

1. Applicant's Name:

- a. **Application Date:** 27 February 2023
- b. **Date Received:** 6 March 2023
- c. **Counsel:**

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

a. **Applicant's Requests and Issues:** The current characterization of service for the period under review is uncharacterized. The applicant requests, through counsel, an upgrade to honorable, and changes to the RE and SPD codes, and narrative reason to "Secretarial Authority."

b. The applicant, through counsel seeks relief contending, in effect, the applicant did not commit the misconduct alleged in the notice of separation and the government did not prove that the applicant committed the alleged misconduct. The applicant's overall service record and post-discharge conduct are deserving of an honorable characterization of service.

c. **Board Type and Decision:** In a telephonic personal appearance conducted on 5 February 2024, and by a 5-0 vote, the Board denied the request upon finding the separation was both proper and equitable.

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 (Serious Offense) / AR 635-200, Chapter 14-12c / JKQ / RE-3 / General (Under Honorable Conditions)

b. **Date of Discharge:** 11 November 2022

c. **Separation Facts:** The applicant's AMHRR is void of the case separation file. However, the applicant provided documents which are described below in 3c(1) through (5).

(1) **Date of Notification of Intent to Separate:** 25 October 2022

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

(a) Commission of a serious military or civil offense, if the specific circumstances of the offense warrant separation and a punitive discharge is, or would be, authorized for the same or a closely related offense under the MCM.

(b) Subparagraph AR 635-200, Chapter 14, Paragraph 14-12 (c) (2) Aggravated Sexual Contact is serious misconduct.

(3) **Recommended Characterization:** NIF

(4) Legal Consultation Date: On 4 October 2022, the applicant waived legal counsel.

(5) Administrative Separation Board: NA

(6) Separation Decision Date / Characterization: NIF

4. SERVICE DETAILS:

a. Date / Period of Enlistment: 12 July 2022 / 3 years and 21 weeks

b. Age at Enlistment / Education / GT Score: 23 / High School Graduate / 86

c. Highest Grade Achieved / MOS / Total Service: E-1 / None / 4 months

d. Prior Service / Characterizations: None

e. Overseas Service / Combat Service: None

f. Awards and Decorations: None

g. Performance Ratings: NA

h. Disciplinary Action(s) / Evidentiary Record:

(1) Counsel provided:

(a) Two developmental counseling forms, dated 30 August 2022 and 10 September 2022, showing the applicant was counseled on failure to follow instructions and failing to comply with AR 600-20 (Army Command Policy).

(b) CG Article 15, dated 16 September 2022, for:

- Failure to obey a lawful order by wrongfully calling another trainee a racial slur on or about 10 September 2022
- Failure to obey a lawful order by wrongfully walking to the shoppette before religious services ended on or about 28 August 2022
- Punishment consisted of forfeiture of \$395.00 pay, extra duty and restriction for 14 days, and an oral reprimand

(c) A developmental counseling form, dated 22 September 2022, showing the applicant received an initial counseling for basic combat training which covered sexual harassment.

(d) CID Report of Investigation - 1st Interim, dated 3 October 2022, states information in this report is based upon an allegation or preliminary investigation and may change prior to completion of the report. On 1 September 2022, Private Two (PV2/E-2) T__ reported being touched in a sexual manner by another trainee. Witnesses were interviewed and stated PV2 T__ told them the applicant restrained PV2 T__ and humped their buttocks. The applicant was advised of their rights, which the applicant waived and stated they approached PV2 T__, placed PV2 T__ in restraint, lifted PV2 T__ in the air, then touched PV2 T__ in a sexual manner despite PV2 T__'s physical resistance. The applicant stated they believed at the time they was playing a prank on PV2 T__.

(e) Developmental counseling form, dated 4 October 2022, shows the applicant was counseled on initiation of an administrative separation under AR 635-200, chapter 14, misconduct.

(f) Memorandum for Record, dated 4 October 2022, shows the applicant declined a medical examination.

(g) Enlisted Record Brief, dated 4 October 2022, shows the applicant was flagged for law enforcement investigation (MA), effective 10 September 2022; and was ineligible for reenlistment due to an adverse action flag (9B).

(2) A DA Form 4833 (Commander Report of Disciplinary or Administrative Action), shows the applicant was referred on 4 October 2022 for Aggravated Sexual Conduct (Adult) on 30 August 2022. On 31 October 2022, the company commander separated the applicant under AR 635-200, Chapter 14, misconduct, with an uncharacterized characterization effective 11 November 2022.

(3) Counsel provided a Report of Mental Status Evaluation, dated 6 October 2022, shows the applicant was 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, depression, TBI, substance misuse, and sexual trauma with negative results. There were no behavioral health conditions that were a mitigating factor in the alleged behavior that is the basis for administrative separation. The applicant does not have a behavioral health condition that causes them to fail medical retention standards in accordance with AR 40-501. The medical record does not contain substantial evidence that the applicant met criteria for a condition requiring a referral to Integrated Disability Evaluation System, but has not yet received a diagnosis. This opinion is based solely on the clinical judgment of the provider and does not constitute a forensic legal opinion as it pertains to criminal responsibility, state of mind at the time of the alleged behavior that is the basis for the administrative separation, competency, or other determinations typically required by the courts.

(4) The applicant's ERB, dated 22 November 2022, shows the applicant was flagged for involuntary separation/field initiated (BA), effective 20 October 2022; and was ineligible for reenlistment due to pending separation (9V).

(5) CID Report of Investigation - Final, dated 13 December 2022, states on 1 September 2022, PV2 T__ reported being touched in a sexual manner by another trainee. PV2 T__ stated around 30 August 2022, the applicant, approached them, restrained them in touch then in a sexual manner. Witnesses were interviewed and stated PV2 T__ told them the applicant restrained PV2 T__ and humped their buttocks. The applicant was advised of their rights, which the applicant waived and stated they approached PV2 T__, placed PV2 T__ in restraint, lifted PV2 T__ in the air, then touched PV2 T__ in a sexual manner despite PV2 T__'s physical resistance. The applicant stated they believed at the time they was playing a prank on PV2 T__. The commander was briefed of all aspects of the investigation. On 17 November 2022, the Fort Sill Resident Agency received the completed DA Form 4833.

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 Tabs A through E.

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

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

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

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

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

(2) Conditions documented in the service record that can reasonably be determined to have existed at the time of discharge will be considered to have existed at the time of discharge. In cases in which a mental health condition, including PTSD; TBI; or sexual assault/harassment may be reasonably determined to have existed at the time of discharge, those conditions will be considered potential mitigating factors in the misconduct that caused the characterization of service in question. All Boards will exercise caution in weighing evidence of mitigation in cases in which serious misconduct precipitated a discharge with a less than Honorable

characterization of service. Potentially mitigating evidence of the existence of undiagnosed combat related PTSD, PTSD-related conditions due to TBI or sexual assault/harassment as causative factors in the misconduct resulting in discharge will be carefully weighed against the severity of the misconduct. PTSD is not a likely cause of premeditated misconduct. Caution shall be exercised in weighing evidence of mitigation in all cases of misconduct by carefully considering the likely causal relationship of symptoms to the misconduct.

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

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

(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) 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.

(4) 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.

(5) Paragraph 14-12c prescribes a Soldier is subject to action per this section for commission of a serious military or civilian offense, if the specific circumstances of the offense warrant separation and a punitive discharge is, or would be, authorized for the same or a closely related offense under the Manual for Courts-Martial.

(6) 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, SPD Codes, provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the SPD codes to be entered on the DD Form 214. It identifies the SPD code of "JKQ" as the appropriate code to assign enlisted

Soldiers who are discharged under the provisions of Army Regulation 635-200, Chapter 14, paragraph 12c, misconduct (serious offense).

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 RE codes:

(1) RE-1 Applies to: Person completing his or her term of active service who is considered qualified to reenter the U.S. Army. Eligibility: Qualified for enlistment if all other criteria are met.

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

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

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

a. The applicant requests an upgrade to honorable, and changes to the RE and SPD codes, and narrative reason to "Secretarial Authority." The applicant's AMHRR, the issues, and documents submitted with the application were carefully reviewed.

b. The applicant's DD Form 214 shows the applicant served 4 months. The applicant was accused of Aggravated Sexual Conduct (Adult). On 11 November 2022, the applicant was discharged under the provisions of AR 635-200, Chapter 14, paragraph 14-12c, by reason of Misconduct (Serious Offense) with an uncharacterized characterization of service.

c. The applicant, through counsel contends, in effect, the narrative reason for the discharge should be changed to "Secretarial Authority." The applicant was separated under the provisions of Chapter 14, paragraph 14-12c, AR 635-200 with a uncharacterized discharge. The narrative reason specified by Army Regulations for a discharge under this paragraph is "Misconduct (Serious Offense)," and the separation code is "JKQ." Army Regulation 635-8, Separation Processing and Documents, governs the 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 as listed in tables 2-2 or 2-3 of AR 635-5-1, SPD Codes. The regulation 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. Separation 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 14, paragraph 14-12c, is "JKQ."

e. The applicant, through counsel contends, in effect, the RE code should be changed. Soldiers processed for separation are assigned RE codes based on their service records or the reason for discharge. Based on Army Regulation 601-210, the applicant was appropriately assigned an RE code of "4." An RE code of "4" cannot be waived, and the applicant is no longer eligible for reenlistment.

f. The applicant, through counsel contends, in effect, the applicant did not commit the misconduct alleged in the notice of separation and the government did not prove that the applicant committed the alleged misconduct. DA Form 4833 (Commander Report of Disciplinary or Administrative Action), shows the applicant was referred on 4 October 2022 for Aggravated Sexual Conduct (Adult) on 30 August 2022. On 31 October 2022, the company commander separated the applicant under AR 635-200, Chapter 14, misconduct, with an uncharacterized characterization effective 11 November 2022. On 30 January 2024, the Army Review Board Agency provided CID reports to the applicant through counsel at the email address provided in the application requesting comments. On 31 January 2024, counsel acknowledged receipt of the request for comments and stated the contents of the disclosure will be addressed at the personal appearance hearing.

g. The applicant, through counsel contends the applicant's overall service record and post-discharge conduct are deserving of an honorable characterization of service. The Board will consider the applicant's service accomplishments and the quality of service according to the DODI 1332.28.

h. Published Department of Defense guidance indicates that the guidance is not intended to interfere or impede on the Board's statutory independence. The Board will determine the relative weight of the action that led to the discharge and whether it supports relief or not. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition.

9. 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): Third-party statement submitted during hearing.

b. The applicant presented the following additional contention(s): Applicant, a character witness, and counsel provided oral arguments in support of the contentions they provided in their written submissions and in support of their documentary evidence.

c. Counsel / Witness(es) / Observer(s): Mr. J.G. (counsel), Mr. B.S. (witness)

10. BOARD DISCUSSION AND DETERMINATION:

a. As directed by the 2017 memo signed by ██████████ 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. Response to Contention(s):

(1) The applicant contends the applicant did not commit the misconduct alleged in the notice of separation and the government did not prove that the applicant committed the alleged misconduct. The Board considered this contention but found insufficient evidence and argument to overcome the findings of the CID investigation, which included an admission by the applicant. Therefore, a discharge upgrade is not warranted.

(2) The applicant contends the applicant's overall service record and post-discharge conduct are deserving of an honorable characterization of service. The Board considered the totality of the applicant's service record and the applicant's post-service accomplishments but determined that these factors do not outweigh the applicant's Aggravated Sexual Contact offense.

(3) The applicant contends the narrative reason for the discharge should be changed to "Secretarial Authority." The Board considered this contention but determined that, in the absence of mitigating factors, the applicant's Misconduct (Serious Offense) narrative reason for separation is proper and equitable.

(4) The applicant contends the RE code should be changed. The Board considered this contention and voted to maintain the RE-code at RE-3, which is a waivable 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 reentry eligibility (RE) codes, if appropriate.

c. The Board determined that the discharge is, at this time, proper and equitable, in light of the current evidence of record. The applicant has exhausted all available appeal options available with ADRB. However, the applicant may still apply to the Army Board for Correction of Military Records. The applicant is responsible for satisfying the burden of proof and providing documents or other evidence sufficient to support the applicant's contention(s) that the discharge was improper or inequitable.

d. Rationale for Decision:

(1) The Board voted not to change the applicant's characterization of service because, despite applying liberal consideration of all the evidence before the Board, the applicant was not found to hold an in-service behavioral health condition to mitigate or excuse the applicant's Aggravated Sexual Contact offense. The Board also considered the applicant's contentions regarding insufficient proof and good service but found that the totality of the applicant's record does not warrant a discharge upgrade. The applicant did not present any issues of impropriety for the Board's consideration. 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 General

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discharge was proper and equitable as the applicant's misconduct fell below that level of meritorious service warranted for an upgrade to Honorable discharge.

(2) The Board voted not to change the applicant's reason for discharge or accompanying SPD code under the same pretexts, and the reason the applicant was discharged was both proper and equitable.

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

11. BOARD ACTION DIRECTED:

- a. **Issue a New DD-214 / Separation Order:** No
- b. **Change Characterization to:** No Change
- c. **Change Reason / SPD Code to:** No Change
- d. **Change RE Code to:** No Change
- e. **Change Authority to:** No Change

Authenticating Official:

3/12/2024

X

Presiding Officer, COL, U.S. ARMY

Army Discharge Review Board

Legend:

AWOL – Absent Without Leave
AMHRR – Army Military Human
Resource Record
BCD – Bad Conduct Discharge
BH – Behavioral Health
CG – Company Grade Article 15
CID – Criminal Investigation
Division
ELS – Entry Level Status
FG – Field Grade Article 15

GD – General Discharge
HS – High School
HD – Honorable Discharge
IADT – Initial Active Duty Training
MP – Military Police
MST – Military Sexual Trauma
N/A – Not applicable
NCO – Noncommissioned Officer
NIF – Not in File
NOS – Not Otherwise Specified

OAD – Ordered to Active Duty
OBH (I) – Other Behavioral
Health (Issues)
OMPF – Official Military
Personnel File
PTSD – Post-Traumatic Stress
Disorder
RE – Re-entry
SCM – Summary Court Martial
SPCM – Special Court Martial

SPD – Separation Program
Designator
TBI – Traumatic Brain Injury
UNC – Uncharacterized
Discharge
UOTHC – Under Other Than
Honorable Conditions
VA – Department of Veterans
Affairs