

1. Applicant's Name: [REDACTED]**a. Application Date:** 12 April 2021**b. Date Received:** 26 April 2021**c. Counsel:** [REDACTED]**2. REQUEST, ISSUES, BOARD TYPE, AND DECISION:**

a. Applicant's Requests and Issues: The current characterization of service for the period under review is general (under honorable conditions). The applicant through counsel, requests:

- an upgrade to honorable
- change RE code to allow option to reenlist
- set aside and remove administrative separation from the applicant's OMPF
- reinstatement of all rights, benefits, and full privileges of military service to which the applicant is entitled
- backpay for the period of wrongful separation after 9 December 2020
- any other relief that the Board deems necessary and just

b. The applicant through counsel seeks relief contending, in effect, despite being found not guilty of cocaine use during an Article 15 proceeding, the applicant was separated from the U.S. Army under AR 635-200, chapter 14-12c (2), misconduct (drug abuse). This was an error in violation of the procedures of AR 635-200 and in violation of the applicant's due process rights.

(1) The applicant joined the Army through the Military Accessions Vital to the National Interests (MAVNI) program which is used to recruit legal non-immigrants with certain critical skills. Through this program the applicant would acquire expedited citizenship as long as certain conditions were met, including an honorable discharge.

(2) On 13 November 2019, the applicant was required to take a random urinalysis which tested positive for cocaine. To prove the applicant never used any illegal drugs including cocaine the applicant paid for a hair follicle drug test and a polygraph test. The hair follicle drug test was negative for all tested substances and the applicant passed the polygraph test (see attachments A and B). On 6 February 2020, the applicant received a field grade Article 15. After presenting the findings of these tests and character statements to the battalion commander, the applicant was found not guilty.

(3) On 6 April 2020, the company commander initiated separation action based on cocaine use. Under the conditions of the MAVNI program, the applicant needed to ensure to perform to all Army standards and the applicant did so without hesitation (see attachment D). On 22 July 2020, while at the machine gun range the applicant received a death threat from Staff Sergeant J__ after the applicant voiced concerns to counsel regarding issues within the unit and discomfort after the Article 15 and separation proceedings (see attachment C). The applicant filed an Inspector General complaint about the ongoing bullying and discriminatory treatment received within the unit.

(4) On 5 September 2020, during a field exercise the applicant was on fire guard. While on fire guard the applicant was called to the tower. The applicant informed Sergeant (SGT) M__

that the applicant did not shave and was told that the applicant still had to go to the tower. After returning from the tower and bedding down, Specialist (SPC) M__ approached the applicant, who had been asleep, waking the applicant up and saying "S__ told me to tell [the applicant] to do pushups." The applicant replied to SPC M__ "Piss off." The next morning the applicant shaved as required under AR 670-1. As a result of this, the applicant was counseled on 17 September 2020 by Sergeant First Class W__ who wrote the counseling based on hearsay and no investigation was done into this matter. The counseling contradicts a statement from A__ R__ and the applicant. According to a statement from A__ R__, no one was shaving in the field and all other personnel only shaved when informed the Commanding General was to visit (see attachment E).

(5) On 22 (24) September 2020, the separation authority approved the separation of the applicant under the provisions of AR 635-200, Chapter 14-12c(2) based upon the claim that the applicant disrespected an NCO and failed to obey a lawful general regulation, AR 670-1. The applicant provided a written defense to the separation on 25 September (15 October) 2020, informing the separation authority the applicant's position regarding the circumstances surrounding the counseling and status under MAVNI.

(6) On 15 October 2020, Captain E__ C__, Trial Defense Counsel, submitted a rebuttal memorandum to the separation authority stating the administrative separation proceedings should not have occurred and the infraction for which the applicant was being separated were both inaccurate and minor, and would not warrant separation proceedings for any other soldier (see attachment F). For the applicant, however, every single action was being over-scrutinized and heightened to prejudicial levels. On 20 October 2020, the separation authority vacated the suspension of separation in spite of the utter lack of reliable evidence supporting an allegation of misconduct (drug abuse).

(7) The applicant continued to serve the Army with honor and dignity while silently suffering from bullying and discrimination within his unit as a result of the unwarranted efforts to separate the applicant from service. The applicant faces deportation as a result of the separation and will be subject to death threats and legal ramifications in Lebanon, having served in the Armed Forces of the U.S. and having left the applicant's birth country.

c. Board Type and Decision: In a records review conducted on 4 September 2024, and by a 5-0 vote, the Board determined the discharge is inequitable based on the applicant's length and quality of service, to include combat service, and the circumstances surrounding the discharge (discrimination). 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, the narrative reason for separation to Misconduct (Minor Infractions), with a corresponding separation code of JKN. The Board determined the reentry code is proper and equitable and voted not to change it.

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

1. DISCHARGE DETAILS:

a. Reason / Authority / Codes / Characterization: Misconduct (Drug Abuse) / AR 635-200, Chapter 14-12c (2) / JKK / RE-3 / General (Under Honorable Conditions)

b. Date of Discharge: 9 December 2020

c. Separation Facts:

ARMY DISCHARGE REVIEW BOARD CASE REPORT AND DIRECTIVE

AR20210010011

(1) Date of Notification of Intent to Separate: 6 April 2020 (initial notification) and 25 September 2020 (after suspension of separation action was vacated)

(2) Basis for Separation: The applicant was informed of the following reasons:

(a) On 6 April 2020, the company commander notified the applicant that the proposed action was because the applicant used cocaine between on or about 10 and 13 November 2019.

(b) On 25 September 2020, the separation authority notified the applicant that the approved separation was because the applicant disrespected SGT S__ L. S__, an NCO in the execution of SGT S__'s office by telling SGT S__ "Just counsel me" or words to that effect; the applicant failed to obey a lawful general regulation to wit: AR 670-1, paragraph 3-2a (2) (b), by failing to be clean shaven.

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

(4) Legal Consultation Date: 15 April 2020

(5) Administrative Separation Board: NA

(6) Separation Decision Date / Characterization: 20 October 2020 / General (Under Honorable Conditions)

4. SERVICE DETAILS:

a. Date / Period of Enlistment: 1 May 2018 / 4 years and 16 weeks

b. Age at Enlistment / Education / GT Score: 24 / Associate Degree / 103

c. Highest Grade Achieved / MOS / Total Service: E-4 / 11B10, Infantryman / 2 years, 7 months, and 9 days

d. Prior Service / Characterizations: None

e. Overseas Service / Combat Service: SWA / Kuwait (21 February 2019 - 21 August 2019)

f. Awards and Decorations: AAM, NDSM, GWOTEM, GWOTSM, ASR

g. Performance Ratings: NA

h. Disciplinary Action(s) / Evidentiary Record:

(1) Military Times News Article, Troop Drug Dismissals Suspended due to Lab Contamination Concerns, 21 June 2018, shows lab contamination concerns resulted in suspended dismissals from services.

(2) Electronic Copy of DD Form 2624, 10 December 2019, shows the applicant tested positive for COC 107 (cocaine), during an Inspection Random (IR) urinalysis testing, conducted on 13 November 2019.

(3) DA Form 268 (Report to Suspend Favorable Personnel Actions (Flag)), undated, shows the applicant was flagged for involuntary separation/field initiated (BA), effective 10 December 2019.

(4) The applicant provided:

(a) Attachment A - Quest Diagnostics, Medical Review Officer Report, 31 January 2020, shows the applicant's hair was tested for amphetamines, cocaine, marijuana, opiates, and phencyclidine. The applicant tested negative for these substances.

(b) Attachment B - Polygraph Examination Report, 3 February 2020, shows the applicant passed a polygraph test after answering "No" to the following questions:

- From 1 November 2019 to 13 November 2019 did you take or consume any recreational drugs?
- From 1 November 2019 to 13 November 2019 other than Ibuprofen, did you take or consume any prescription drugs?
- From 1 November 2019 to 13 November 2019 did you take or consume any cocaine drugs?

(5) FG Article 15, 6 February 2020, for wrongfully using cocaine between on or about 10 and 13 November 2019. The applicant submitted matters in defense, extenuation, and/or mitigation (see subparagraphs 4h (4) (a) and (b) above). The applicant was found not guilty of all specifications.

(6) On 6 April 2020, the company commander initiated action to separate the applicant for using cocaine between on or about 10 and 13 November 2019. The applicant acknowledged receipt of the notification.

(7) The applicant provided:

(a) Attachment D - Monthly counselings for February, May, June, and July 2020, shows in part, the applicant performed satisfactorily, gave 100 percent during physical training, met personal appearance standards, played a critical part on how the machine gun range flowed, and was helpful to the crew.

(b) Attachment C - Applicant email, Death Threat from an E6 (I'm an E3), 27 July (year unspecified), shows the applicant emailed the Fort Carson Inspector General, stating the applicant was receiving ongoing bullying and discriminatory treatment within the unit and received a death threat from SSG J__.

(8) On 4 August 2020, the separation authority directed the applicant be separated from service with a general under honorable conditions characterization, however, it was suspended for a 12 month period.

(9) On 17 September 2020, the platoon SGT counseled the applicant for failure to obey a lawful order and disrespect to an NCO. It states, when the applicant arrived to the tower to retrieve a paper for the range safety officer, the applicant was unshaved and was told by SGT S__ to shave. The applicant's response was "Just counsel me." As the applicant left the tower, SGT S__ told SPC (P) M__ to relay to the applicant to do pushups. The applicant responded to SPC (P) M__ with "Piss off." Ever since returning to the platoon, the applicant's behavior has been collectively poor and erratic.

(10) On 25 September 2020, the separation authority notified the applicant that the separation was approved because the applicant disrespected SGT S__ L. S__, a NCO in the execution of SGT S__'s office by telling SGT S__ "Just counsel me" or words to that effect; the applicant failed to obey a lawful general regulation to wit: AR 670-1, paragraph 3-2a (2) (b), by failing to be clean shaven. The applicant was granted 3 days to submit rebuttal matters. The applicant acknowledged receipt of the notification.

(11) The applicant provided Captain C__'s, Trial Defense Counsel, rebuttal memorandum, 15 October 2020, that states to the separation authority, the separation should not have occurred because the applicant was found not guilty of cocaine use. Even though the applicant was found not guilty, administrative separation proceedings were initiated against the applicant in July based on serious misconduct under Chapter 14-12(c), AR 635-200. However, paragraph 14-12(c) clearly states that it must be an "abuse of illegal drugs." It specifically notes that a one-time use, in and of itself, does not qualify as serious misconduct. Not only was there no proof of the applicant's use of cocaine there was further even less proof of an "abuse." The applicant filed an IG complaint to shed light on the issues that the applicant faced. The incident where the applicant is alleged to have disrespected an NCO was not properly investigated or vetted. A SPC relayed a message to the applicant while the applicant was sleeping in a wholly inappropriate tone and manner, and being both junior enlisted, the applicant responded in kind. This clearly does not meet the elements of disrespect to an NCO. Because there is an distinct flavor of retaliation when it comes to anything surrounding the applicant, the applicant is back to being considered for separation (see attachment F).

(12) On 15 October 2020, the applicant submitted a statement and materials in support of a continued suspension of the administrative separation, stating the first sergeant said "I don't care whether they find (applicant) guilty or not, I will do whatever it takes to get (applicant) out of my Army. (Applicant) even fart wrong, I will be there watching (applicant)." The applicant tried to move on and kept trying to submit their form N-426 (USCIS naturalization paperwork) many times, but somehow the applicant's paperwork kept "getting lost." It would not be in the applicant's best interest to do anything that would be against the rules to jeopardize the applicant's place in the U.S. If the applicant was sent back to Lebanon for an alleged incident that the applicant did not commit, the applicant would face dire repercussions as the applicant received death threats when first joining the U.S. Army.

(13) On 20 October 2020, the separation authority vacated the suspended separation action and directed the applicant be separated with a characterization of general, under honorable conditions for disrespecting an NCO and failing to obey a lawful general order.

i. Lost Time / Mode of Return: None

j. Behavioral Health Condition(s):

(1) Applicant provided: None

(2) AMHRR Listed: Report of Mental Status Evaluation, 4 February 2020, shows 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 diagnosed with occupational problem.

The ARBA's medical advisor reviewed DoD and VA medical records and not solely those documents listed in 4j(2) above.

5. APPLICANT-PROVIDED EVIDENCE: DD Form 149; attorney brief; Quest Diagnostics, Medical Review Officer Report; Polygraph Examination Report; email; 4 monthly counselings; Trial Defense Counsel memorandum; and three character statements.

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 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) 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) 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) 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.

(5) 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.

(6) 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.

(7) 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. Title 10 U.S. Code 891, Article 91 (Insubordinate conduct toward warrant officer, NCO, or petty officer), states any warrant officer or enlisted member who:

(1) strikes or assaults a warrant officer, NCO, or petty officer, while that officer is in the execution of his office;

(2) willfully disobeys the lawful order of a warrant officer, NCO, or petty officer; or

(3) treats with contempt or is disrespectful in language or deportment toward a warrant officer, NCO, or petty officer, while that officer is in the execution of their office; shall be punished as a court-martial may direct.

f. 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).

g. Army Regulation 601-210, (Regular Army and Reserve Components Enlistment Program), governs eligibility criteria, policies, and procedures for enlistment and processing of persons into the Regular Army, the U.S. Army Reserve, and Army National Guard for enlistment per DODI 1304.26. It also prescribes the appointment, reassignment, management, and mobilization of Reserve Officers' Training Corps cadets under the Simultaneous Membership Program. Chapter 4 provides the criteria and procedures for waiverable and nonwaiverable separations. Table 3-1, defines reentry eligibility (RE) codes:

(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 waiverable. Eligibility: Ineligible unless a waiver is granted.

(3) RE-4 Applies to: Person separated from last period of service with a nonwaiverable disqualification. This includes anyone with a DA imposed bar to reenlistment in effect at time of separation or separated for any reason (except length of service retirement) with 18 or more years active Federal service. Eligibility: Ineligible for enlistment.

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 through counsel, requests:

- an upgrade to honorable
- change RE code to allow option to reenlist
- set aside and remove administrative separation from the applicant's OMPF
- reinstatement of all rights, benefits, and full privileges of military service to which the applicant is entitled
- backpay for the period of wrongful separation after 9 December 2020
- any other relief that the Board deems necessary and just

b. The applicant's AMHRR, the issues, and documents submitted with the application were carefully reviewed. The applicant's DD Form 214 shows the applicant served 2 years, 7 months and 9 days. In February 2020, the applicant was found not guilty of cocaine use during an Article 15 proceeding. Six months later, the applicant was counseled for disrespecting an NCO and failing to obey a lawful general order. The applicant was discharged on 9 December 2020 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 RE code should be changed. 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 "3." There is no basis upon which to grant a change to the reason or the RE code. An RE Code of "3" indicates the applicant requires a waiver before being allowed to reenlist. Recruiters can best advise a former service member as to the Army's needs at the time and are required to process waivers of RE codes if appropriate.

d. The applicant through counsel contends, in effect, in spite of being found not guilty of cocaine use in an Article 15 proceeding, the applicant was separated from the U.S. Army under AR 635-200, chapter 14-12c (2), misconduct (drug abuse). This was an error in violation of the procedures of AR 635-200 and in violation of the applicant's due process rights.

(1) The applicant provided Captain C__'s, Trial Defense Counsel, rebuttal memorandum, 15 October 2020, that states to the separation authority, the separation should not have occurred because the applicant was found not guilty of cocaine use. AR 635-200, paragraph 14-12(c) clearly states that it must be an "abuse of illegal drugs." It specifically notes that a one-time use, in and of itself, does not qualify as serious misconduct. Not only was there no proof of the applicant's use of cocaine there was further even less proof of an "abuse." (see attachment F)

(2) The AMHRR contains:

(a) Separation authority memorandum, Separation Under AR 635-200, Chapter 14-12c (2), Misconduct-Abuse of Illegal Drugs, (Applicant), 20 October 2020, that shows the separation authority vacated the suspended separation action and directed the applicant be separated with a characterization of general, under honorable conditions for disrespecting an NCO and failing to obey a lawful general order.

(b) FG Article 15, 6 February 2020, for wrongfully using cocaine between on or about 10 and 13 November 2019. The applicant submitted matters in defense, extenuation, and/or mitigation (see subparagraphs 4h (4) (a) and (b) above). The applicant was found not guilty of all specifications.

(3) AR 635-200, paragraph 14-12c (2) states abuse of illegal drugs is serious misconduct. 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.

e. The applicant through counsel contends, in effect, the applicant received a counseling on 17 September 2020 from Sergeant First Class W__ who wrote the counseling based on hearsay and no investigation was done into this matter.

(1) The applicant provided:

(a) Developmental Counseling Form, 17 September 2020, shows the platoon SGT counseled the applicant for failure to obey a lawful order and disrespect to an NCO. It states, when the applicant arrived to the tower to retrieve a paper for the range safety officer, the applicant was unshaved and was told by SGT S__ to shave. The applicant's response was "Just counsel me." As the applicant left the tower, SGT S__ told SPC (P) M__ to relay to the applicant to do pushups. The applicant responded to SPC (P) M__ with "Piss off."

(b) Captain C__'s, Trial Defense Counsel, rebuttal memorandum, 15 October 2020, that states to the separation authority, the incident where the applicant is alleged to have disrespected an NCO was not properly investigated or vetted. A SPC relayed a message to the applicant while the applicant was sleeping in a wholly inappropriate tone and manner, and being both junior enlisted, the applicant responded in kind. This clearly does not meet the elements of disrespect to an NCO (see attachment F).

(c) A statement from A__ R__, undated, states no one was shaving in the field and all other personnel only shaved when informed the Commanding General was to visit (see attachment E).

(2) Title 10 U.S. Code 891, Article 91 (Insubordinate conduct toward warrant officer, NCO, or petty officer), states any warrant officer or enlisted member who:

- strikes or assaults a warrant officer, NCO, or petty officer, while that officer is in the execution of his office;
- willfully disobeys the lawful order of a warrant officer, NCO, or petty officer; or
- treats with contempt or is disrespectful in language or deportment toward a warrant officer, NCO, or petty officer, while that officer is in the execution of their office; shall be punished as a court-martial may direct

f. The applicant through counsel contends, in effect, the applicant served the Army with honor and dignity while silently suffering from bullying and discrimination within the unit as a result of the unwarranted efforts to separate the applicant. In addition, the applicant received a death threat from an NCO.

(1) The applicant provided:

(a) Applicant email, Death Threat from an E6 (I'm an E3), 27 July (year unspecified), that states to the Fort Carson Inspector General, the applicant was receiving ongoing bullying and discriminatory treatment within the unit and received a death threat from SSG J__.

(b) Captain C__'s, Trial Defense Counsel, rebuttal memorandum, 15 October 2020, which states the applicant filed an IG complaint to shed light on the issues that the applicant faced (see attachment F).

(2) Analyst notes, there was no response from the IG's office provided by the applicant or the attorney.

g. The third party statements provided with the application states:

(1) The moment the applicant showed up to the platoon the applicant was already well above their peers. The applicant was a private first class and much more mature than the rest of the other soldiers in the same rank. The applicant was respectful toward their peers and chain

of command. The applicant took their job responsibilities serious and if the applicant was in a different company the applicant would not have had a problem, the applicant's work ethic and knowledge on different cultures are adaptive but hard to find.

(2) Civilian Legal Assistance Attorney at Fort Carson represented the applicant for approximately 1 year in a capacity as a Legal Assistance Attorney in the immigration aspects of the applicant's Article 15 case. States the applicant's unique immigration circumstances create second and third order consequences to the applicant's administrative separation that the vast majority of soldiers do not face. It is important to note that the applicant would otherwise be a U.S. Citizen but for a policy enacted by the Department of Defense in 2017 which created a 180-day service requirement of all active duty soldiers prior to applying for naturalization. The practical effect of this policy, is that while prior to 2017 naturalization applications were initiated immediately once a soldier started basic training, they now are left to rely on their leadership at their first post to assist them in this process. Army posts and leadership are largely uneducated in this process and unaware of the immigration benefits, procedures, and regulations. This has caused a great disservice to both servicemembers and the Army. For example, certain units need soldiers to get secret security clearances, but servicemembers cannot because, years later, they still do not have their citizenship. This is not only an individual servicemember issue, but a mission-readiness issue. This policy was overturned in August 2020, in a class-action lawsuit *Ange Samma v. Department of Defense, et. al.* Unfortunately, the applicant was also a victim of this now-unlawful policy. The applicant attempted for years to get the applicant's citizenship processed, but was unable to do so. Without an honorable discharge, the applicant will be further punished by this unlawful policy.

h. 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 Contentions:

(1) The applicant through counsel contends, in effect, in spite of being found not guilty of cocaine use in an Article 15 proceeding, the applicant was separated from the U.S. Army

under AR 635-200, chapter 14-12c (2), misconduct (drug abuse). This was an error in violation of the procedures of AR 635-200 and in violation of the applicant's due process rights. The Board acknowledged and considered this contention during proceedings.

(2) The applicant through counsel contends, in effect, the applicant received a counseling on 17 September 2020 from Sergeant First Class W__ who wrote the counseling based on hearsay and no investigation was done into this matter. The Board acknowledged and considered this contention during proceedings.

(3) The applicant through counsel contends, in effect, the applicant served the Army with honor and dignity while silently suffering from bullying and discrimination within the unit as a result of the unwarranted efforts to separate the applicant. In addition, the applicant received a death threat from an NCO. The Board acknowledged and considered this contention during proceedings.

d. The Board determined the discharge is inequitable based on the applicant's length and quality of service, to include combat service, and the circumstances surrounding the discharge (discrimination). 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, the narrative reason for separation to Misconduct (Minor Infractions), with a corresponding separation code of JKN. The Board determined the reentry code is proper and equitable and voted not to change it.

e. Rationale for Decision:

(1) The Board voted to change the applicant's characterization of service based on the following reasons. Based on a preponderance of evidence, the Board determined that the reason for the applicant's separation and the character of service the applicant received upon separation were inequitable. The Board determined the applicant's in-service mitigating factors (Length, Quality, and Combat service) mitigate the applicant's misconduct (used cocaine and disrespect toward an NCO). The Board members discussed the applicant's contention of discrimination, the death threat the applicant received, and evidence that the applicant submitted an IG complaint. The Board members believed the applicant experienced discrimination based on his culture.

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

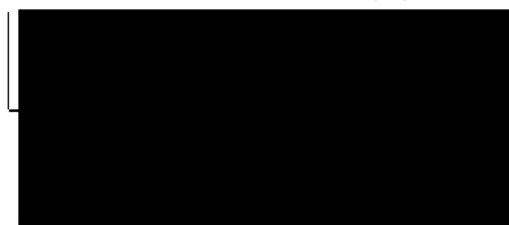
(3) The RE code will not change, as the current code is consistent with the procedural and substantive requirements of the regulation.

10. BOARD ACTION DIRECTED:

- a. **Issue a New DD-214:** Yes
- b. **Change Characterization to:** Honorable
- c. **Change Reason / SPD Code to:** Misconduct (Minor Infractions)/JKN
- d. **Change RE Code to:** No change
- e. **Change Authority to:** AR 635-200

Authenticating Official:

9/18/2024



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