

**1. Applicant's Name:**

- a. **Application Date:** 26 May 2023
- b. **Date Received:** 8 June 2023
- c. **Counsel:** Yes

**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, through counsel, requests an upgrade to Honorable, a narrative reason change to "Secretarial Authority," and both the separation and reentry codes changed.

b. **Counsel states.** The applicant seeks relief contending, in January 2018, [they were] found guilty at a Special Court-Martial (SPCM) and sentenced to be reduced to E-3, forfeit \$1,417.00 pay per month for three months, restriction to the limits of Fort Meyer for 60 days, and hard labor without confinement for 90 days. **Enclosures (4)-(5).** Following [their] court-martial, before the any legal review was conducted of the trial proceedings under R.C.M. 1112, [the applicant] was notified of administrative separation processing (with no board entitlement, and thereafter, [they] submitted a response to the notification on [14 February 2018]. **Enclosure (6).** On 8 March 2018, [they] separated from the Army with a General Under Honorable Conditions discharge. No discharge board was conducted. **Enclosure (7).**

(1) In September 2019, 20 months after [their] court-martial was completed, the Army conducted the R.C.M. 1112 legal review of [their] court-martial. **Enclosure (8).** Despite the allegations of error raised by [the] defense counsel[s] requests for clemency, which included discovery violations committed by the government during the trial, **[Enclosure (9); see also Enclosure (8)]**, the R.C.M. 1112 memorandum failed to address them as required under the law. **Enclosure (10).** Notably, the post-trial review had not even occurred until [the applicant's] counsel requested a copy of the review and then after numerous emails between August and October 2019 to determine the status. **Enclosure (11).** It is clear that the Army was derelict in performing a proper post-trial review in this case after a 2017 court-martial, which was not reviewed until two years later. As such, [the applicant] was denied proper and timely post-trial processing.

(2) [The applicant] enlisted in the United States Army in 2012. [They] reenlisted in April 2015 for another three years. **Enclosure (12) - (13).** [The applicant] was assigned to the Old Guard at Fort Meyer, VA and afforded the great honor and responsibility of guarding the Tomb of the Unknowns, an honor only afforded the finest Soldiers. Prior to [their] enlistment [the applicant] earned a Bachelor of Arts from Old Dominion University. **Enclosure (14).** While on active duty [the applicant] earned outstanding evaluations as well as two Army Achievement Medals, a Good Conduct Medal, and the Army Superior Unit Award. **Enclosure (15).** [They] served the Old Guard well. **Enclosure (16).**

(3) [The applicant] has always fully accepted responsibility for [their] actions resulting in [the applicant's] court-martial. However, what [they] contested was the nature and intent of [their] actions. The Army took what was considered horseplay among Soldiers and attempted to turn it into something far more sinister. As is apparent from the findings of the court martial, the members did not agree with the Army's characterization. The members excepted out any

offensive language and any physical contact involving slapping or shoving, leaving contact between Soldiers that is easily recognizable as horseplay. The members recognized this was horseplay between Soldiers and though not acceptable clearly was not warranting court-martial level punishment, and rather sentencing [the applicant] essentially to Article 15 level punishment.

(4) At the conclusion of [the applicant's] SPCM, the Army failed to properly and timely process the legal review of [their] case. The court-martial concluded on 20 October 2017. Convening Authority's action was effectuated on 26 January 2018. Despite [the applicant's] extensive and detailed clemency request, the Convening Authority (CA) failed to consider it. Rule for Court-Martial (R.C.M.) 1107(b)(3) (2016 ed.) requires the Convening Authority to consider any matters submitted by the accused in accordance with R.C.M. 1105. The Action in this case clearly is deficient in that the CA failed to indicate the consideration of the clemency matters submitted by [the applicant's] counsel on 10 January 2018. Clemency is a vitally important legal right of an accused and is the last opportunity an accused has for the findings and sentence to be reviewed, and for any relief granted by the Commander who ordered the court-martial.

(5) In this case, [the applicant's] counsel submitted a robust clemency package, with character statements and financial matters on [their] behalf and referenced the Defense Motion for Mistrial, yet the Army disregarded [the applicant's] post-trial rights in this regard and failed to have the convening authority review such matters prior to taking action in [their] case. Thus, it is as if [the applicant] received no clemency consideration by the convening authority at all, and now this Honorable Board must review this case for clemency.

(6) R.C.M. 1112 (2016 ed.) and AR 27-10 require that a Judge Advocate must conduct the legal review of the court-martial. In this case, no Judge Advocate conducted the legal review of [the applicant's] court-martial. A judge advocate is defined in Article 1(a), UCMJ, as "an officer of the Judge Advocate General's Corps of the Army or Navy." According to the R.C.M. 1112 memorandum dated 27 September 2019, the reviewer of [the applicant's] court-martial was a civilian employee of the United States Army, and not a judge advocate. Therefore, Mr. K. was not qualified, or authorized, to conduct the post-trial review of [their] court-martial. AR 27-10 sets forth how the Army can designate a Judge Advocate to conduct the legal review, nowhere does this instruction (or the Rules for Court-Martial) permit a civilian employee of the Army to conduct such review. As such, [the applicant's] case has not been reviewed and made final under the law.

(7) An example of why it is important to have a Judge Advocate conduct such a review is that the civilian employee failed to acknowledge that [the applicant] had raised legal error in [their] clemency petition. The R.C.M. 1112 memorandum claims that [the applicant] did not raise any legal error. This was a patently inaccurate statement. As a result of the defective review, this Honorable Board must now consider the legal errors raised by [the applicant], which are factual and legal insufficiency, as well as discovery violations committed by the government. It is only fair and reasonable for this board to consider the clemency matters that the convening authority and legal reviewer failed to consider and address.

(8) Unfortunately, [the applicant] was denied proper clemency consideration and post-trial legal review of [their] court-martial. During post-trial processing, [the applicant's] counsel submitted a clemency request on behalf of [their] client. During the trial, due to the government's discovery violations, defense counsel submitted a motion for a mistrial. On the first day of the trial in this case, the defense learned the government had withheld exculpatory evidence. This evidence has a substantial impact on the defense presentation of evidence and overall strategy, yet the legal reviewer failed to mention it in [their] post-trial review, and the Convening Authority

failed to consider it before taking action. The best opportunity a service member has for clemency is with the Convening Authority. However, in this case, the applicant was denied proper consideration before the General of all the matters in clemency, as well as the trial deficiencies claimed in clemency. Furthermore, the legal reviewer failed in [their] basic responsibilities to consider all matters, including the allegations of legal error raised by [the applicant]. As such, [the applicant] requests that this Honorable Board consider [them] for clemency at this time.

(9) [The applicant] was ordered to separate from the Army based solely upon this conviction. There is nothing in [their] record other than this court-martial warranting separation. To the contrary, [their] record warrants retention. Likewise, [they were] given a General discharge solely for the same reason. There is nothing else in [their] record warranting any but an Honorable discharge. The injustice in this case is [the applicant] was never provided an opportunity to present a case for [their] retention or Honorable discharge to [their] fellow soldiers. The only reason for this is that [the applicant was] one month short of six years of service when separated. [They were] never given the opportunity to have neutral and detached finders of fact, weigh the nature and severity of [their] offenses against [the applicant's] service and achievements and determine if the minor misconduct warranted a discharge or [their] service warranted retention on active duty. No one took the time to look the Soldier in the eye and see if [they] had learned a lesson, ask [their] plans for the future, and assess whether [they] had potential for future useful service. Rather, they simply looked at the court martial conviction and without thought or deliberation simply separated [the applicant].

(10) Had the Army taken the time to review [the applicant's] record, it would have seen the Soldier whose chain of command universally supported [them], even though the court martial providing statements to the court in [the applicant's] support. Had the Army convened a board they would have had the opportunity to hear from [the applicant's] family, members of [their] command, both senior and subordinate, as well as people who knew [them] at stages of [their] life. The board members would have heard how they believed [the applicant] was a [person] of character who made an error in judgment, but still had outstanding potential for future useful service, just as they testified on [the applicant's] behalf at [their] trial. An administrative board would also have seen the [person] today as evidenced by the remarkable character statements included with this petition, all of whom know [the applicant] personally or professionally.

**c. Board Type and Decision:** In a personal appearance conducted on 03 June 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:** 8 March 2018

**c. Separation Facts:**

**(1) Date of Notification of Intent to Separate:** NIF

**(2) Basis for Separation:** twelve specifications of cruelty and maltreatment of subordinates (Article 93, UCMJ)

**(3) Recommended Characterization:** NIF

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

**(5) Administrative Separation Board:** NA

**(6) Separation Decision Date / Characterization:** NIF

**4. SERVICE DETAILS:**

**a. Date / Period of Enlistment:** 2 April 2015 / 3 years (first reenlistment)

**b. Age at Enlistment / Education / GT Score:** 26 / bachelor's degree / 92

**c. Highest Grade Achieved / MOS / Total Service:** E-5 (SGT) / 11B10 Infantryman / 5 years, 11 months

**d. Prior Service / Characterizations:** Regular Army (9 April 2012 – 1 April 2015) / Honorable

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

**f. Awards and Decorations:** AAM-2, ASUA, AGCM, NDSM, GWOTSM, ASR

**g. Performance Ratings:**

- SGT (1 December 2014 – 30 November 2015) / Fully Capable
- SGT (1 December 2015 – 30 November 2016) / Highly Qualified

**h. Disciplinary Action(s) / Evidentiary Record:** Through counsel, the applicant provides the following:

**(1)** On 2 April 2015, the applicant completed their first reenlistment in the Regular Army for 3 years as an SGT, with 2 years, 11 months, and 24 days of prior active service. The Enlisted Record Brief provides the applicant has been awarded two Army Achievement Medals, an Army Superior Unit Award, and an Army Good Conduct Medal.

**(2)** [The applicant's evaluations for SGT] indicate the following, **Enclosure (17):**

**(a)** From 1 December 2014 – 30 November 2015: "Highly respected and dedicated NCO with unlimited potential...unwavering loyalty to [their] seniors, peers and subordinates...always placed the well-being of the mission, Army and Soldiers above [their] own...squad leader during the Best Squad Competition; named the best squad in the Battalion...cultivated an atmosphere of dignity and respect...possesses the potential to serve in positions of increased responsibility with continued mentorship and development".

**(b)** From 1 December 2015 – 30 November 2016: "Exceptionally selfless to subordinates; consistently coached and assisted Soldiers in maintaining uniform and ceremonial

precision...maintained a high level of morale within the squad...exceptional role model for Soldiers; projected self-confidence and authority...performed exceptionally well as a Squad Leader for three months...displayed tactical competency at a higher rank...selected as the platoon's uniform subject matter expert...constantly takes initiative by training the platoon...ranks #3 out of 6 highly qualified Team Leaders."

**(3)** On 3 May 2017, the applicant was charged in violation of twelve specifications for cruelty and maltreatment of subordinates (Article 93, UCMJ) and wrongfully communicating a threat to their subordinates (Article 134). The charges were referred to a SPCM.

**(4)** On 26 January 2018, the applicant was sentenced in a SPCM in violation of 12 specifications of cruelty and maltreatment of subordinates, as listed below. Their sentence was adjudged on 20 October 2017: to be reduced to the grade of PFC (E-3); to forfeit \$1,417.00 pay per month for three months; to be restricted for 60 days to the limit of Fort Myer, VA; to perform hard labor without confinement for 90 days. Charge I is in violation of Article 93, UCMJ, with the following, found guilty of nine out of the 12 charges:

**(a)** Specification 1: On or between 1 October 2014 – 15 April 2015, on divers occasions, at or near Joint Base Myer-Henderson Hall, Virginia, did maltreat SPC A. L., a person subject to their orders, by striking SPC's testicles with their hand; by calling SPC fat; by placing the palms of the applicant's hands on SPC's torso and having shoved them; and by having SPC slap themselves in the face, after the applicant ordered them to do so. Plea: Guilty. Finding: Guilty, except the words "a Mexican and". Of the excepted words: Not Guilty.

- Specification 3: On or about 22 June – 1 February 2016, did maltreat SPC H. M., a person subject to the applicant's orders, by having SPC slap themselves in the face, after the applicant ordered them to do so. Plea: Not Guilty. Finding: Guilty.
- Specification 4: On or between 1 May – 31 July 2014, did maltreat SPC J. B., a person subject to the applicant's orders, by striking SPC's testicles with the applicant's hand. Plea: Not Guilty. Finding: Guilty.
- Specification 6: On or about 1 October 2014 – 31 August 2016, on divers occasions, did maltreat SPC J. M., a person subject to [the applicant's] orders, by using [the applicant's] hand to strike SPC's testicles; by placing [the applicant's] hands on SPC's torso and showing [them]; and by calling SPC M. a skinny Jew, or words to that effect. Plea: Not Guilty. Finding: Guilty, except the words "and by calling Specialist M. a skinny Jew," or words to that effect. Of the excepted words: Not Guilty.
- Specification 7: On or between 12 January – 30 October 2016, on divers occasions, did maltreat PFC T. P., a person subject to [their] orders, by using [the applicant's] hand to strike PFC's testicles and by placing the palms of [their] hands on PFC's torso and shoving [them]". Plea: Not Guilty. Finding: Guilty, except the words "by placing the palms of [their] hands on Private First Class P.'s torso and shoving [them]".
- Specification 8: On or about 1 August 2014 – 30 June 2015, on divers occasions, did maltreat SPC J. P., a person subject to [their] orders, by using [the applicant's] hand to strike SPC P's testicles. Plea: Not Guilty. Finding: Guilty.

- Specification 9: On or between 20 January 2015 – 1 February 2016, did maltreat PFC H. W., a person subject to [the applicant's] orders, by using [their] hand to strike PFC's testicles and by placing the applicant's forearm on PFC's chest and showing them against a wall. Plea: Not Guilty. Finding: Guilty, except the words "by placing [their] forearm on Private First Class W.'s chest and". Of the excepted words: Not Guilty.
- Specification 11: On or about 1 February – 31 October 2016, on divers' occasions, did maltreat PFC J.S., a person subject to [their] orders, by calling [PFC] gay and by placing the palms of [the applicant's] hands on SPC S.'s torso and shoving [them]'. Plea: Not Guilty. Finding: Guilty, except the words "and by placing the palms of [their] hands on Specialist S.'s torso and shoving [them]". Of the excepted words: Not Guilty.
- Specification 12: On or about 9 February – 31 October 2016, on diverse occasions, did maltreat PFC I.S., a person subject to [their] orders, by using the palm of [the applicant's] hand to slap PFC's face and by placing the palms of [their] hands on PFC's torso and shoving [them]. Plea: Not Guilty. Finding: except the words "using the palm of [the applicant's] hand to slap Private First Class S.'s face". Of the excepted words: Not Guilty.

(b) Notwithstanding the missing separation documents, on 23 February 2018, their amended separation orders were issued. A DD Form 214 (Certificate of Release or Discharge from Active Duty) reflects the following:

- Authority: AR 635-200, Chapter 14-12c
- Narrative Reason: Misconduct (Serious Offense)
- SPD Code: JKQ
- Reentry Code: RE-3
- Service Characterization: General (Under Honorable Conditions)
- Total NET Active Service Period: 5 years, 11 months
- Remarks: Member has not completed first full term of service. [administrative error as the applicant was on their first reenlistment]
- Lost Time: None
- Signature: Electronically signed.

(5) On 27 September 2019, a legal review (R.C.M. 1112 – Legal Review of Special Court-Martial, US v. [the applicant]) provides the court-martial had jurisdiction over the applicant and each offense to which there was a finding of guilty which was not disapproved. Each specification to which there was a finding of guilty which was not disapproved stated an offense. The sentence was legal. [The applicant] did not raise written allegations of error [although the applicant's sworn statement was dated 14 February 2018].

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

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

**(1) Applicant provided:** None

**(2) AMHRR Listed:** None

**5. APPLICANT-PROVIDED EVIDENCE:**

**a.** Enclosures: (1) Power of Attorney; (2) Privacy Act Release; (3) Application for Review of Discharge; (4) Two Charge Sheets; (5) Special Court-Martial Number One; (6) Separation Self-Authorized Statement; (7) Certificate of Release or Discharge from Active Duty; (8) Legal Review Memorandum; (9) Posttrial Documents; (10) Posttrial Motion for Mistrial (11) Emails; (12) Enlistment Documents; (13) Enlisted Record Brief; (14) Civilian Educational Records; (15) Awards and Commendations; (16) Old Guard Duty Awards; (17) Three Noncommissioned Officer Evaluation Reports; (18) Court-martial Character Statements; (19) Court-martial Testimonies; (20) Five Current Character Letters; (21) Self-Authorized Sworn Statement; (22) Civilian Awards; (23) Photographs

**b.** RADM (Ret), U.S. Navy, who has known [the applicant] since [they] were 10 years old, states: "[They] provided evidence of [the applicant's] high character at the trial ...Since [discharge from the Army], [the applicant] has attempted to clear [their] name and be reinstated into the Army. RADM must congratulate [them] on [their] drive and desire to pursue this goal. Any lesser individual would have been so bitter and disillusioned and that they would have just given up...have spoken with [the applicant] numerous times since the incident and am utterly amazed at [their] steadfast dedication to be reinstated into the Army. [Their] character has been above reproach as [they have] become a valuable member of the Booz-Allen team...would be honored to have [the applicant] as a member of my Command."

**(1)** COL (Ret), United States Army, who has known the applicant since high school states: "[They are] confident [the applicant] has taken responsibility for [their] actions, learned from [their] mistakes and overcome [their] situation...In September 2018, Booz Allen Hamilton, a major government contractor, selected [the applicant] as an operations management analyst for the Department of Energy... [they have] thrived. In the last two years, [the applicant] received three awards from [their] project manager that oversees 140 employees. The awards were based on the company's values and best practices. [The applicant] also constantly receives compliments and excellent reviews from [their] clients...would be a wise choice for the Army Reserves. If given the chance, [the applicant] won't let us, or the Army down-ever again."

**(2)** The applicant's Booz Allen Hamilton boss, states: "[They] have consistently found [the applicant] to be an extraordinarily knowledgeable and talented individual with an unmatched level of professionalism and unique ability to handle difficult situations with sensitivity...an outstanding team member who works very well with others...always brings a practical approach to situations, a "can-do" spirit that creates trust and confidence...possessing a sense of purpose and commitment to excellence....the passion [they] brings to [their] work outshines all others in similar roles that [the boss] have supervised...confident that [their] extraordinary skills and experience can once again benefit our United States Armed Forces...Without any reservation...strongly recommend [them] for the U.S. Army Reserves."

**(3)** CPT (Ret), U.S. Navy, who has known [the applicant] since [they were] young, states: "[The applicant] has always been an honest, respectful and diligent person...[their] commitment and attention to detail was evident... [they have] always openly shared [their] love for the Army and [their] desire to continue to serve [their] country. [The applicant] always wanted to serve for a career...Honor demands character above reproach and Robert epitomizes this. I respectfully and sincerely ask the governing authorities to view positively Robert's application to continue to serve the country as a soldier in the U.S. Army."

**(4)** LTC (Ret), U.S. Army, who have known [the applicant] all [their] life, state: "After joining the Army, [the applicant] continued to develop professionally, and always spoke very positively of [their] work, responsibilities, opportunity to serve [their] country, as well as [their] future in the Army...[the applicant] has always demonstrated compassion and respect for others...[the applicant] is a very fine person of exceptional moral character and can be trusted to always do the right thing....would not hesitate to have [them] in their unit...[the applicant] has

character and integrity the Army seeks in its soldiers."

**(5)** Furthermore, the character witnesses from [their] trial (close to 20 individuals), all attest to [their] patriotism and character. See Enclosure (18). A sampling of some of the specific comments from trial include:

**(a)** The applicant's father provides: "[They] believe [their child] can be a valuable member of society...can learn from [their] mistakes and be valuable to the military."

**(b)** The applicant's stepmother provides: "[They] observed [the applicant] as persistent, unflappable, quiet, and extremely physically fit... [they are] resilient... [the applicant] has the ability to learn from [their] mistakes. [They are] honest with themselves and [they do not] blame people... [The applicant] can be a very valuable member of society...what makes [them] valuable is steady, evenhanded.... [They are] mostly hardworking... can be a dedicated person trying to work hard to improve [themselves]."

**(c)** 1SG M. B., U.S. Army, stated: "[They are] very hard-working, detail oriented...usually strives for mission accomplishment... [The applicant] was an asset when [they were] working with [them]...absolutely can be rehabilitated."

**(d)** SFC G. G., U.S. Army, stated: "[The applicant] was willing to help. [They were] a take charge person...required little instruction...had a lot of passion...put in a lot of hours...always had the top uniform scores... [they will] learn from [their mistakes] ... [they going to take it and grow. [They are] going to utilize it, to expand, to become a better NCO...has a lot of value to the military...one of the hardest working NCOs [SFC has] had in [their] platoon...has the potential to be a valuable member of society."

**(e)** SGT A. S., states: "[They] observed that [the applicant] was a hard-worker, very easy to talk to, professional. [The applicant] always wanted to get the job done, but [they] wanted to make sure it was done right ... [The applicant] never tried to cut corners... [the applicant] possesses value to the military."

**(f)** Mr. A. was one of the named victims in the case, and [they] testified in sentencing for [the applicant]: "[They] think [the applicant] has rehabilitative potential...can still have value to the Army. [The applicant is] a subject matter expert in the Old Guard. [The applicant] definitely knows [their] stuff when it comes to the Old Guard...When [the applicant] took [Mr. A.] under [their] team, [the applicant] was able to get really quickly [them] assimilated to the untied...with the NCOs that [Mr. A. has] had, [the applicant is] probably the most knowledgeable...was a caring leader."

**(g)** CPT J. D, U.S. Army, stated: "[The applicant] always acted as a respectable and knowledgeable NCO...Many times [the applicant] took the initiative and started training the soldiers to ensure they met the standard, and [CPT] always noted that [the applicant] acted professional...a respectful, hardworking and responsible leader... With minimal guidance, [they] performed many tasks exceptionally well and often independently of the rest of the staff section. [CPT] trusted [the applicant], and [they] proved to be very knowledgeable on certain topics. Also, [the applicant] consistently strived to ensure the battalion had all available resources and information to complete any mission."

**(h)** CPT J. K., (the applicant's company commander at 4th Battalion, 3d U.S. Infantry Regiment (The Old Guard)), provides: "[CPT] can say with certainty that [the applicant] is an outstanding [NCO] in our Army. [The applicant] has shown [themselves] to be a valuable asset to the Old Guard, and contributes significantly to our ceaseless mission in the National



Capital Region...[the applicant] is an honorable and trustworthy person... is in fact the [NCO] our Army needs...[CPT has] personally witnessed [them] on countless occasions mentoring younger Soldiers, either in the gym, coaching marksmanship on the range, or teaching new Soldiers how to prepare their uniforms. In this role [the applicant] is patient, professional and fair. [CPT] wish[ed] there were more [people] like [them]."

(i) CPT J. G., U.S. Army provides: "[They] have worked with [the applicant] the past 26 months...one of the most professional and dedicated NCOs [they] have ever had the pleasure of working with. He is an extraordinary leader that has proven himself in under heavy pressure, ceremonies, and without fail, a reliable leader who takes care of Soldiers in the Headquarters Platoon. The one character that stands out about [the applicant] is [their] ability to work with others...has always maintained an excellent working relationship between senior leaders, subordinates and [their] peers in the organization...was hand selected and working two of the most challenging platoons, The Tomb of the Unknown Soldier and the Presidential Escort Platoon due [their] maturity, dedication, professionalism and leadership potential...would fight to serve with this NCO again in the future."

**6. POST SERVICE ACCOMPLISHMENTS:** [The applicant] has many accomplishments since departing military service and [their] reputation in the community is outstanding, and despite [their] conviction, [the applicant] desires to continue to serve the military. **Enclosure (20) - (22).** [The applicant] has been employed with Booz Allen since 2018 and [their] current title is "Senior Consultant." Notably, the individuals that have provided character statements for [them] cite [their] Honorable service and good character.

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

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

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

(1) Individually and collectively, these documents provide further clarification to the Military Discharge Review Boards and Boards for Correction of Military/Naval Records when considering requests by Veterans for modification of their discharge due to mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment. Liberal consideration will be given to Veterans petitioning for discharge relief when the application for relief is based in

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

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

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

d. Army Regulation 635-200 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) An Under other-than-honorable-conditions discharge is an administrative separation from the Service under conditions other than honorable and it may be issued for misconduct, fraudulent entry, security reasons, or in lieu of trial by court martial based on certain circumstances or patterns of behavior or acts or omissions that constitute a significant departure from the conduct expected of Soldiers in the Army.

(4) Chapter 14 establishes policy and prescribes procedures for separating members for misconduct. Specific categories include minor disciplinary infractions, a pattern of misconduct,

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

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

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

f. Army Regulation 601-210, Regular Army, and Reserve Components Enlistment Program, governs eligibility criteria, policies, and procedures for enlistment and processing of persons into the Regular Army, the U.S. Army Reserve, and Army National Guard for enlistment per DODI 1304.26. It also prescribes the appointment, reassignment, management, and mobilization of Reserve Officers' Training Corps cadets under the Simultaneous Membership Program. Chapter 4 provides the criteria and procedures for waiverable and nonwaiverable separations. Table 3-1, defines reentry eligibility (RE) codes:

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

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

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

g. Manual for Courts-Martial (2016 Edition), United States, states military law consists of the statutes governing the military establishment and regulations issued thereunder, the constitutional powers of the President and regulations issued thereunder, and the inherent authority of military commanders. Military law includes jurisdiction exercised by courts-martial and the jurisdiction exercised by commanders with respect to nonjudicial punishment. The purpose of military law is to promote justice, to assist in maintaining good orders and discipline in the Armed Forces. Article 93 (cruelty and maltreatment of subordinates) states in the subparagraph, the maximum punishment consists of a dishonorable discharge, forfeiture of all

pay and allowances, and confinement for two years.

**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 a narrative reason change. A review of the records provides there was administrative irregularity in the proper retention of official military records, specifically, the separation package.

b. The available evidence provides the applicant completed their first reenlistment for 3 years as a SGT, with 2 years, 11 months, and 24 days of prior active service. The applicant served for 2 years, 1 month, and 1 day prior to having been charged with 12 specifications of cruelty and maltreatment of subordinates, in which charges were referred for a SPCM, resulting a guilty decision for nine of the charges. Their sentence was adjudged a reduction to PFC; forfeiture of some pay and allowances for three months; and was restricted for 60 days on Fort Myer; to perform hard labor without confinement for 90 days. Defense counsel requested a motion to declare a mistrial; requested deferment of the adjudged rank reduction and forfeitures for six months to avoid the applicant becoming financially insolvent; however, all was denied. The sentence was approved and executed. Notwithstanding the missing documents, they were processed for separation under the provisions of AR 635-200, Chapter 14-12c, Misconduct (Serious Offense), and discharged with a General (Under Honorable Conditions) characterization of service. The applicant provided a statement requesting to be retained in the Army or released with an Honorable, as they have been punished enough; this was subsequently denied.

(1) There is no evidence of a mental status and/or medical examination in the record or provided by the applicant, through counsel.

(2) They served for 2 years, 11 months, and 7 days of their 3 year contractual 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. 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):

b. The applicant presented the following additional contention(s):

**c. Counsel / Witness(es) / Observer(s):****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? **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): The applicant, through counsel contends, for all of the foregoing reasons, an upgrade to Honorable characterization of service; change blocks 25, 26, and 28 of their DD Form 214 thereby removing all references to misconduct and replacing it with "Secretarial Authority" or such equivalent; and change block 27 to "RE-1". The board considered this contention and determined that General Under Other Than Honorable Conditions characterization of service, the separation authority (AR 635-200, PARA 14-I2 C), separation code, and narrative reason for separation is proper and equitable because there were no in service behavioral health mitigating factors for the board to consider and the applicant was discharged for misconduct (serious offense) for cruelty and maltreatment of subordinates. Therefore, no change is warranted.

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 their 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 there were no mitigating factors for the board to consider. The applicant's discharge for misconduct (serious offense) of cruelty and maltreatment of subordinates General (Under Honorable Conditions) is proper and equitable. The applicant ignored his misconduct and continued to inflict cruelty and maltreatment to several of his subordinates. 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, no change is warranted.

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

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

**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:**

12/3/2024

**X**

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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