

IN THE CASE OF: ██████████

BOARD DATE: 31 January 2022

DOCKET NUMBER: AR20200008228

APPLICANT REQUESTS:

- Reversal of the U.S. Army Medical Command (MEDCOM) decision to revoke his medical credentials
- Removal of incorrect information in the National Practitioner Databank (NPDB)
- Removal of three referred Officer Evaluation Reports (OER) from his official records:
 - 2011, 1 July 2011 to 6 October 2011
 - 2012, 7 October 2011 to 6 October 2012
 - 2014, 7 October 2012 to 9 May 2014
- Restoration and retroactive entitlement to Army Medical Corps Officer Special Pay (MASP)
- Change of the authority for his separation to disability retirement
- Retroactive promotion to grade/pay grade colonel/O-5
- Retirement in grade/pay grade colonel/O-5
- Change the narrative reason for separation to Secretarial discretion
- Rescission of his Occupational and Environmental (OEM) residency
- Reimbursement of legal fees with interest for the costs incurred as a result of his appeal of his General Court-Martial conviction, a DNA hair follicle lab test, and the costs incurred for the rescission of the revocation of his OEM Residency and credentials
- Personal appearance hearing before the Board

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record), 5 August 2020
- Counsel Statement (25 pages), undated
- DA Form 4856 (Developmental Counseling), 20 July 2011
- DD Form 2624 (Specimen Custody Document), 8 August 2011
- (Company) Test Results, 30 August 2011
- DA Form 67-9 (Officer Evaluation Report), 31 October 2012 (1 July 2011 to 6 October 2011)
- Self-authored OER Rebuttal, 31 October 2012
- General Court-Martial Trial Transcripts, 27 September 2012

- Memorandum, Substance Abuse Rehabilitation Department (SARD), JB Lewis-McChord, 5 March 2013 (SARD Treatment Summary (Applicant))
- memorandum, Madigan Army Medical Center (MAMC), 12 August 2013 (Minutes of Credential Committee Hearing, 19 June 2013) (6 pages)
- memorandum, Western Regional Medical Command (MEDCOM), 10 September 2013 (Notification of Result of 5 September Termination Hearing)
- NPDB, MEDCOM, Correction to Title IV Medical Privileges, 25 November 2013
- DA Form 67-9, 2 September 2014 (7 October 2012 to 9 May 2014)
- memorandum, Western Regional MEDCOM and MAMC, 29 June 2014 (Rebuttal to Referred OER (Applicant)) (7 pages)
- DA Form 268 (Report to Suspend Favorable Personnel Actions (FLAG), 12 January 2015
- Forensic Biology Laboratory (Company) Report, 20 January 2015
- Forensic Biology supplemental information document, undated
- Forensic Biology Laboratory Supplemental Report, 20 January 2015
- email, Internal DoD Hotline, 11 May 2015 (26 pages)
- Memorandum Opinion, U.S. Army Court of Criminal Appeals, Case ██████████, 17 July 2015 (19 pages)
- General Officer Memorandum of Reprimand (GOMOR), Commanding General (CG), Headquarters (HQ), I Corps, Joint Base (JB) Lewis-McChord, 27 August 2015 (Memorandum of Reprimand)
- memorandum, Headquarters and Headquarters Company, AMEDD Troop Command, Madigan Army Medical Center (MAMC), 2 September 2015 (Acknowledgement of Receipt of Reprimand)
- letter, Dr. ██████████ 6 September 2015
- memorandum, Counsel, 22 September 2015 (Rebuttal to GOMOR, Request to Withdraw GOMOR, and Request to File GOMOR Locally) (5 pages)
- memorandum, DCG, HQ, I Corps, JB Lewis-McChord, 15 October 2015 (Reprimand Filing Determination (Applicant)) with enclosures
- memorandum, HQ, I Corps, JB Lewis-McChord, 21 October 2015 (Initiation of Elimination)
- memorandum, HQ, I Corps, JB Lewis-McChord, 30 January 2016 (Notification to Appear before a BOI)
- Affidavit of ██████████ 10 February 2016
- DA Form 1574 (Report of Proceedings by Investigating Officer/Board of Officers), 3 March 2016 (32 pages)
- memorandum, CG, HQ, I Corps, JB Lewis-McChord, 4 March 2016 (Disposition Concerning Board of Inquiry (BOI) Findings and Recommendations)
- Memorandum, Office of The Surgeon General, 28 September 2016 (Decision Regarding NPDB Report)
- letter, Physicians' Advocates, 28 September 2016

- letter, Department of Health and Human Services (DHHS), Bureau of Health Professions (BHP), 16 November 2016
- Officer Record Brief, 13 December 2016
- letter, (Company) laboratory, 17 December 2016
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 31 December 2016
- letter, The Inspector General, 19 January 2017, Freedom of Information Act Request
- Department of the Army Special Evaluation Board (DASEB) Case [REDACTED], 8 June 2017 with supporting evidence
- email, applicant and Physicians' Insurance Company, 30 April 2020
- memorandum, Applicant, 27 July 2020 (Appeal of Notification of Result of 5 September 2013 Termination Hearing)
- letter, Washington Physicians' Health Program, 28 July 2020
- Applicant Resume, not dated

FACTS:

1. The applicant did not file within the three-year time frame provided in Title 10, United States Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant states, through counsel:

a. The applicant originally submitted an application in 2018 in appeal to the issues listed above but his application was returned by mail because he did not sign the application. The case was subsequently closed after 60 days because he did not respond. Neither he nor his attorneys were aware the case had been returned and subsequently closed because the ARBA letter notifying him to sign and resubmit his application was returned and he and his attorneys were not aware the case was closed but were still waiting the Board's decision.

b. The applicant:

- graduated from (City) College of Osteopathic Medicine in 1998 as a Doctor of Osteopathic Medicine
- completed internship at Tripler Army Medical Center in 1999
- served at a general medical officer from 1999 to 2008
- was promoted to major/O-4 in 2004
- was selected for residency at MAMC

- graduated from (City) University in 2010 with a master's degree in public health

c. He tested positive for cocaine and was notified of a unit urinalysis result in 2011. He was tried by a General Court-Martial convening authority in 2012. Contrary to his not guilty plea, he was convicted of one specification of wrongful use of a controlled substance, sentenced to forfeiture of all pay and allowances, and 24 months confinement. The military trial defense failed to introduce evidence of a 29 August 2011 hair follicle test which tested negative to a zero-detection level for any controlled substance.

d. The applicant appealed his conviction to the U.S. Army Court of Criminal Appeals (ACCA) and filed a petition for a new trial because a forensic DNA test of the same urine sample tested by the Tripler Army Medical Center Forensic Toxicology Drug Testing Laboratory, revealed there were two contributors to his urine sample. It concluded some of the urine came from an unknown contributor at a 60 to 40 ratio.

e. On 10 September 2013, the Director, Graduate Medical Education, Western Regional Medical Command and Madigan Army Medical Center (MAMC) informed him that the Deputy Commander for Clinical Services approved the Graduate Medical Education Committee's recommendation to terminate him from the Occupational and Environmental Medicine training program.

f. On 25 November 2013, his clinical preventive medicine privileges at MAMC were terminated.

g. On 20 January 2015, MAMC filed an adverse report with National Practitioner Databank (NPDB).

h. On 20 January 2015, the applicant sent the Commanding Officer, MAMC, a copy of the results of the secondary urine drug screen revealing presence of another person's urine.

i. On 17 July 2015, the ACCA (Army Court of Criminal Appeals) set aside his conviction. The ACCA concluded his attorney deprived him of the effective assistance of counsel because introduction of the hair follicle test would have resulted in an acquittal. The ACCA authorized a retrial but the convening authority declined to retry him and declined to send the case to another general court-martial convening authority.

j. In July and August 2015, the requested rescission of the revocation of his medical credentials and reinstatement as a staff physician through his MAMC chain of command. He received a letter from the Commander, MAMC stating all credentialing matters rested with The Surgeon General of the Army.

k. On 10 August 2015, he received notice from several officials at MAMC The Surgeon General decided to revoke the 20 January 2015 NPDB report and he should reapply for his MAMC credentials. Later that day the Chief Medical Officer, MAMC advised him to hold his application and await further instructions.

l. On 14 August 2015, he notified the Commander, MAMC of the results of the secondary urine drug screen and requested an investigation. He received no response so he made multiple requests to identify the unknown donor. Eventually MG [REDACTED] denied the requests for an investigation.

m. On 2 September 2015, he received a GOMOR from Deputy Commander, I Corps, MG [REDACTED] for his unprofessional behavior in the presence of a junior noncommissioned officer. He requested removal of the GOMOR.

n. On 23 November 2015, MAMC filed a corrected report with the NPDB. The corrected report removed the original reference to his court-martial conviction but otherwise remained the same.

o. On 8 January 2016, he submitted a FOIA request for a complete record of allegations regarding MEDCOM's assertion he failed to answer an emergency room consultation.

p. On 25 January 2016 he filed a complaint with the DoD IG alleging abuse of authority by various members of his chain of command.

q. On 29 February 2016, DoD IG informed him the abuse of authority complaint was unsubstantiated. His FOIA request of the investigation was heavily redacted.

r. A March 2016, Board of Inquiry (BOI) was convened to show cause for his retention in the Army. The BOI unanimously voted to retain him. It further found:

- the allegation he failed to respond to alcohol or drug problem was not supported by a preponderance of the evidence
- the allegation he had substantiated derogatory activity resulting in a GOMOR, 27 August 2015, was not supported by a preponderance of the evidence
- he would most likely not have received a GOMOR, 27 August 2015 if not for the drug charge and most likely would have been formal counseling

s. Testimony from a former Chief of Occupational Medicine, MAMC, during the BOI, highlighted doubts in the validity of the urinalysis sample methodology; highlighted supporting results of the hair test, and suggested the government should conduct DNA testing on the sample.

t. On 16 March 2016, HRC advised the applicant of a mandatory retirement date of 30 November 2016.

u. On 1 July 2016, the applicant petitioned the Department of the Army Suitability Evaluation Board (DASEB) to remove the 27 August 2015 GOMOR. On 8 June 2017 the DASEB removed this GOMOR and all related documents from his OMPF and considered the decision retroactive and it constituted a basis for promotion reconsideration.

v. On 8 December 2017, The Surgeon General sent its decision by letter to MEDCOM that the NPDB report was accurate and would remain unchanged but the decision was not sent to the applicant.

w. On 5 March 2018, the DHHS, BHP notified the applicant his request for the Secretary of DHHS to void the 23 November 2015 NPDB Clinical Privileges Action Report was denied. It acknowledged it did not have the authority to take his requested action as per a memorandum of understanding between the DoD and NPDB. The Surgeon General was granted to sole authority to determine which actions and individuals are reportable. Pursuant to a Memorandum of Understanding between the NPDB and the DoD, the Secretary of the DHHS can only review whether the adverse report is accurate, complete, timely, or relevant. The Secretary DHHS could review only whether the report accurately describes the reporter's action and reason for action. The Secretary DHHS determined there was no basis to conclude the report should not have been filed.

x. MEDCOM corrected its initial report to the NPDB by removing the language referring to the general court-martial but has consistently refused to void the report, despite the negative hair follicle test, the conclusive proof the urine sample was contaminated, the BOI findings, and the DASEB removal of the GOMOR. MEDCOM's refusal to void the NPDB report has prejudiced the applicant's ability to secure civilian employment. Three potential employers have retracted interview offers or refused to speak with him after he voluntarily disclosed history to them.

y. His OERs for the rating periods 1 July 2011 to 6 October 2011 and 7 October 2011 to 6 October 2012 explicitly reference a positive drug screen and his conviction, respectively. In his OER for the rating period 7 October 2012 to 9 May 2014 his rater and senior rater evaluated and rated him because of bias due to his wrongful conviction. In his OER for the rating period 7 October 2012 to 9 May 2014 his rater did not evaluate and rate him because of bias due to his wrongful conviction.

z. He lost his credentials and ability to practice medicine because of his wrongful conviction. The ACCA decision, negative hair follicle test, and forensic and genetic testing have all exonerated him.

aa. MEDCOM asserts he has failed to acknowledge any issues with drugs. The BOI's findings contradict this statement by specifically finding he self-referred for rehabilitation efforts.

bb. MEDCOM vaguely described several instances of unprofessional behavior including failure to respond to ED consultation when called. The BOI and GOMOR concerned one instance of unprofessional behavior; his inappropriate comment to a junior NCO. The DASEB concluded that the BOI repudiated the imposition of the GOMOR.

3. A review of the applicant's service records shows:

a. On 27 February 1994, he was appointed a Reserve Commissioned Officer in the Army and commissioned a second lieutenant.

b. On 24 May 1998, he received his Doctorate of Osteopathic Medicine at (City) College.

c. On 6 June 1998, he was promoted to captain/O-3 in the Army Medical Corps.

d. On 23 October 2000, he was reprimanded by the Commanding General (CG), 101st Airborne Division and Fort Campbell for misconduct. The GOMOR was imposed as an administrative action and not punishment under the Uniform code of Military Justice. On 8 January 2001, the CG directed the GOMOR be filed in the performance section of his official military personnel file (OMPF) which is part of the Army Military Human Resource Record (AMHRR). The GOMOR reads, in part:

(1) He was driving a motor vehicle on 1 October 2000, in the State of [Name of State], with a blood alcohol content of .10 percent or higher, in violation of State law.

(2) The Army consistently emphasizes the tragic consequences of driving after drinking, but he has ignored this. Further, it is essential that he understand that as an officer he is expected to set a proper example for the young Soldier to follow.

e. He completed foreign service:

- in Egypt, 7 October 1999 to 8 November 1999 (1 month)
- in Kenya, 13 March 2000 to 15 March 2000 (3 days)

- in Tanzania, 7 March 2000 to 12 March 2000 (1 week) and 26 April 2000 to 5 June 2000 (1 month and 1 week)
- in Uzbekistan, 16 September 2001 to 30 November 2001 (3 months)
- in Iraq, 17 October 2003 to 22 February 2004 (4 months)

f. On 6 June 2004, he was promoted to Major/O-4.

g. On 27 October 2004, the DASEB voted to approve the transfer of the GOMOR (8 January 2001) based upon intent served. It was not considered retroactive and did not constitute grounds for referral to a Special Selection Board (SSB) for a previous non-selection.

h. He completed periods of foreign service:

- in Egypt, 27 July 2004 to 26 September 2005 (2 months)
- in Russia, 28 July 2007 to 6 August 2007 (1 week)

i. On 1 April 2011, he applied to the Chief, Special Pay Branch, Office of the Surgeon General, for MASP, contingent upon his agreement to remain on active duty for a continuous period of 1 year, beginning 1 July 2010.

j. On 18 May 2010, he applied to the Chief, Special Pay Branch, Office of the Surgeon General, for MASP, contingent upon his agreement to remain on active duty for a continuous period of 1 year, beginning 1 July 2011.

k. He provided through counsel, a copy of:

(1) A urinalysis report, Tripler Army Medical Center, 28 July 2011, showing a positive cocaine result of a specimen entered under his social security number.

(2) A (Company) Diagnostics test result of a hair specimen, 30 August 2011, showing a negative result for cocaine, metabolites and other drugs.

l. On 27 September 2012, a General Court-Martial, was convened at HQ, I Corps, Joint Base Lewis-McChord, WA.

m. On 31 October 2012, he received a referred Officer Evaluation Report (DA Form 67-9) for his 3 months duty for the period 1 July 2011 to 6 October 2011, as an Occupational and Environmental Medicine Resident at MAMC, MEDCOM. The reason shown for submission of the report, reads in part, he was he lost his medical credentials and his residency and was suspended as a result of a positive urine drug screen. Previously, his work as a resident was marred by an episode of unprofessional

conduct toward a junior noncommissioned officer while seeking care for his medical issues. The senior rater evaluated his promotion potential to the next higher grade as 'Do Not Promote.'

n. On an unspecified date, he provided a self-authored rebuttal in response to the referred OER. His rebuttal reads, in part:

(1) On 20 July 2011, he was counseled for unprofessional behavior in the presence of a noncommissioned officer. This behavior involved complaining about the leave policy at the time and uttering one profane word during his complaint. He knew it was wrong as soon as he did it and admitted so promptly. As part of his counseling he was given an assignment at program level remediation. He enthusiastically completed his assignment and made a special visit to the NCO to apologize in person.

(2) During the months of July and August 2011, he was under significant stress as his health was declining and affecting his cognitive abilities. Despite multiple visits to the emergency room a cause of his symptoms was not found. Approximately 19 days after this incident he presented with acute appendicitis and it was removed on 9 August. He believed his judgement was affected by his physical discomfort and illness.

(3) On 24 August 2011, he was informed he screened positive for cocaine on a routine drug urinalysis. He is an alcoholic in recovery pursuing a sober lifestyle. He has never used cocaine and never will. He has over 23 years of negative urine drug screens. He has never had any interest in using cocaine whatsoever. He is actively involved in the recovery community, Alcohol Anonymous, and the Army Substance Abuse Program. Cocaine has never been mentioned in any of his substance abuse records. His counselors can verify that cocaine has never been mentioned in his records.

(4) The reason he went to this urinalysis was because his name had appeared on the list the week prior on 22 July 2011 and he didn't want to miss two tests in a row. He questions that if he had willfully used cocaine why would he attend a urine drug screen that he was not required to attend.

o. On 15 November 2012, he received a referred OER for his 12 months duty during the period 7 October 2011 to 6 October 2012, as an Administrative Assistant at Madigan Healthcare System, Tacoma, MEDCOM. The reason shown for submission of the report, reads in part, on 27 September 2012, he was convicted of a positive urinalysis.

p. On an unspecified date, he provided a self-authored rebuttal in response to the referred OER. His rebuttal reads, in part:

(1) On 27 September 2012, he was convicted for a urine drug screen positive for cocaine. He has never used and never will use cocaine. There were several problems with his trial that he believed would cause the finding to be overturned on appeal.

(2) He was denied his right to due process by not being given adequate time to have his urine independently tested. His hair follicle test was negative. His lawyer failed to obtain the litigation packet from the laboratory that processed his specimen.

q. General Court-Martial Orders Number 17, issued by Headquarters, I Corps, 15 May 2013, show he was found guilty of one specification of wrongful use of cocaine between on or about 20 July 2011 and on or about 28 July 2011. He was sentenced to forfeiture of all pay and allowances and confinement for 24 months. The sentence was adjudged on 27 September 2012. The sentence to confinement was deferred on 28 September 2012, and the deferment was terminated on 12 October 2012.

r. He served confinement from on or about 12 October 2012 to 15 May 2013 when the GCMCA suspended the remaining confinement and forfeitures for 6 months, at which point they were remitted.

s. He provided through his attorney, a copy of:

(1) A memorandum, ASAP, JB Lewis-McChord, 5 March 2013, showing he met the criteria for alcohol dependence on 12 November 2012, and following treatment he was compliant and actively participated in the treatment groups. He was disenrolled as a successful rehabilitation effort on 24 October 2012.

(2) A memorandum, MAMC, 12 August 2013 (Minutes of Credentials Committee Hearing, 19 June 2013), showing a special credentials Committee hearing convened and decided to recommended his privileges by revoked on 10 May 2013.

(3) A memorandum, Western MEDCOM, 10 September 2013, (Notification of Result of 5 September 2013 Termination Hearing), showing the Deputy Commander of Clinical Services (DCCS) approved the recommendation of the Graduate Medical Education Committee (GMEC) to terminate him from the Occupational and Environmental Medicine training program. (Note: He appealed this decision on 27 July 2020-see below in this ROP)

(4) A NPDB, U.S. Army MEDCOM correction to Title IV Clinical Privileges, 25 November 2013, showing a request to destroy all copies of the previous report. The report reads, in part, on 25 November 2013, the clinical preventive medicine privileges of (Applicant) were revoked following appropriate due process proceedings, after he tested positive for cocaine during the duty day, failed to acknowledge any issues with

drugs, and failed to fully respond to questions concerning his past issues with alcohol. Several instances of unprofessional behavior also contributed, including failure to respond to ED consultation when called.

(a) The applicant subsequently requested Secretarial (DHSS) review of the report (5 March 2018).

(b) The Secretary responded that the reporting requirements of the DoD are governed by the DoD Directive Number 6025.13, 17 February 2011. The Surgeon General of the appropriate military service is granted the sole authority to determine which actions and individuals are reportable. The Secretary can review only whether the report accurately describes the reporter's action and reasons for action as stated in the reporter's decision documents. After review of the available information, the Secretary determined that there is no basis to conclude that the report should not have been filed or that for agency purposes it is not accurate, complete, timely, or relevant. Accordingly, the report shall be maintained as submitted by the DoD.

t. On 2 September 2014, he received a referred OER for his 11 months duty during the period 7 October 2012 to 9 May 2014 as a project analyst, MAMC, JB Lewis-McChord. The reason shown for submission of the report, reads in part, his potential to serve as a Medical Corps Officer was limited by the fact that his clinical privileges were revoked. He had the potential to serve as a Medical Service Corps officer with additional training and reclassification. His senior rater recommended he should not be promoted.

u. On 29 June 2014, he provided a seven page rebuttal to his OER for this period. His rebuttal reads, in part, the OER did not accurately reflect his performance and contributions during the rating period, nor was it consistent with the feedback he received from this rater and senior rater. Procedures were not followed in accordance with DA PAM 623-3, paragraph 2-28. He contented his rater's evaluation, GS [REDACTED] and his senior rater's comments, COL [REDACTED] on his potential. He reiterated that was awaiting the outcome of the appeal of his trial conviction, and though it was not the forum to plead his case, he contextualized the conviction and subsequent removal of his credentials as creating second and third order effects on his work climate, his performance evaluation, and bias on the part of his rater and senior rater. He was not initially given an option to make comments but was told to sign his OER that day or it would be marked 'refused to sign.' Only after consulting with an attorney did his rater give him time to submit comments in response to the referred OER.

v. He provided through counsel, a copy of:

(1) A DA Form 268, 15 January 2015, showing HRC initiated a flag by reason of recommendation for involuntary separation.

(2) A (Company) Laboratory Report, 20 January 2015, showing a DNA profile rendered from the urine sample collected in his original urinalysis contained a mixture of at least two contributors.

(3) An email confirmation of a DoD IG hotline report he filed relating a false narrative and retribution against him while he was assigned to MAMC.

(4) A U.S. Army Court of Criminal Appeals Memorandum Opinion (Case Number Army ██████████), 17 July 2015, showing the Court set aside the findings of guilty and the sentence. The Court found, in part, had defense counsel properly investigated the hair follicle testing in time for potential use at trial and had called COL ██████████ as a witness to corroborate appellant's testimony, there is a reasonable probability that the result of appellant's trial would have been different. The Court concluded all rights, privileges, and property, of which appellant has been deprived by virtue of the findings and the sentence, be set aside by its decision and ordered them restored.

w. On 27 August 2015, the Commanding General, AMEDD Troop Command, MAMC reprimanded him for unprofessional behavior in the presence of a junior noncommissioned officer, and for a positive test for cocaine on 20 July 2011. The GOMOR (GOMOR 2) was imposed as an administrative measure and not as punishment under the UCMJ. (Note: the date of the urinalysis was 28 July 2011).

x. He provided through counsel, a copy of:

(1) A memorandum from Dr. ██████████, to the DCG, HQ, I Corps, JB Lewis-McChord, 6 September 2015, showing a sample of the original urine specimen he provided for a drug screen was contaminated by the presence of at least two DNA sources, rendering the original sample as an invalid urine drug screen. This determination was supported by the secondary independent exculpatory evidence of a hair analysis, collected on 25 August 2011. The Dr. further addressed skepticism regarding his submission of a chest hair sample, stating the skepticism had no scientific basis, while hair testing was more sensitive than urine testing.

(2) A memorandum from Dr. ██████████ to the DCG, HQ, I Corps, JB Lewis-McChord, 16 September 2015, containing an opinion as to ongoing medical conditions that affected the applicant and how these conditions affected his central nervous system and contributed to his actions in July 2011.

(3) A letter from (City) Physician's Health Program, 18 September 2015, showing he was in full compliance with his monitoring/therapy treatment plus random urine toxicology testing.

(4) A memorandum from his counsel, 22 September 2015, rebutting his second GOMOR, 27 August 2015. His counsel's rebuttal reads, in part:

(a) The GOMOR reprimands him for two incidents: the unprofessional behavior in the presence of a junior noncommissioned officer and the positive cocaine urinalysis.

(b) On 17 July 2015, the U.S. Army Court of Criminal Appeals (ACCA) set aside his conviction. The ACCA agreed that his trial defense counsel's performance was so deficient that it violated his Sixth Amendment right to counsel.

(c) Regarding the first incident, he accepted full responsibility for his unprofessional behavior in the presence of a junior noncommissioned officer. However, it was an arbitrary nature for a reprimand given it was for a 4 year old incident for which he had already received a formal counseling and for which he had then acknowledged his unacceptable behavior and apologized to the NCO.

(d) Regarding the second incident, his urine sample was tested by an independent lab and shown to be contaminated by two contributors of DNA. The forensic hair follicle test tested negative for the presence of cocaine. The ACCA gave the Commanding General, AMEDD Troop Command, MAMC, an option of court-martialing him again or sending his case to a different GCMCA, neither of which did the Commanding General, AMEDD Troop Command, MAMC chose. He already served 7 months in confinement for an offense he did not commit. To reprimand him for the positive urinalysis in the face of evidence which undeniably exonerates him serves only to punish him again.

(5) A 5 page letter from Dr. [REDACTED] 17 December 2015, summarizing the DNA analysis of the applicant's urine sample and the methodology used in determining the urine filtrate was a mixture of two or more individuals.

y. On 15 October 2015, the CG, HQ, I Corps, JB Lewis-McChord, directed GOMOR 2 be permanently filed in his OMPF along with all enclosures.

z. On 21 October 2015, the CG, HQ, I Corps, JB Lewis-McChord, notified him to show cause for retention on active duty for failure to respond to alcohol or drug problem rehabilitation efforts in a reasonable length of time; for making an intentional omission or misstatement of fact in official statements or records for the purpose of misrepresentation; for acts of personal misconduct; for conduct unbecoming an officer; for conduct or actions resulting in the loss of a professional status; and for adverse information filed in the Official Military Performance File (OMPF).

aa. On an unspecified date he acknowledged his rights; among those rights he understood that any costs to retain civilian counsel would be at his own expense.

bb. On 30 January 2015, he was notified by memorandum, HQ, I Corps, JB Lewis-McChord, to appear before a BOI and on 1 February 2016, he acknowledged receipt of the notification.

cc. On 3 March 2016, the BOI met and recommended he be retained in the Army without reassignment. The BOI found:

(1) The allegation that he had substandard performance of duty by failing to respond to alcohol or drug problem rehabilitation efforts in a reasonable length of time, in accordance with Army Regulation (AR) 600-8-24 (Officer Transfers and Discharges), paragraph 4-2(a)(7), in the notification of proposed elimination, was not supported by the preponderance of the evidence. The BOI found it did not warrant his elimination from the service. The Board noted he self-referred and was treated at (Company) for physicians. In addition, he self-enrolled in (Company) health program and complied with all rehabilitation efforts.

(2) The allegation that he made an intentional omission or misstatement of fact in official statements or records for the purpose of misrepresentation under the provisions of AR 600-8-24, paragraph 4-2b(4), to wit: statements made under oath at the Respondent's courts-martial on 27 September 2012, in the notification of proposed elimination, was supported by a preponderance of the evidence. The BOI found it did not warrant his elimination from the service. The Board noted he did comment in reference to topics outside of his medical review officer experience at the request of the GCCA; potentially, misleading but fighting for his own defense at the same time. Board put him in a position to answer questions. These should have been directed to a witness and not to him.

(3) The allegation that the Respondent committed conduct or actions that resulted in the loss of a professional status, such as withdrawal, suspension or abandonment of professional license, endorsement, or certification that is directly or indirectly connected with or is necessary for the performance of one's military duties under the provisions of AR 600-8-24, paragraph 4-2(b)(9), in the notification of proposed elimination, was supported by a preponderance of the evidence. The BOI found it did not warrant his elimination from the service. The BOI noted he lost certification and was terminated from residency. A pattern of substandard performance was documented but it appears without the court-martial results, this could have been managed in-house. He has already served 7 months of unwarranted confinement.

(4) The allegation that the Respondent has had substantiated derogatory activity resulting in a General Officer Memorandum of Reprimand dated 27 August 2015, under the provisions of AR 600-8-24, paragraph 4-2c(5), in the notification of proposed elimination, was not supported by a preponderance of the evidence. The BOI found it did not warrant his elimination from the service. The BOI noted the GOMOR (27 August

2015) was based on unprofessional behavior in the presence of a junior noncommissioned officer and a positive test for cocaine. The results of the urinalysis were inconclusive because of two donors' DNA. He would most likely would not have received a GOMOR for the unprofessional behavior for the incident with the NCO if not for the drug charge. This most likely would have been formal counseling.

dd. On 4 March 2016, the CG, HQ, I Corps, JB Lewis-McChord, approved the findings of the BOI that he be retained in the U.S. Army.

ee. On 16 March 2016, U.S. Army Human Resources Command (HRC) notified him of his mandatory retirement date due to non-selection for promotion. His mandatory removal/retirement date was established as 30 November 2016. He subsequently requested voluntary retirement.

ff. On 27 June 2016, the Army Grade Determination Review Board (ARBA Case Number [REDACTED]) reviewed the applicant's voluntary request for retirement. The Deputy Assistant Secretary of the Army, Army Review Boards Agency (DASA-ARBA) approved his retirement and directed that he be placed on the retired list in his current grade major/O-4. In regard to the calculation of his retired pay under the provisions of Title 10, U.S. Code, sections 1370 and 1407(f), the DASA-ARBA determined his service in the rank/grade major/O-4 was satisfactory.

gg. He provided through counsel:

(1) A letter from a Physician's Advocates organization to the NPDB, Health Resources and Services Administration, 28 September 2016, with exhibits, requesting avoidance of reports provided by the U.S. Army MEDCOM to NPDB. The Physician's Advocates outlined the BOI findings and the decision of the ACCA in arguing that the NPDB reports did not meet the criteria for NPBD reportable events or Army Regulations.

(2) A memorandum from the OSG, 28 September 2016, (Decision Regarding NPDB Report), leaving the NPDB report as is, in response to his request to remove the NPDB report.

(3) A letter, BHP, HRSA, DHHS, 16 November 2016, requesting information from U.S. Army MEDCOM, in response the applicant's request for a review of the NPDB report.

hh. On 27 October 2016, an Informal Physical Evaluation Board (DA Form 199) found the applicant was physically fit and his disposition be fit following evaluation of his diagnosis for chronic fatigue syndrome. The Board further noted that based on VA Form 21-0819, section I block entry for date of referral to a Medical Evaluation Board (MEB):

(1) He entered into the Disability Evaluation System (DES) on 18 July 2016. His entry into the DES was after he was selected for mandatory retirement on 16 March 2016, with a retirement date of 30 November 2016, due to non-selection for promotion. He entered the presumptive period (and was "pending retirement") as of 16 March 2016. Therefore, the presumption of fitness applied. During the presumptive period, he did not develop a new condition that would prevent further duty were he not retiring; nor did he experience a serious deterioration of a chronic condition that would prevent further duty were he not retiring. The evidence indicates he was performing duties befitting their experience before entering the presumptive period.

(2) In full consideration of DoD Instruction 1332.18, Enclosure 3, Appendix 2, to include combined, overall effect, the conditions are not unfitting because the MEB indicates these conditions meet Army Regulation 40-501, chapter 3, Medical Fitness Standards; does not indicate that any of these conditions prevent him from performing any block 5, functional activities; and, does not indicate that performance issues, if any, are due to these conditions. He is fit for the following conditions of the MEB diagnosis:

- Metabolic myopathy
- Tinnitus
- Temporomandibular dysfunction right and left
- Gastroesophageal reflux disease
- Hiatal hernia
- Surgical scars
- Scar right brow
- Seborrheic dermatitis
- Grover's disease
- Tinea versicolor
- Obstructive sleep apnea
- Coronary artery disease
- Left ventricular hypertrophy
- Irritable bowel syndrome
- Diverticulosis
- Bilateral should strain
- Labral tear left shoulder
- Bilateral knee strain
- Bilateral plantar fasciitis
- Degenerative arthritis of the cervical spine
- Lumbar sacral strain
- Erectile dysfunction
- Hypogonadism

- Tension headaches
- Mild traumatic brain injury
- Post-traumatic stress disorder
- Somatoform disorder, not otherwise specified
- Other specified anxiety disorder
- Unspecified problems, related to employment
- Personal history of military deployment

ii. On 27 October 2016, the PEB Liaison Officer informed him of the findings and recommendations of the PEB and explained to him the result of the findings of the PEB and waived a formal hearing of his case.

jj. On 31 December 2016, he was retired. His DD Form 214 shows he was retired under the provisions of AR 600-8-24 by reason of non-selection, permanent promotion. He completed 18 years, 6 months, and 25 days of net active service during this period with 1 year, 6 months, and 20 days of prior active service. His grade/pay grade was shown as MAJ/O-4. He was awarded or authorized:

- Joint Service Commendation Medal
- Army Commendation Medal (Second Award)
- Joint Meritorious Unit Award
- National Defense Service Medal
- Armed Forces Expeditionary Medal
- Global War of Terrorism Expeditionary Medal
- Global War on Terrorism Service Medal
- Iraq Campaign Medal with one bronze service star
- Army Service Ribbon
- Overseas Service Ribbon (Second Award)
- Multinational Force and Observers Medal
- Combat Medical Badge
- Flight Surgeon Badge
- Parachutist Badge

kk. On 8 June 2017, the Army Suitability Evaluation Board (DASEB Case Number [REDACTED]) voted to remove the GOMOR, 27 August 2015 and all related documents from his AMHRR, in that the intended purpose was served and it would not be in the best interest of the Army. The action was retroactive and constituted a basis for promotion reconsideration.

ll. He provided through counsel, a copy of:

(1) An undated copy of his resume

(2) Email showing his application with (Company) Insurance and its response notifying him his employment application was disapproved. The (Company) Insurance advised him that once he had all the actions against him cleared and once he had a better idea of his practice profile it would reconsider his application.

(3) A memorandum, 27 July 2020, he sent to the Office of the Graduate Medical Education Committee appealing the results of his termination hearing of 5 September 2013.

(4) A letter from the (City) Physicians Health Program, 28 July 2020, notifying ARBA he approved disclosure of a monitoring agreement with (City) Physicians Health Program showing he was in full compliance with his agreement to random toxicology testing.

4. By regulation (AR 15-185), the ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

5. By regulation (AR 635-40 (Disability Evaluation for Retention, Retirement, or Separation)), provided that:

a. The case of a member charged with an offense, or is under investigation for an offense which could result in dismissal or punitive discharge, may not be referred for disability processing unless the officer exercising proper court-martial jurisdiction dismisses the charge.

b. Based upon the final decision of the Commanding General, U.S. Army Physical Disability Agency, or the Army Physical Disability Review Board, the Commanding General, Military Personnel Center would issue retirement orders or other disposition instruction separation for physical disability with severance pay.

6. By regulation (AR 600-37 Unfavorable Information), unfavorable information will not be filed in an official personnel file unless the recipient has been given the chance to review the documentation that serves as the basis for the proposed filing and make a written statement, or to decline, in writing, to make such a statement. This statement may include evidence that rebuts, explains, or mitigates the unfavorable information. The issuing authority should fully affirm and document unfavorable information to be considered for inclusion in official personnel files. Additionally, the regulation states that the Department of the Army Suitability Evaluation Board can revise, alter, or remove from the OMPF unfavorable information that is determined upon appeal to be unjust or

untrue, in part or in whole. The burden of proof rests with the individual concerned to provide evidence of a clear and convincing nature that the document is untrue or unjust, in whole or in part, thereby warranting its alteration or removal from the OMPF.

7. Army regulation (AR 600-8-24 Officer Transfers and Discharges), prescribes the principles of support, standards of service, policies, tasks, rules, and steps governing all work required to support officer transfers and discharges.

8. Army regulation (AR 40-68 Clinical Quality Management (CQM)), prescribes policies, procedures, and responsibilities for the administration of the Clinical Quality Management Program (CQMP). It included Department of Defense (DOD) and statutory policies addressing medical services quality management requirements.

9. By regulation (AR 600-8-29 Officer Promotions), the promotion of any officer who is in a nonpromotable status is automatically delayed. DA Form 268 (Report to Suspend Favorable Personnel Actions (Flag)) will be imposed during the delay. The office preparing the DA Form 268 must give that officer written notice of the reason for the delay of promotion before its imposition or as soon thereafter as possible (AR 600-8-2). If a DA Form 268 is in effect at the time an officer's name is announced on a promotion list, the officer's commander will immediately notify him or her of the reason for the delay.

BOARD DISCUSSION:

1. The applicant's request for a personal appearance was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance before the Board is not necessary to serve the interest of equity and justice in this case.

2. After reviewing the application, all supporting documents, and the evidence within the military record, the Board determined that partial relief was warranted. The Board carefully considered applicant's contentions, military record, and applicable regulatory guidance. The Board noted that the Army Court of Criminal Appeals set aside the applicant's conviction due evidence of a procedurally incorrect urinalysis test, thus negating the unfavorable information in the applicant's file. Based on the preponderance of the evidence available for review, the Board determined the evidence presented sufficient to warrant a recommendation for partial relief.

3. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the remainder of the application that pertains to remainder of the applicant's request.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

: : : GRANT FULL RELIEF

█ █ █ GRANT PARTIAL RELIEF

: : : GRANT FORMAL HEARING

: : : DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by:

- reversal of the MEDCOM decision to revoke his medical credentials
- removal of the adverse report within the National Practitioner Databank
- removal of the Officer Evaluation Reports from his official records for the periods
 - 2011: July 2011 to 6 October 2011
 - 2012: 7 October 2011 to 6 October 2012
 - 2014: 7 October 2012 to 9 May 2014

X █

CHAIRPERSON
█

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, United States Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Army Regulation 15-185 (Army Board for Correction of Military Records) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR.

a. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing (sometimes referred to as an evidentiary hearing or an administrative hearing) or request additional evidence or opinions. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

Disability Retirement

3. Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation), in effect at the time, established the Army Physical Disability Evaluation System according to the provisions of chapter 61 of Title 10, U.S. Code, and Department of Defense Directive 1332.18. It set forth policies, responsibilities, and procedures that apply in determining whether a member was unfit because of physical disability to perform the duties of his office, grade, rank, or rating. If a member was found unfit because of physical disability, it provided for disposition of the member according to applicable laws and policies.

a. Paragraph 4-1 provided the case of a member charged with an offense, or is under investigation for an offense which could result in dismissal or punitive discharge, may not be referred for disability processing unless:

(1) The investigation ends without charges.

(2) The officer exercising proper court-martial jurisdiction dismisses the charge.

(3) The officer exercising proper court-martial jurisdiction refers the charge for trial to a court-martial that cannot adjudge such a sentence.

b. Paragraph 4-2 provided, a member may not be referred for disability processing if he is under sentence of dismissal or punitive discharge. If the sentence is suspended, the member's case may then be referred for disability processing. A copy of the order suspending the sentence must be included in the member's records. If action to vacate the suspension, is started after the case is forwarded for disability processing, notify the PEB serving the area promptly. Stop disability processing. Do not resume processing unless the PEB is certain that the suspension will not be vacated.

c. Paragraph 4-24e(3) provided that based upon the final decision of the Commanding General, U.S. Army Physical Disability Agency, or the Army Physical Disability Review Board, the Commanding General, Military Personnel Center would issue retirement orders or other disposition instruction separation for physical disability with severance pay.

d. If the unfitness is of such a degree that a Soldier is unable to perform the duties of his office, grade, rank or rating in such a way as to reasonably fulfill the purposes of his employment on active duty. The mere presence of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier reasonably may be expected to perform because of his or her office, grade, rank, or rating.

Board of Officers

4. Army Regulation 15-6 (Procedures for Investigating Officers and Boards of Officers), in effect at the time, establishes procedures for investigations and BOIs not specifically authorized by any other directive. The appointing authority will also seek legal review of all cases involving serious or complex matters, such as where the incident being investigated has resulted in death or serious bodily injury, or where the findings and recommendations may result in adverse administrative action, or will be relied upon in actions by higher headquarters.

a. Paragraph 3-10(a) states that an investigation finding is a clear and concise statement of a fact that can be readily deduced from evidence in the record. It is directly established by evidence in the record or is a conclusion of fact by the IO or board. Negative findings (for example, that the evidence does not establish a fact) are often appropriate. The IO or board will normally not exceed the scope of findings indicated by the appointing authority. The findings will be necessary and sufficient to support each recommendation.

b. Paragraph 3-14 states that a formal report will be used if a verbatim record of the proceedings was directed. The transcript of those proceedings, with a completed DA Form 1574 (Report of Proceedings by IO/Board of Officers) as an enclosure, and other enclosures, and exhibits, will constitute the report.

c. In an informal investigation or board, the report will be written unless the appointing authority has authorized an oral report. Every report, oral or written, will include findings, and unless the instructions of the appointing authority indicate otherwise, recommendations.

REMOVAL OF RECORDS

5. Army Regulation 600-37 (Unfavorable Information), in effect at the time, set forth policies and procedures to authorized placement of unfavorable information about Army members in individual official personnel files.

a. It states that unfavorable information will not be filed in an official personnel file unless the recipient has been given the chance to review the documentation that serves as the basis for the proposed filing and make a written statement, or to decline, in writing, to make such a statement. This statement may include evidence that rebuts, explains, or mitigates the unfavorable information. The issuing authority should fully affirm and document unfavorable information to be considered for inclusion in official personnel files. Additionally, the regulation states that the Department of the Army Suitability Evaluation Board can revise, alter, or remove from the OMPF unfavorable information that is determined upon appeal to be unjust or untrue, in part or in whole. The board can transfer from the performance to the restricted portion of the OMPF those administrative letters of reprimand, admonition, or censure that are determined upon appeal to have served their intended purpose, when such transfer would be in the best interest of the Army.

b. It provides that administrative letters of reprimand may be issued by an individual's commander, by superiors in the chain of command, and by any general officer, or officer exercising general court-martial jurisdiction over the Soldier. Letters of reprimand may be filed in a Soldier's OMPF upon the order of a general officer level authority and are to be filed in the performance section. The direction for filing is to be contained in an endorsement or addendum to the letter. If the reprimand is to be filed in the OMPF, then the recipient's submissions are to be attached. Once an official document has been properly filed in the OMPF, it is presumed to be administratively correct and to have been filed pursuant to an objective decision by competent authority. Thereafter, the burden of proof rests with the individual concerned to provide evidence of a clear and convincing nature that the document is untrue or unjust, in whole or in part, thereby warranting its alteration or removal from the OMPF.

6. Army Regulation 600-8-104 (Army Military Human Resource Records Management) prescribes Army policy for the creation, utilization, administration, maintenance, and disposition of the OMPF. Documents will be placed in the performance or restricted folders as they are received by the custodian. Documents filed are those that must be permanently kept to record a Soldier's military service, manage a Soldier's career, and/or protect the interests of both the Soldier and the Army. Administrative letters of reprimand, referral correspondence, rebuttal, and allied documents are filed in the performance folder.

Officer Discharges

7. Army Regulation 600-8-24 (Officer Transfers and Discharges), prescribes the officer transfers from active duty to the Reserve Component (RC) and discharge functions for all officers on active duty for 30 days or more. It provides principles of support, standards of service, policies, tasks, rules, and steps governing all work required to support officer transfers and discharges.

a. Paragraph 4-6 provides for Boards of Inquiry. The Board of Inquiry's purpose is to give the officer a fair and impartial hearing determining if the officer will be retained in the Army. Through an administrative investigation conducted under AR 15-6 and this regulation, the BOI establishes and records the facts of the respondent's alleged misconduct, substandard performance of duty, or conduct incompatible with military service. Based upon the findings of fact established by its investigation and recorded in its report, the board then makes a recommendation for the officer's disposition, consistent with this regulation. The Government is responsible to establish, by preponderance of the evidence, that the officer has failed to maintain the standards desired for their grade and branch or that the officer's Secret-level security clearance has been permanently denied or revoked by appropriate authorities. In the absence of such a showing by the Government, the board will retain the officer. The respondent is entitled to produce evidence to show cause for his retention and to refute the allegations against him. The respondent's complete OMPF will be entered in evidence by the Government and considered by the BOI.

b. Paragraph 4-7 states boards will consist of at least three voting members and a recorder, legal advisor, and respondent's counsel without vote. The president of the BOI will be the grade of colonel or above and senior in grade to the respondent. Other voting members will be RA officers on active duty (unless the respondent is a Reserve officer) in the grade of LTC or above and senior in grade and rank to the respondent.

c. Paragraph 4-11. Respondent. When a Board of Inquiry convenes to consider an officer's recommendation for involuntary separation, the board will determine whether

each allegation in the notice of proposed separation is supported by a preponderance of the evidence. The respondent will be present at all open sessions of the board unless he or she is excused by the president of the board and expressly waives the right to attend. Additionally, the respondent:

- Will be provided with counsel who is an officer of the JAG Corps or be allowed to obtain civilian counsel of own selection without expense to the Government
- Will be allowed to appear in person
- Will not be reimbursed expenses incident to the appearance or assistance of civilian counsel

d. Paragraph 4-13 states that to the maximum extent possible the respondent has the right to be confronted with the witnesses against him or her.

(1) The personal appearance of witnesses should be obtained whenever practicable in preference to the use of depositions, affidavits, or written statements. Accordingly, such requests will be honored by the board if the requested witness is considered reasonably available and testimony will add materially to the case. Requests for witnesses will include a statement specifying the substance of expected testimony.

(2) The president of the BOI will request the commander or Government agency to order witnesses to appear as witnesses for the Government who are members of the Armed Forces or civilian employees of the Government. The availability of the witness is determined by the appropriate commander. If the commander determines that a requested witness is not reasonably available, the reasons will be furnished to the president of the board, who will have this determination appended to the record of proceedings.

Clinical Quality Management

8. Army Regulation 40-68 (Clinical Quality Management (CQM)), in effect at the time (22 May 2009), prescribed policies, procedures, and responsibilities for the administration of the Clinical Quality Management Program (CQMP). It included Department of Defense (DOD) and statutory policies addressing medical services quality management requirements. This regulation provides the following definitions:

a. Centralized Credentials Quality Assurance System (CCQAS) is the DOD database maintained by each military treatment facility (MTF) that assists the credentials manager with control of credentials, managing the credentialing/privileging processes, reports, letter generation, preparing provider permanent change of station (PCS) paperwork and the inter-facility credentials transfer briefs. Information is available

to managers at all levels for generating DOD and other reports, personnel management, and for planning purposes.

b. Privilege (clinical) is the permission to provide specified medical and other beneficiary health care services in the granting institution within defined limits based on the individual's education, professional license, experience, competence, ability, health, and judgment.

c. Professional review process is the process by which providers/personnel of a like or similar discipline conduct an investigation and peer review to evaluate the quality of patient care of another health care provider/professional. Recommendations are subsequently made to the commander regarding adverse privileging action or limitation of practice. The credentials committee/function is involved in the evaluation of the privileged provider; a designated peer review panel evaluates the nonprivileged health care professional.

d. PCF is a file containing a variety of professional credentialing and privileging documents that substantiate the provider's licensure, education, training, experience, current competence, health status, and medical practice reviews. Information related to provider performance, permanent adverse privileging actions, and malpractice cases is contained in the file. It is maintained in a secure manner and is protected from disclosure by Title 10, U.S. Code, section 1102 (10 USC 1102).

e. Provider Activity File (PAF) is a file containing temporary provider-specific information and performance data used to support the privilege renewal process. It contains risk management data to include pending adverse privileging/practice action information and potential data pending resolution. It is an extension of the PCF and contains active quality assurance (QA) documents protected from disclosure by 10 USC 1102.

f. Appendix 1. Reportable Acts of Misconduct/Unprofessional conduct for DoD Health Care Personnel.

(1) Acts of misconduct or unprofessional conduct, or similarly unprofessional actions, will be reported to the Federation of State Medical Boards (physicians and dentists), National Council for State Boards of Nursing (RN and LPN/L VN), and the appropriate State agency or national professional certifying body for health care personnel, as appropriate, following command action and completion of applicable appeal procedures in compliance with DOD guidance (DOD 6025.13-R). The following will be reported upon conviction by court-martial or civilian court or upon other final disposition, adjudication, or administrative action:

(a) Fraud or misrepresentation involving application for enlistment, commission, employment, or affiliation with DOD service that results in removal from Service.

(b) Fraud or misrepresentation involving renewal of contract for professional employment, application for or renewal of clinical privileges, or extension of a Service obligation.

(c) Proof of cheating on a professional qualifying examination.

(d) Entry of guilty, nolo contendere plea, or request for discharge in lieu of courts-martial while charged with a serious misdemeanor or felony.

(e) Abrogating professional responsibility through any of the following or similarly unprofessional actions:

- deliberately making false or misleading statements to patients regarding clinical skills md/or clinical privileges/practice
- willfully or negligently violating the confidentiality between practitioner and patient except as required by civilian or military law
- being impaired by reason of alcohol/other drug abuse and refusing to participate in or failing to complete rehabilitation
- intentionally aiding or abetting the practice of medicine or dentistry by obviously incompetent or impaired persons

(f) Commission of an act of sexual abuse, misconduct, or exploitation related to clinical activities or non-clinically related indications of sexual misconduct.

(g) Prescribing, selling, administering, giving, or using any drug legally classified as a schedule II controlled substance.

(h) Commission of any offense that is punishable in a civilian court of competent jurisdiction by a fine of more than \$1,000 or confinement for over 30 days for an offense(s) related to professional practice or which impairs the practitioner's credibility within the health care system or within his/her professional community.

(i) Any violation of the UCMJ for which the individual was awarded nonjudicial punishment when the offense is related to the practitioner's ability to practice his/her profession or which impairs the practitioner's credibility within the health care system or within his/her professional community.

(j) Fraud under dual compensation provisions of Federal statutes relating to directly or indirectly receiving a fee, commission, rebate, or other compensation for the treatment of patients eligible for care in a DOD MTF.

(k) Failure to report to the privileging authority, disciplinary action, malpractice awards, judgements, or settlements occurring outside DoD facilities; or any professional sanction taken by a civilian licensing agency or health care facility.

(l) Request for administrative discharge in lieu of courts-martial or administrative discharge while charged with any of the offenses noted above.

9. The National Defense Authorization Act for Fiscal Year 1987 (Public Law 99-661), as contained in Title 10, U.S. Code, section 1102, provides that records created by or for the DOD in a medical or dental QA program are confidential and privileged. This law precludes disclosure of, or testimony about, any QA records or findings, recommendations, evaluations, opinions, or actions taken as part of a QA program except in limited situations. Further guidance is provided in DOD Directive 6025.13-R. The statutory privilege addressed in these documents is designed to improve the quality of medical/dental care by encouraging thorough and candid QA evaluation, review, and reporting processes.

a. A "medical QA program" is defined in 10 USC 1102 as "all activities carried out before, on, or after 14 November 1986 by or for the DOD to assess the quality of medical care." The statute specifically includes any activity designed to assess the quality of medical care by individuals; MTF/dental treatment facility committees or other review bodies responsible for QA, credentials, infection control, patient care assessment outcomes (including treatment procedures, blood, drugs, and therapeutics); medical/dental records; health resource management review; and identification and prevention of medical/dental incidents and risks.

b. A "medical QA record" is defined in Title 10, U.S. Code, section 1102 as "the proceedings, records, minutes, and reports that emanate from QA program activities and are produced or compiled by the DOD as part of a medical QA program" (now considered a subset of the CQMP). QA records do not lose their protected status because they are included as part of other records or reports. For example, when QA records are included as part of IG, U. S. Army Criminal Investigation Command (USACIDC, also known as CID), or other reports, the QA records will not be released under the Freedom of Information Act or other formal request for information except as specifically outlined in this regulation. QA records will be removed from the report(s) when IG, CID, or other reports are released if disclosure of said QA records is not authorized. The investigation record(s) or report(s) will be annotated that QA contents have been removed pursuant to Title 10, U.S. Code, section 1102.

c. A PCF will be established for all privileged providers per Army Regulation 40-68, paragraph 8-3b(2)(a). Either paper or electronic files may be maintained. Any request by the subject privileged provider for amendment of information contained in the PCF

must be considered under the provisions of the Privacy Act and Army Regulation 340-21 (The Army Privacy Program). The PCF will be maintained for the entire service career of the military provider to include active and inactive service in the RC. For civilians (general schedule (GS) and contract), the PCF will be maintained for the entire period of employment with the Federal government. For the various categories of U.S. Army Medical Department providers, the responsibility for PCF maintenance is as follows:

(1) For Active Army (AA) military and civilian (GS and contract), the credentials office of the MTF who exercises command or executive authority over the provider is responsible for the PCF. For AA privileged providers attending nonclinical postgraduate or specialty training, advanced military training, or changing duty stations to a nonclinical assignment, the PCF will be forwarded to Commander, U.S. Army Medical Command (MEDCOM), Fort Sam Houston, TX.

(2) For Army National Guard (ARNG), the respective State Adjutant General or the ARNG State Surgeon who is the Adjutant General's designee for CQM will be responsible.

(3) For USAR TPU privileged providers, the Army Reserve Clinical Credentials Activity is responsible. Duplicate files will not be maintained by the unit of assignment/attachment.

(4) For Individual Ready Reserve (IRR) members and retired providers (USAR/ARNG, retired and discharged/separated AA), the U.S. Army Human Resources Command (HRC) is responsible.

(5) For IMAs, the credentials office of the facility to which the provider is assigned is responsible.

d. The PCF transfer from facility-to-facility will be by certified mail, return receipt requested. For AA providers who have separated in good standing with defined privileges, the original PCF will be forwarded immediately to Commander, HRC. A copy of the order of separation, discharge, or assignment to the IRR will be included with the PCF. A copy of the PCF and a copy of the separation order will be held at the MTF for 1 year and then destroyed. Upon discharge or retirement from the Army, the PCF (all military providers) will be forwarded to HRC Quality Management Directorate for maintenance. For those AA providers transferring to the RC, the entire PCF will be forwarded to the unit of assignment/attachment or to Commander, HRC, St. Louis, MO, for forwarding to the TPU of assignment. Disposition of the PCF after the provider ends his/her military service (separates, is discharged, or retires) will be according to Army Regulation 25-400-2 (The Army Records Information Management Systems). HRC will

store in a retired status the PCFs of all retired privileged providers as stipulated in Army Regulation 25-400-2. Pertinent data from the PCFs of all retired privileged providers will be entered into the CCQAS database; the PCFs are then catalogued and stored according to established tracking procedures. Retirees in MEDCOM-designated critically short areas of concentration will have their PCFs maintained by HRC for a period as specified in MEDCOM guidance. The PCFs of privileged providers separating from the military will be entered into the CCQAS database, identified by a tracking number, and forwarded to the designated QM holding area at HRC. The PCFs and credentials data of privileged providers discharged from active duty roles and transferred to the IRR will be maintained by HRC until these individuals retire or separate from the IRR.

e. The PCF of civilian providers (GS and contract) will be retained for 5 years by the last MTF of employment and then destroyed. At the time of provider discharge or separation, a copy of both the PCF and the PAF that contain any permanent adverse privileging actions or information will be forwarded directly to Commander, MEDCOM, Fort Sam Houston, TX. When the provider PCSs, separates, or retires from the Service, an updated copy of DA Form 5374 and DA Form 5441 (Evaluation of Clinical Privileges - Anesthesia) will be included in the PCF prior to the file being forwarded, as indicated above.

f. Chapter 5 provides for competency assessment. It states, in pertinent part, that competency assessment is required of all members of the staff and is demonstrated by one's performance in a designated setting. Performance must meet established standards that are determined, in part, by the work setting and the employee's designated role in that setting. Thus, the leaders of an organization must have clearly defined the qualifications and competencies that staff must possess to accomplish the organization's mission. Immediate supervisors (officer, enlisted, civilian) are responsible for assessing, maintaining, and improving staff competency through an ongoing series of activities.

g. The performance of all health care personnel is supervised, indirectly or directly, and evaluated according to established Army regulations and Office of Personnel Management guidance. Specific requirements related to individuals requiring direct supervision will be locally determined based on the unique circumstances necessitating this level of supervision and can be indirect (supervisor performs retrospective review of selected records and/or observes the results of the care provided. Criteria used for this review relate to quality of care, quality of documentation, and the staff member's authorized scope of practice) or direct (during the delivery of health care and services, the supervisor is involved in the decision-making process, which may be verbal such as when the supervisor is contacted by telephone or by informal consultation before the supervised individual implements or changes a regimen or plan of care or physical

presence such as when the supervisor is physically present through all or a portion of care).

h. The intent of providing appropriate oversight of practice, in the context of this regulation, is to evaluate and enhance performance of health care personnel in delivering patient care services. Given that objective, a planned and organized approach to supervision is appropriate. The written plan of supervision maintained in the PAF (privilege-eligible provider) or CAF (nonprivileged professional), as appropriate, will include the type of supervision to be provided based upon the assessed needs of individually privileged providers/nonprivileged personnel, the name of the appointed supervisor, and the performance evaluation or specific intervals at which performance evaluations will be conducted during the period of supervision will be noted. Supervisors of privileged providers will complete periodic clinical performance evaluations based on the individual's experience and competency utilizing DA Form 5441 and DA Form 5374. These are filed initially in the PAF and transferred to the PCF at the time of clinical privileges renewal, PCS, or release from service/employment. A variety of parameters allow for review of the appropriateness of care and the privileged provider's current competence. Organizations must consider and integrate current TRICARE and other managed care performance assessment variables/outcomes into the plan for supervision and the evaluation of privileged provider performance. These address such factors as diagnostic techniques and procedures and associated costs, therapeutic practice patterns and outcomes of care, consultation and referral patterns, availability and productivity, and documentation of patient care and services.

Reimbursement

10. Title 10, U.S. Code, section 1552, provides that the Secretary of a Military Department may correct any military record of the Secretary's Department when the Secretary considers it necessary to correct an error or remove an injustice. With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under the Uniform Code of Military Justice, action to correct any military record of the Secretary's Department may extend only to correction of a record to reflect actions taken by reviewing authorities under the Uniform Code of Military Justice or action on the sentence of a court-martial for purposes of clemency. Such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that Military Department.

Officer Promotions

11. Army Regulation 600-8-29 (Officer Promotions), prescribes the officer promotion function of the military personnel system. It is linked to AR 600-8 and provides principles of support, standards of service, policies, tasks, rules, and steps governing all

work required in the field to support officer promotions. This regulation supports the objectives of the Army's officer promotion system, which include filling authorized spaces with the best qualified officers. It also provides for career progression based upon recognition of an officer's potential to serve in positions of increased responsibility. Additionally, it precludes promoting the officer who is not eligible or becomes disqualified, thus providing an equitable system for all officers.

a. Paragraph 1-10. Promotion Eligibility. To be considered for promotion by a selection board, an officer must be on the active duty list (ADL) on the day the board convenes. Officers under suspension of favorable personnel actions (AR 600-8-2) or in a nonpromotable status remain eligible for consideration.

b. Paragraph 1-12. Promotion lists. The names of those officers recommended and approved for promotion are placed, in order of their seniority on the active duty list, on promotion lists published by Army Human Resources Command. Separate lists will be published and maintained for each board.

c. Paragraph 1-19. Nonpromotable status. An officer's promotion is automatically delayed (that is, the officer is not promoted in spite of the publication of promotion orders) when the officer is:

(1) Absent without leave, in custody of or confined by law enforcement authorities (civil or military), a deserter, injured, or sick not in the line of duty.

(2) Serving a court-martial sentence or being punished under Article 15, Uniform Code of Military Justice (UCMJ). He or she is considered to be serving a sentence or undergoing punishment (including suspended punishments), and AR 600-8-29 February 2005 therefore nonpromotable, through the last day of any forfeiture or detention of pay, or the date the entire fine is paid (if required), even if all other parts of the punishment have been served.

d. Paragraph 1-20. Delay of promotion. The promotion of any officer who is in a nonpromotable status is automatically delayed. DA Form 268 (Report to Suspend Favorable Personnel Actions (Flag)) will be imposed during the delay. The office preparing the DA Form 268 must give that officer written notice of the reason for the delay of promotion before its imposition or as soon thereafter as possible (AR 600-8-2). If a DA Form 268 is in effect at the time an officer's name is announced on a promotion list, the officer's commander will immediately notify him or her of the reason for the delay. If this is impractical, written notice will be given as soon as possible.

MASP

12. Title 37, U.S.C., sections 301d, 302, 302f, and 303a, provide for multi-year retention bonuses and special pays for medical officers and health professionals of the Armed Forces. For Army Medical Corps officers (physicians), these special pays are:

a. Variable Special Pay that is paid to all Medical Corps officers monthly upon entry on active duty;

b. Board Certification Pay that is paid monthly to all board-certified Medical Corps officers based upon their date of board certification and their creditable service used to establish the Health Professional Pay Entry Date;

c. MASP that is paid to all Medical Corps officers upon completion of internship (not during initial residency) at the current rate of \$15,000.00 (less taxes) for a 1-year active duty obligation that can be served concurrently with all other obligations;

d. Incentive Special Pay (ISP) that is paid based on a variable rate to selected Medical Corps officers who hold the specialties eligible to receive this pay for a 1 year active duty obligation that may be served concurrently with all other obligations; and

e. Multi-year Special Pay that is paid based on execution of a contract for 2, 3, or 4 years of active duty to selected Medical Corps officers based on their specialty. This pay is authorized concurrently with MASP and ISP.

13 Army Regulation 40-501 (Standards of Medical Fitness) governs medical fitness standards for enlistment, induction, appointment (including officer procurement programs), retention, and separation (including retirement). Chapter 3 provides the various medical conditions and physical defects which may render a Soldier unfit for further military service. Soldiers with conditions listed in this chapter who do not meet the required medical standards will be evaluated by a medical evaluation board (MEB) and will be referred to a physical evaluation board (PEB).

//NOTHING FOLLOWS//