

**1. Applicant's Name:** [REDACTED]

- a. **Application Date:** 24 May 2022
- b. **Date Received:** 2 June 2022
- c. **Counsel:** Aimee M. Bateman  
520 S. 4th Street, Suite 101  
Leavenworth, KS 66048

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

a. **Applicant's Requests and Issues:** The current characterization of service for the period under review is honorable. The applicant requests a narrative reason change from unacceptable conduct to "Substandard Performance" and the SPD from JNC to JHK.

b. The applicant through counsel, seeks relief contending, in effect,

(1) The applicant's discharge was inequitable because it was based on failing two Army Physical Fitness Tests (APFT), even though the applicant passed a subsequent APFT during the pendency of the separation action (see paragraph 3 of attached legal brief).

(2) Prior to the start of the APFT on 7 May 2019, it was announced as a "record APFT" for all participants (see enclosure 10, MAJ D\_\_'s sworn statement). However, the applicant's passing APFT scorecard is labeled as a "Diagnostic" test (see enclosure 9). Also, MAJ D\_\_'s sworn statement states the company commander called the applicant about the APFT being a diagnostic instead of a record APFT. The company commander got loud and heated enough over the phone with the applicant that MAJ D\_\_ intervened by traveling to the company commander's office to diffuse the situation. It appeared that the applicant was being verbally attacked by the company command team. Because the applicant passed the APFT, an equitable outcome for the initiated separation would have been to retain the applicant and close the elimination action which was recommended by Colonel (COL) K\_\_ (see enclosures 6 and 11).

(3) The applicant's discharge was improper because the applicant did not "utilize[e] [the applicant's] position and entitlements as an adjutant officer to misuse Government information systems to acquire information for personal use" (see paragraph 4 of attached legal brief). During a command initiated investigation into the applicant's allegations of inequitable treatment, the applicant produced officer record briefs (ORB) showing officers with failing APFT scores without corresponding flags. The ORB's obtained during the applicant's duties with the 20th Engineer Battalion were provided to the investigating officer (IO) who was charged with investigating the applicant's allegations of discrimination. MAJ D\_\_ explains in a sworn statement that the applicant regularly pulled reports for unit readiness briefings, unit status reports, and for the battalion commander's briefing book (see enclosure 10).

(4) "Misuse of government information for personal use" did not occur in this case (see paragraph 5 of attached legal brief). The "finding" of misconduct in this case, which subsequently became the basis for the applicant's separation for "unacceptable conduct" is wholly unsupported by the facts and shows a complete misunderstanding of the law. A separation code and narrative for "unacceptable conduct" is improper.

- there was *never* an investigation in which the applicant was a subject

- IO was charged with investigating the circumstances of applicant's APFT failure and allegations of discrimination (see enclosure 13)
- every document that the applicant provided to the IO was as a part of this duly appointed investigation
- the applicant was a witness in this investigation, not a suspect or subject, and as such was asked to provide relevant evidence to the IO

(5) The most egregious impropriety by the command in the applicant's separation action is their improper determination that presenting official military files to a properly appointed IO, in an official Army investigation might somehow fit the definition of "personal use."

(6) Counsel further details the contentions in an allied legal brief provided with the application.

**c. Board Type and Decision:** In a records review conducted on 19 January 2024, and by a 3-2 vote, the Board determined the discharge is inequitable based on the applicant's length and quality of service, as well as the circumstances surrounding the discharge. Therefore, the Board voted to grant relief in the form of a narrative reason change from unacceptable conduct to Substandard Performance with a corresponding separation code of JHK. *Please see Section 9 of this document for more detail regarding the Board's decision.*

*(Board member names available upon request)*

### 3. DISCHARGE DETAILS:

**a. Reason / Authority / Codes / Characterization:** Unacceptable Conduct / AR 600-8-24, Chapter 4-2B / JNC / Honorable

**b. Date of Discharge:** 4 September 2020

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

**(1) Date of Notification of Intent to Separate:** 5 March 2020

**(2) Basis for Separation:** The applicant was informed to show cause for retention on active duty under the provisions of AR 600-8-24, paragraphs 4-2a and b for the applicant's substandard performance of duty and misconduct, moral, or professional dereliction due to the following reasons:

**(a)** The applicant failed two consecutive record APFTs administered to the applicant on 11 January and 10 April 2019.

**(b)** The applicant utilized the applicant's position and entitlement as an adjutant officer to misuse government information systems to acquire information for personal use.

**(c)** The applicant utilized the applicant's position and entitlement as an adjutant officer to misuse government information systems to perform personnel actions for a soldier outside the applicant's authority.

**(d)** Conduct unbecoming an officer as indicated by the above-referenced misconduct.

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

**(4) Board of Inquiry (BOI):** None

**(5) GOSCA Recommendation Date / Characterization:** On 7 May 2020, the GOSCA recommended disapproval of the applicant's request through counsel, for retention and recommended the applicant be involuntarily discharged from service. / Honorable

**(6) DA Board of Review for Eliminations:** Date NIF, the Army Board of Review for Eliminations considered the GOSCA's request to involuntarily separate the applicant for unacceptable conduct in accordance with AR 600-8-24, Chapter 4-2b.

**(7) Separation Decision Date / Characterization:** 17 August 2020 / Honorable

**4. SERVICE DETAILS:**

**a. Date / Period of Appointment:** 20 September 2017 / 36 months

**b. Age at Appointment: / Education:** 31 / Bachelor's Degree

**c. Highest Grade Achieved / MOS / Total Service:** O-2 / 42B, Human Resources Officer / 5 years, 8 months, and 26 days

**d. Prior Service / Characterizations:** USAR, 9 December 2014 - 19 September 2017 / HD  
IADT, 17 May 2015 - 12 August 2015 / HD  
(Concurrent Service)

**e. Overseas Service / Combat Service:** None

**f. Awards and Decorations:** NDSM, GWTSM, ASR

**g. Performance Ratings:** 20 September 2017 - 19 September 2018 / Highly Qualified  
1 October 2018 - 1 June 2019 / Qualified

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

**(1)** The applicant received a referred OER for period ending on 19 September 2018 for not being in compliance with the Army body composition standards.

**(2)** On 11 January 2019, the applicant failed a record APFT (see enclosure 4, provided by counsel) and counseled for the APFT failure.

**(3)** On 5 February and 6 March 2019, the applicant failed diagnostic APFTs.

**(4)** On 10 April 2019, the applicant failed a record APFT. The applicant was flagged for involuntary separation/field initiated (BA). (See enclosures 4 and 8, provided by counsel).

**(5)** On 11 April 2019, the applicant was counseled for APFT failure and recommendation of involuntary separation with an honorable characterization of service.

**(6)** On 18 July 2019, an elimination action was initiated against the applicant for substandard performance of duties.

(7) On 23 July 2019, the applicant acknowledged receipt of this notification, however, it is not in the applicant's AMHRR but documented in memorandum, Officer Elimination Action, 21 November 2019.

(8) On 7 May 2019, the applicant passed a diagnostic APFT (see enclosure 9, provided by counsel).

(9) On 13 and 17 June 2019, the brigade commander recommended to retain the applicant on active duty. COL K\_\_, states the applicant quickly lost 98 pounds after being assessed onto active duty shortly following pregnancy and advocated for the applicant due to the mitigating circumstances (see enclosures 6 and 11, provided by counsel).

(10) On 19 August 2019, the applicant's human resources systems access was removed on 9 August 2019, because the applicant no longer was serving as the battalion S1 and for processing an action that was erroneously uploaded into an officer's personnel electronic record file prior to approval by either the company or battalion commander.

(11) On 21 August 2019, COL K\_\_ requested the III Corps Deputy Commanding General-Maneuver to allow the applicant to continue service in the U.S. Army on active duty.

(12) On 23 August 2019, the applicant's separation rebuttal letter states the applicant wanted the leadership to prove that the separation action was not based on clerical errors, false data, favoritism, being of the wrong gender, or just because.

(13) On 3 September 2019, an IO was appointed to conduct a preliminary inquiry to determine the facts and circumstances surrounding allegations made by the applicant that Headquarters and Headquarters Company, 20th Engineer Battalion improperly scored the applicant's 10 April 2019 APFT and to determine whether anyone discriminated against the applicant based on gender (see enclosure 13, provided by counsel).

(14) On 3 September 2019, an assistant IO requested the applicant to submit a sworn statement into the facilitation of the APFT and gender discrimination against the applicant.

(15) On 4 September 2019, the applicant completed two sworn statements consisting of five exhibits of 63 pages of For Official Use Only documents and reports. This resulted in the applicant's supervisor revoking the applicant's Electronic Military Personnel Office (eMILPO) access after discovering the applicant used the system for personal reasons and for utilizing the system incorrectly to complete administrative actions for a soldier outside the battalion.

(16) On 25 November 2019, the applicant refused to sign the initiation of elimination memorandum, 21 November 2019, before speaking to counsel. The applicant was provided the aforementioned memorandum as well as all supporting documentation related to the elimination.

(17) On 14 January 2020, the applicant's counsel's separation rebuttal letter requested the applicant to be retained on active duty and in the alternative to separate the applicant with an honorable discharge.

(18) On 5 March 2020, the elimination action initiated on 21 November 2019 was initiated without the necessary probationary officer language and was withdrawn. On this same date, the GOSCA initiated a third elimination action against the applicant.

(19) Memorandum, 10 March 2020, states the applicant refused to sign the initiation of elimination memorandum, 5 March 2020, before speaking to counsel. The applicant was provided the aforementioned memorandum as well as all supporting documentation related to the elimination that was not provided on 25 November 2019.

(20) On 6 April 2020, the applicant's counsel's separation rebuttal letter requested the applicant to be retained on active duty and in the alternative to separate the applicant with an honorable discharge. On the same date, the applicant submitted their election of rights stating they previously submitted rebuttal, written statements and/or documents.

(21) Report of Mental Status Evaluation (MSE), 8 April 2020, shows the applicant was psychiatrically cleared for any administrative actions deemed appropriate by the command. The applicant could understand and participate in administrative proceedings; could appreciate the difference between right and wrong; and met medical retention requirements. The applicant had been screened for PTSD and TBI with negative results.

(22) On 22 April 2020, the applicant's brigade and senior commanders recommended an honorable discharge.

(23) On 17 August 2020, the Deputy Assistant Secretary of the Army (Army Review Boards) involuntarily eliminated the applicant from the U.S. Army based on substantive performance of duty (AR 600-8-24, paragraph 4-2a), and misconduct and moral or professional dereliction (AR 600-8-24, paragraph 4-2b), with an honorable characterization of service.

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

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

**(1) Applicant provided:** None

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

**5. APPLICANT-PROVIDED EVIDENCE:** DD Form 293; Legal Brief with all listed enclosures 1 through 17.

**6. POST SERVICE ACCOMPLISHMENTS:** None submitted with the application.

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

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

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

**(1)** Individually and collectively, these documents provide further clarification to the Military Discharge Review Boards and Boards for Correction of Military/Naval Records when considering requests by Veterans for modification of their discharge due to mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment. Liberal consideration will be given to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment. Special consideration will be given to Department of Veterans Affairs (VA) determinations that document a mental health condition, including PTSD; TBI; or sexual assault/harassment potentially contributed to the circumstances resulting in a less than honorable discharge characterization. Special consideration will also be given in cases where a civilian provider confers diagnoses of a mental health condition, including PTSD; TBI; or sexual assault/harassment if the case records contain narratives supporting symptomatology at the time of service or when any other evidence which may reasonably indicate that a mental health condition, including PTSD; TBI; or sexual assault/harassment existed at the time of discharge might have mitigated the misconduct that caused a discharge of lesser characterization.

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

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

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

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

**(2)** Paragraph 1-23a, states an officer will normally receive an honorable characterization of service when the quality of the officer's service has met the standards of

acceptable conduct and performance of duty, or the final revocation of a security clearance under DODI 5200.02 and AR 380-67 for reasons that do not involve acts of misconduct for an officer.

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

(4) Chapter 4 outlines the rules and steps for eliminating officers for substandard performance of duty, misconduct, moral or professional dereliction, and in the interests of national security.

(5) Paragraph 4-2a, prescribes for the elimination of an officer for substandard performance of duty for: downward trend in over performance of duty; failure to keep pace or to progress with contemporaries; failure exercise necessary leadership or command; and other reasons.

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

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

e. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the SPD codes to be entered on the DD Form 214. It identifies the SPD code of "JNC" as the appropriate code to assign commissioned officers who are discharged under the provisions of Army Regulation 600-8-24, Chapter 4-2b, unacceptable conduct.

**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 a narrative reason change from unacceptable conduct to "Substandard Performance" and the SPD from JNC to JHK. The applicant's AMHRR, the issues, and documents submitted with the application were carefully reviewed.

b. The applicant honorably served as second lieutenant in the U.S. Army Reserve from 2014 until 2017. In 2017, the applicant was ordered to active duty in the rank of first lieutenant. An AR 15-6 investigation was conducted against the applicant in September 2019 for allegations made by the applicant that Headquarters and Headquarters Company, 20th Engineer Battalion improperly scored the applicant's 10 April 2019 APFT and to determine whether anyone discriminated against the applicant based on gender. Documents the applicant provided in response to the investigation led to the applicant's eMILPO access being revoked because it was determined the applicant used the system for personal reasons and for utilizing the system incorrectly to complete administrative actions for a soldier outside the battalion. On 17 August 2020, the Deputy Assistant Secretary of the Army (Army Review Boards) involuntarily eliminated the applicant from the U.S. Army based on substantive performance of duty (AR 600-8-24, paragraph 4-2a), and misconduct and moral or professional dereliction (AR 600-8-24,

paragraph 4-2b), with an honorable characterization of service. The applicant's DD Form 214 shows the applicant was discharged under AR 600-8-24, Unacceptable Conduct and SPD code JNC with an honorable characterization of service.

c. The applicant through counsel contends, in effect, the narrative reason for the discharge should be changed from unacceptable conduct to "Substandard Performance." The applicant was separated under the provisions of Chapter 4, paragraph 4-2b, AR 600-8-24 with an honorable discharge. The narrative reason specified by Army Regulations for a discharge under this paragraph is "Unacceptable Conduct," and the separation code is "JNC." AR 635-8 (Separation Processing and Documents), governs preparation of the DD Form 214 and dictates the entry of the narrative reason for separation, entered in block 28 and separation code, entered in block 26 of the form, will be exactly as listed in tables 2-2 or 2-3 of AR 635-5-1, SPD Codes. The regulation further stipulates no deviation is authorized. There is no provision for any other reason to be entered under this regulation.

d. The applicant through counsel contends, in effect, the SPD code should be changed from JNC to JHK. The SPD codes are three-character alphabetic combinations that identify reasons for, and types of, separation from active duty. The primary purpose of SPD codes is to provide statistical accounting of reasons for separation. They are intended exclusively for the internal use of DoD and the Military Services to assist in the collection and analysis of separation data. The SPD codes are controlled by OSD and then implemented in Army policy AR 635-5-1 to track types of separations. The SPD code specified by Army Regulations for a discharge under Chapter 4, paragraph 4-2b, is "JNC."

e. The applicant through counsel contends, in effect, the applicant's discharge was inequitable because it was based on failing two APFTs, although the applicant passed a subsequent diagnostic APFT during the pendency of the separation action (see enclosure 9, provided by counsel).

f. The applicant through counsel contends, in effect, prior to the start of the APFT on 7 May 2019, it was announced as a "record APFT" for all participants (see enclosure 10, MAJ D\_\_'s sworn statement, provided by counsel). However, the applicant's passing APFT scorecard is labeled as a "Diagnostic" test (see enclosure 9, provided by counsel). AR 350-1 (Army Training and Leader Development), states commanders may administer the APFT as often as they wish; however, they must specify beforehand when the APFT is for record. Soldiers must take a record APFT every 6 months for RA and AGR Soldiers, and annually for all other USAR and ARNG Soldiers. If a Soldier fails a record APFT, commanders may allow Soldiers to retake the test as soon as the Soldier and commander feel the Soldier is ready to test (not to exceed 90 days). A repetitive APFT failure occurs when a Soldier fails a record test, is provided adequate time and assistance to condition (not to exceed 90 days), and fails again. Soldiers without medical profiles that fail a retest or fail to take the APFT with no authorized waiver within the required time will be barred from re-enlistment or processed for separation from the service. Provisions for separation are per AR 600-8-24 for officers.

g. The applicant through counsel contends, in effect, the applicant's discharge was improper because the applicant did not "utilize[e] [the applicant's] position and entitlements as an adjutant officer to misuse Government information systems to acquire information for personal use." The "finding" of misconduct in this case, which subsequently became the basis for the applicant's separation for "unacceptable conduct" is wholly unsupported by the facts and shows a complete misunderstanding of the law. A separation code and narrative for "unacceptable conduct" is improper.



(1) Counsel states:

- there was *never* an investigation in which the applicant was a subject
- IO was charged with investigating the circumstances of the applicant's APFT failure and the applicant's allegations of discrimination (see enclosure 13)
- every document that the applicant provided to the IO was as a part of this duly appointed investigation
- the applicant was a witness in this investigation, not a suspect or subject, and as such the applicant was asked to provide relevant evidence to the IO

(2) Counsel provides, AR 15-6 (Procedures for Administrative Investigations and Boards of Officers), chapter 3 states IOs and boards are not bound by the rules of evidence for court-martial or court proceedings generally. ". . . anything that a reasonable person would consider relevant and material to an issue may be accepted as evidence. For example, medical records, counseling statements, police reports, and other records may be considered, regardless of whether the preparer of the record is available to give a statement or testify in person." "No officer, Department of the Army employee, or Service member may deny IOs and boards access to documents, records, or evidentiary materials needed to discharge their duties, to include data stored in official Department of the Army repositories, except as permitted by law and applicable regulations."

h. The applicant through counsel contends, in effect, while not explicitly stated in the findings, it appears the command was invoking the prohibitions of Article 123, Uniform Code of Military Justice (UCMJ), when making the determination that the applicant "misuse[d] government information systems" (as is stated in the basis for separation, see enclosure 2, provided by counsel).

(1) Counsel provides the elements of that crime are as follows in DA Pam 27-9 (Military Judges' Benchbook), see enclosures 14 and 15, excerpts:

(a) That the accused intentionally accessed a government computer with an unauthorized purpose; and

(b) That the accused thereby obtained classified or other protected information from any such government computer, (from).

(c) "The key criterion to determine "unauthorized purpose" is whether the person intentionally used the computer for a purpose that was clearly contrary to the interests or intent of the authorizing party."

(2) All evidence provided by the applicant to the IO was evidence the applicant obtained as an "insider" to the personnel systems. The applicant did not hack into any systems to which the applicant had not been granted proper access. The applicant's access was in no way "clearly contrary to the interests or intent of the authorizing party. It was the applicant's command that had both granted the applicant access to the systems and appointed the investigation at hand.

i. The applicant through counsel contends, in effect, the most egregious impropriety by the command in the applicant's separation action is their improper determination that presenting official military files to a properly appointed IO, in an official Army investigation might somehow fit the definition of "personal use." Counsel provides:

(1) The Standards of Ethical Conduct for Employees of the Executive Branch, codified in Title 5 C.F.R. Part 2635, discuss the general principles and standards of the obligations of public service. Among the enumerated prohibitions for public servants is, "Misuse of Position," and specifically included is "Use of nonpublic information." It states, "An employee shall not engage in a financial transaction using nonpublic information, nor allow the improper use of nonpublic information to further [their] own private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure." (See enclosure 17, 5 C.F.R § 2635.703(a), provided by counsel).

(2) Any evidence, to include non-public information, that the applicant provided to the IO in this matter was not to "further [applicant's] private interest or that of another." A "private interest" is just that - something that lies outside of the realm of government programs and policies.

(3) The applicant through counsel, provided an ORB of another soldier to reveal their failed APFT with no corresponding flag (name of soldier is marked out).

j. The third party statement provided with the application further expounds on the applicant's competence, character, and extensive personal observations of the applicant as a personnel officer. It states, "I have never met a more conscientious officer that ensured the security and protection of personal information was maintained." (See enclosure 16, provided by counsel).

k. 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:

c. Response to Contention(s):

(1) The applicant through counsel contends, in effect, the narrative reason for the discharge should be changed from "Unacceptable Conduct" to "Substandard Performance."

The Board determined that this contention was valid and voted to grant relief in the form of a narrative reason change from unacceptable conduct to Substandard Performance.

(2) The applicant through counsel contends, in effect, the SPD code should be changed from JNC to JHK. The Board determined that this contention was valid and voted to grant relief in the form of a narrative reason change from unacceptable conduct to Substandard Performance with a corresponding separation code of JHK.

(3) The applicant through counsel contends, in effect, the applicant's discharge was inequitable because it was based on failing two APFTs, although the applicant passed a subsequent diagnostic APFT during the pendency of the separation action (see enclosure 9, provided by counsel). The Board determined that this contention was valid and voted to grant relief in the form of a narrative reason change from unacceptable conduct to Substandard Performance.

(4) The applicant through counsel contends, in effect, prior to the start of the APFT on 7 May 2019, it was announced as a "record APFT" for all participants (see enclosure 10, MAJ D\_\_'s sworn statement, provided by counsel). However, the applicant's passing APFT scorecard is labeled as a "Diagnostic" test (see enclosure 9, provided by counsel). The Board determined that this contention was valid and voted to upgrade based on the applicant's length and quality of service as well as the circumstances surrounding the discharge.

(5) The applicant through counsel contends, in effect, the applicant's discharge was improper because the applicant did not "utilize[e] [the applicant's] position and entitlements as an adjutant officer to misuse Government information systems to acquire information for personal use." The "finding" of misconduct in this case, which subsequently became the basis for the applicant's separation for "unacceptable conduct" is wholly unsupported by the facts and shows a complete misunderstanding of the law. A separation code and narrative for "unacceptable conduct" is improper. The Board determined that this contention was valid and voted to upgrade based on the applicant's length and quality of service as well as the circumstances surrounding the discharge.

(6) The applicant through counsel contends, in effect, while not explicitly stated in the findings, it appears the command was invoking the prohibitions of Article 123, UCMJ, when making the determination that the applicant "misuse[d] government information systems" (as is stated in the basis for separation. The Board determined that this contention was valid and voted to upgrade based on the applicant's length and quality of service as well as the circumstances surrounding the discharge.

(7) The applicant through counsel contends, in effect, the most egregious impropriety by the command in the applicant's separation action is their improper determination that presenting official military files to a properly appointed IO, in an official Army investigation might somehow fit the definition of "personal use." The Board determined that this contention was valid and voted to upgrade based on the applicant's length and quality of service as well as the circumstances surrounding the discharge.

d. The Board determined the discharge is inequitable based on the applicant's length and quality of service as well as the circumstances surrounding the discharge. Therefore, the Board voted to grant relief in the form of a narrative reason change from unacceptable conduct to Substandard Performance with a corresponding separation code of JHK.

**e. 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, in a 3-2 vote, found sufficient evidence of in-service mitigating factors (Length, Quality) and circumstances surrounding the discharge that does mitigate the applicant's misuse of government systems. Based on a preponderance of evidence, the Board determined that the reason for the applicant's separation was inequitable.

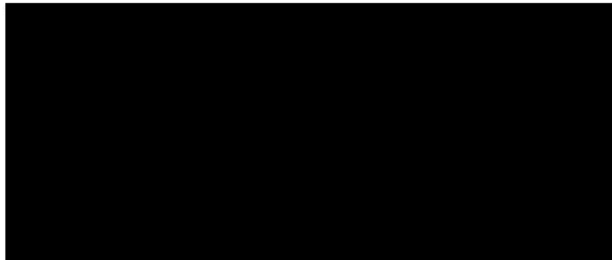
(2) The Board voted to grant relief in the form of a narrative reason change from unacceptable conduct to Substandard Performance with a corresponding separation code of JHK.

(3) As the applicant was an Army Officer, there is no reentry code supplied upon discharge, honorable or otherwise.

**10. BOARD ACTION DIRECTED:**

- a. **Issue a New DD-214:** Yes
- b. **Change Characterization to:** No Change
- c. **Change Reason / SPD Code to:** Substandard Performance -JHK
- d. **Change RE Code to:** No Change
- e. **Change Authority to:** No Change

**Authenticating Official:**



**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