

**1. Applicant's Name:**

- a. **Application Date:** 15 September 2020
- b. **Date Received:** 18 September 2020
- c. **Counsel:** None

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

**a. Applicant's Requests and Issues:** The current characterization of service for period under review is general (under honorable conditions). The applicant requests an upgrade to honorable and a narrative reason change to "completion of required active service." The applicant seeks relief contending, in effect,

(1) The discharge was inequitable; in 9 years (Attached Documents (AD) see AD 1, Officer DD FM 214) of faithful service the applicant allegedly made one mistake.

(2) The applicant has a previous 4 year period of honorable service (see AD 2, Enlisted DD FM 214).

(3) If current policies had been in place when the applicant served, the applicant likely would not have been discharged. According to the Manual for Courts-Martial (MCM) 2019, page IV-145, paragraph 99, Article 134 (Extramarital sexual conduct), subparagraph 60c (1)(h) (should be subparagraph 99c (4)) Legal separation; now lists pending legal dissolution as an affirmative defense. The applicant was at the time seeking a divorce but not separation as it was irrelevant in the Army at the time of the pending divorce. If separation was relevant to the Army at the time, the applicant would have sought it, as it stands, the applicant was in fact seeking divorce (AD 5 (see Text message 1LT C\_\_ T\_\_ to Applicant)).

(4) The minimum requirements of Article 134 were not met as it is expressed in the MCM 2016, page IV-114, paragraph 60c (2)(a). "To the prejudice of good order and discipline, refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial; however, this article does not include these distant effects."

(5) The elements necessary for Article 134 - Adultery under MCM 2016, page IV-117, subparagraphs 62b (1) and (3) were not proven/met. It was never proven that intercourse occurred, subparagraph 62b (1). See above issue for explanation of paragraph 62b (3), Prejudice to Good Order and Discipline.

(6) The elements necessary for Article 133 (Conduct Unbecoming an Officer and Gentleman), under MCM 2016, page IV-112, were not met (see AD 6 (Memorandum, Response to Article 15 for 1LT M\_\_ J\_\_, 25 July 2018), paragraphs 11-15).

(7) This investigation and accusations are not in accordance with the Army Equal Opportunity policy, the applicant and First Lieutenant (1LT) M\_\_ J\_\_ were charged with violations that others admitted to and were not charged. Specifically, why was Captain M\_\_ not charged with sharing living accommodations? (see AD 6 (Memorandum, Response to Article 15 for 1LT M\_\_ J\_\_, 25 July 2018), paragraphs 20-22).

(8) Evidence used against the applicant was illegally obtained (see AD 4 Memorandum, Matters for (Applicant), 24 July 2018), paragraph 3a (2) and (5)).

(9) The accuser was caught in a lie in their sworn statement, violated Uniformed Code of Military Justice (UCMJ) and host nation laws; this was not addressed at any point during the investigation (see AD 4 (Memorandum, Matters for (Applicant), 24 July 2018), subparagraphs 3a (1), (2), and (4) - (6); AD 5 (Detective Agency Armed Transport and Personal Protection receipt), 29 November 2017; and AD 6 (Memorandum, Response to Article 15 for 1LT M\_\_ J\_\_, 25 July 2018), paragraphs 38, 39, and 41).

(10) There were several unexplained errors/shortcomings in the investigation (see AD 4 (Memorandum, Matters for (Applicant), 24 July 2018), subparagraphs 3d (1) - (5); AD 5 (Detective Agency Armed Transport and Personal Protection receipt), 29 November 2017; and AD 6 (Memorandum, Response to Article 15 for 1LT M\_\_ J\_\_, 25 July 2018), paragraphs 29-33), including assuming statements as facts even with evidence to the contrary, drawing conclusions unsubstantiated by evidence, and embellishing.

**b. Board Type and Decision:** In a records review conducted at on 6 December 2023, and by a 5-0 vote, the Board denied the request upon finding the separation was both proper and equitable.

*Please see Section 9 of this document for more detail regarding the Board's decision.*

*(Board member names available upon request)*

### 3. DISCHARGE DETAILS:

**a. Reason / Authority / Codes / Characterization:** Unacceptable Conduct / AR 600-8-24, Chapter 4-2B / BNC / General (Under Honorable Conditions)

**b. Date of Discharge:** 26 February 2019

#### **c. Separation Facts:**

##### **(1) Date of Notification of Intent to Separate:**

**(2) Basis for Separation:** The applicant was informed to show cause for retention on active duty under the provisions of AR 600-8-24, paragraphs 4-2a (5) (should be paragraph 4-2b (5)) for acts of personal and subparagraph 4-2c (1), Punishment under UCMJ, Article 15, due to the following reasons:

**(a)** On or about 1 November 2017 and between on or about 7 February 2018, the applicant shared living accommodations and engaged in public displays of affections with a woman not the applicant's spouse, in violation of Article 133, UCMJ.

**(b)** On or about 1 November 2017 and between on or about 7 February 2018, the applicant had sexual intercourse with a woman not the applicant's spouse, in violation of Article 134, UCMJ.

**(c)** On 26 July 2018, punishment was imposed on the applicant under UCMJ, Article 15.

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

**(4) Board of Inquiry (BOI):** NA

**(5) GOSCA Recommendation Date / Characterization:** On 25 September 2018, the GOSCA recommended approval of the applicant's request for discharge. / General (Under Honorable Conditions)

**(6) DA Board of Review for Eliminations:** NIF

**(7) Separation Decision Date / Characterization:** 5 February 2019 / General (Under Honorable Conditions)

**4. SERVICE DETAILS:**

**a. Date / Period of Appointment:** 17 February 2014 / NIF

**b. Age at Appointment: / Education:** 25 / Bachelor's Degree

**c. Highest Grade Achieved / MOS / Total Service:** O-3 / 42B, Human Resources Officer / 9 years, 2 months, and 14 days

**d. Prior Service / Characterizations:** RA, 7 June 2006 - 10 August 2010 / HD

**e. Overseas Service / Combat Service:** Germany, Poland, SWA / Afghanistan (15 February 2009 - 8 May 2009); Iraq (9 May 2009 - 9 February 2010)

**f. Awards and Decorations:** ARCOM-3, AAM-2, VUA, AGCM, NDSM, GWOTSM, ACM-2CS, ICM-CS, NCOPDR, ASR, OSR-2, NATOMDL, CAB

**g. Performance Ratings:** 3 March 2014 - 30 October 2015 / Highly Qualified  
 31 October 2015 - 8 July 2016 / Most Qualified  
 9 July 2016 - 8 July 2017 / Highly Qualified  
 9 July 2017 - 7 May 2018 / Not Qualified  
 8 May 2018 - 22 February 2019 / Highly Qualified

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

**(1)** The applicant provided attachment 7 - Memorandum AR 15-6 Investigation Findings and Recommendations, 28 February 2018, showing:

**(a)** Findings:

- According to sworn statements from 1LT C\_\_ M. T\_\_ (wife at the time) and 1LT M\_\_S (best friend) (analyst should 1LT M\_\_R) and a recorded conversation between the applicant and 1LT T\_\_ (see Exhibit O), the applicant and 1LT J\_\_ had a sexual relationship beginning November 2017
- According to 1LT T\_\_, the applicant confessed to having an affair (see Exhibit O)
- The applicant and 1LT J\_\_'s inappropriate relationship is in violation of Article 133, conduct unbecoming an officer
- 1LT J\_\_ falsely stated never had a sexual relationship with the applicant (see Exhibit A)
- There was a perception that the applicant was engaging in inappropriate relationship with 1LT J\_\_
- According to Article 134, the applicant and 1LT J\_\_ had sexual intercourse while the applicant was married to 1LT T\_\_

**(b)** Recommendations:

- Adverse actions against the applicant and 1LT J\_\_ as appropriate
- The applicant be removed from 2nd Squadron immediately

**(2)** FG Article 15, 26 July 2018, for:

**(a)** Wrongfully share living accommodations with First Lieutenant M\_\_ J\_\_, a woman not the applicant's wife between on or about 1 November 2017 and on or about 7 February 2018.

**(b)** Wrongfully engage in public displays of affection with First Lieutenant J\_\_, a woman not the applicant's wife between on or about 1 November 2017 and on or about 7 February 2018.

**(c)** The punishment consisted of forfeiture of \$3,041 pay per month for 2 months. DA Form 268 (Report to Suspend Favorable Personnel Actions (Flag)), unspecified date, shows the applicant was flagged for involuntary separation/field initiated (BA), effective 26 July 2018.

**(3)** Memorandum for Applicant, Initiation of Elimination, 26 July 2018, shows the applicant had to show cause for retention on active duty under the provisions of AR 600-8-24, subparagraphs 4-2a (5) (should be paragraph 4-2b (5)) and paragraph 4-2c(1), due to personal acts of misconduct and conduct unbecoming of an officer, due to the following reasons:

- On or about 1 November 2017 and between on or about 7 February 2018, the applicant shared living accommodations and engaged in public displays of affections with a woman not the applicant's spouse, in violation of Article 133, UCMJ
- On or about 1 November 2017 and between on or about 7 February 2018, the applicant had sexual intercourse with a woman not the applicant's spouse, in violation of Article 134, UCMJ
- On 26 July 2018, punishment was imposed on the applicant under UCMJ, Article 15

**(4)** Memorandum, Acknowledgement of Notification of Initiation of Elimination, from active duty, 30 July 2018, shows the applicant elected to submit a resignation.

**(5)** Report of Mental Status Evaluation (MSE), 22 August 2018, shows the applicant received a command directed behavioral health evaluation. 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 applicant was not found to have a disabling behavioral health condition that would warrant referral to a medical board. The command was advised.

**(6)** Memorandum, Discharge in Lieu of Elimination Proceedings, 28 August 2018, shows the applicant requested to be discharged from the Army under the provisions of AR 600-8-24, chapter 4, in lieu of further elimination proceedings.

**(7)** Memorandums, Request for Discharge in Lieu of Elimination (Applicant), 6 and 19 September 2018, from the Regiment and Squadron commanders, shows they recommended the applicant's request to be discharge be approved with a general (under honorable conditions) characterization of service.

**(8)** Memorandum, Discharge in Lieu of Elimination Proceedings, 25 September 2018, shows the GOSCA recommended the applicant's request to be discharge be approved with a general (under honorable conditions) characterization of service.

(9) Memorandum, Discharge in Lieu of Elimination Proceedings, 5 February 2019, shows the Deputy Assistant Secretary of the Army (Army Review Boards) approved the applicant's request for to be discharged with a general (under honorable conditions) characterization of service.

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

j. **Behavioral Health Condition(s):**

(1) **Applicant provided:** None

(2) **AMHRR Listed:** MSE as described in previous paragraph 4h.

5. **APPLICANT-PROVIDED EVIDENCE:** DD Form 293; officer and enlisted DD Forms 214; AD 1-7; exhibits A through T (AR 15-6 allied documents); Officer Record Brief; text and Facebook Messenger messages.

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 600-8-24, Officer Transfers and Discharges, sets forth the basic authority for the separation of commissioned and warrant officers.

(1) Paragraph 1-23 provides the authorized types of characterization of service or description of separation.

(2) Paragraph 1-23a, states an officer will normally receive an honorable characterization of service when the quality of the officer's service has met the standards of acceptable conduct and performance of duty, or the final revocation of a security clearance under DODI 5200.02 and AR 380-67 for reasons that do not involve acts of misconduct for an officer.

(3) Paragraph 1-23b, states an officer will normally receive a general (under honorable conditions) characterization of service when the officer's military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge. A separation under general (under honorable conditions) normally appropriate when an officer: Submits an unqualified resignation; Separated based on misconduct; discharged for physical disability resulting from intentional misconduct or neglect; and, for final revocation of a security clearance.

(4) Chapter 4 outlines the policy and procedure for the elimination of officers from the active Army for substandard performance of duty.

(5) Paragraph 4-2b, prescribes for the elimination of an officer for misconduct, moral or professional dereliction, or in the interests of national security.

**(6)** Paragraph 4-20a (previously 4-24a), states an officer identified for elimination may, at any time during or prior to the final action in the elimination case elect one of the following options: (1) Submit a resignation in lieu of elimination; (2) request a discharge in lieu of elimination; and (3) Apply for retirement in lieu of elimination if otherwise eligible.

**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 "JNC" as the appropriate code to assign commissioned officers who are discharged under the provisions of Army Regulation 600-8-24, Chapter 4-2b, unacceptable conduct.

**f.** MCM 2016, provides rules that are intended to provide for the just determination of every proceeding relating to trial by court-martial. These rules shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.

**(1)** Paragraph 59, Article 133 (Conduct unbecoming an officer and gentleman)), subparagraph 59c (2) (Nature of offense), states conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet unrealistically high moral standards, but there is a limit of tolerance based on customs of the service and military necessity below which the personal standards of an officer, cadet, or midshipman cannot fall without seriously compromising the person's standing as an officer, cadet, or midshipman or the person's character as a gentleman. This article prohibits conduct by a commissioned officer, cadet, or midshipman which, taking all the circumstances into consideration, is thus compromising. This article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman. Examples of offenses are instances of violation of this article include knowingly making a false official statement; dishonorable failure to pay a debt; cheating on an exam; opening and reading a letter of another without authority; using insulting or defamatory language to another officer in that officer's presence or about that officer to other military persons; being drunk and disorderly in a public place; public association with known prostitutes; committing or attempting to commit a crime involving moral turpitude; and failing without good cause to support the officer's family.

**(2)** Paragraph 62, Article 134 (Adultery), paragraph 62b (Elements) states:

**(a)** That the accused wrongfully had sexual intercourse with a certain person;

**(b)** That, at the time, the accused or the other person was married to someone else; and

**(c)** That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

**(3)** Paragraph 62, Article 134 (Adultery), paragraph 62c (Explanation), states:

**(a)** To constitute an offense under the UCMJ, the adulterous conduct must either be directly presidential to good order and discipline or service discrediting. Adulterous conduct that is directly prejudicial includes conduct that has an obvious, immeasurably decisive effect on unit

or organization discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of or respect towards a service member. Adultery may also be service discrediting, even though the conduct is only indirectly or remotely prejudicial to good order and discipline. Discredit means to injure the reputation of the armed forces and includes adulterous conduct that has a tendency, because of its open or notorious nature, to bring the service into disrepute, make it subject to public ridicule, or lower it in public esteem. While adulterous conduct that is private and discreet in nature may not be service discrediting by this standard, under the circumstances, it may be determined to be conduct prejudicial to good order and discipline.

**(b)** Commanders should consider all relevant circumstances, including but not limited to the following factors, when determining whether adulterous acts are prejudicial to good order and discipline or are of a nature to bring discredit upon the armed forces:

- The accused's marital status, military rank, grade, or position;
- The co-actor's marital status, military rank, grade, and position, or relationship to the armed forces;
- The military status of the accused's spouse or the spouse of co-actor, or their relationship to the armed forces;
- The impact, if any, of the adulterous relationship on the ability of the accused, the co-actor, or the spouse of either to perform their duties in support of the armed forces;
- The misuse, if any, of government time and resources to facilitate the commission of the conduct;
- Whether the conduct persisted despite counseling or orders to desist; the flagrancy of the conduct, such as whether any notoriety ensued; and whether the adulterous act was accompanied by other violations of the UCMJ;
- The negative impact of the conduct on the units or organizations of the accused, the co-actor or the spouse of either of them, such as a detrimental effect on unit or organization morale, teamwork, and efficiency;
- Whether the accused or co-actor was legally separated; and
- Whether the adulterous misconduct involves an ongoing or recent relationship or is remote in time

**g.** MCM 2019, provides rules that are intended to provide for the just determination of every proceeding relating to trial by court-martial. These rules shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay. Paragraph 99, Article 134 (Extramarital sexual conduct), subparagraph 99c (4) Legal separation states, it is an affirmative defense to the offense of extramarital sexual conduct that the accused, co-actor, or both were legally separated by order of a court of competent jurisdiction. The affirmative defense does not apply unless all parties to the conflict are either legally separated or unmarried at the time of the conduct.

**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 to completion of required active service. The applicant's AMHRR, the issues, and documents submitted with the application were carefully reviewed.

**b.** The applicant honorably served over 4 years, 2 months, and 4 days in the U.S. Army as an enlisted Soldier. In 2014, the applicant served in the U.S. Army as a second lieutenant, was promoted through the rank of captain, and deployed to Afghanistan and Iraq. An AR 15-6 investigation was conducted against the applicant in February 2018 and the applicant received a FG Article 15 in July 2018. On 26 July 2018, the GOSCA initiated a show cause for retention on



active duty under the provisions of AR 600-8-24, paragraph 4-2a (5) (should be paragraph 4-2b (5)), for acts of personal misconduct, and subparagraph 4-2c (1), punishment under UCMJ, Article 15. On 28 August 2019, the applicant requested a discharge in lieu of elimination proceedings. On 5 February 2019, the Deputy Assistant Secretary (Army Review Boards) approved the applicant's discharge with a characterization of service of general (under honorable conditions).

c. The applicant requests the narrative reason to be changed to completion of required active service. The applicant was separated under the provisions of Chapter 4, paragraph 4-2b and 4-24, AR 600-8-24 with a general (under honorable conditions) discharge. The narrative reason specified by Army Regulations for a discharge under this paragraph is "Unacceptable Conduct," and the separation code is "JNC." 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 exactly as listed in tables 2-2 or 2-3 of AR 635-5-1, SPD Codes. The regulation further stipulates no deviation is authorized. There is no provision for any other reason to be entered under this regulation.

d. The applicant contends, in effect, that the discharge was inequitable; in 9 years (see AD 1, Officer DD FM 214) of faithful service the applicant allegedly made one mistake. AR 600-8-24, paragraph 1-23, in pertinent part, stipulates there are circumstances in which the conduct or performance of duty reflected by a single incident may provide the basis of a characterization of service.

e. The applicant contends, in effect, the applicant has a previous 4 year period of honorable service (see AD 2, Enlisted DD FM 214). The Board will consider the applicant's service accomplishments and the quality of service according to the DODI 1332.28.

f. The applicant contends, in effect, if current policies had been in place when the applicant served, the applicant likely would not have been discharged. The applicant states according to the MCM 2019, page IV-145, paragraph 99, Article 134 (Extramarital sexual conduct), subparagraph 60c (1)(h) (should be subparagraph 99c (4)) Legal separation, is an affirmative defense to the offense of extramarital sexual conduct that the accused, co-actor, or both were legally separated by order of a court of competent jurisdiction. The affirmative defense does not apply unless all parties to the conflict are either legally separated or unmarried at the time of the conduct. The applicant states that at the time the applicant was seeking a divorce but not separation as it was irrelevant in the Army at the time of the pending divorce. The applicant contends that if [legal] separation was relevant to the Army at the time, the applicant would have sought it, as it stands, the applicant was in fact seeking divorce. See paragraph 5 (AD 5).

g. The applicant contends, in effect, the minimum requirements of Article 134 (Adultery) were not met as it is expressed in the MCM 2016, page IV-114, paragraph 60c (2)(a). "To the prejudice of good order and discipline, refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial; however, this article does not include these distant effects. MCM 2016, paragraph 62, Article 134 (Adultery), states in part, adultery may also be service discrediting, even though the conduct is only indirectly or remotely prejudicial to good order and discipline. Discredit means to injure the reputation of the armed forces and includes adulterous conduct that has a tendency, because of its open or notorious nature, to bring the service into disrepute, make it subject to public ridicule, or lower it in public esteem. While adulterous conduct that is private and discreet in nature may not be service discrediting by this standard, under the circumstances, it may be determined to be conduct prejudicial to good order and discipline.

**h.** The applicant contends, in effect, the elements necessary for Article 134 (Adultery) under MCM 2016, page IV-117, subparagraphs 62b (1) and (3) were not proven/met, including it was never proven that intercourse occurred per subparagraph 62b (1).

**(1)** MCM 2016, paragraph 62, Article 134 (Adultery), paragraph 62b (Elements) states in: subparagraph 62b (1), that the accused wrongfully had sexual intercourse with a certain person; and subparagraph 62b (3), that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Armed Forces or was of a nature to bring discredit upon the Armed Forces.

**(2)** The applicant provided 13 sworn statements and one email as referenced in paragraph 5 above. Seven (7) statements reflect that that the witnesses did not observe the applicant and 1LT M.J. engage in inappropriate behavior or suspect romantic intimacy. The 15-6 investigation includes a voice recording between the applicant and 1LT T.

**i.** The applicant contends, in effect, the elements necessary for Article 133 (Conduct Unbecoming an Officer and Gentleman), under MCM 2016, page IV-112, were not met. See paragraph 5 (see AD 6). MCM 2016, paragraph 59, Article 133 (Conduct unbecoming an officer and gentleman)), subparagraph 59c (2) (Nature of offense), states conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. The applicant submitted the applicant's and the 1LT M's TDS response to the Article 15 that both received for violating Article 134 and Article 133 which refutes the Article 15 offenses that subsequently became the basis of the applicant's officer elimination action. The AR 15-6 investigation, that was deemed legally sufficient, reflects that the Investigating Officer found by preponderance of the evidence that the applicant was engaged in an adulterous relationship that was prejudicial to the good order and discipline and brought discredit upon the armed forces under Article 134 and violates Article 133, conduct unbecoming of an officer.

**j.** The applicant contends, in effect, this investigation and accusations are not in accordance with the Army Equal Opportunity policy, the applicant and 1LT J\_\_ were charged with violations that others admitted to and were not charged. Specifically, why was Captain M\_\_ not charged with sharing living accommodations? See paragraph 5 (AD 6). DODI 1332.28 provides that each case must be decided on its individual merits, and a case-by-case basis, considering the unique facts and circumstances of the case.

**k.** The applicant contends, in effect, evidence used against the applicant was illegally obtained. See paragraph 5 (AD 4).

**(1)** The applicant's defense counsel states 1LT T\_\_ opened, read, and photographed emails, logged onto the Facebook and Amazon account of the applicant without consent. The investigating officer never commented on or inquired into the wrongfulness of the unauthorized intrusion into the applicant's password-protected accounts. 1LT T\_\_'s sworn statement states, "[1LT T\_\_] also checked [applicant] email..." MCM 2016, paragraph 59, Article 133 (Conduct unbecoming an officer and gentleman)), subparagraph 59c (3) (Examples of Offenses) includes "opening and reading a letter of another without authority."

**(2)** The applicant's defense counsel states 1LT T\_\_ provided a recorded audio conversation between 1LT T\_\_ and the applicant, to the investigating officer. In many states in the United States, including Germany, requires two-part consent, that is, both parties to private conversations must knowingly consent to the recording of that private conversation.

l. The applicant contends, in effect, the accuser was caught in a lie in as the accuser's sworn statement, violated UCMJ and host nation laws; this was not addressed at any point during the investigation. See paragraph 5 (AD 4).

(1) The applicant provided an email from 1LT T\_\_\_, stating "[1LT T\_\_\_] lied to [applicant] on 02 DEC and told [applicant] [1LT T\_\_\_] had hired a private investigator who had captured footage and photos of them having sex. [1LT T\_\_\_] told [applicant] [1LT T\_\_\_] would keep the evidence and not turn it in and that [1LT T\_\_\_] hadn't opened it.

(2) AD 5 (Detective Agency Armed Transport and Personal Protection receipt), 29 November 2017, shows "Frau" which is German for wife and has C\_\_ T\_\_'s name (analyst notes see additional information bookmark in PDF for translation).

m. The applicant contends, in effect, there were several unexplained errors/shortcomings in the investigation, including assuming statements as facts even with evidence to the contrary, drawing conclusions unsubstantiated by evidence, and embellishing. See paragraph 5 (AD 4). The DODI 1332.28 provides each case must be decided on its individual merits, and a case-by-case basis, considering the unique facts and circumstances of the case. MCM 2016, paragraph 62, Article 134, paragraph 62c, states that Commanders should consider all relevant circumstances when determining whether adulterous acts are prejudicial to good order and discipline or are of a nature to bring discredit upon the Armed Forces. AR 600-8-24 requires that the government find by preponderance of the evidence that the applicant violated Articles 133 and 134.

n. If the applicant desires a personal appearance hearing, it will be the applicant's responsibility to meet the burden of proof and provide the appropriate documents (i.e., the discharge packet) or other evidence sufficient to explain the facts, circumstances, and reasons underlying the separation action, for the Board's consideration because they are not available in the official record.

o. Published Department of Defense guidance indicates that the guidance is not intended to interfere or impede on the Board's statutory independence. The Board determines 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 [REDACTED] the board considered the following factors:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? **No.**

(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 Contentions:**

(1) The applicant contends, in effect, that the discharge was inequitable; in 9 years of faithful service the applicant allegedly made one mistake. The Board considered the applicant's 9 years, 2 months and 14 days of service, including combat tours in Iraq and Afghanistan, and the numerous awards received by the applicant, but determined that these factors did not outweigh the preponderance of the evidence that the applicant violated UCMJ Articles 133 and 134.

(2) The applicant contends, in effect, the applicant has a previous 4-year period of honorable service. The Board considered the applicant's total 9 years, 2 months and 14 days of service, including combat tours in Iraq and Afghanistan, and the numerous awards received by the applicant, but determined that these factors did not outweigh the preponderance of the evidence that the applicant violated UCMJ Articles 133 and 134.

(3) The applicant contends, in effect, if current policies had been in place when the applicant served, the applicant likely would not have been discharged. The Board considered this contention and determined that the applicant could have pursued a Board of Inquiry but elected to resign in lieu of elimination; and that the weight of the evidence does not warrant an upgrade as the AR 15-6 investigation and FG Article 15 specifically addresses the facts that support the elements of Article 134.

(4) The applicant contends, in effect, the minimum requirements of Article 134 were not met as it is expressed in the MCM 2016, page IV-114, paragraph 60c (2)(a). The applicant contends, in effect, the elements necessary for UCMJ (2016), Article 134 because the government did not prove that intercourse occurred. The applicant contends, in effect, the elements necessary for Article 133. See paragraph 5 (AD 6). The Board considered this contention and determined that the weight of the evidence does not warrant an upgrade as the AR 15-6 investigation specifically addresses the facts that support the elements of Articles 133 and 134, including the prejudice to the good order and discipline - specifically, that the applicant's misconduct negatively impacted the applicant's unit and the applicant's spouse's duty performance as the applicant's spouse served in the same unit.

(5) The applicant contends, in effect, this investigation and accusations are not in accordance with the Army Equal Opportunity policy as the applicant and 1LT J\_\_ were charged with violations that others admitted to and were not charged. Specifically, why was Captain M\_\_ not charged with sharing living accommodations? See paragraph 5 (AD 6). The Board considered this contention and determined that a discharge upgrade is not warranted as there is insufficient evidence in the applicant's official record or provided by the applicant to support that the Command acted in an arbitrary or capricious manner.

(6) The applicant contends, in effect, evidence used against the applicant was illegally obtained (see AD 4 (Memorandum, Matters for (Applicant), 24 July 2018), Paragraph 3a (2) and (5)). The Board considered this contention and determined that the weight of the evidence does not warrant an upgrade as the AR 15-6 investigation and FG Article 15 specifically addresses the facts that support the elements of Article 134.

(7) The applicant contends, in effect, the accuser was caught in a lie in their sworn statement, violated UCMJ and host nation laws; this was not addressed at any point during the investigation (see AD 4 (Memorandum, Matters for (Applicant), 24 July 2018), subparagraphs 3a (1), (2), and (4) - (6); see AD 5 (Detective Agency Armed Transport and Personal Protection receipt) , 29 November 2017; and see AD 6 (Memorandum, Response to Article 15 for 1LT M\_\_ J\_\_, 25 July 2018), paragraphs 38, 39, and 41). The Board considered this contention and

determined there was insufficient evidence to determine if the accuser made a false statement; and that the weight of the evidence does not warrant an upgrade as the AR 15-6 investigation and FG Article 15 specifically addresses the facts that support the elements of Article 134.

**(8)** The applicant contends, in effect, there were several unexplained errors/shortcomings in the investigation (see AD 4 (Memorandum, Matters for (Applicant), 24 July 2018), subparagraphs 3d (1) - (5); see AD 5 (Detective Agency Armed Transport and Personal Protection receipt) , 29 November 2017; and see AD 6 (Memorandum, Response to Article 15 for 1LT M\_\_ J\_\_, 25 July 2018), paragraphs 29-33), including assuming statements as facts even with evidence to the contrary, drawing conclusions unsubstantiated by evidence, and embellishing. The Board considered this contention and determined that a discharge upgrade is not warranted as the applicant was represented by counsel and had the opportunity to present a defense at a Board of Inquiry. However, the applicant elected to submit a resignation in lieu of elimination.

**(9)** Analyst notes block f (Foreign Service) of the applicant's DD Form 214 has an administrative irregularity, the applicant's time served in Germany is not reflected. This does not fall within this Board's purview; however, the applicant may apply to the ABCMR, using the enclosed DD Form 149 regarding this matter. A DD Form 149 may also be obtained from a Veterans' Service Organization.

**c.** The Board determined that the discharge is, at this time, proper and equitable, in light of the current evidence of record. However, the applicant may request a personal appearance hearing to address the issues before the Board. The applicant is responsible for satisfying the burden of proof and providing documents or other evidence sufficient to support the applicant's contention(s) that the discharge was improper or inequitable.

**d.** Rationale for Decision:

**(1)** The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board also considered the applicant's statement, record of service, the frequency and nature of misconduct, and the reason for separation. The Board found insufficient evidence of in-service mitigating factors and determined, based on the Board Medical Advisor opine, that the applicant's does not have behavioral health condition that mitigates the applicant's misconduct (shared living accommodations and engaged in public displays of affections with a woman not the spouse; sexual intercourse with a woman not spouse; received punishment imposed under UCMJ, Article 15). The discharge was consistent with the procedural and substantive requirements of the regulation, was within the discretion of the separation authority, and the applicant was provided full administrative due process. Therefore, the applicant's GD was proper and equitable as the applicant's misconduct fell below that level of meritorious service warranted for an upgrade to HD.

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

**(3)** There is no requirement for an RE code as the applicant was an officer.

**10. BOARD ACTION DIRECTED:**

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

**Authenticating Official:**

3/19/2024

**X**

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Presiding Officer, COL, U.S. ARMY  
Army Discharge Review Board

**Legend:**

AWOL – Absent Without Leave  
AMHRR – Army Military Human  
Resource Record  
BCD – Bad Conduct Discharge  
BH – Behavioral Health  
CG – Company Grade Article 15  
CID – Criminal Investigation  
Division  
ELS – Entry Level Status  
FG – Field Grade Article 15

GD – General Discharge  
HS – High School  
HD – Honorable Discharge  
IADT – Initial Active Duty Training  
MP – Military Police  
MST – Military Sexual Trauma  
N/A – Not applicable  
NCO – Noncommissioned Officer  
NIF – Not in File  
NOS – Not Otherwise Specified

OAD – Ordered to Active Duty  
OBH (I) – Other Behavioral  
Health (Issues)  
OMPF – Official Military  
Personnel File  
PTSD – Post-Traumatic Stress  
Disorder  
RE – Re-entry  
SCM – Summary Court Martial  
SPCM – Special Court Martial

SPD – Separation Program  
Designator  
TBI – Traumatic Brain Injury  
UNC – Uncharacterized  
Discharge  
UOTHC – Under Other Than  
Honorable Conditions  
VA – Department of Veterans  
Affairs