

1. Applicant's Name: [REDACTED]

- a. **Application Date:** 17 November 2021
- b. **Date Received:** 29 November 2021
- c. **Counsel:** None

2. REQUEST, ISSUES, BOARD TYPE, AND DECISION:**a. Applicant's Requests and Issues:**

(1) The current characterization of service for the period under review is Under Other Than Honorable Conditions. The applicant requests an upgrade to honorable, change of their narrative reason for separation to "Secretarial Authority" and a change of their separation code and reentry code. The applicant requests a personal appearance before the Board.

(2) The applicant, through counsel, seeks relief stating the principles of justice, fairness, and equity require the applicant's discharge be upgraded. They are entitled to the requested relief for the following reasons –

(a) The applicant was never advised of their right to a separation prior to being discharged with an Under Other Than Honorable Conditions discharge and to the extent there was a waiver, their waiver was not a knowing and intelligent one.

(b) The applicant denies that they never went absence without leave (AWOL) or broke restriction.

(c) Although the applicant does not deny Tetrahydrocannabinol (THC) use, they submit that their use directly attributed to their service-connected Post-Traumatic Stress Disorder (PTSD), specifically, their deployment to Iraq. This constitutes extenuating and mitigating circumstances, which were not sufficiently considered at the time of their discharge.

(d) Given their service-connected PTSD, the applicant is entitled to consideration and relief pursuant to the Hagel Memorandum.

(e) Although they have previously requested relief from this Board, they are entitled to submit this new application pursuant to the Army Review Boards Agency notice they received, as part of a settlement agreement in a class-action lawsuit filed in federal court in Connecticut, Kennedy v. McCarthy.

a. Board Type and Decision: In a telephonic personal appearance hearing conducted on 6 May 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 time elapsed from discharge being almost twenty years. 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.

3. DISCHARGE DETAILS:

a. Reason / Authority / Codes / Characterization: Misconduct (Drug Abuse) / Army Regulations 635-200, Paragraph 14-12c(2) / JKK / RE-4 / Under Other Than Honorable Conditions

b. Date of Discharge: 13 May 2005

c. Separation Facts:

(1) Date of Notification of Intent to Separate: 17 March 2005

(2) Basis for Separation: illegal use of controlled substances and failure to report on time to their extra duty

(3) Recommended Characterization: Under Other Than Honorable Conditions

(4) Legal Consultation Date: 17 March 2005

(5) Administrative Separation Board: NA

(6) Separation Decision Date / Characterization: 22 April 2005 / Under Other Than Honorable Conditions

4. SERVICE DETAILS:

a. Date / Period of Enlistment: 23 August 2002 / 3 years

b. Age at Enlistment / Education / GT Score: 20 / One Semester of College / 109

c. Highest Grade Achieved / MOS / Total Service: E-3 / 35F1O, Special Electronics Devices Repairer / 2 years, 8 months, 3 days

d. Prior Service / Characterizations: None

e. Overseas Service / Combat Service: Germany, SWA / Iraq (17 July 2003 – 1 March 2004)

f. Awards and Decorations: NDSM, GWTEM, GWTSM, ASR, OSR

g. Performance Ratings: NA

h. Disciplinary Action(s) / Evidentiary Record:

(1) Two DA Forms 4856 (Developmental Counseling Form) dated 22 April 2004 and 27 April 2004, reflects the applicant received counseling for failing to follow instructions on two occasions. The applicant agreed with the information and signed the forms.

(2) A memorandum, U.S. Army Criminal Investigation Command (USACID), subject: CID Report of Investigation – Initial Report, dated 24 May 2004, reflects the applicant as the named subject in violation of Article 112a (Wrongful Use of a Controlled Substance (Marihuana), Uniform Code of Military Justice (UCMJ), with a dated of occurrence of 12 April 2004. The investigative summary states the applicant tested positive for the presence of THC, the active ingredient in marihuana/hashish, during a Unit Urinalysis Inspection which was conducted on 12 April 2004.

(3) A DA Form 4856 dated 10 June 2004, reflects the applicant received counseling from their company commander notifying them of the initiating actions to separate them from military service for abuse of illegal drugs. They tested positive on two separate urinalysis and has shown no initiative to enroll themselves for help. The applicant is being referred to the Army Substance Abuse Program for an assessment. The applicant disagreed with the information and signed the form.

(4) A DA Form 2627 (Record of Proceedings under Article 15, UCMJ), dated 23 June 2004, reflects the applicant received nonjudicial punishment for, between on or about 12 May 2004 and on or about 12 April 2004, wrongfully used marijuana, in violation of Article 112a, UCMJ. Their punishment consisted of reduction in rank/grade from private first class/E-3 to private/E-1, forfeiture of \$597.00 pay for 2 months, extra duty and restriction for 45 days and a verbal admonition or reprimand. The applicant elected not to appeal.

(5) A Report of Mental Status Evaluation dated 6 July 2004, reflects the applicant has the mental capacity to understand and participate in the proceedings, was mentally responsible, and meets retention requirements. The Remarks Section the staff psychiatrist states there is no evidence of an emotional or mental condition of sufficient severity to warrant disposition through medical channels. There is no evidence of a psychiatric condition. The applicant is currently mentally responsible for their behavior, can distinguish right from wrong, and possesses sufficient mental capacity to understand and participate in any administrative or judicial proceedings.

(6) A DD Form 2808 (Report of Medical Examination) dated 2 August 2004, reflects the applicant is qualified for service/separation with no physical profile restrictions. Item 77 (Summary of Defects and Diagnoses) reflects Pes Planus – mild.

(7) A DA Form 2627 dated 21 September 2004, reflects the applicant received nonjudicial punishment for, four occurrences of failure to go at the time prescribed to their appointed place of duty, to wit: accountability formations. This is in violation of Article 86 (Absence Without Leave), UCMJ. Their punishment consisted of a forfeiture of \$278.00 pay and restriction and extra duty for 14 days. The applicant elected not to appeal.

(8) A DA Form 2627 dated 22 October 2004, reflects the applicant received nonjudicial punishment for, three occurrences of failure to go at the time prescribed to their appointed place of duty, in violation of Article 86, UCMJ; and for on or about 7 September 2004, wrongfully use THC, a schedule I controlled substance, in violation of Article 112a. Their punishment consisted of forfeiture of \$597.00 for 2 months and restriction and extra duty for 45 days. The applicant elected not to appeal.

(9) A DA Form 2627 dated 10 December 2004, reflects the applicant received nonjudicial punishment for, four occurrences of failure to go at the time prescribed to their appointed place of duty, to wit: extra duty, in violation of Article 86, UCMJ. Their punishment consisted of forfeiture of \$596.00 pay for 2 months and restriction and extra duty for 45 days. The applicant elected not to appeal.

(10) Five DA Forms 4856 dated 31 December 2004 through 17 January 2005, reflects the applicant received counseling on four occurrences of failure to report and an occurrence of a violation of restriction. The applicant agreed with the information and signed the forms.

(11) A DA Form 458 (Charge Sheet) dated 28 January 2005, reflects charges were preferred against the applicant for

(a) Charge I – Violation of Article 86 UCMJ, with three Specifications – failed to go at the time prescribed to their appointed place of duty, to wit: extra duty.

(b) Charge II – Violation of Article 112a (Wrongful Use of Controlled Substances), UCMJ, for, between on or about 22 November 2004 and on or about 22 December 2004, wrongfully use THC a Schedule I controlled substance.

(c) Charge III – Violation of Article 134 (General Article), UCMJ for, on or about 16 January 2005, broke restriction.

(11) An Offer to Plead Guilty, in the U.S. Army Fifth Judicial Circuit, dated 28 January 2005, reflects the applicant, in a pending court-martial, offered to plead guilty to the charges, as show above in paragraph 10. As part of the offer, they agreed to enter into a Stipulation of Facts, correctly describing the offenses to which they are offering to plead guilty; they understand that they have a right to be tried by a Summary Court-Martial Officer; and they agreed to submit a voluntary waiver of their rights to a separation board for an Other Than Honorable Conditions discharge. The Offer to Plead Guilty was signed by the applicant and their Defense Counsel.

(12) A Stipulation of Facts, in the U.S. Army Fifth Judicial Circuit, dated 28 January 2005, reflects the facts that are admissible and may be considered by the Summary Court-Martial Officer in determining the providence of the plea of the accused, that the facts may be considered by the sentencing authority in determining an appropriate sentence even if otherwise inadmissible, and that the accused waives any objection they may have to the admission into evidence of these facts.

(13) A DD Form 2329 (Record of Trial by Summary Court-Martial) dated 9 February 2005, reflects at the preliminary proceeding, the summary court-martial gave the applicant a copy of the Charge Sheet. After being given a reasonable time to decide, they did not object to trial by summary court-martial. The applicant was not represented by counsel. The applicant plead guilty to the charges and was found guilty. The sentence was adjudged, consisting of forfeiture of \$617.00 pay and confinement for 21 days.

(14) A memorandum, Headquarters, 1st Infantry Division, Office of the Staff Judge Advocate, subject: Legal Review of Administrative Separation regarding [Applicant], dated 9 March 2005, the Staff Judge Advocate states they have conducted a legal review of the administrative separation and found it legally sufficient. Consultation has been made with the applicant's defense counsel in order to verify they were properly advised regarding their rights under an Under Other Than Honorable Conditions discharge. The applicant is being separated subsequent to a guilty plea at a Summary Court-Martial. As a condition of that guilty plea, the applicant waived their right to a Separation Board Hearing although their case may be considered for an Under Other Than Honorable Conditions discharge.

(15) A memorandum, 71st Corps Support Battalion, 317th Maintenance Company, subject: Administrative Separation under Army Regulation 635-200, Paragraph 14-12c, Commission of a Serious Offense, dated 17 March 2005, the applicant's company commander notified the applicant of their intent to separate them under the provisions of Army Regulation 635-200, Chapter 14-12c, for commission of a serious offense. The reason for the proposed action is for illegal use of controlled substances and failure to report on time to their extra duty. The company commander recommended the applicant's characterization of service as under other than honorable conditions. On the same date, the applicant acknowledged the notification.

(16) The applicant's memorandum, subject: Acknowledgement and Election of Rights for Administrative Separation under Army Regulation 635-14-12c (Commission of a Serious Offense), dated 17 March 2005, the applicant acknowledged that they have been advised by consulting counsel of the basis of the contemplated action to separate them for the commission of a serious offense, and its effects, of the rights available to them, and of the effect of any action taken in waiving their rights. They further understood that they have waived their right for consideration by an administrative separation board should their characterization of discharge be recommended as Under Other Than Honorable Conditions, pursuant to an Offer to Plead Guilty, dated 28 January 2005 submitted for a Summary Court-Martial. They understand that as a result of the issuance of a discharge Under Other Than Honorable Conditions, they may be ineligible for any or all benefits as a veteran under both Federal and State laws and that they may expect to encounter substantial prejudice in civilian life. They elected to submit statements in their behalf. [Note: statements in their behalf are not in evidence for review.]

(17) A memorandum, 71st Corps Support Battalion, 317th Maintenance Company, subject: Commanding Officer's Report for Administrative Separation under Army Regulation 635-200, Paragraph 14-12c (Commission of a Serious Offense), dated 17 March 2005, the applicant's company commander submitted a request to separate them prior to their expiration term of service to the separation authority. The company commander states they do not consider it feasible or appropriate to accomplish other disposition as the applicant has proven to be a discipline problem and repeated drug offender. They are an infection within the unit.

(18) A memorandum, 71st Corps Support Battalion, subject: Recommendation for Administrative Separation under Army Regulation 635-200, Paragraph 14-12c (Commission of a Serious Offense) for [Applicant], dated 22 March 2005, the applicant's battalion commander recommended approval of the administrative separation for the applicant with the characterization of service as Under Other Than Honorable Conditions. The battalion commander states the applicant has not served honorably during their service in the unit. After multiple patterns of misconduct, it became apparent that they had no intention of fulfilling their service obligation and decided to take this path.

(19) A memorandum, 7th Corps Support Group, subject: Recommendation for Administrative Separation under Army Regulation 635-200, Paragraph 14-12c (Commission of a Serious Offense) for [Applicant], dated 28 March 2005, the applicant's group commander recommended approval of the administrative separation for the applicant with the characterization of service as Under Other Than Honorable Conditions. The group commander states the seriousness of their offenses and apparent refusal to change their behavior dictate an Under Other Than Honorable Conditions discharge.

(20) A memorandum, Headquarters, 1st Infantry Division, subject: Separation under Army Regulation 635-200, Chapter 14-12c, dated 22 April 2005, the separation authority approved the recommended separation of the applicant prior to the expiration of their current term of service and directed the applicant be issued an Under Other Than Honorable Conditions Discharge Certificate.

(21) A DD Form 214 (Certificate of Release or Discharge from Active Duty) reflects the applicant was discharged on 13 May 2005, with 2 years, 8 months and 3 days of net active service this period. They have not completed the first full term of service of their contractual enlistment obligation of 3 years. The DD Form 214 shows in –

- item 4a (Grade, Rate or Rank) – Private

- item 4b (Pay Grade) – E-1
- item 12i (Effective Date of Pay Grade) – 23 June 2004
- item 24 (Character of Service) – Under Other Than Honorable Conditions
- item 26 (Separation Code) – JKK
- item 27 (Reentry Code) - 4
- item 28 (Narrative Reason for Separation) – Misconduct

(22) A DD Form 293, dated 24 May 2012, reflects the applicant's request to upgrade their characterization of service to general (under honorable conditions) or honorable and to change the narrative reason for separation. The applicant states after serving in Iraq from May 2003 through March 2004, they had problems dealing with their emotions and adjusting once they returned. They were having flashbacks and nightmares. There were always on alert and had problems sleeping. To cope, they admit to using illegal drugs for which they are very sorry. They had regarding killing themselves at one point. They would like to receive counseling and treatment for these issues through the Department of Veterans Affairs (VA) but they are not eligible because of their discharge.

(23) On 12 October 2012, the Army Discharge Review Board determined the applicant's discharge was both proper and equitable and voted to deny the applicant's request.

(a) The applicant's discharge was appropriate because the quality of their service was not consistent with the Army's standards for acceptable personal conduct and performance of duty by military personnel. By their misconduct, the applicant diminished the quality of their service below that meriting fully honorable discharge. The applicant provided no independent corroborating evidence demonstrating that either the command's action was erroneous or that the applicant's service mitigated the misconduct or poor duty performance.

(b) The evidence of record shows the applicant's command attempted to assist them in performing and conducting themselves to Army standards by providing counseling and by the imposition of nonjudicial punishment. The applicant failed to respond appropriately to these efforts.

(c) By violating the Army's policy not to possess or use illegal drugs, compromised the trust and confidence placed in a Soldier. They knowingly risked their military career and diminished the quality of service below that meriting a fully honorable discharge.

(d) The record of evidence does not demonstrate that the applicant sought relief or assistance through their command or the numerous Army community services like the Chaplain, Army Community and Family Support Services, Community Counseling Center, and other medical resources available to all Soldiers. Likewise, the applicant has provided no evidence that they should not be held responsible for their conduct.

i. Lost Time / Mode of Return: None

j. Behavioral Health Condition(s):

(1) Applicant provided: On 26 May 2022 the Army Review Boards Agency requested the applicant provide their medical documents to support their issue of PTSD. The applicant's counsel responded through email on 19 June 2022, reflecting diagnoses of Major Depressive Disorder, Generalized Anxiety Disorder and PTSD. [Note: the submitted document reflects no date, no psychiatrist name, or the name of a psychiatric office/clinic.]

(2) AMHRR Listed: None

5. APPLICANT-PROVIDED EVIDENCE:

- DD Form 293 (Application for the Review of Discharge from the Armed Forces of the United States)
- Counsel's Supplemental Statement with four Tabs
 - DD Form 214
 - Administrative Separation Documents
 - Army Review Boards Agency Letter
 - Hagel Memorandum and Clarifying Guidance
- Counsel's Response for Medical Records, with unsourced Medical Record document
- Telephonic Hearing Notification Response Form

6. POST SERVICE ACCOMPLISHMENTS: None submitted with application.

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

a. Title 10, U.S. Code, Section 1553, (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, Title 10, U.S. Code, Section 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 (DoD) 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; Title 10, U.S. Code, Section 1553; and DoD Directive 1332.41 and DoD Instruction 1332.28.

d. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), 15 July 2004, 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) A Under Other Than Honorable Conditions Discharge is an administrative separation from the Service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, security reasons, or in lieu of trial by court-martial.

(4) Chapter 14 (Separation for Misconduct) established policy and prescribed procedures for separating members for misconduct. Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impractical or unlikely to succeed. Paragraph 14-12c(2) (Abuse of Illegal Drugs is Serious Misconduct), stated, abuse of illegal drugs is serious misconduct; however, 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. 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.

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

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

f. Army Regulation 601-210 (Regular Army and Reserve Components Enlistment Program) governs eligibility criteria, policies, and procedures for enlistment and processing of persons into the Regular Army, the U.S. Army Reserve, and Army National Guard for enlistment per DoD Instructions 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.

g. Army Regulation 600-85 (Army Substance Abuse Program (ASAP)) dated 15 October 2001, prescribed policies, and procedures to implement, administer, and evaluate the ASAP. The ASAP is a command program that emphasizes readiness and personal responsibility. The ultimate decision regarding separation or retention of abusers is the responsibility of the Soldier's chain of command. Abuse of alcohol or the use of illicit drugs by military personnel is inconsistent with Army Values, and the standards of performance, discipline, and readiness necessary to accomplish the Army's mission.

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

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

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

(4) When a unit commander, in consultation with the ASAP clinical staff, determines that rehabilitative measures are not practical and that separation action will be initiated, all Soldiers identified as illegally abusing drugs will be processed for administrative separation. Soldiers diagnosed as being drug dependent by a physician will be detoxified and then processed for administrative separation and be considered for disciplinary action under the UCMJ.

h. Manual for Courts-Martial, United States (2005 Edition) stated, 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 order and discipline in the Armed Forces. Appendix 12 (Maximum Punishment Chart) Manual for Courts-Martial shows the maximum punishments include punitive discharge for violating the following Article 112a (Wrongful Use, Possession, etc., of Controlled Substances).

8. SUMMARY OF FACT(S):

a. The Army Discharge Review Board considers applications for upgrade as instructed by Department of Defense Instruction 1332.28.

b. The applicant's Army Military Human Resource Record (AMHRR) reflects the applicant received nonjudicial punishment under the UCMJ on two occasions, for wrongful use of marijuana and wrongful use of THC, which led to their involuntary separation from the service. The applicant's DD Form 214 indicates their discharge under the provisions of Army Regulation 635-200, Chapter 14, paragraph 14-12c (2), by reason of Misconduct (Drug Abuse), with a characterization of service of under other than honorable conditions. The applicant did not complete their first full term of service of their 3-year enlistment obligation.

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. The applicant's AMHRR does not reflect documentation of a diagnosis of PTSD, nor did the applicant provide evidence of a diagnosis of PTSD, during their military service.

e. 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:

b. 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 which was void of a diagnosis. However, the applicant asserts PTSD which may be sufficient evidence to establish the existence of a condition that could mitigate or excuse the discharge.

(2) Did the condition exist, or experience occur during military service? **Yes.** The applicant asserts PTSD and cut and pasted the diagnosis in an email to ARBA without necessary information to verify authenticity.

(3) Does the condition or experience actually excuse or mitigate the discharge? **Unknown.** The Board's Medical Advisor applied liberal consideration and opined that while diagnoses of Major Depressive Disorder (MDD), Generalized Anxiety Disorder (GAD), and PTSD are within the cut and paste info, these cannot be verified as conditions diagnosed by a provider credentialed to make behavioral health diagnoses. Accordingly, at this time mitigation cannot be determined due to the diagnoses being uncorroborated. However, the applicant may be able to provide context and information needed in his testimony allowing for a mitigation decision.

(4) Does the condition or experience outweigh the discharge? **No.** Based on liberally considering all the evidence before the Board, the ADRB determined that the condition or experience did not outweigh the basis of separation. Mitigation cannot be determined due to the diagnoses being uncorroborated.

c. Prior Decisions Cited: 2012, RR, P&E

d. Response to Contentions:

(1) The applicant contends stating the principles of justice, fairness, and equity require the applicant's discharge be upgraded. The Board considered this contention and determined that 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 applicant contends stating they were never advised of their right to a separation prior to being discharged with an Under Other Than Honorable Conditions discharge and to the extent there was a waiver, their waiver was not a knowing and intelligent one. The Board considered this contention and determined that 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 discharge was proper and equitable as the applicant's misconduct fell below that level of meritorious service warranted for an upgrade to Honorable discharge.

(3) The applicant contends stating they deny that they never went absence without leave (AWOL) or broke restriction.

The Board considered this contention non-persuasive during its deliberations.

(4) The applicant contends stating although they did not deny using THC, they submit that their use directly attributed to their service-connected PTSD, specifically, their deployment to Iraq. This constitutes extenuating and mitigating circumstances, which were not sufficiently considered at the time of their discharge.

The Board acknowledged this contention and the applicant's assertion of the condition or experience. However, from the records and available evidence the Board was unable to determine whether the applicant's conditions actually outweighed the applicant's discharge without the Board Medical Advisor determination on medical mitigation. Without knowing the facts and circumstances relating to the applicant's discharge, the Board is unable to determine if the applicant's behavioral health conditions outweigh the applicant's discharge. The Board voted to upgrade the characterization of service due to determining that the discharge served its purpose, and the time elapsed from discharge is almost twenty years as well as sufficient evidence of in-service mitigating factors (Length, Quality, Combat).

(5) The applicant contends stating although they have previously requested relief from this Board, they are entitled to submit this new application pursuant to the Army Review Boards Agency notice they received, as part of a settlement agreement in a class-action lawsuit filed in federal court in Connecticut, Kennedy v. McCarthy.

The Board considered this contention during deliberations.

e. The Board determined the discharge is inequitable based on the applicant's length and quality of service, to include combat service and the time elapsed from discharge is almost twenty years. 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.

f. 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 considered the applicant's statement, record of service, the frequency and nature of misconduct, and the reason for separation. The Board found sufficient evidence of in-service mitigating factors (Length, Quality, Combat). Although there are no BH mitigating conditions the Board voted that the discharge served its purpose, and the time elapsed from discharge is almost twenty years. The applicant takes responsibility and has turned his life around and is now married and employed. Based on a preponderance of evidence, the Board determined that the character of service the applicant received upon separation was inequitable.

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

(3) The 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:

