

1. Applicant's Name: [REDACTED]

- a. **Application Date:** 2 July 2018
- b. **Date Received:** 21 February 2023
- c. **Counsel:** [REDACTED]

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

a. Applicant's Requests and Issues: The current characterization of service for the period under review is general (under honorable conditions). The applicant requests an upgrade to honorable and reentry (RE) code and narrative reason changes.

The applicant through counsel seeks relief contending, in effect, the applicant believed the no contact order, dated 8 February 2002, from Captain (CPT) B__, commander, had been rescinded. The applicant and several friends celebrated M__ H__'s birthday in February 2002 while M__ H__ was estranged from husband. M__'s then husband reported the applicant's presence after the birthday party to CPT B__. After M__ H__'s divorce was finalized in November 2002, M__ H__ initiated contact with the applicant. The applicant relied on the commander's February 2002 representation that the commander did not "give a shit" what the applicant did after M__ H__'s divorce. The applicant understood the commander's statement, contrary to the commander's later inability or unwillingness to recall that part of the conversation, as a de facto rescission of the no contact order. The applicant also relied on Sergeant M__ H__'s statement that the applicant could do whatever the applicant wanted once M__ H__'s divorce was finalized.

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

b. Board Type and Decision: In a telephonic personal appearance hearing conducted on 12 February 2024, and by a 3-2 vote, the Board determined the discharge was inequitable and voted to grant relief in the form of an upgrade of the characterization of service to Honorable, change the separation authority to AR 635-200 paragraph 14- 12a, the narrative reason for separation to Misconduct (Minor Infractions), with a corresponding separation code of JKN. The Board determined the reentry code is proper and equitable and voted not to change it.

Please see Section 10 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 / AR 635-200, Chapter 14-12c (1) / JKD / RE-3 / General (Under Honorable Conditions)

b. Date of Discharge: 6 August 2003

c. Separation Facts: The applicant's Army Military Human Resource Record (AMHRR) contains the case separation file. However, the applicant provided the case separation file which are described below in 3c(1) through (6).

(1) Date of Notification of Intent to Separate: 14 July 2003

(2) Basis for Separation: The applicant was informed of the following reasons: The applicant willfully disobeyed a lawful order issued by Captain D__ D. B__.

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

(4) Legal Consultation Date: 15 July 2003

(5) Administrative Separation Board: NA

(6) Separation Decision Date / Characterization: 25 July 2003 / General (Under Honorable Conditions)

4. SERVICE DETAILS:

a. Date / Period of Enlistment: 10 January 2000 / 6 years

b. Age at Enlistment / Education / GT Score: 20 / 1 year of college / 114

c. Highest Grade Achieved / MOS / Total Service: E-4 / 74B, Information System Operation - Analyst

d. Prior Service / Characterizations: None

e. Overseas Service / Combat Service: None

f. Awards and Decorations: NDSM, ASR

g. Performance Ratings: NA

h. Disciplinary Action(s) / Evidentiary Record: FG Article 15, dated 4 June 2003, for disobeying a lawful order from a superior commission officer, to have no contact with M__ H__, which the applicant willfully disobeyed between 8 February 2002 and 27 May 2003, on diverse occasions. The punishment consisted of a reduction from E-4 to E-1; forfeiture of \$250.00 pay per month for 2 months; restriction for 45 days; and an oral reprimand.

Memorandum, no contact order, dated 8 February 2002, from commander, stemming from involvement in the marital issues of another couple. The applicant was to cease and desist any and all contact with M__ H__, with no exceptions. The contact order was to remain in effect until it was rescinded, and the applicant would be personally notified. The applicant could not inquire, by any means, as to how this information was brought to the commander 's attention. If M__ H__ was to contact the applicant or the applicant unintentionally came into contact with M__ H__, the applicant was to immediately inform the commander.

Seven Developmental Counseling Forms, between 15 January 2002 and 9 May 2003, for:

- informed to remove self from a marital dispute that the applicant was not involved in
- no contact order and foot condition
- performance on the Soldier of the month board
- unauthorized length of sideburns
- reminder of no contact order

disrespect to a senior noncommissioned officer (NCO)
disobeying a lawful order

Applicant written statement, dated 9 May 2003, the applicant assumed that if the divorce between the two parties was finalized that the no contact order would be automatically rescinded. The day the applicant was given the no contact order, the applicant asked the commander, "When their problems are resolved (meaning their divorce) what can [applicant] do?" The commander told the applicant that the commander did not care what the applicant did and to ensure that they were divorced. The divorce was finalized on 18 November 2002. The applicant was told the same by a NCO.

Memorandum for record, dated 23 May 2003, from the commander, regarding the no contact order, dated 8 February 2002. The commander reiterated that at no time did the commander give the applicant any reason to believe the no contact order was lifted or no longer in effect.

Two Developmental Counseling Forms, between 30 May and 5 June 2003, for:

- substandard performance separation
- disobeying a lawful no contact order
- recommending separation from service for misconduct
- willful disobedience of a superior commissioned officer

Personnel Action form reflects the applicant was reduced from E-4 to E-1 effective 4 June 2003.

i. Lost Time / Mode of Return: None

j. Behavioral Health Condition(s):

(1) Applicant provided: Chronological Record of Medical Care, dated 9 June 2003, reflects the applicant received a Mental Status Evaluation (MSE). The applicant was cleared for any administrative actions deemed appropriate by the command. The applicant could understand the difference between right and wrong and could participate in the proceedings. The applicant was diagnosed with: Occupational Problem and Right Foot Complex Regional Pain (Hallux Rigidus).

(2) AMHRR Listed: MSE as described in previous paragraph 4j(1).

5. APPLICANT-PROVIDED EVIDENCE: DD Form 293; Legal Brief with all listed enclosures 1 through 7, includes DD Form 214 and case separation packet; Army Discharge Review Board Case Report and Directive (AR20090001852).

6. POST SERVICE ACCOMPLISHMENTS: The applicant coached stepdaughter's soccer team for years and serves as the assistant coach for youngest daughter's volleyball team. The applicant's family volunteers as a foster family for the Animal Defense League of TX and adopted a physically disabled Labrador retriever. The applicant earned an Associate degree from ITT Tech and has multiple information technology certifications. The applicant works for VMware as a Technical Support engineer.

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

a. Section 1553, Title 10, United States Code (Review of Discharge or Dismissal) provides for the creation, composition, and scope of review conducted by a Discharge Review Board(s)

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

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

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

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

c. Army Regulation 15-180 (Army Discharge Review Board) sets forth the policies and procedures under which the Army Discharge Review Board is authorized to review the character, reason, and authority of any Servicemember discharged from active military service

within 15 years of the Servicemember's date of discharge. Additionally, it prescribes actions and composition of the Army Discharge Review Board under Public Law 95-126; Section 1553, Title 10 United States Code; and Department of Defense Directive 1332.41 and Instruction 1332.28.

d. Army Regulation 635-200 provides the basic authority for the separation of enlisted personnel.

(1) Chapter 3, Section II provides the authorized types of characterization of service or description of separation.

(2) Paragraph 3-7a states an Honorable discharge is a separation with honor and is appropriate when the quality of the Soldier's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

(3) Paragraph 3-7b states a General discharge is a separation from the Army under honorable conditions and is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

(4) Chapter 14 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions, a pattern of misconduct, and commission of a serious offense, to include abuse of illegal drugs, convictions by civil authorities and desertion or being absent without leave. Action will be taken to separate a member for misconduct when it is clearly established that rehabilitation is impractical or unlikely to succeed.

(5) Paragraph 14-3 prescribes a discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter. However, the separation authority may direct a general discharge if such is merited by the Soldier's overall record.

(6) Paragraph 14-12c(1) allows for an absentee returned to military control from a status of absent without leave or desertion to be separated for commission of a serious offense.

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

e. 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 "JKD" as the appropriate code to assign enlisted Soldiers who are discharged under the provisions of Army Regulation 635-200, Chapter 14, paragraph 12c(1), misconduct.

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 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: RE-3 Applies to: Person who is not considered fully qualified for reentry or continuous service at time of separation, but disqualification is waivable. Eligibility: Ineligible unless a waiver is granted.

8. SUMMARY OF FACT(S): The Army Discharge Review Board considers applications for upgrade as instructed by Department of Defense Instruction 1332.28.

The applicant requests an upgrade to honorable change RE code and narrative reason. The applicant's AMHRR, the issues, and documents submitted with the application were carefully reviewed.

The applicant through counsel contends, in effect, the narrative reason for the discharge needs to be changed. The applicant was separated under the provisions of Chapter 14, paragraph 14-12c(1), AR 635-200 with a general (under honorable conditions) discharge. The narrative reason specified by Army Regulations for a discharge under this paragraph is "Misconduct," and the separation code is "JKD." Army Regulation 635-8, Separation Processing and Documents, governs preparation of the DD Form 214, and dictates 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, Separation Program Designator (SPD) Codes. The regulation stipulates no deviation is authorized. There is no provision for any other reason to be entered under this regulation.

The applicant through counsel, requests a RE code change. Soldiers processed for separation are assigned reentry codes based on their service records or the reason for discharge. Based on AR 601-201, the applicant was appropriately assigned an RE code of "3." There is no basis upon which to grant a change to the reason or the RE code. An RE Code of "3" indicates the applicant requires a waiver before being allowed to reenlist. Recruiters can best advise a former service member as to the Army's needs at the time and are required to process waivers of RE codes if appropriate.

The applicant through counsel contends, in effect, the no contact order, dated 8 February 2002, from CPT B__, commander, had been rescinded. The applicant relied on the commander's February 2002 representation that the commander did not "give a shit" what the applicant did after M__ H__'s divorce. The applicant understood the commander statement, contrary to the commander's later inability or unwillingness to recall that part of the conversation, as a de facto rescission of the no contact order. The applicant also relied on Sergeant M__'s statement that the applicant could do whatever the applicant wanted once M__ H__'s divorce was finalized. The applicant had contact with M__ H__, at M__ H__'s birthday celebration in February 2002 and at a store which the applicant made aware to two NCOs but not directly to the commander. The applicant and M__ H__ had no further contact until after the divorce was finalized in November 2002. The no contact order provided by the applicant through counsel, reflects the applicant was to cease and desist any and all contact with M__ H__, with no exceptions. The contact order was to remain in effect until it was rescinded, and the applicant would be personally notified. The applicant was to immediately inform the commander of any contact with M__ H__. Memorandum for Record dated 23 May 2003, from the commander, regarding the no contact order, dated 8 February 2002, reflects the commander reiterated that at no time did the commander give the applicant any reason to believe the no contact order was lifted or no longer in effect.

The applicant through counsel contends, in effect, Staff Sergeant (SSG) C__ improperly prohibited the applicant from discussing the situation, asking questions of anyone without an attorney present, and from answering any questions from officers and NCOs. This order, as well

as CPT B__'s order forbidding the applicant from inquiring in any way about "how this information was brought to" the battalion commander's attention, was outrageous. Anyone accused of committing an offense has the right to know the nature and source of the allegation. The Manual of Courts-Martial reflects the accused has a right to notice of any witnesses that relate to the subject matter of any charged offense.

The applicant through counsel contends, in effect, the chain of command suspected the applicant of violating the uniform code of military justice (UCMJ) without advising the applicant of the applicant's rights pursuant to Article 31, UCMJ. Counselings received by the applicant reflects the applicant violated Article 90 (Willfully disobeying a superior commissioned officer). Article 31 (Compulsory Self Incrimination Prohibited) - No person subject to this chapter may compel any person to incriminate themselves or to answer any questions the answer to which may tend to incriminate themselves.

Counsel contends, in effect, the applicant commendably served. The Board will consider the applicant's service accomplishments and the quality of service according to the DODI 1332.28.

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 request, available records and/or submitted documents in support of the request.

9. DOCUMENTS / TESTIMONY PRESENTED DURING PERSONAL APPEARANCE: In addition to the evidence in the record, the Board carefully considered the additional document(s) and testimony presented by the applicant at the personal appearance hearing.

- a. **The applicant submitted the following additional document(s):** None
- b. **The applicant presented the following additional contention(s):** None
- c. **Counsel / Witness(es) / Observer(s):**

Counsel: [REDACTED]

Witness: [REDACTED]

10. 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: OCD
- (2) Did the condition exist, or experience occur during military service? **Yes.** Treated in-service for anxiety with likelihood of the specific diagnosis was OCD.
- (3) Does the condition or experience actually excuse or mitigate the discharge? **No.** The Board's Medical Advisor applied liberal consideration and opined that rather than contribute to the misconduct, OCD would have led the applicant to be hypervigilant to the details

seeking and desiring concrete understanding and clarification.

(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 OCD diagnosis did not outweigh the basis of separation.

b. Prior Decisions Cited: None

c. Response to Contentions: No additional contentions presented at PA Board.

d. The Board determined the discharge was inequitable and voted to grant relief in the form of an upgrade of the characterization of service to Honorable, change 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.

e. Rationale for Decision:

(1) The Board voted to change the applicant's characterization of service based on the following reasons: The Board's Medical Advisor applied liberal consideration and opined that rather than contribute to the misconduct, OCD would have led the applicant to be hypervigilant to the details seeking and desiring concrete understanding and clarification. The Board discussed the applicant's contentions and carefully considered the applicant's request, supporting documents, medical review, and evidence in the records. Based on the applicant's acceptance of responsibility, post service accomplishments (College Degree, Business Owner, Volunteer for his Child Sports, Husband, and Father) and elapsed time (20 years) since the discharge, The Board determined that the current discharge is inequitable and warranted an upgrade.

(2) The Board voted to change the applicant's narrative reason for separation to Misconduct (Minor Infractions), with a corresponding separation code of JKN.

ARMY DISCHARGE REVIEW BOARD CASE REPORT AND DIRECTIVE

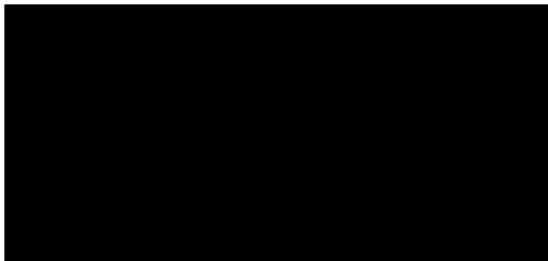
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(3) The RE code will not change, as the current code is consistent with the procedural and substantive requirements of the regulation.

11. 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:



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