

1. Applicant's Name:

a. **Application Date:** 16 December 2020

b. **Date Received:** 28 December 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 Under Other than Honorable Conditions. The applicant requests an upgrade to Honorable.

b. The applicant seeks relief contending, in early 2017, the applicant consulted with a civilian attorney (J__ W__), regarding filing for a divorce from their spouse and revealed that the spouse had threatened the applicant's military career, by making false allegations against them, with approximately two years of service remaining until their retirement. The applicant filed for divorce on or about 1 May 2017 and was unable to locate the spouse to have them served. The spouse had abandoned the marriage and was avoiding the divorce to maintain the spouse's BAH (basic allowance for housing) under Army Regulation 608-99. Eventually, the applicant served the spouse by publication (petition, order of publication, and decree are attached). In October 2016, the first serious allegations against the applicant were made, just prior to them having sought legal representation. There were no complaints filed or actions taken, over the next year, prior to the filing and the divorce; however, the spouse made numerous complaints, although none of which were supported by evidence. The spouse made multiple allegations against the applicant as retaliation for the divorce action, which were ALL denied by the applicant.

(1) On 19 October 2017, the Army finally served the applicant under the provisions of AR 635-200, Chapter 14-12C (Misconduct (Serious Offense)). By then, the applicant had received an Article 15 for having been drunk on duty, given the stress they were under. On or about 15 October 2017, the applicant met with defense counsel (1LT, Fort Sill Trial Defense Services) and was notified of their [administrative separation] board, which was scheduled for 27 October 2017. It was the applicant's understanding, 1LT was awaiting appointment as a TDS counsel and, in fact, had never tried a board or court martial, and certainly not an administrative separation board under AR 635-200. They were immediately concerned as the applicant was nearly one year out from retirement; therefore, they hired a civilian attorney (J__ W__), who at that point, had over forty years of experience in trying military cases, both military boards and court martials.

(2) By the time the attorney was hired, the board had been reset for 28 November 2017. The attorney contacted the recorder and the president of the board, requesting a continuance to 13 December 2017, which was the attorney's next available date on their trial calendar and additionally, the two-week continuance would allow for proper review and preparation of the extremely thick file, to consult with the applicant, and acquire witnesses. The president of the board denied the continuance and rescheduled the hearing for 1 December 2017. It was the attorney's understanding that the continuance was not due to their request to push the date, but because the president of the board had other duties as a battalion commander, the board could not be held, until 1 December 2017 to accommodate the board president's own calendar. Their attorney objected and requested again for more time to prepare, review, and acquire witnesses, which was denied for 13 December 2017, and instead, moved to 3 December 2017; and then rescheduled to 6 December 2017. It is not clear to this day whether those changes were at the

request of their attorney or a member of the board.

(3) On the morning of the board, the applicant was not satisfied with the trial defense counsel appointed and when 1LT left the board room, taking with them the only copy of their separation documents, the applicant requested a continuance, until 13 December 2017, in order for their civilian attorney (hired with their own money) could be present to represent them because at that point, the applicant was sitting at the defense table alone. A copy of the recorded hearing was included with their application. It is clear that the applicant did not receive a fair trial. The applicant presented no evidence, did no cross examination, presented no witnesses, and was clearly at a disadvantage. Additionally, they later discovered that the board recorder presented evidence to the board members that was never disclosed to the defense. Repeatedly, the applicant (and counsel) were denied and was unable to receive a fair trial.

(4) The applicant then requested one of the JAG lawyers who were in the trial defense office, a few feet away, who at least had some experience in administrative boards, to represent them. This request was also denied; since there was another JAG lawyer available with administrative board experience, the applicant's request for due process representation was again denied. Moreover, the recording was recorded in such a way that it sounds, to the listener, that the applicant made the decision to represent themselves, rather than be represented by counsel. This could have only been done purposely by the recorder. The disk also does not reflect the applicant's answers to questions by the president of the board.

(5) The applicant saved and borrowed the money necessary to hire their own attorney and was deprived due process by failure to extend the hearing only two weeks to give the civilian attorney time to prepare and go through the administrative law packet. The Government violated due process and the trial counsel went forward, misleading in their questions and answers and presented evidence that had not been provided to the defense counsel. Finally, the applicant did not even have copy of the evidence. The applicant's discharge should be overturned, and they should be allowed to retire with twenty years of active duty service and an Honorable characterization of service.

c. Board Type and Decision: In a records review conducted on 18 October 2024, 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: Misconduct (Serious Offense) / AR 635-200, Chapter 14-12C / JKQ / RE-3 / Under Other than Honorable Conditions

b. Date of Discharge: 15 December 2017

c. Separation Facts:

(1) Date of Notification of Intent to Separate: 19 October 2017

(2) Basis for Separation: sexually harassed their stepchild (a minor) and was found drunk on duty

(3) Recommended Characterization: Under Other than Honorable Conditions

(4) Legal Consultation Date: 27 October 2017

(5) Administrative Separation Board:

(6) Separation Decision Date / Characterization: 12 December 2017 / Under Other than Honorable Conditions

4. SERVICE DETAILS:

a. Date / Period of Enlistment: 13 October 2014 / Indefinite (3rd Reenlistment)

b. Age at Enlistment / Education / GT Score: 40 / Some College / 105

c. Highest Grade Achieved / MOS / Total Service: E-6 (SSG) / 13M30 Multiple Launch Rocket System (MLRS) and High Mobility Artillery Rocket System (HIMARS) Crewmembers / 19 years, 7 months, 19 days

d. Prior Service / Characterizations:

- 14 March 2008 – 11 December 2012 / Honorable
- 12 December 2012 – 21 September 2014 / Honorable
- 22 September – 14 October 2014 / Honorable

e. Overseas Service / Combat Service: Korea / None (25 May 2015 – 14 February 2016) / 8 months, 20 days

f. Awards and Decorations:

- Army Commendation Medal
- Joint Service Achievement Medal (2nd Award)
- Army Achievement Medal (7th Award)
- USA/United States Air Force Presidential Unit Citation
- Army Good Conduct Medal (5th Award)
- National Defense Service Medal
- Armed Forces Expeditionary Medal
- Global War on Terrorism Service Medal
- Korea Defense Service Medal
- Noncommissioned Officer Professional Development Ribbon
- Army Service Ribbon
- Overseas Service Ribbon (2nd Award)
- NATO Medal
- Combat Action Badge
- Certificate of Achievement (2nd Award)
- Driver and Mechanic Badge w/Driver-Wheeled Vehicle(s) Clasp

g. Performance Ratings:

(1) SSG, 31 January 2014 – 30 January 2015 / Fully Capable

(2) SSG, 30 January 2015 – 28 October 2016 / Met Standard; For “Presence” they did not meet standard and notes the applicant failed height and weight standards IAW AR 600-9 by 1%; enrolled into the Army Body Composition Program; resisted new ideas and processes hindering their progression and ability to lead; takes time to adjust to change; demonstrated a

lack of self-confidence which inhibited their capability to be an effective leader. The senior rater stated, they were not ready to accept further responsibilities. They needed to develop greater professional bearing, fitness, and dedication to their profession in order to regain competitiveness with their peers. They have demonstrated the least potential of the three SSG's they have rated in their career.

h. Disciplinary Action(s) / Evidentiary Record:

(1) On 13 October 2014, the applicant reenlisted indefinitely as a staff sergeant, SSG (E-6), with 14 years, 5 months, and 27 days of prior active duty. The Enlisted Record Brief provides they served Korea for nine months from 25 May 2015 – 14 February 2016.

(a) In previous enlistments, they deployed on four occasions, totaling 26 months between 2002 – 2010 to Kuwait, Iraq, and Afghanistan.

(b) On 15 October 2016 and 4 May 2017, they were flagged, Suspend Favorable Personnel Actions (FLAG), for law enforcement investigation (MA) and field-initiated involuntary separation (BA).

(2) On 19 October 2016, they were detained under custody in violation of Article 120, UCMJ, for having sexually assaulted of a child. They were released to their unit.

(3) On 6 January 2017, the CID (Criminal Investigation Division), Fort Sill, OK, provided a Special Agent was notified of the applicant's spouse (then) was at the Army Community Hospital and suspected the applicant of having sexually assaulted the minor stepchild. The child disclosed to their aunt that the applicant had touched their breast area, crotch, and buttocks. Upon completion of a forensic interview, the child stated the applicant touched them on their stomach, which the child did not want them to. The child stated the applicant tried to touch them on another occasion and instructed the child not to tell their parent. The applicant was advised of their legal rights, which they invoked and requested legal counsel. The unique circumstances of domestic abuse was noted, and a protective order was issued. The trial counsel opined probable cause existed to believe the applicant had committed the offense of sexual abuse of a child. Additional investigative reports, statements from the ex-spouse, hospital records of the child's interview and examinations, are all present in the record for further review.

(4) On 18 April 2017, in a memorandum for record, the company commander intended for the applicant to be declared a rehabilitation failure, as the applicant reported for duty drunk on 23 February 2017, with a BAC (blood alcohol content) of 0.10%. Additionally, they reported to duty with alcohol in their system on 1 February 2017, although their BAC was not high enough to be categorized as having been drunk on duty. The applicant also, surrendered a bottle of Jack Daniels to 1SG on the morning of 30 March 2017, which was a week after having returned from an inpatient facility. The command's intention was to separate the applicant from service and until then, they were to remain in ASAP (Army Substance Abuse Program) counseling.

(5) On 19 April 2017, the applicant completed their medical history and examination (MHE) for separation at Reynolds Army Community Hospital, Fort Sill, OK, which indicates the following:

(a) Their medical history, block 29 lists the following explanations of "yes" answers:

- **11f:** currently wear glasses; **11h:** December 2006 PRK, Fort Bragg, NC

- **12c:** continually have tenderness/soreness in lower back; they have asked about it several times over the year, was giving a profile, and RTO; **12h:** knees hips; **12n:** broke right leg growth plate at age 13
- **13f:** hemorrhoids; had since a teenager
- **16f:** high blood pressure; started taking meds about 3 months ago
- **17e:** substance abuse, weight control, behavioral health
- **20:** car wreck at age 16, head laceration required stitches
- **21:** Red River Hospital for in-patient alcohol rehab
- **22:** right eye surgery at age 11
- **26:** Honorable Discharge November 2003 (ETS)

(b) Their medical history, block 30a, provides the examiner's notes:

- **11f:** wears prescription glasses, no vision concerns; **11h:** PRK surgery 2006, routine/full recovery
- **12c:** low back pain, chronic; **12h:** bilateral hip and knee pain, chronic; **12n:** right leg fracture at age 13, routine healing, full recovery; **13f:** recurrent hemorrhoids; **16f:** HTN, started in HCT2
- **17e:** ongoing BH counseling (substance abuse); insomnia
- **20:** ER visit for laceration at age 16
- **21:** inpatient alcohol rehabilitation

(6) Their medical examination qualified them for service and separation. As the summary of diagnoses, the provider listed Hypertension, lower back pain, Insomnia, Alcohol Dependence, bilateral hip pain, and bilateral leg pain. There were no recommendations provided.

(7) On 20 June 2017, the applicant accepted nonjudicial punishment in violation of Article 112, UCMJ, for having been found drunk on duty, at or near Fort Sill, OK, on 23 February 2017. The punishment imposed a reduction to sergeant, SGT (E-5); forfeiture of \$1616.00 pay; and extra duty for 45 days. They did not appeal.

(8) On 22 September 2017, a GOMOR (General Officer Memorandum of Reprimand) was an administrative reprimand imposed on the applicant, for having sexually harassed their stepchild by intentionally allowing the minor to see the applicant's erect genitals having told the child to come over to the applicant, causing harm to a child who lived in their home on 15 October 2016. Although not in the record, the applicant elected to submit a rebuttal; however, no matters were provided. The approval authority under the provisions of AR 600-37, directed the GOMOR and to be permanently filed in their OMPF (Official Military Personnel File).

(9) On 19 October 2017, the company commander notified the applicant of their intent to initiate separation proceedings under the provisions of AR 635-200, Chapter 14-12C, Misconduct (Serious Offense), for having sexually harassed their stepchild by allowing the minor to see the applicant's erect genitals on 15 October 2016 and on 23 February 2017, they were found to be drunk on duty. They recommended an Under Other than Honorable Conditions characterization of service and the applicant acknowledged receipt of their separation notice.

(10) On 27 October 2017, they elected and consulted with legal and declined to provide a statement on their behalf. Defense counsel counseled the applicant on the possible effects of their separation and rights available to them.

(11) On 1 and 2 November 2017, the battalion and brigade commander's concurred with the company's commander's recommendation. On 12 December 2017, the separation

approval authority approved the discharge with an Under Other than Honorable Conditions characterization of service, which subsequently reduced them to the lowest enlisted grade.

(12) On 12 December 2017, their separation orders were issued and amended. A DD Form 214 (Certificate of Release or Discharge from Active Duty) reflects the applicant was discharged on 15 December 2017, with 19 years, 7 months, and 19 days of total service. Their electronic signature was provided, and they have completed their first full term of service.

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

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

(1) **Applicant provided:** None

(2) **AMHRR Listed:** On 17 May 2017, the applicant completed a mental status evaluation (MSE) at Embedded Behavioral Health (BH), Reynolds Army Community Hospital, Fort Sill, OK, which indicated a BH diagnosis of Alcohol Dependence and met retention standards IAW AR 40-501. The applicant had the mental capacity to understand and participate in the proceedings; was mentally responsible and was cleared for chapter proceedings. They were psychiatrically cleared for any administrative action deemed appropriate by the command.

5. APPLICANT-PROVIDED EVIDENCE: Application for the Review of Discharge; Self-Authored Statement; Divorce Decree

6. POST SERVICE ACCOMPLISHMENTS: None provided with this application.

7. STATUTORY, REGULATORY AND POLICY REFERENCE(S):

a. Section 1553, Title 10, United States Code (Review of Discharge or Dismissal) provides for the creation, composition, and scope of review conducted by a Discharge Review Board(s) within established governing standards. As amended by Sections 521 and 525 of the National Defense Authorization Act for Fiscal Year 2020, 10 USC 1553 provides specific guidance to the Military Boards for Correction of Military/Naval Records and Discharge Review Boards when considering discharge upgrade requests by Veterans claiming Post Traumatic Stress Disorder (PTSD), Traumatic Brain Injury (TBI), sexual trauma, intimate partner violence (IPV), or spousal abuse, as a basis for discharge review. The amended guidance provides that Boards will include, as a voting board member, a physician trained in mental health disorders, a clinical psychologist, or a psychiatrist when the discharge upgrade claim asserts a mental health condition, including PTSD, TBI, sexual trauma, IPV, or spousal abuse, as a basis for the discharge. Further, the guidance provides that Military Boards for Correction of Military/Naval Records and Discharge Review Boards will develop and provide specialized training specific to sexual trauma, IPV, spousal abuse, as well as the various responses of individuals to trauma.

b. Multiple Department of Defense Policy Guidance Memoranda published between 2014 and 2018. The documents are commonly referred to by the signatory authorities' last names (2014 Secretary of Defense Guidance [Hagel memo], 2016 Acting Principal Deputy Under Secretary of Defense for Personnel and Readiness [Carson memo], 2017 Official Performing the Duties of the Under Secretary of Defense for Personnel and Readiness [Kurta memo], and 2018 Under Secretary of Defense for Personnel and Readiness [Wilkie memo].

(1) Individually and collectively, these documents provide further clarification to the Military Discharge Review Boards and Boards for Correction of Military/Naval Records when considering requests by Veterans for modification of their discharge due to mental health

conditions, including PTSD; TBI; sexual assault; or sexual harassment. Liberal consideration will be given to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment. Special consideration will be given to Department of Veterans Affairs (VA) determinations that document a mental health condition, including PTSD; TBI; or sexual assault/harassment potentially contributed to the circumstances resulting in a less than honorable discharge characterization. Special consideration will also be given in cases where a civilian provider confers diagnoses of a mental health condition, including PTSD; TBI; or sexual assault/harassment if the case records contain narratives supporting symptomatology at the time of service or when any other evidence which may reasonably indicate that a mental health condition, including PTSD; TBI; or sexual assault/harassment existed at the time of discharge might have mitigated the misconduct that caused a discharge of lesser characterization.

(2) Conditions documented in the service record that can reasonably be determined to have existed at the time of discharge will be considered to have existed at the time of discharge. In cases in which a mental health condition, including PTSD; TBI; or sexual assault/harassment may be reasonably determined to have existed at the time of discharge, those conditions will be considered potential mitigating factors in the misconduct that caused the characterization of service in question. All Boards will exercise caution in weighing evidence of mitigation in cases in which serious misconduct precipitated a discharge with a less than Honorable characterization of service. Potentially mitigating evidence of the existence of undiagnosed combat related PTSD, PTSD-related conditions due to TBI or sexual assault/harassment as causative factors in the misconduct resulting in discharge will be carefully weighed against the severity of the misconduct. PTSD is not a likely cause of premeditated misconduct. Caution shall be exercised in weighing evidence of mitigation in all cases of misconduct by carefully considering the likely causal relationship of symptoms to the misconduct.

c. Army Regulation 15-180 (Army Discharge Review Board), dated 25 September 2019, sets forth the policies and procedures under which the Army Discharge Review Board is authorized to review the character, reason, and authority of any Servicemember discharged from active military service within 15 years of the Servicemember's date of discharge. Additionally, it prescribes actions and composition of the Army Discharge Review Board under Public Law 95-126; Section 1553, Title 10 United States Code; and Department of Defense Directive 1332.41 and Instruction 1332.28.

d. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), set policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons. Readiness is promoted by maintaining high standards of conduct and performance.

(1) An Honorable discharge is a separation with honor and is appropriate when the quality of the Soldier's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

(2) A General discharge is a separation from the Army under honorable conditions and is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

(3) An Under other-than-honorable-conditions discharge is an administrative separation from the Service under conditions other than honorable and it may be issued for misconduct, fraudulent entry, security reasons, or in lieu of trial by court martial based on certain

circumstances or patterns of behavior or acts or omissions that constitute a significant departure from the conduct expected of Soldiers in the Army.

(4) Chapter 14 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions, a pattern of misconduct, and commission of a serious offense, to include abuse of illegal drugs, convictions by civil authorities and desertion or being absent without leave. Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impractical or unlikely to succeed. A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter. However, the separation authority may direct a general discharge if such is merited by the Soldier's overall record. A Soldier is subject to action per this section for commission of a serious military or civilian offense, if the specific circumstances of the offense warrant separation and a punitive discharge is, or would be, authorized for the same or a closely related offense under the Manual for Courts-Martial.

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

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

f. Army Regulation 635-8 (Separation Processing and Documents) prescribes policy and procedures regarding separation documents, it states in the preparation of the DD Form 214 for soldiers who have previously reenlisted without being issued a DD Form 214 and are separated with any characterization of service except "Honorable," enter in item 18 (Remarks) "Continuous Honorable Active Service From (first day of service which DD Form 214 was not issued) until (date before commencement of current enlistment).

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.

h. Army Regulation 600-85 (Army Substance Abuse Program (ASAP)) provided a comprehensive alcohol and drug abuse prevention and control policies, procedures, and responsibilities for Soldiers for ASAP services. The ASAP is a command program that emphasizes readiness and personal responsibility. The ultimate decision regarding separation or retention of abusers is the responsibility of the Soldier's chain of command. Abuse of alcohol or the use of illicit drugs by military personnel is inconsistent with Army values and the standards of performance, discipline, and readiness necessary to accomplish the Army's mission. All Soldiers who are identified as drug abusers, without exception, will be referred to the ASAP counseling center for screening; be considered for disciplinary action under the UCMJ, as appropriate; and be processed for administrative separation in accordance with Army Regulation 635-200.

(1) Unit commanders must intervene early and refer all Soldiers suspected or identified as alcohol and/or drug abusers to the ASAP. The unit commander should recommend enrollment based on the Soldier's potential for continued military service in terms of professional skills, behavior, and potential for advancement. ASAP participation is mandatory for all Soldiers who are command referred. Failure to attend a mandatory counseling session may constitute a violation of Article 86 (Absence Without Leave) of the UCMJ.

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

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

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

i. Manual for Courts-Martial (2016 Edition), United States, states military law consists of the statutes governing the military establishment and regulations issued thereunder, the constitutional powers of the President and regulations issued thereunder, and the inherent authority of military commanders. Military law includes jurisdiction exercised by courts-martial and the jurisdiction exercised by commanders with respect to nonjudicial punishment. The purpose of military law is to promote justice, to assist in maintaining good orders and discipline in the Armed Forces.

(1) Article 112 (drunk on duty) states in the subparagraph, the maximum punishment consists of a bad conduct discharge, forfeiture of all pay and allowances, and confinement for

nine months.

(2) Article 120c (other sexual misconduct, indecent exposure) states in the subparagraph, the maximum punishment consists of dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.

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. The applicant's Army Military Human Resources Record (AMHRR), the issues, and documents submitted with the application were carefully reviewed.

b. The evidence provides the applicant has previously deployed on four occasions, totaling 26 months between 2002 – 2010 to Kuwait, Iraq, and Afghanistan. They completed a third reenlistment (indefinitely) as a SSG, with 14 and a half years of prior active duty and two years of inactive service. For this period, they completed an overseas tour in Korea for nearly nine months and served two and a half years, prior to having been flagged for involuntary separation.

(1) In October 2016, they were arrested for sexual assault of a child and was released to their unit, eight months later, they received a GOMOR for the incident in violation of Article 120c, UCMJ (indecent exposure) in which specified the applicant intentionally revealed their clothed erect genitals to the child while watching television and told the child to come over to them. The applicant elected to submit matters on their behalf; however, did not provide anything in time, resulting in the approval authority having directed the GOMOR for permanent (OMPF) filing. Moreover, the applicant received NJP for having been drunk on duty (in violation of Article 112) and was consequently, reduced to SGT. Separation proceedings were initiated for the above, under the provisions of AR 635-200, Chapter 14-12C, Misconduct (Serious Offense), with an Under Other than Honorable Conditions characterization of service.

(2) On their election of rights, the applicant requested an administrative separation board with personal appearance, declined to submit a statement on their behalf, and requested to consult with defense counsel. After having consulted with counsel, the applicant provides they did not receive due process representation as defense counsel had no previous experience with an administrative separation board or court-martials, therefore, they requested a more experienced JAG to no avail. The applicant stated when 1LT left the hearing after being released by the applicant, they took with them the separation package and the evidence against the applicant, resulting in the applicant having been left without proper representation. The applicant requested to postpone the hearing, as they hired civilian attorney to represent them with the necessary experience. Later, it was discovered that the board recorder presented evidence to the board members which was never disclosed to the defense.

(3) The applicant completed a mental status evaluation (MSE) which determined a diagnosis of Alcohol Dependence, met retention standards IAW AR 40-501, and was psychiatrically cleared for any administrative action deemed appropriate by the command. Medical qualified them for service and separation, with the provider listing the following as a summary of their diagnoses with no recommendations: Hypertension, lower back pain, Insomnia, Alcohol Dependence, bilateral hip pain, and bilateral leg pain.

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

impracticable or is unlikely to succeed. A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter. However, the separation authority may direct a general discharge if such is merited by the Soldier's overall record.

d. 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? **Yes.** The Board's Medical Advisor, a voting member, reviewed the applicant's DOD and VA health records, applicant's statement, and/or civilian provider documentation and found that the applicant has the following potentially mitigating diagnosis: Alcohol Dependence and PTSD.

(2) Did the condition exist, or experience occur during military service? **Yes.** Alcohol Dependence.

(3) Does the condition or experience actually excuse or mitigate the discharge? **No.** The Board's Medical Advisor applied liberal consideration and opined that PTSD and trauma do not lead an individual to abuse a child.

(4) Does the condition or experience outweigh the discharge? **No.** The Board concurred with the Medical Advisor and determined that the medical condition does not outweigh the basis for separation.

b. Response to Contention(s): The applicant contends, for all of the foregoing reasons in section 2b, their discharge should be upgraded to honorable. They were discharged with approximately 19 years of active duty and would have reached their discharge date if they had been allowed due process.

The board considered this contention, the applicant's medical diagnosis, along with the applicant's in service factors (length, quality, combat) and determined the applicant was properly and equitably discharged. The applicant's offenses and nature of misconduct does not warrant a discharge upgrade, as outlined in sections 3c (2) and 4h (2), (3), (4) above, of this document. The applicant diminished the quality of service below that meriting an honorable discharge at the time of separation. Also, the board found no evidence of the Command acting in an arbitrary or capricious manner.

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 voted not to change the applicant's characterization of service because, despite applying liberal consideration of all the evidence before the board, the applicant's diagnoses of Alcohol Dependence and PTSD do not excuse or mitigate the offenses of sexually harassed their stepchild and found drunk on duty. 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.

(2) The board voted not to change the applicant's reason for discharge or accompanying SPD code under the same rationale, 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:** No
- b. Change Characterization to:** No Change
- c. Change Reason / SPD code to:** No Change
- d. Change RE Code to:** No Change
- e. Change Authority to:** No Change

Authenticating Official:

11/20/2024

X

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