Warfare Center and School - US Army Special Operations Center of Excellence, Major A__ S. C__, Chief of Administrative Law, email (Applicant) - Chapter 14-12c), 16 December 2020, informed K__ R. P__ that there was no DD Form 3881 for 6 June.

(2) Army Regulation 27-10, Appendix C states, under the provisions of Article 31 of the UCMJ, you are not required to make any statement or provide any information concerning the alleged offense(s). If you do, it may be used against you in these proceedings or in a trial by court-martial. You have the right to consult with a lawyer.

g. The third party statement provided with the application requests that the applicant's characterization of service be changed to honorable. The incident leading to the applicant's discharge represents a temporary fault in judgment, and is not indicative of the applicant's character.

h. On 20 February 2025, the Army Review Boards Agency (ARBA) legal advisor rendered an advisory opinion in the processing of this case. It was opined:

(1) This case was referred to the ARBA Legal Office for input as to whether information about a positive LSD urinalysis test violated the Limited Use policy.

(2) The applicant asserts that a urine specimen collected pursuant to a company commander's search authorization was not based on probable cause, and therefore violated the Army's Limited Use Policy."

(3) On 5 June 2020, Fort Bragg, NC MPs arrested a PFC who admitted to using LSD the previous evening. The PFC also stated that, during the previous evening, the PFC was watching a television show in a barracks room with three other junior enlisted Soldiers, including the applicant. Upon learning of these facts, the Soldiers' company commander discussed with a JAG Corps captain (CPT) whether probable cause existed to direct the Soldiers to submit to

involuntary urinalyses. The JAG CPT opined that probable cause did exist. The company commander directed an involuntary urinalysis for each of the four Soldiers. On 6 June 2020, the applicant provided a urine sample which tested positive for LSD. The positive test result was used to support the applicant's involuntary separation. The applicant received a General, Under Honorable Conditions service characterization.

(4) Limited Use Policy prohibits use by the government of protected evidence against a Soldier in actions under the UCMJ or on the issue of characterization of service in administrative proceedings. The policy limits the characterization of service to "Honorable" if protected evidence is used. Protected evidence includes results of command-directed drug or alcohol testing that are inadmissible under the MRE. See generally AR 600-85, paragraph 10-12a (1), 4 October 2024. Evidence obtained from nonconsensual extraction of body fluids is admissible if seized pursuant to a search warrant or a search authorization under MRE 315. MRE 312(d). A search authorization issued under MRE 315 must be based upon probable cause. MRE 315(f). Probable cause exists when there is reasonable belief that the evidence sought is located in the place or on the person to be searched. MRE 315(f)(2). A determination of the existence or absence of probable cause is made based on an examination of the totality of circumstances at the time. *United States v. N__*, 76 M.J. 101, 105 (C.A.A.F. 2017) (quoting *United States v. R__*, 67 M.J. 162, 165 (C.A.A.F. 2009) (see ARBA Legal Review, 20 February 2025).

(5) In this case, the company commander suspected that the applicant had used LSD because one of the Soldiers with whom the applicant spent the prior evening exhibited aberrant behavior and admitted to using LSD. However, the Soldier who admitted to using LSD never indicated that the applicant used LSD. Neither of the other two Soldiers implied or suggested that the applicant used LSD. The applicant made no admission to using any drugs. Thus, the only basis upon which the company commander determined that probable cause existed regarding the applicant's drug use was that the applicant had spent the prior evening watching television with a Soldier who later admitted to using LSD that same evening.

(6) The applicant's case is similar to *United States v. H__*. In *United States v. H__*, law enforcement personnel were called to a barracks/dormitory in which the odor of marijuana was prevalent. A German shepherd military working dog accompanied the law enforcement personnel. When the dog passed Airman H__, it alerted by sitting down next to him. The dog had been trained to alert next to items that smelled of drugs. Although the dog could sense the odor of drugs on a person, the dog could not detect drugs, or evidence of drug use, inside the human body. A local commander issued a search authorization based upon the dog alerting next to Airman H__ and upon Airman H__'s prior court-martial conviction for drug use. Airman H__ was ordered to provide a urine sample, which tested positive for cocaine. Although the positive cocaine result was admitted at H__'s second court-martial, the Air Force Court of Criminal Appeals ruled that the evidence was wrongly admitted into evidence and set aside Airman H__'s conviction for wrongful cocaine use. See generally, *United States v. H__*, 2020 CCA LEXIS 362 (see ARBA Legal Review, 20 February 2025).

(7) Air Force Court of Criminal Appeals Overturns Conviction. Although the applicant's case does not involve a military working dog, the facts in H__ are nevertheless helpful. In H__, the fact that the dog alerted next to Airman H__ merely indicated that Airman H__ probably had been in the presence of illegal drugs, which of course is different from possessing or using illegal drugs. The dog's reaction provided no probative information as to whether Airman H__ actually ingested illegal drugs. In the applicant's case, evidence that the applicant socialized with a known LSD user the previous evening likewise provided little or no probative evidence that the applicant ingested LSD. Significantly, the Air Force Court of Criminal Appeals found a lack of probable cause in H__ even though the commander who authorized the search knew Airman H__ had previously been convicted of wrongful drug use. This contrasts with the facts in

the applicant's case. In the applicant's case, the applicant had no known history of drug use prior to the incidents of 5 and 6 June 2020. Thus, the facts in H__ provided a stronger case for probable cause than the facts in the applicant's case. Despite the stronger case, the Air Force Court of Criminal Appeals nevertheless found an absence of probable cause and set aside Airmen H__'s conviction.

(8) In the legal advisor's opinion, the company commander's search authorization was not based on probable cause. The legal advisor believes the positive LSD test result violates the Limited Use Policy and recommends the applicant's characterization of service be upgraded to Honorable.

i. 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. Prior Decisions Cited: None

c. Response to Contention(s):

(1) The applicant through counsel contends the narrative reason for the discharge should be changed to "Convenience of the Government."

The Board considered this contention. Based on a Limited Use Policy violation, the Board determined an upgrade to the characterization of service to Honorable was warranted.

(2) Counsel contends, PFC S__ confessed to police that PFC S__ was high on acid. From that fact alone, the company commander assumed everyone "associated" with PFC S__ was "guilty by association," and that is not probable cause. This included all the occupants of barracks room 209 (the applicant and SPC D__'s room and not PFC S__'s assigned room) and PFC S__'s roommate. There are no particularized facts relied upon by the company commander that would lead to a reasonable belief that the applicant had used drugs. Therefore, the evidence is protected, and, under the limited use policy, the applicant should have received an honorable discharge characterization. The Board acknowledged this contention and discussed it during its deliberations.

(a) Protected evidence includes results of command directed drug testing that are inadmissible under the MRE. A commander may order a Soldier to provide a urine sample for the purpose of testing for the presence of drugs if there is a probable cause determination. Probable cause exists when there is a reasonable belief that the person has committed a crime and that evidence of the crime may be obtained by the urine test. MRE 312(d) and 315. The Board discussed this contention during its deliberations and determined an upgrade was warranted due to a violation of the Limited Use Policy.

(b) Under the provision of AR 600-85, paragraph 10-12a (1), the urinalysis that served as the basis for the separation of the applicant resulted from a command directed urinalysis without probable cause. It was therefore protected evidence and, per the limited use policy in the regulation and AR 635-200, a characterization of honorable is warranted. The ADRB considered the Legal Review conducted by its Senior Legal Advisor and discussed the opine during the Board's deliberations and determined an upgrade was warranted.

(3) Counsel contends, the company commander did not advise the applicant of the applicant's Article 31(b) rights or complete a DA Form 3881 (Rights Warning Procedure/Waiver Certificate). The ADRB considered this contention during Board deliberations and found the company commander consulted with the SJA and requested the applicant sign the proper documentation, however the applicant refused to sign and requested to speak with a lawyer.

d. Board Determination: Based on a violation of the Limited Use Policy, the Board determined the characterization of service the applicant received upon separation was improper. The majority of the Board concurred with the ARBA Legal Advisor's opine, the company commander's search authorization was not based on probable cause. Consequently, the applicant's positive LSD test result violated the Limited Use Policy. Therefore, the Board voted to grant relief in the form of an upgrade of the characterization of service to Honorable. There will be no change to the narrative reason for separation or the reentry code.

e. Rationale for Decision:

(1) Based on a preponderance of evidence, the Board determined that the characterization of service the applicant received upon separation was improper due to a violation of the Limited Use Policy. Therefore, the Board voted to grant relief in the form of an upgrade of the characterization of service to Honorable.

(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.

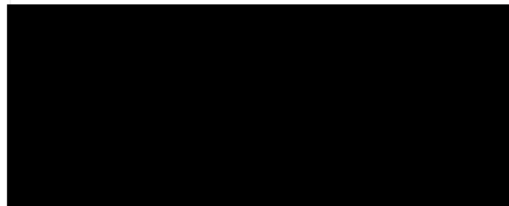
(3) The RE code will not change, as the current code is consistent with the procedural and substantive requirements of the regulation.

10. BOARD ACTION DIRECTED:

- a. Issue a New DD-214 / Separation Order: Yes
- b. Change Characterization to: Honorable
- c. Change Reason / SPD code to: No Change
- d. Change RE Code to: No Change
- e. Change Authority to: No Change

Authenticating Official:

5/22/2025



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 ROP – Field Grade Record of
 Proceedings under 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