

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 14 February 2024

DOCKET NUMBER: AR20210014938

APPLICANT REQUESTS:

- a. Reconsideration of the following previous requests:
 - Retirement in the rank/grade of major (MAJ)/O-4
 - Removal of the adverse board of inquiry (BOI) results from his official military personnel file (OMPF)
 - Permission to appear personally before the Board

- b. As new requests, the applicant asks the Board for the following:
 - Removal of the general officer memorandum of reprimand (GOMOR) from his OMPF
 - Removal of his name from the titling block of a U.S. Army Criminal Investigation Command (CID) Law Enforcement Report (LER)
 - Correction of administrative data

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- Exhibit 1 – DD Form 149 (Application for Correction of Military Record)
- Exhibit 2 – Representational Power-of-Attorney
- Exhibit 3 – Applicant's personal statement
- Exhibit 4 – CID LER (redacted)
- Exhibit 5 – Video Statement by MAJ R__ M. S__ to CID
- Exhibit 6 – Video and Summary of applicant's CID interview (written summary not provided)
- Exhibit 7 – GOMOR
- Exhibit 8 – Voluntary Retirement Request in Lieu of Elimination
- Exhibit 9 – Approval Recommendation for Voluntary Retirement Request
- Exhibit 10 – U.S. Army Human Resources Command (HRC) emails regarding voluntary retirement request
- Exhibit 11 – Officer Elimination Notification

- Exhibit 12 – Discharge Order (i.e., HRC message announcing approval of applicant's separation)
- Exhibit 13 – Previous Army Board for Correction of Military Records (ABCMR) Petition and Denial (ABCMR Docket Number AR20180000390)
- Exhibit 14 – Post-Service Community Involvement
- Exhibit 15 – "Army Review Board and Military Personnel Law Practice and Procedure"

FACTS:

1. Incorporated herein by reference are military records, as were summarized in the previous consideration by the ABCMR of the applicant's case in Docket Number AR20180000390, on 11 June 2019.

2. With regard to the applicant's request to remove his name from the titling block of a CID LER, the Board's governing regulation (Army Regulation (AR) 15-185 (ABCMR)) requires applicants to have exhausted all administrative remedies prior to seeking relief from the Board.

a. The applicant has submitted no proof that he first petitioned CID and CID denied his request.

b. Under the provisions of Department of Defense Instruction (DODI) 5505-07 (Titling and Indexing by DOD Law Enforcement Activities), dated 8 August 2023, persons seeking to remove their names from a law enforcement report must submit a written request to the responsible agency; in this case, a request, with supporting evidence, would go to Director, U.S. Army Crime Records Center (CICR – FP), 27130 Telegraph Road, Quantico, VA 22134-2253.

3. As to the applicant's request to appear personally before the Board, AR 15-185 states applicants are not entitled to a hearing before the Board; however, a panel of the Board or by the Director of ABCMR may authorize a request for a hearing.

4. Counsel states:

a. Statement of Case. The applicant suffered a severe injustice when the Army administratively separated him just 11 days before he reached his 20-year retirement-eligibility date; the Army's action amounted to a grossly disproportionate punishment for alleged misconduct.

(1) Counsel contends he is now offering newly discovered mitigating circumstances that pertain to the applicant's culpability at his board of inquiry (BOI). In

addition, counsel provides proof of procedural errors regarding the processing of the applicant's voluntary retirement request.

(2) Counsel notes that the previous petition to the Board ignored the fact that CID investigated a completely different allegation than the one for which the Army separated him.

(3) Further, and in accordance with established military retirement policy, two provisions within Title 10 (Armed Forces), United States Code (USC) were applicable: section 12686 (Reserves on Active Duty within Two Years of Retirement Eligibility: Limitation on Release from Active Duty), and the Temporary Early Retirement Authority (TERA) (enacted, on 31 December 2011, per the Fiscal Year 2012 National Defense Authorization Act, Public Law 112-81).

(4) Counsel argues, "Preventing [applicant], who gave two decades of his life to the United States Army, from retirement is an error and injustice that only this Honorable board has the authority to correct."

b. Facts. The applicant served his country and the U.S. Army for 19 years and 11 months; of that period of service, 8 years were as an enlisted Soldier and the remainder as a commissioned officer. He risked his life and sacrificed valuable time he could otherwise have spent with his family; he completed 34 months on combat deployments and was awarded the Purple Heart, the Combat Action Badge, and numerous other significant awards. Since his separation, the applicant has continued his service through his employment as a government contractor for the Federal government.

(1) On 3 March 2017, the CID office at Fort Lee, VA (now Fort Gregg-Adams) received an allegation that, while participating in Command and General Staff Officer's Course (CGSOC), the applicant had committed abusive sexual conduct against a female classmate (MAJ R__ M. S__). MAJ R__ M. S__ alleged the applicant asked her a series of intimate and sexually explicit questions, ran his fingers through her hair, and then "tried to straddle her while she was sitting in her computer desk chair."

(2) On 7 March 2017, the CID interviewed MAJ R__ M. S__ and, in describing the applicant's behavior, she stated, "it clearly was sexual harassment but I don't know what to do. I don't want to get anyone in trouble." Even after consulting her SHARP (Sexual Harassment/Assault Response and Prevention) representative, MAJ S__ remained unsure as to whether the applicant's actions constituted an assault or harassment. The CID's LER lists the applicant's offense as, "Abusive Sexual Contact (Adult) (UCMJ (Uniform Code of Military Justice) – Article 120)."

(3) On 19 April 2017, the U.S. Army Combined Arms Support Command (CASCOM) commanding general (CG) issued the applicant a GOMOR for alleged sexual harassment, committed in violation of AR 600-20 (Army Command Policy), paragraph 7-6b (Prevention of Sexual Harassment – Types of Sexual Harassment – Hostile Environment). The applicant promptly and vehemently denied the accusation. Counsel further notes that, while the GOMOR referenced CID's LER, it described the applicant's behavior as "sexual harassment" and failed to acknowledge CID's charge of "Abusive Sexual Contact." Counsel maintains, "This is significant because [applicant] was not put on notice of the true accusation, and had he been aware of it, he would have very likely provided significant evidence and denials to that fact. He could have very easily provided evidence that would suggest to a reasonable person looking from the outside that this behavior was not abnormal for his relationship with MAJ S__."

(4) On 18 May 2017, the command notified the applicant it was initiating separation action against him; the applicant began conferring with the Trial Defense Service (TDS) and a civilian paralegal (Mr. J__ A__) with the Office of the Staff Judge Advocate (OSJA). During these conversations, the TDS and Mr. J__ A__ advised the applicant that because CASCOM had initiated the BOI, there would be scheduling flexibility; they additionally recommended the applicant "accept a 30 June 2017 date for the BOI hearing. The reason for this advice was so that [applicant's] retirement eligibility would not be forfeited in the event that the BOI recommended elimination." The applicant accepted the June 2017 hearing date based on the advice he received from his counsel and the command, and after his further review of AR 600-8-24 (Officer Transfers and Discharges), paragraph 4-20 (Eliminations – Rules for Processing an Elimination of a Probationary Officer), "which stated he could apply for retirement in lieu of elimination based on his 19 years and 6 months of active service." (AR 600-8-24 defines a probationary officer as one with less than 5 years of commissioned service; officers with more than 5 years commissioned service are nonprobationary).

(5) On 30 June 2017, the BOI convened and determined the applicant had committed an act of sexual harassment and conduct unbecoming of an officer; the BOI recommended the applicant's separation under honorable conditions. On 7 July 2017, the applicant's civilian counsel filed a notice of substantial defect; on 4 August 2017, the CG, CASCOM found that no substantial defect had been committed and directed that the applicant's elimination processing continue. On 15 August 2017, the applicant elected to apply for retirement in lieu of elimination and, upon his submission eligibility date of 13 September 2017, he forwarded his request through his chain of command. On or about 13 September 2017, the CG, CASCOM recommended approval of the applicant's retirement request and sent that recommendation with applicant's separation packet to HRC.

(6) On 21 September 2017, HRC returned the retirement request because the applicant was pending three flags (under the provisions of AR 600-8-2 (Suspension of Favorable Personnel Actions (FLAG))). However, HRC indicated the applicant could resubmit at a later date. The HRC representative additionally stated the applicant met the criteria for a retirement application, and that a grade determination review board (Army Grade Determination Review Board (AGDRB)) would subsequently convene to determine the last grade in which the applicant had honorably served.

(7) On 21 December 2017, the applicant received correspondence stating the senior official performing the duties of the Assistant Secretary of the Army (Manpower and Reserve Affairs) (ASA, M&RA) had directed his elimination under honorable conditions, based on misconduct and moral or professional dereliction. The correspondence noted an "Ad Hoc Review Board" had reviewed the applicant's case, on 16 November 2017. Counsel points out that no one ever provided notice to the applicant of an "Ad Hoc Review Board," and the ASA, M&RA's directive made no mention of the applicant's retirement request; additionally, the notification failed to address whether the applicant's elimination packet would be sent to the AGDRB. The ASA, M&RA's adverse decision came as a complete shock to the applicant, and he found himself hindered in the ability to adequately and thoroughly respond due to the short notice and the fact that the notice arrived during the holiday season.

(8) On 22 December 2017, HRC directed the CG, CASCOM to discharge the applicant no later than 5 January 2018; the applicant's retirement eligibility date was 16 January 2018 (sic, applicant achieved 20 years of active duty service, on 15 January 2018). On 4 January 2017, the applicant petitioned the ABCMR, requesting the removal of the BOI results from his OMPF and reinstatement on active duty so he could complete sufficient service for retirement. On 5 January 2018, the Army discharged the applicant under honorable conditions; on 11 June 2019, the Board denied the applicant's request.

c. Discussion. Counsel maintains the applicant's case is "riddled with errors and injustices." By separating him 11 days (sic, 10 days) before his retirement eligibility date, the Army created a disproportionate punishment. Counsel argues, "The ultimate administrative separation has since stigmatized and severely prejudiced [applicant] in his civilian life. This Board is empowered to identify and rectify instances of error and injustices. In the case of [applicant], we have identified multiple examples that led to his eventual unjust separation. For the reasons articulated below, he now seeks relief."

(1) "[Applicant] Was Improperly Reprimanded and Required to Show Cause For Allegedly Committing an Offense That Was Not The Subject of The CID Investigation."

(a) At the outset of the applicant's case, it was clear CID was investigating the applicant for alleged sexual contact. However, during CID's interview of MAJ R__ M.

S___, she never accused the applicant of sexually assaulting her, nor did she claim to be a victim of abusive sexual contact; further, she disclosed that, even after consulting her SHARP representative, she was unsure of whether the applicant's conduct was an assault or harassment. Counsel states, "The significance of this distinction is not only in the severe ramifications of this titling action, which [applicant] is still impacted by and will be addressed later in this brief, but additionally in how [applicant] was initially confronted with the allegations against him."

(b) Counsel continues, "Despite not being investigated for sexual harassment allegations, not being told he is accused of sexual harassment, and frankly, not even committing sexual harassment, [applicant] received a GOMOR on 19 April 2017 for committing sexual harassment in violation of AR 600-20, paragraph 7-6b." Sexual harassment and abusive sexual contact are not the same offense; procedurally, this is a distinct failure, where an accused has waived his right to remain silent in response to one allegation only to be held accountable for an entirely separate offense.

(c) "Compounding this concern was the fact that [applicant] was never offered non-judicial punishment or a court-martial for this offense. It is not secret that he proclaimed his innocence on these accusations since the moment he was confronted by CID, yet he was not given an opportunity to defend himself until his BOI, which has tremendous stakes with a low burden of proof for the government. If this offense was so serious – and alleged Article 120 offense(s) are serious – that [applicant] received a notification of elimination, then why was it never referred to a court-martial? To go directly from a GOMOR to a BOI, skipping the crucial steps that allows a Soldier to actually respond and submit matters to rebut some allegations, especially when the allegation shifted from the investigation to the actual GOMOR, is an injustice."

(2) "Failure to Properly Refer [Applicant's] Favorably Endorsed Retirement Request to an AGDRB."

(a) The applicant's defense counsel and the Fort Gregg-Adams (OSJA) staff gave him multiple assurances that, by scheduling his BOI in June 2017, he would "receive a favorable endorsement to request retirement in lieu of elimination." Counsel contends the Board should apply the "doctrine of promissory estoppel" (a contract law principle that states a party may recover on the basis of a promise made when the party's reliance on that promise was reasonable, and the party attempting to recover detrimentally relied on the promise). "[Applicant] reasonably relied on these assurances, and, to ensure equity, it should be enforced. [Applicant's] retirement was always expected, by representatives on both sides of the case. This sentiment is proven by the fact that the very command that reprimanded and notified [applicant] of the elimination proceedings, was also the same command recommending approval of [applicant's] voluntary retirement request."

(b) Counsel quotes the most recent version of AR 600-8-24, paragraph 4-20, wherein it states: "An officer identified for elimination may, at any time during or prior to the final action in the elimination case, elect one of the following options: (3) Apply for retirement in lieu of elimination if otherwise eligible. The officer must have at least 19 years and 6 months active service toward regular retirement or 19 years and 6 months good reserve years for nonregular retirement to apply."

(c) Counsel continues, citing paragraph 4-20, subparagraph c, which states, "Any officer described in AR 15-80 (AGDRB and Grade Determinations) who is being retired that has been the subject of any substantiated adverse finding or conclusion from an officially documented investigation, proceeding, or inquiry (except minor traffic infractions) since the officer's last promotion, will have the case forwarded to the AGDRB for a grade determination under AR 15-80 to determine the highest grade the officer satisfactorily held while on AD (active duty)." (The paragraph continues stating, "Final grade determination is made by the DASA (RB) (Deputy Assistant Secretary of the Army (Review Boards)) or ASA, M&RA, as appropriate.").

(d) Counsel contends, "These regulations, taken collectively, illustrate what the common understanding and expectations (were) for [applicant's] retirement in 2017. [Applicant] timely filed for retirement when he hit his 19 year and 6 month date of active duty service. This request was then approved by his Commanding General, who also was his General Officer Show Cause Authority (GOSCA) for the BOI. Thus, by favorably endorsing this request, the obvious intent of the GOSCA was to suspend the elimination proceedings pending the final option elected by [applicant], which was to retire. Based on these elections, [applicant's] case should have proceeded to an AGDRB, as was told to him by (HRC)."

(e) Counsel adds, "Rather than follow these clear procedures and the clear intent of CASCOM, [applicant's] case was improperly referred to an Ad Hoc Review Board on 16 November 2017. [Applicant's] case never should have been referred to this type of board. In an article titled, "Army Review Board and Military Personnel Law Practice and Procedure", a summary of a class presentation held at The Judge Advocate General's Legal Center and School, the author, J__ W. S__ (the Senior Legal Advisor to Army Review Boards Agency, Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs)), highlighted this very issue:

"However, the Ad Hoc Board does not review requests to retire in lieu of elimination because the DASA (RB) will approve all legitimate retirements in lieu of elimination. Pursuant to (Title) 10 USC, (sections) 1186 (Separation of Regular Officers for Substandard Performance of Duty or for Certain Other Reasons – Officer Considered for Removal: Voluntary Retirement or Discharge) and 14905 (Part III – Promotion and Retention of Officers on the Reserve Active-Status List – Additional Provisions Relating to Involuntary Separation – Officer Considered for Removal:

Voluntary Retirement or Discharge), an approved elimination on a retirement eligible officer will be converted to a retirement by operation of law; therefore, there is no reason to deny a retirement in lieu of elimination."

(f) Counsel contends, "In reviewing this analysis, the error becomes clear. AHRC processed [applicant's] retirement request as a resignation request. Putting aside the BOI's recommendation, [applicant's] request to retire was legitimate. His request was favorably endorsed by the same officer that reprimanded him and convened the BOI. Based strictly on that endorsement, [applicant's] request should not (emphasis added by counsel) have been referred to the Ad Hoc Review Board; but, rather, the AGCRD."

(3) "[Applicant's] Punishment is Disproportionate and an Injustice Based on His Honorable Service and Honorable Life Post-Discharge."

(a) Since being out of uniform, the applicant has led an exemplary life; his contributions to society are commendable. As a cleared Federal contractor, the applicant works daily to support the warfighter, and his passion and dedication to service stems directly from his Army career. As a father of two, the applicant is devoted to being a positive role model and moving on with his life, despite the adversity he has faced. Counsel adds that the cost of the applicant's lost retirement income equates to hundreds of thousands of dollars.

(b) In support of his arguments, counsel refers the Board to two of its previous cases, which addressed the application of clemency. In assessing the punishment imposed upon the applicant, counsel contends it is evident that clemency is warranted.

(c) As an example, counsel describes the case of a command sergeant major (CSM) who the Army accused of raping a junior Soldier; although the CSM admitted to having sexual contact with his subordinate Soldier, a court-martial acquitted him, and the Army allowed him to continue his service. By contrast, the applicant was "not allowed to challenge his case in a court-martial, and the lower administrative forum led to the loss of his retirement, absent any due process. CSM T__ was presumably permitted to retire, even after (he) admitted to having sex with one of his subordinates." Counsel additionally points to a 2020 case where the Army disciplined 14 leaders for creating a command climate that allowed sexual harassment; none of the senior leaders and officers lost their retirement. For those who might argue the applicant's alleged misconduct was more serious, counsel counters by maintaining that the proper course of action would have been to refer the case for nonjudicial or judicial action, vice "jump(ing) straight to a BOI."

(d) Counsel further states, "It is also worth noting that the Department of Defense (DOD) previously did allow servicemembers to submit for early retirement through the Temporary Early Retirement Authority (TERA). This program was in effect

with the Army during [applicant's] tour of duty. Given that the command at CASCOM was willing to favorably endorse [applicant's] voluntary retirement request AFTER the substantiated BOI, they surely would have supported a TERA request."

(4) In conclusion, counsel states the applicant's case is one where the applicant has proclaimed his innocence from the onset; the Army never afforded him the opportunity to properly challenge and rebut the allegations in the proper forum. He has missed employment opportunities and valuable benefits, and he must now live with a stigmatized narrative for discharge and an inappropriate titling action. These consequences are grossly disproportionate to the applicant's alleged misconduct, "which was strictly a misinterpretation of friendly interactions." The applicant has never been accused of sexual impropriety, and he is an honorable, family-oriented man who merits the relief he requests.

5. Counsel provides:

a. Applicant's self-authored statement.

(1) The applicant states he was a career Army officer with close to 20 years of active Federal service, and he completed two overseas tours and 34 months of deployments to hostile environments; during the course of his career, he received the Purple Heart and earned a Combat Action Badge. As both a noncommissioned officer (NCO) and a commissioned officer, his leaders consistently rated him as being "among the best." He is also the father of two wonderful daughters, and he has worked closely with many female Soldiers, NCOs, officers, and Department of the Army (DA) civilians; "not once was my character contested. I mention these facts because they unfortunately are not the lasting impressions of my career."

(2) The applicant continues, "My career ended when I was wrongfully accused of sexual harassment by a peer of mine. A BOI substantiated her allegations, and I was forced out of the Army with a general discharge, despite having 19 years and 6 months of active duty service, and despite being told that I would be permitted to retire. The allegations of sexual harassment against me, as defined by AR 600-20, Chapter 7, were false. I believe my accuser misinterpreted my actions. I did not commit sexual harassment. This misinterpretation ruined my career, and still impacts me deeply to this day."

(3) "During the incident in question, I did ask MAJ S___, my accuser, about her dating experience. In my statement to CID, I explained the context for that question. I did admit to removing her hairpin twice. There was no sexual connection in removing MAJ S___'s hairpin. I did not ask her any sexually explicit questions, nor did I attempt to saddle her. My version of the conversation aligns with what was reported by MAJ F___ in her statement to CID, in which she accurately described in her words that it 'did not

seem to be meant as overly sexual.' It is my belief if an unbiased audience observed my actions that evening, they would conclude my behavior was not sexual in any manner. The only connection between my actions and the serious allegations of sexual harassment was the exaggerated and questionable statement made by MAJ S__ and the biased opinion and actions of the CID." The applicant goes on to argue that, given his length of service, any tendencies or habits demonstrating the behaviors alleged should have manifested themselves prior to the night in question.

(4) In addition, the applicant contends that, during the BOI hearing, both his accuser and the CID special agent (SA) made inappropriate judgments about his efforts to mentor three junior officers and a DA civilian, and their opinions only serve to illustrate their prejudices. MAJ S__ and the CID SA opined the applicant's mentorship was "just a power thing," and that he was "exhibiting signs of a 'predator.'" The implication that he was essentially "preying" on those he was mentoring was "wildly taken out of context." "I participated in numerous mentoring programs at every duty station I was assigned to. Not once have I participated to prey on others, nor did I volunteer to gain power. I lived the Army values of selfless service and respect through participation in the community. I lived in through volunteering. I have continued to live a just and honorable life post-service, and I have never had anyone complain about my actions or behaviors since this occasion."

(5) As to the GOMOR, Major General W__ justified his action by citing the CID investigation, and the GOMOR included some invalid statements; also, the decision to place the GOMOR in the applicant's OMPF was unwarranted. "The investigation, CRC Number XXXX-17-CIDXX, did not draw any conclusions about my behavior, nor did it issue a finding regarding the conversation between MAJ S__ and me that evening. CID's investigation was initiated to investigate an alleged sexual assault – which the investigator did not substantiate."

(6) The CID exhibited bias when it titled him, despite the inconsistencies in the evidence against him, and the consequences of being titled have had a rippling effect on both his personal and private life. The applicant offers ten summarized examples of how he was adversely affected. He notes that he nonetheless remained optimistic throughout his ordeal, believing the Army would ultimately accept his retirement application and basing that belief on the assurances he received from Mr. J__ A__, from his counsel, and from HRC. The applicant describes the sequence of events from when he first received Mr. J__ A__'s advice to receiving the notification of elimination. Due to the delays caused how long it took for HRC's discharge determination, the applicant lost value time to prepare for his transition to civilian life. He adds, "To this day, I am still deeply disheartened by the fact that the information I relied upon was not followed, and I was forced to scramble for a solution during the Federal holiday season against an extremely short deadline."

(7) " As a career Soldier, I had a long track record working in close quarters with females Soldiers...Never have I been accused of inappropriate behavior, to include sexual context conversations. What occurred on the night of 27 February 2017 did not constitute sexual harassment as defined by Army Regulation AR 600- 20, Chapter 7. It also was never a sexual assault, which it was investigated as initially , but not what I was ultimately processed for."

(8) "As a young enlisted Soldier, company commander, and field-grade officer, I witnessed and fully supported the Army SHARP program's transformation into a program that provides victims with a safe place to report such serious offenses (sic). However, as an innocent individual, there's room for improvement. Removing MAJ S__'s hairpin and asking about her dating history demonstrated poor judgement. My actions were not sexual in any manner, and no evidence connected my behavior to such serious allegations of sexual harassment or sexual assault. I misinterpreted the level of our relationship, but do not believe my punishment was proportionate to this type of misinterpretation. My conduct was misrepresented and did not rise to the level to that warranted the excessive punishment that denied me of the benefits associated with retirement after competing over 19 years and 11 months of active Federal service."

(9) The applicant details his transition to the civilian sector and states he was able to adjust "fairly seamlessly," in spite of his circumstances; he has since accepted a position as a Federal contractor for the National Security Agency, and he also performs volunteer work in his local community.

b. Letter of support from the president, board of trustees and volunteer coordinator for a charity in the applicant's community. Ms. S__ H__ affirms the applicant has been volunteering with their organization since March 2020 and currently is a team leader in their meal kitchen. The applicant is one of their many dedicated volunteers, and the charity appreciates his service.

6. A review of the applicant's service record reveals the following:

a. On 22 February 2006, after completing over 8 years of enlisted Regular Army service and graduating from Officer Candidate School, the applicant executed his oath of office as a Regular Army commissioned officer; (both his DD Form 214 (Certificate of Release or Discharge from Active Duty) for his enlisted service, and his DA Form 71 (Oath of Office – Military Personnel) are unavailable for review).

b. The applicant served continuously in a variety of continental United States and overseas assignments, including three deployments (once to Qatar and twice to Afghanistan). In November 2016, while assigned in Germany, the applicant received reassignment orders for Fort Gordon, GA (subsequently renamed Fort Eisenhower); as

additional instructions, the applicant was to report to Fort Gregg-Adams, by 4 January 2017, for CGSOC (also referred to as Intermediate Level Education (ILE)).

c. On 3 March 2017, MAJ R__ M. S__ filed a complaint with the Fort Gregg-Adams CID; according to the CID SA's investigation report, MAJ S__ stated the applicant had sexually assaulted her in her hotel room at Fort Gregg-Adams.

(1) On 3 March 2017, during a videotaped interview, MAJ S__ provided a sworn statement, in which she disclosed that the applicant had come to her hotel room to borrow a cork screw and stayed to talk.

(a) The applicant began asking her a series of sexually explicit/intimate questions; three times the applicant ran his hands through her hair, and each time MAJ S__ told him "no" or "stop" and backed the applicant off. The incident culminated with the applicant trying to straddle her as she sat in her desk chair, whereupon MAJ S__ asked the applicant to leave.

(b) MAJ S__ added that she wore her wedding ring to class every day and it was common knowledge that she was married and had children; she could not understand why the applicant would think his sexual advances would be welcomed.

(c) MAJ S__ consented to have CID search her cellphone, and CID obtained multiple digital images of text messages between MAJ S__ and the applicant. CID's review of the messages revealed that MAJ S__ and the applicant were "social outside of the classroom," but they never engaged in intimate or personal conversations.

(2) On 6 March 2017, MAJ J__ L. F__, a fellow female classmate of MAJ S__ and the applicant, provided a sworn statement.

(a) She stated that, on 27 February 2017, she was studying in her room when she heard voices next door; the walls are thin and, because she was sitting close to the wall, she was able to hear several muffled voices. She affirmed she distinctly heard the voices of the applicant and MAJ S__ but she could only make out an occasional word.

(b) "I heard, at one point, [applicant] ask MAJ S__ something about 'being with a black man.' I cannot remember the exact wording, but something referring to dating or being with a black man. It did not seem to be meant as overtly sexual, and I remembered it since I had had black men I had dated in the past ask a similar question, so I found it amusing. I then turned up my music so I could focus on my studying."

(c) "The next morning at breakfast and then in class I jokingly mentioned to MAJ S__ and [applicant] that I heard them last night and were they having a party? [Applicant] seemed surprised that I could hear him, but his voice carries and is quite

distinct. MAJ S__ seemed surprised and admitted that they were 'having a heated discussion.'"

(d) When the CID SA asked if MAJ F__ had ever witnessed MAJ S__ act in a manner that might be considered flirting, MAJ F__ indicated MAJ S__ was "probably the least flirty person I know." In response to the question of whether MAJ S__ had told MAJ F__ about what had happened that night, MAJ S__ said, "[Applicant] came over to use a corkscrew, sat down while (MAJ S__) was trying to work and something inappropriate happened. She (MAJ S__) related she was surprised that it happened, and she felt marginalized, and that he (applicant) saw her as a weak person and (she) felt victimized. (MAJ S__) related she told [applicant] he lost her trust, and she asked him to leave."

(3) On 7 March 2017, MAJ W__ H. Ei__, a male fellow classmate, completed a sworn statement.

(a) On or about 2300 hours, 28 February 2017, MAJ Ei__ received a text message from MAJ S__ saying, "I'm sorry to text you so late – are you up?" This was followed by, "Need to talk to you about [applicant]." Because MAJ Ei__ was asleep, he did not respond until the next morning; MAJ S__ indicated she would talk with him after class.

(b) On 1 March 2017, at the start of the class, MAJ Ei__ heard MAJ J__ L. F__ ask MAJ S__ about the previous night's activities, remarking that it sounded like they were having a party. MAJ S__ uncomfortably denied that there was a party and quickly changed the subject.

(c) Later, around 1230 hours, MAJ Ei__, MAJ S__, and another classmate exited the classroom, and they walked to their hotel; on arrival, MAJ S__ asked if she could talk with MAJ Ei__. They went to her room , and she told him the following:

- At about 2000, 28 (sic) February 2017, the applicant texted, asking to borrow a corkscrew; MAJ S__ said he could stop by whenever he needed to
- When he came by, he picked up the corkscrew and asked if she could take a break to talk; because she wanted to finish her homework, she told him she was busy but would text him later if he still had a question
- About 2200 hours, she completed her work and texted the applicant letting him know she was free, and he could ask his question; on his arrival to the room, MAJ S__ sat in a chair; MAJ S__ noticed the applicant appeared intoxicated, but she was not sure to what extent
- The applicant began asking her questions that made her very uncomfortable, such as, "have you ever seen a black (male member)?" and "are you in to

black guys?" MAJ S__ clearly told the applicant "No" and told him the questions made her very uncomfortable

- MAJ S__ tried to end the conversation, but the applicant continued; he said, "I know you're a good girl, but you aren't a good girl..."; the applicant continued with another 10 questions before he moved from the chair to a moveable table that put him about 3 to 6 inches from MAJ S__
- At this point, they were both face to face, although the applicant's hips were at MAJ S__'s shoulder level, providing a clear vertical separation; MAJ S__ asked the applicant what he was doing; at this point, MAJ S__ stopped speaking at a normal tone of voice and dramatically increased her volume
- The applicant reached behind MAJ S__'s head and removed her hair clip; MAJ S__ clearly told the applicant to stop; she retrieved the hair clip and put it back in her hair, but the applicant reached for the clip again and removed it; MAJ S__ told the applicant to stop and put the hair clip back in her hair
- The applicant repeated his actions a third time, removing the hair clip and placing it on the desk; at this time, MAJ S__ felt the applicant was encroaching on her position and things were escalating; MAJ S__ extended her arms and yelled at the applicant to leave
- The applicant tried to "back track" verbally and laugh off the situation, but MAJ S__ was yelling at the top of her voice for him to leave; the applicant eventually left the room.
- As MAJ S__ told MAJ Ei__ what had happened, she was physically upset; she cried and had to stop numerous times; MAJ S__ said, "It clearly was sexual harassment but I don't know what I want to do. I don't want to get anyone in trouble. I just wanted to go to CGSC and not have any drama."

d. On 19 April 2017, the CG, CASCOM issued the applicant a GOMOR; he reprimanded the applicant for "committing sexual harassment in violation of AR 600-20, paragraph 7-6b while attending Command and General Staff School." The GOMOR continued, "An Army CID investigation revealed that you asked a female officer a series of intimate and sexually explicit questions. You then removed the officer's hairclip and touched the officer's head and hair. The officer told you to stop and tried to fix her hair. Rather than stopping, you continued to touch the officer's hair and advanced closer to the officer, nearly straddling her and cornering her in her chair. You finally ceased this inappropriate behavior when the officer again told you to stop and pushed you away."

e. On 20 April 2017, the applicant acknowledged receipt of the GOMOR and indicated he would submit a rebuttal. On 27 April 2017, the applicant filed his rebuttal, with the assistance of a counsel. The applicant requested the CG, CASCOM reconsider the GOMOR, or, in the alternative, direct the GOMOR's placement in the applicant's local military personnel file. The applicant argued the following:

(1) The CID report mischaracterized the applicant's actions, and he denied he committed sexual harassment, as defined in chapter 7, AR 600-20. Furthermore, he had served closely with female Soldiers, NCOs, and officers most of his 19 years of active duty service and none had ever accused him of sexual harassment or of having inappropriate relationships.

(a) In her CID interview, MAJ S__ claimed the applicant was "on the prowl from day one" at CGSOC, but this simply was not true; the applicant maintained that, although he was not married, he was in a serious, monogamous relationship. Additionally, he was well aware that MAJ S__ was married. "Clearly, MAJ S__ has mistaken my outgoing and extraverted behavior. In fact, she told the CID agent that I was mentoring several BOLC (Basic Officer Leader Course) but that she was sure that it was, 'just a power thing.' The CID Agent, SA H__, then agreed with her that such behavior was 'typical of a predator.'"

(b) "During the incident in question, I did ask MAJ S__ if she had ever dated a black man. In my statement to CID, I described both the context and the question itself. I told MAJ S__ that I believed one of our instructors, a black male, was attracted to her. In the context of that discussion, I did ask her if she had ever dated a black man and she told me that she had dated a mixed-race man in college. I did not ask her any sexually explicit questions."

(c) "In the course of our discussion, MAJ S__ was twirling her hair that was held back in a clip. I found it to be distracting and, in a friendly manner, I did walk over and remove the clip from her hair. She replaced it and I removed it again. I did not, as she contends, run my hands through her hair. After I removed the clip the second time, she became upset and began to cry. She said, "If my husband knew you touched my hair...", I immediately moved back to the chair I was previously in and asked her what was wrong. I was taken aback by her reaction. After a few minutes, she regained her composure. I apologized for touching her, we shook hands and she said that I would have to work to regain her trust, or words to that effect, and I left her room."

(2) With regard to the CID investigation, CID initiated its investigation based on an alleged sexual assault, which the investigator "absolutely did not substantiate." CID drew no conclusions as to the applicant's actions, nor did the report offer any findings about the conversation the applicant had with MAJ S__; the report simply summarized the statements of MAJ S__, MAJ F__, and MAJ Ei__.

(a) MAJ Ei__ did not witness any part of the incident; instead, he focuses on his perceptions of what MAJ S__ told him; parts of his statement are "grossly exaggerated and do not match any of the other accounts." For example, MAJ Ei__ claimed the applicant moved up to MAJ S__ so that his hips were at MAJ S__'s shoulder level. According to MAJ Ei__, the applicant and MAJ S__ were at that point about 3 to

6 inches apart; however, MAJ S__ never made such a claim and that is because it never happened. MAJ Ei__ just made it up. In addition, MAJ Ei__ asserts the applicant asked MAJ S__ if she had ever seen a black man's member; "I don't know how (MAJ Ei__'s) account became so sinister, but clearly his statement, that only relates what he thought he heard from MAJ S__, is a gross caricature of what the actual witnesses heard and saw."

(b) "Regarding MAJ S__'s recorded statement, she claims that I asked her, "If your husband asked you to hook-up with a prostitute, what would you do?" I have no idea from where that question comes. I flatly and unequivocally deny asking any such question. Nor did I ask, 'a series of intimate and sexually explicit questions.' Furthermore, based on my life experience and belief; if I had asked such a disgusting and inappropriate question, I think MAJ S__ would likely have asked me, at that point, to leave her room."

(3) The applicant maintained his conduct did not meet the definition nor the intent of sexual harassment under chapter 7, AR 600-20. Further, his conduct was not a sexual advance; he did not ask for any sexual favors; and touching MAJ S__'s hair was not "conduct of a sexual nature."

(4) The applicant concluded by stating, had he known MAJ S__ believed he was "on the prowl," he would never have spent time with her; he mistakenly believed they were friends. "I am profoundly sorry that my actions offended her, and I told her so immediately after the incident. However, I never meant my touch of her hair to be of a sexual nature, nor do I believe most people would view it that way."

f. Both the battalion-level commander and the brigade-level commandant recommended local filing for the GOMOR; on 16 May 2017, the GOMOR imposing official (CG, CASCOM) directed the GOMOR's placement in the applicant's OMPF.

g. Also, on 16 May 2017, the CG, CASCOM notified the applicant, via memorandum, that the applicant needed to show cause for retention on active duty, under the provisions of AR 600-8-24, paragraph 4-2b (Misconduct, Moral or Professional Dereliction, or in the Interests of National Security). The CG advised he initiated this action based on the applicant's commission of sexual harassment and conduct unbecoming of an officer. On 18 May 2017, after consulting with counsel, the applicant acknowledged receipt of the officer elimination memorandum, and he requested a BOI.

h. On 30 June 2017, a board of officers convened to determine whether the applicant should be separated or retained; the applicant was present with counsel. The board considered documentary evidence and heard testimony.

(1) MAJ R__ M. S__ testified that she and the rest of her group arrived, on 3 January 2017, to attend CGSOC and were assigned to staff groups; the applicant was a member of MAJ S__'s group. In the class, she introduced herself the Chief of Physical Therapy at an Army community hospital, and she told the class she was married and had two sons. Interactions with other classmates during class and after hours were generally positive.

(a) The assistant board recorder showed MAJ S__ a series of text messages between MAJ S__ and the applicant, and MAJ S__ provided context. "On the third page text of Saturday, June 21 (sic, January 21), after midnight, it says, 'Hey.' I recall that evening, which was a Saturday, several of us went to a brew pub in Richmond for dinner and drinks. A couple of us went to the bar in the IHG hotel afterwards, and we were just having a good time. It was me, [the applicant], MAJ Ga__, MAJ Gr__, and MAJ Ei__." "At the end of the night, [applicant] followed me to my room." "I didn't know if my room was on the way to his room, so he kind of followed me back. And so I stopped at my door and I'm pulling out my key card to go into my room, and he like pulls me in and my head is kind of like on his chest, like on his sternum area, and he takes his hands and like puts them in my hair, as if to like massage my hair or head. I'm like, 'Nope, not interested. I'm out. Bye' and nothing more than that."

(b) "I go in my room and then the 'Hey' text comes in. I didn't call him that night, but I did call him the next day around noon after I got a text from him to have me call him. I called him and he wanted to apologize to me personally, you know, like over the phone as opposed to over a text messaging for him getting very close to me, you know, putting his hands on me. And I thanked him for the apology, told him, 'It's fine. It's cool.' and I appreciated the fact that, you know, he showed some remorse for putting his hands on me." "I did continue to hang out with him and the others in CGSC after that incident."

(c) On or about 1 February 2017, the applicant indicated he wanted MAJ S__ to be his "wing lady," MAJ S__ explained, "I had teased [applicant] about my perception of him, you know, just kind of being on the prowl, kind of just eyes moving, just--you know, that sort of thing. And I told him I'd be his "wing lady" and I'll vet the females he might be pursuing. And it was just kind of lighthearted conversation, or that's how I interpreted it." "When he said, 'Only requirement is you can't share my world. We'll hang out. You and I are hanging out. No one need to know.' I didn't understand why it was a secret." MAJ S__ asked the applicant to talk about this in person, but the applicant never brought up the subject again.

(d) "Concerning the text, 'Am I too direct with you,' and I don't remember if it was that same day...in the hallway, he said something about me having a good body or something like that, but he wasn't like turning his head and looking down at me. He was like, 'Yeah, you've--you know, you look pretty good,' or something along those lines. No,

I didn't take offense to it, but, I mean, it's kind of like, you know, at this point the comments are starting (to) add up. It's like, you know, I mean, I wear a ring every day. I talk about my kids like incessantly, people know I'm married and I talk about my husband all the time, like what he does for a living, what he's doing with my kids while I'm gone for four months. But, yeah, I just kind of felt like, okay, this is like really starting to add up."

(e) On 26 February 2017, the applicant texted MAJ S__ and, after some conversation about the weekend, the applicant asked if he could borrow a wine opener; MAJ S__ responded that the applicant could come by and grab the opener, but rather than simply picking up the opener, the applicant brought the wine bottle, and, after opening it, he sat down, drank some wine, and started a conversation. MAJ S__ indicated she wanted to finish her classwork, and the applicant said, "When you're done, I have 5 raw questions to ask." After MAJ S__ completed her coursework, the applicant came back to her room and they talked about school and career progression.

(f) "During the conversation, I remember he was leaning forward on his elbows on his thighs and he kind of had this s__-eating grin on his face and he was like, 'Yeah, I kind of have a buzz.'" This surprised MAJ S__ because the applicant had only been in her room about 30 or 40 minutes earlier, and she remarked, "Wow, how much did you drink in that short period of time?" They continued talking and this was when the "five raw questions" came up. "He had asked me if I had ever been with a black guy and I said that I had briefly dated a guy who was mixed race, like 10 or 12 years before, even before I went to physical therapy school. When he asked the question, all I could think was why did it matter? Like, who cares if I dated a black guy or not. Once I said that, he asked me if he'd had a big (male member), and he asked me if I had any curiosities or something like that--like, was I curious about black men in a sexual sense. I'm feeling very uncomfortable."

(g) I did mention (in earlier testimony) that I tried not to cause any stirs in the small group. I didn't kick him out of the room at that point was just for the same reason. It's like I'm starting to get uncomfortable because these are pretty bizarre questions. You know, I've been in the Army long enough to just to have been exposed to plenty of off-hand comments where, you know, it's just like, 'Whatever. It's the Army.'" "Then he mentioned something about one of our secondary instructors who was a black male who was into me. And I was like, 'What do you...what? What are you talking about?'"

(h) "So after that, another one of these raw questions comes out and he says that he'd seen a talk show where they said, 'If you're the wife and your husband says, 'I want to be with a...like, hey, I want to get with a prostitute,' what would you do? And he gave three choices. Would you tell your husband--or so, my husband--to just go masturbate, go take a cold shower, or get with a prostitute? And I actually answered the

question. I don't know, maybe I just felt cornered. And I think--I don't even remember what my response was. I'm feeling just very uncomfortable."

(i) "I think the next was that he got up out of the armchair, walked across the room and took a clip out of my hair and then put his hands in my hair just like he did that first night in January...so he took the clip out and I was like, 'No, I want my hair up. Thank you,' like this is not your place to decide (how) my hair is. And so, I took the clip off the table and put it back in my hair. And I don't remember if he went back to his chair or if he did it again. But it was a pretty short period of time that he took the clip out of my hair again and he's like, 'Yeah, you need to take this out. This needs to not be here.' And then he did it again and put his hands like all in my hair. Like I'm just getting really...like, what the hell's going on here? Like, what the hell?" The applicant then made a comment about MAJ S__ being a "good girl but not a good girl," "To me, this was just so explicit.

(j) MAJ S__ describes the applicant as having a "s__-eating grin on his face," and after taking the clip out of her hair a third time, the applicant, "put his hands on my face head again, and then he's like standing in front of me and he pulls (off) his leg and kind of rotates it as if he's about to straddle me. And I'm in the wheeled chair and I like pushed--I couldn't push him away because he was by that L-shaped table, and so I like wheeled away I was like, 'Stop it,' or 'Get away,' or something like, you know, 'Cease operations,' like, 'Don't do that.' And I immediately just started like--my eyes started welling up."

(k) When the applicant saw MAJ S__ was upset, he said, "R__, R__ what's going on? Did I upset you?" MAJ S__ responds, "'This is like a major trust issue.' And I think he asked me like, 'Well, how much trust have I--you know, has he lost. Like I'm trying to quantify it, but I'm also just trying to process everything in my head at the same time. I mean, this guy just tried to like get in my lap, you know? And I felt like, you know, if--retrospectively, it's like if I had not stopped that at that point, it would have taken 10 seconds for me to be in a horizontal position, our clothes to be removed, or something. Like it just [snapped fingers] moved so fast."

(l) "I'm like, 'This conversation is over. You need to leave.' When I pushed him away, yes, I had raised my voice and I was probably talking in a louder volume when I'm telling him he needs to leave or like, you know, 'You lost my trust,' like my volume is probably higher at this point." "After he leaves the room, I'm just crying profusely and I texted my battle buddy, MAJ Ei__...(it was) my instinct was to talk to him because he was--I mean, not only my good friend, my battle buddy--MAJ Ei__ sat next to me...He was definitely someone I had come to trust." The next day, MAJ S__ told MAJ Ei__ what had happened and she subsequently filed a SHARP complaint and spoke to CID.

(m) In response to a question by applicant's counsel, MAJ S__ clarified a comment she had made to the CID SA about the applicant mentoring some BOLC students. "I told him that I was told by...I don't remember who mentioned this to me...that [applicant] had befriended or had met some second lieutenants who were there for their basic course and then offered to mentor them. I just kind of found it a little unusual. Not unusual in general, but just in that context of like, 'I don't know you. You don't me. We don't work together. We don't have any professional relationship except for like I just met you in this IHG hotel,' and he offered to mentor them. And I just was like, "Why?" I mean ...I was puzzled by that." "I interpret that as like an opportunity to be in a position of power to be offering such professional advice on personal time to people you're not going to be working with, that aren't doing anything that they're doing. I mean, the lieutenants are here as logistics officers. [Applicant is] a Signal Officer. And so, it's not like they would be...it's not like those lieutenants would be going to his unit. I don't know if [applicant] was the only person in the ILE class mentoring others, but I would assume so."

(2) The applicant's counsel called CID SA R__ J. H__ as a witness, and he testified via telephone. He stated, "at the outset of a (case) intake, we probably give the victim a 51 percent shake, but see where the evidence takes us because we're not allowed to turn away an allegation. The victim can't come to our office say, 'A, B, and C happened,' and right there without investigating, without doing anything, we can't turn her away and go, 'Ah, she's making it up.' We have to look into it at least to the level where we can determine it's a misperception of facts, it didn't happen, or it's a crazy story but we really think she's telling the truth."

(a) Counsel and the SA discussed a hotel video that showed the applicant entering MAJ S__'s room, "walking kind of happy go luck." and leaving her room seeming to be disappointed and less positive.

(b) SA H__ added, "I don't think MAJ S__ said that she explicitly said she was open to do anything sexual with [applicant]. I think the circumstance was or what the problem was, which is why we're here, is that [applicant] read into other things like body language or whatnot, and habits and mannerisms, and that's where he got the idea that she might be open to a sexual advance and that's why we're dealing with this now. I don't think she ever explicitly told him, 'We should do something,' and then that's why she would have had to say, 'I don't want to have sex with you,' or 'I don't want to do X, Y and Z with you.' And that's why that conversation, that explicitly right up front conversation never happened because of, in my opinion, a misunderstanding of the circumstances by [applicant]."

(c) "We did talk about the misunderstandings. As I understand how the MCM (Manual for Courts-Martial) is written, if I'm going to initiate sexual activity with another person, the burden is on me to understand where their red lines are...you can put

yourself in a spot where you're going to cross a red line and not even realize it because maybe you misread the social cues." "I did say that an accident occurred in the IHG hotel in that no one went there with the idea that, 'Hey, let's do this and hope it doesn't turn into a sex crime,' kind of like you drive down the road to the store to buy something. You don't plan on getting in a car accident, but it can happen if you're not vigilant." "I would agree that there's a burden on a person initiating a sexual act to read signs no matter how subtle they may be based on the way the MCM is written."

(3) The applicant provided sworn testimony.

(a) The applicant summarized his military service and stated, "I'm a social person. I'm an extrovert. I'm the type of guy that likes to talk and not always work. I like to engage on different intellectual subjects during conversations. If I don't talk to you in a while, I'll call you and check up on you. I currently have a girlfriend who works at the Pentagon." "I have two children. They live in Argentina right now because I'm in flux. I just completed the assignment in Stuttgart (Germany)."

(b) The applicant affirmed that he viewed MAJ S__ as a friend, and that she and MAJ Ei__ were the two classmates with whom he socialized the most. As to comments about his mentoring BOLC students, "When I came up through the ranks, mentorship was a really big thing that was always harped on us from the battalion commander to the company commander to the majors." "So I was coming in to do an assignment late at night and I ran into two of the lieutenants that was at the desk doing CQ that night. And I stopped to look at something that was going on in the news or whatever it was and they started asking other questions. 'Hey, sir, what are you doing here? And then that built into a relationship with (lieutenant) S__ S__. He was one of the top performers in this OBC class, but he was working on his training management briefing due in three days. He was like, 'Sir, I would really appreciate it if you could take a look at that because you've been there, you've done that.' The applicant remarked that it would be best if the lieutenant brought his entire team over so that they could review the briefing together. That one time turned into something consistent; the applicant would go to visit his girlfriend on Friday, and, when he returned on Sunday, he would help the lieutenants prepare for their training meeting.

(c) Concerning the January incident when he touched MAJ S__'s hair in the hallway by her room, "MAJ S__ and I were having a conversation...but it was not a conversation you could just stop and go because we were debating whatever it was." After getting off the elevator, "I stepped off one time and I don't know what the vibe or what the energy was, but I stopped right there and I'm facing as I'm facing you now. And she was probably ahead of me. And I don't know if the conversation may have stopped, but it was that quiet moment and she turned around and she was maybe in this distance that I'm demonstrating with my hands [arm's length] and I reached out and I touched (MAJ S__'s) hair like this [stroking motion]. It had to last two, three seconds. We

stopped and then there was an awkward moment and then I went literally right there to the steps."

(d) "When I got upstairs, I didn't have this (easy) feeling about the situation because it was already late...I remember I sent her a (text) saying, 'Hey, call me because I want to talk to you about whatever...'" "That bothered my moral compass that day and I knew it was wrong. But I wanted to clear the air." Later, when he spoke with MAJ S__, "I explained it in detail. She accepted it...or I took it was a genuine acceptance of my apology, and we just moved on from there."

(e) The applicant talked about how one of the instructors (Lieutenant Colonel (LTC) C__) at first appeared to be interested on one female student, and then seemed to shift his focus to MAJ S__, and this caught his immediate attention. "So I paid attention to that for a while and then I just wanted to ask (MAJ S__) what her vibe was about that situation. So that's when I sent the message to (MAJ S__) about the five raw questions. Those five questions were still in line with what I texted (MAJ S__) before and I said, 'Am I too direct with you?' Sometimes, as I have learned, you deal with certain people and you don't know where that line is at so I'm always checking to see if maybe I'm crossing that line." "You can just tell me, '[Applicant], that could be a little too much. You're too close to my personal space'..." "Just tell me. We're adults. We're human and I know when to stop or something like that."

(f) "(MAJ S__) is a fidgeter. She fidgets. She is (sitting) there. She moves. She is just always there." "When I went in, I sat in the chair...I remember she was playing with her hair or touching her hair and I leaned up and I grabbed the clip and I dropped it down on the table or something there at that moment. And she just gave me this look and then we continued on and then I said to her, 'Do you think LTC C__ is treating you a little bit different?'; MAJ S__ replied she had not noticed. "And then I said to (MAJ S__)...have you ever dated black men before?" and she acknowledged she had and asked, "Why are you asking me?" "I said, 'Because I see you downstairs when we're in the hotel...I see you checking them out.'" "...by then, she was fidgeting with this hairpin again. And then I remembered that I stood up and the space between her chair and her desk was a decent space. I wouldn't say it was like as wide as...but it was enough. And I leaned over and I grabbed her pin. I didn't...I didn't rub...put my hands in her hair at the time. I didn't do anything at the time. And I dropped the pin or the hairclip. At that moment, she jumped up and she said...(applicant then telling the board) no, no, I'm sorry. Let me back up. I think I went too fast."

(g) "Before I got to the second question, she...I had asked her a third...I don't recall what the third question was, but it was about the same scenario about LTC C__'s behavior. It was all in line with LTC C__'s behavior. And I paused. And she said to me, 'I thought you had five questions. You only asked me three. Where are the other two questions?' I said, 'I didn't have nothing else.' She said, 'Whatever, [applicant]. You're

not going to ask me.' And she...that's the kind of relationship we had where like she would say, 'Okay.' At that moment, I stood up and I reached over and I pulled her hairpin. She was fidgeting. But at that...as soon as I reached over and I dropped her pin, she sprouts up and she...well, she pulls back and she sprouting up and she said, '[applicant].' And I said, '(MAJ S__), what's going on? And immediately, her eyes started watering. And I'm like, 'Are you okay, (MAJ S__)?' She said, 'Just give me a minute.'"

(h) "And at that moment, she sits back down probably on the second, '(MAJ S__), are you okay?' I sat back down on the chair like I'm in now. I sat back in that chair and she's...I'm asking her like, 'What's going on?' I said, 'Did I trigger an emotion or something?' She said, "No, just give me a second.' We talked about something and I said, '(MAJ S__), if I've done something, then tell me right now that I've done something.' She said, 'No, no, no. Hold on.' And she said, 'You violated' or 'You broke my trust.' Something in that context. After that happened, we sat there maybe two minutes, if that. At the time, everything was fast and slow. She said, 'No, no, everything's fine.' I said, "Are you sure, (MAJ S__)?" She said, 'Yes.' At that moment, we shook hands and I left and that was the evening."

(i) "When I touched her hairclip for the first time, I think what caught my attention about it was just the fidgeting. To be honest with you, I didn't put any thought behind it. It was just a fidgety moment. It was nothing. I didn't really put any thought behind it." "I never saw (MAJ S__) in a sexual way at all. I mean, no. Why did I pause? I paused because of the fact that I went to DC when I wanted to go there....So if I was that desperate, to say, I could have just drive to (his girlfriend's home). There was nothing constraining me to not go see my girlfriend. Nothing."

(j) "In hindsight, I do regret touching her in her room. I regret multiple things. The thing I regret the most is I think I accept the conditions for my behavior. So, yes, I shouldn't have gone down there at 10:00 at night. That's one thing you regret because you're not looking at tomorrow, so to say. If I was to look and see how this could be perceived, because I always say that your last name means everything." "And that's what I didn't take into consideration because I didn't see it from that perspective, so that is a regret."

(k) In response to questioning by the assistant recorder, the applicant stated, "During the interview with SA H__, it is correct that I told him I had noticed MAJ S__ staring at my crotch. I pointed that out because I felt...so, as I previously mentioned, I have caught MAJ S__ on multiple occasions looking at black males or African American males. I thought it stood out as kind of awkward. I mentioned it to A__ (MAJ Ei__) about it twice. It just stood out. I didn't take it as nothing, but I thought it was kind of awkward that it happened."

(l) The board president asked the applicant questions, and he responded, "(It did occur to me that it was inappropriate to touch a married woman. I think that thought process came in the first incident because that truly bothered me. It bothered me from two ways. I had a wife and I understand that; and I have two daughters and I understand that process there. So, yes." "The second time, and my thought process was about the fidgeting. It had nothing to do with anything sexual. I didn't see it as a married woman, a single female. I didn't see it from the female perspective; I saw it as a friend or a colleague that I was having a friend or colleague conversation with and the fidgeting just caught my attention and I removed the hairpin."

(4) The board recalled MAJ S__ to clarify her testimony, and she answered questions from the assistant recorder, the board members, and the applicant's counsel. MAJ S__ stated she had thought that the actions were inappropriate the first time the applicant touched her hair, but she did not tell him so; they were both inebriated at the time, and she did not want to cause a scene. She acknowledged telling SA H__ that, "I could have invited him in at that moment...but I chose not to do that." The applicant's counsel asked about the applicant's presence in MAJ S__'s room the night of the incident, and she stated, "Yes, [applicant] had put his hands in my hair romantically, he had come into my room earlier, and I noticed that he may have been partially erect, and I still trusted him enough to come into my room. I'm a pretty trusting person. I like people. I like to be around people. I'm an extrovert, so it's just an opportunity to socialize with a peer."

i. On 30 June 2017, after deliberations, the board returned with its findings and recommendations:

(1) Findings; the preponderance of evidence supported the allegations that:

- The applicant sexually harassed a fellow CGSOC student, in violation of AR 600-20, paragraph 7-6b
- The applicant committed sexual harassment against a fellow CGSOC student, which was unbecoming an officer and violated AR 600-20, paragraph 7-6b

(2) Recommendations: The applicant should be separated under honorable conditions.

j. On 6 July 2017, the applicant's counsel filed a notice of substantial defect, arguing the board recorder had allowed MAJ S__ to remain in the gallery to watch the board's proceedings; this violated both AR 600-8-24 and AR 15-6 (Procedures for Administrative Investigations and Boards of Officer), which barred witnesses from observing proceedings as a spectator. On 25 July 2017, the Chief, Administrative Law addressed counsel's contentions.

(1) The Chief, Administrative Law noted that AR 600-8-24 allowed board presidents to exclude any spectator when, in the board's opinion, that spectator's presence may interfere with the proceedings. The board president never elected to exclude MAJ S__.

(2) Additionally, MAJ S__ was not present until the board had permanently excused her; as such, she was not there when the applicant's counsel called several witnesses and she did not observe the applicant's sworn testimony.

(3) Further, MAJ S__ sat in a location that was visible to both the applicant and his counsel; if they had actually been concerned about her presence, counsel could have raised an objection but did not.

k. On 4 August 2017, the General Officer Show Cause Authority (GOSCA) determined no substantial defect had been committed in the applicant's BOI, and he directed the continuation of the applicant's elimination process.

l. On 5 August 2017, the applicant submitted a request to voluntarily retire in lieu of elimination. On 9 August 2017, the applicant's command provided him a copy of the BOI proceedings, and, via memorandum, advised the applicant of the following:

(1) The applicant could request the following in lieu of elimination: resignation, discharge, or retirement. Concerning retirement, the memorandum stated he could:

(a) "Apply for retirement in lieu of elimination if otherwise eligible, according to AR 600-8-24, Chapter 4 and Chapter 6 (must specifically state that your application for retirement is submitted in lieu of elimination). The effective date of retirement will be (for officers with 20 years or more of Active Federal Service (AFS) & for officers with minimal of 19 years and 6 months of AFS but less than 20 years of AFS) no later than two full months from final adjudication of request or at the 20 year-mark, whichever is later."

(b) "Along with your retirement in lieu of elimination, you may submit matters for the AGDRB because your retirement in lieu of elimination, Official Military Personnel File, Officer Record Brief, and the derogatory information, will be forwarded to the AGDRB under the provisions of AR 15-80. The board will make a recommendation to the DASA (RB), who will make a final determination as to the highest grade in which you have served satisfactorily for retirement purposes."

(c) "You may not appear before the AGDRB. If you elect to submit written materials, they must be attached to your request for retirement in lieu of elimination."

(2) "The entire case will be considered by a Board of Review, and you will be entitled to a copy of the Board of Review report."

(3) "If the Board of Review determines that you should not be retained, the case will be referred to the Secretary of the Army or their designee for final action. If the Board of Review determines you should be retained, the case will be closed. In either event, you will be notified at the earliest and practicable time by CG, HRC."

m. On 15 August 2017, the applicant affirmed his election to apply for retirement in lieu of elimination. On 5 September 2017, the GOSCA forwarded the applicant's elimination packet to HRC, and he recommended approval of the applicant's retirement request.

n. On or about 21 September 2017, HRC returned the applicant's retirement request without taking action; HRC noted the applicant had three adverse flagging actions pending and, because he was transferring his 9/11 GI Bill education benefits, he was obligated to continue his service until 1 December 2018. HRC recommended the applicant resubmit his request once the flags had cleared and ask for an effective retirement date of 31 December 2018.

o. DA Form 1059 (Service School Academic Evaluation Report), dated 2 October 2017 and pertaining to the applicant's participation in the CGSOC, showed the applicant had failed to achieve course standards. Under item 14 (Comments), the report stated, "Performance: [Applicant] does not support the SHARP. He was dismissed from CGSOC for committing sexual harassment in violation of AR 600-20, paragraph 7-6b. [Applicant] is not able to reenroll in CGSOC."

p. On 16 November 2017, an Ad Hoc Review Board reviewed the applicant's case and considered his request for retirement in lieu of elimination; the board unanimously recommended the applicant's elimination with an under honorable conditions character of service.

q. On 21 December 2017, the Deputy Assistant Secretary of the Army (Review Boards) (DASA (RB)) signed a memorandum by order of the Secretary of the Army. The memorandum stated that, on 30 June 2017, a BOI had recommended the applicant's involuntary elimination, based on misconduct and moral or professional dereliction. On 16 November 2017, an Ad Hoc Review Board had reviewed the case. On 21 December 2017, the Senior Official Performing the Duties of the Assistant Secretary of the Army (Manpower and Reserve Affairs) (ASA, M&RA) determined the applicant was to be involuntarily eliminated from the Army with a general discharge under honorable conditions. On 22 December 2017, HRC notified the applicant's command of the ASA, M&RA's decision and directed the applicant's discharge under honorable conditions, not later than 5 January 2018.

r. On 4 January 2018, the applicant petitioned the ABCMR, requesting the removal of the BOI from his OMPF; his reinstatement on active duty so that he could complete 20 years; and the expedited consideration of his case, due to his pending separation.

s. On 5 January 2018, the Army discharged the applicant under honorable conditions. His DD Form 214 shows he completed 11 years, 10 months, and 13 days of net active duty commissioned service, and 8 years, 1 month, and 7 days as an enlisted Soldier. Item 13 (Decorations, Medals, Badges, Citations, and Campaign Ribbons Awarded or Authorized) lists the following:

- Afghanistan Campaign Medal with two bronze service stars
- Purple Heart
- Defense Meritorious Service Medal
- Joint Service Commendation Medal (2nd Award)
- Army Commendation Medal (4th Award)
- Army Achievement Medal (6th Award)
- Joint Meritorious Unit Award (2nd Award)
- Valorous Unit Award
- Army Good Conduct Medal (2nd Award)
- National Defense Service Medal
- Global War on Terrorism Expeditionary Medal
- Global War on Terrorism Service Medal
- Iraq Campaign Medal with one bronze service star
- NCO Professional Development Ribbon with Numeral "2"
- Overseas Service Ribbon with Numeral "3"
- North Atlantic Treaty Organization Medal
- Combat Action Badge
- Parachutist Badge
- Air Assault Badge

t. On 11 June 2019, the Board voted to deny the applicant's requests for relief.

u. On 5 November 2021, the U.S. Army Crime Records Center provided redacted copies of the CID LER, pertaining to the misconduct allegations that resulted in his separation, as well as two military police (MP) reports, both occurring while the applicant was an enlisted Soldier and stationed in Germany. The two MP Reports were dated in October 2004, and both addressed the operation of a vehicle while intoxicated. In the second report, the applicant was not the driver; another Soldier drove the applicant's uninsured and unregistered car.

v. On 9 November 2021, the Army Review Boards Agency provided the applicant and counsel a copy of the advisory opinion for review and the opportunity to submit a

statement or additional evidence on his own behalf. On 19 November 2021, counsel submitted his response, pointing out that the CID LER highlighted the "severe disconnect" between the alleged offense for which CID titled the applicant and the stated basis for the applicant's separation.

7. Clemency guidance to the Boards for Correction of Military/Naval Records (BCM/NR) does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority to ensure each case will be assessed on its own merits. In determining whether to grant relief BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment. This includes consideration of changes in policy, whereby a service member under the same circumstances today would reasonably be expected to receive a more favorable outcome.

8. Published guidance to the BCM/NRs clearly 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.

BOARD DISCUSSION:

1. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing 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 found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered.

a. As to the request that the applicant's name be removed from the CID titling block, the Board considered regulatory guidance including Department of Defense Instruction 5505.07. The Board determined a preponderance of the evidence shows an error or injustice did not occur when the applicant was titled because probable cause existed and still exists to support the titling. In reaching this conclusion, the Board considered the relative credibility of the applicant and the complaining victim, available video footage, witness statements, and the extent to which the applicant's statements corroborated the offense. The Board also considered the subsequent administrative actions taken and the unanimous findings of the Board of Inquiry. The Board ultimately

determined that sufficient evidence existed then, and existed now, to lead a reasonable person to conclude that the applicant committed the offense of Abusive Sexual Contact.

b. As to the applicant's request that the BOI and GOMOR be removed from his record, the Board examined the proceedings of both and determined that the applicant was afforded full due process in both actions. The Board noted that, contrary to the applicant's claims, he received adequate notice of the offenses which formed the basis of the BOI and GOMOR, was given the opportunity to consult with counsel, and had ample opportunity to prepare for and present his response in accordance with regulatory requirements. The applicant was present at his BOI hearing and had the right to present witnesses, evidence, and his own testimony. The fact that the previous CID investigation was based upon a different offense does not bear on whether due process was properly afforded in the subsequent administrative actions. The Board further determined that applicant's command was not required to take nonjudicial punishment and/or court-martial action in conjunction with or before proceeding the GOMOR or BOI.

c. With respect to applicant's request that he be retired, the Board first reviewed the applicant's separation action file and confirmed that the applicant's request for retirement in lieu of elimination (RETILE) was considered by the ad hoc officer elimination board before it rendered a decision to not retain the applicant. The Board noted that, contrary to the applicant's assertion, AR 600-8-24 did not require that his RETILE be considered by an Army Grade Determination Review Board (AGDRB). Paragraph 4-20 of the regulation provides that elimination proceedings "may" be suspended upon submission of a RETILE, and that an officer who "is being retired" will be considered by an AGDRB. Neither of those provisions indicate that approval of retirement or consideration by an AGDRB are mandatory upon just a request for RETILE. The Board also found that the applicant's claim that he'd relied upon his defense counsel and installation staff's assurances that he would receive favorable action on his RETILE unpersuasive. The ultimate separation authority is not bound by the entities cited by the applicant, or any other entity, in its decision to approve or disapprove the RETILE.

d. Finally, the Board considered the applicant's contention that the consequences – being eliminated with almost 20 years of service – were unduly harsh compared to the severity of the offense for which he was separated. The Board acknowledged that the applicant served for over 19 years but ultimately determined that the result was not unjust. In reaching this decision, the Board considered the results of the BOI, the particulars of the offense, and the evidence presented in the applicant's petition.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. As for the issues being reconsidered (Retirement in the rank/grade of major and removal of board of inquiry (BOI) results from his official military personnel file) the evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Number AR20180000390, on 11 June 2019.

2. As for the new issues (Removal of the general officer memorandum of reprimand from his OMPF, Removal of his name from the titling block of a U.S. Army Criminal Investigation Command Law Enforcement Report, and correction of administrative data), the evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

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. AR 600-20, in effect at the time, prescribed the policies and responsibilities of command, which included the Army Ready and Resilient Campaign Plan, military discipline and conduct, the Army Equal Opportunity Program, and the Army Sexual Harassment/Assault Response and Prevention Program (formerly the Army Sexual Assault Victim Program). Chapter 7 addressed the prevention of sexual harassment.

a. Paragraph 7-4 defined sexual harassment is a form of gender discrimination that involves unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature between the same or opposite genders when:

- submission to, or rejection of, such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career;
- submission to, or rejection of, such conduct by a person is used as a basis for career or employment decisions affecting that person; or
- such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment

b. Paragraph 7-4b stated that any person in a supervisory or command position who uses or condones implicit or explicit sexual behavior to control, influence, or affect the career, pay, or job of a Soldier or civilian employee is engaging in sexual harassment. Similarly, any Soldier or civilian employee who makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature is engaging in sexual harassment.

c. Paragraph 7-5 (Categories of Sexual Harassment).

- Verbal – verbal sexual harassment may include telling sexual jokes; using sexually explicit profanity, threats, sexually oriented cadences, or sexual comments
- Nonverbal – nonverbal sexual harassment may include staring at someone (that is, “undressing someone with one’s eyes”), blowing kisses, winking, or licking one’s lips in a suggestive manner
- Physical Contact – physical sexual harassment may include touching, patting, pinching, bumping, grabbing, cornering, or blocking a passageway; kissing; and providing unsolicited back or neck rubs

d. Paragraph 7-6 (Types of Sexual Harassment) stated:

(1) Paragraph 7-6a (Quid Pro Quo). Quid Pro Quo referred to conditions placed on a person's career or terms of employment in return for favors. It included implicit or

explicit threats of adverse action if the person did not submit to such conditions and promises of favorable actions if the person did submit to such conditions.

(2) Paragraph 7-6b (Hostile Environment). A hostile environment occurred when Soldiers or civilians were subjected to offensive, unwanted, and unsolicited comments or behaviors of a sexual nature. If these behaviors unreasonably interfered with their performance, regardless of whether the harasser and the victim were in the same workplace, then the environment was classified as hostile.

2. AR 600-37 (Unfavorable Information), in effect at the time, set forth policies and procedures to ensure the best interests of both the Army and Soldiers were served by authorizing unfavorable information to be placed in, transferred within, or removed from an individual's OMPF.

a. Paragraph 3-4 (Filing of Nonpunitive Administrative Letters of Reprimand, Admonition, or Censure in Official Personnel Files).

(1) An administrative memorandum of reprimand could 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. The memorandum had to be referred to the recipient and that referral needed to include and list applicable portions of investigations, reports, or other documents that served as a basis for the reprimand. Statements or other evidence furnished by the recipient were to be reviewed and considered before a filing determination was made.

(2) A memorandum of reprimand could be filed in a Soldier's OMPF only upon the order of a general officer-level authority and was to be filed in the performance folder. An endorsement or addendum to the memorandum was to show the direction for filing. If the reprimand was to be filed in the OMPF, any submissions by the recipient were to be attached. Once filed in the OMPF, the reprimand and associated documents were a permanent part of the record unless removed in accordance with chapter 7 (Appeals and Petitions).

b. Paragraph 7-2 (Appeals and Petitions – Policies and Standards). Once an official document was properly filed in the OMPF, it was presumed to be administratively correct and to have been filed pursuant to an objective decision by competent authority. The burden of proof rested with the individual concerned to provide evidence of a clear and convincing nature that the document was untrue or unjust, in whole or in part, thereby warranting its alteration or removal from the OMPF.

c. Paragraph 7-6 (Correction of Military Records). A Soldier could appeal the placement of the information in their OMPF to the ABCMR.

3. Army Directive 2014-29 ((Inclusion and Command Review of Information on Sex-Related Offenses in the Army Military Human Resource Record (AMHRR) dated 9 December 2014, established a new policy intended to ensure accountability for sex-related offenses.

a. Sex-related offenses included violations of Article 120 (Rape and Sexual Assault) of the UCMJ. Commanders were to ensure that a Soldier's permanent record was annotated when they received a court-martial conviction, nonjudicial punishment, or punitive administrative action based on sex-related offense. For the purposes of this directive, "punitive administrative action" meant any adverse administrative action initiated as a result of sex-related offense and included, but was not limited to, memoranda of reprimand, admonishment, or censure from all levels of command.

b. The foregoing requirement applied to Soldiers in all components, regardless of grade. Commanders did not have the option to direct the local filing of these documents or to have them placed in the restricted folder of the OMPF. The documents were required to be filed in the performance-disciplinary folder within the Interactive Personnel Electronic Records Management System (iPERMS). The Commander, HRC was to designate and implement an appropriate code for use on Soldiers' record briefs to identify those with a court-martial conviction, nonjudicial punishment, or punitive administrative action for a sex-related offense. The policy did not prohibit Soldiers from appealing the adverse action's OMPF placement to the ABCMR.

4. Military Personnel (MILPER) Message Number 14-365 (Inclusion and Command Review of Information on Sex-Related Offenses in the Army Military Human Resource Record (AMHRR; i.e., OMPF)), dated 24 December 2014, as amended by MILPER Message Number 15-052 (Revision of Inclusion and Command Review of Information on Sex-Related Offenses in the AMHRR), issued 19 February 2015, provided that:

(1) Any court-martial conviction, nonjudicial punishment, or punitive administrative action for sex-related offenses listed below were to be filed as sex-related offenses in the performance-disciplinary folder of the OMPF.

(2) Commanders did not have the authority to designate any of these documents be filed locally or in the restricted folder of the OMPF. Paragraph 3 of the MILPER message stated that sex-related offenses included violations of any offenses under the following sections or subsections of Title 10, USC, and equivalent articles of the UCMJ:

- Section 920 – Article 120 (Rape and Sexual Assault) – this includes rape, sexual assault, aggravated sexual contact, and proof of threat
- Section 920a – Article 120a (Stalking)
- Section 920b – Article 120b (Rape and Sexual Assault of a Child) – this includes rape, sexual assault, sexual abuse of a child, and proof of threat

- Section 920c – Article 120c (Other Sexual Misconduct) – this includes indecent viewing, visual recording, or broadcasting
- Section 925 – Article 125 (Forcible Sodomy, Bestiality)
- Section 880 – Article 80 (Attempt) – any attempt to commit these offenses

5. AR 15-6, currently in effect, establishes procedures for investigations and boards of officers not specifically authorized by any other directive.

a. Paragraph 3-7 (Rules of Evidence and Proof of Facts).

(1) Proceedings under this regulation are administrative, not judicial. As such, boards are not bound by the rules of evidence for courts-martial or court proceedings generally. Subject only to the limitations set forth in subparagraph d, anything that a reasonable person would consider relevant and material to an issue may be accepted as evidence.

(2) Subparagraph 3-7d (Limitations) states, although administrative proceedings governed by this regulation generally are not subject to exclusionary or other evidentiary rules precluding the use of evidence, the following limitations do apply:

- Relevance – Evidence must be relevant, i.e., evidence that makes a fact's existence either more probable or less probable than it would be without the evidence; witnesses will not be asked whether they believe a particular individual is telling the truth
- Privileged Communications – Communications with inspectors general, spouses, clergy, psychotherapists, and victim advocates
- Investigations Related to Sex Offense Cases – With limited exceptions, evidence of an alleged victim's sexual behavior or sexual predisposition is not relevant
- "Off the Record" statements – Findings and recommendations must be supported by the evidence contained in the board's report; any statements witnesses make "off the record" will not be considered

b. Paragraph 3-8b (Witnesses – Attendance as Spectators). Witnesses, other than respondents, normally will not be present at the investigation or board proceedings, except when they are testifying. In some cases, however, it is necessary to allow expert witnesses to hear evidence presented by other witnesses, so that they may be sufficiently advised of the evidence to give informed testimony as to the technical aspects of the case. In such instances, the report of proceedings will indicate that the expert witnesses were present during the testimony of the other witnesses.

c. Paragraph 3-20a (Effect of Errors – Harmless Errors). Harmless errors are defects in the procedures or proceedings that do not have a material adverse effect on

an individual's substantial rights. A harmless error does not prevent the approval authority from taking final action on the investigation or board.

d. Paragraph 3-20c (Effect of Errors – Substantial Errors).

(1) The approval authority may set aside all findings and recommendations and refer the entire case to a new investigating officer or board composed of entirely new voting members. Alternatively, the approval authority may take action on findings and recommendations not affected by the error, set aside the affected findings and recommendations, and refer the affected portion of the case to a new investigating officer or board.

(2) In either case, the new investigating officer or board may be furnished any evidence properly considered by the previous one. The new investigating officer or board may also consider additional evidence. If the regulation or directive under which a board is appointed provides that the approval authority may not take less favorable action than the board recommends, the approval authority's action is limited by the recommendations of the original board, even if the case is referred to a new board that recommends less favorable action.

e. Paragraph 3-20d (Effect of Errors – Failure to Object to Board Proceedings) states no error is substantial within the meaning of this paragraph if there is a failure to object or otherwise bring the error to the attention of the investigating officer, legal advisor, or board president prior to the board adjourning. Accordingly, errors in board proceedings described in subparagraph c above may be treated as harmless if the respondent or respondent's counsel fails to object.

6. AR 600-8-24, in effect at the time, prescribed policies and procedures governing transfer and discharge of Army officer personnel. Chapter 4 (Eliminations) pertained to officer eliminations.

a. Paragraph 4-2b (Reasons for Elimination). While not all inclusive, when one of the following or similar conditions existed, elimination action could or had to be initiated:

(1) Paragraph 4-2b (Misconduct, Moral or Professional Dereliction, or In the Interests of National Security):

- Acts of personal misconduct
- Conduct unbecoming an officer

(2) Paragraph 4-2c (Derogatory Information). The following reasons (or ones similar) required an officer's record to be reviewed for consideration of terminating appointment:

- Adverse information filed in the OMPF in accordance with AR 600–37
- Failure of a course at a service school

b. Paragraph 4-6 (BOI) stated the BOI's purpose was to give the officer a fair and impartial hearing determining if the officer should be retained in the Army.

(1) Through a formal administrative investigation conducted under AR 15-6 and this regulation, the BOI was to establish and record the facts of the Respondent's alleged misconduct, substandard performance of duty, or conduct incompatible with military service.

(2) Based upon the findings of fact established by its investigation and recorded in its report, the board then made a recommendation for the officer's disposition, consistent with the regulation. The Government was responsible for establishing, by preponderance of the evidence, that the officer had failed to maintain the standards desired for their grade and branch.

c. Paragraph 4-14 (Spectators). At the respondent's request, the board president could permit the respondent's personal friends or relatives to be present during open board hearings. However, the respondent was advised the presence of these spectators terminated the confidential status of the proceedings. The board president could also exclude any spectator when (in the opinion of the board) the spectator's presence interfered with the proceedings. Any person called as a witness cannot not be present as a spectator.

d. Paragraph 4-15 (Conclusion of Hearing). The BOI determined its findings and recommendations by secret written ballot in closed session with a majority vote deciding any issue.

e. Paragraph 4-16 (Actions Concerning BOI Defects). At any time after receipt and review of a case by the GOSCA or HRC, the following actions could be taken with respect to substantial defects that were noted: direct the officer's retention; when apparent procedural errors occur, and the officer's rights have been substantially violated, the case could also be returned for a rehearing by a new board.

f. Paragraph 4-17 (Board of Review). An officer recommended for elimination by a BOI was to have their case referred to a Board of Review.

(1) The Board of Review was appointed by the Secretary of the Army or their designee and had the same board composition as the BOI. The Board of Review, after thorough review of the records of the case, made recommendations to the Secretary of the Army or designee as to whether the officer should be retained in the Army. Appearance by the respondent (or the counsel) was not authorized.

(2) When the board recommended elimination, the recommendation was to be transmitted to the Secretary of the Army or his/her designee for a final decision. The board could additionally recommend clemency, but only the Secretary of the Army or his/her designee could grant clemency.

g. Paragraph 4-19 (Steps for Processing an Elimination of a Nonprobationary Officer). This paragraph outlined procedures for a nonprobationary officer's elimination by the Soldier's command, HRC, and the Secretary of the Army (or designee).

(1) When the BOI recommended elimination, the GOSCA gave the officer the option to apply for retirement in lieu of elimination, if otherwise eligible for voluntary retirement as stated in chapter 6, paragraph 6-17d. Voluntary retirement application was to be amended to specifically state that the application had been submitted in lieu of elimination.

(2) Additionally, the GOSCA advised the officer that:

- He/she could submit an appellate brief and statement
- The entire case would be considered by a Board of Review and the officer was entitled to a copy of the Board of Review report
- If the Board of Review determined the officer should be eliminated, the officer's case would be referred to the Secretary of the Army or his/her designee for a final determination

(3) The GOSCA then forwarded the officer's elimination packet to HRC with a recommendation as to approval or disapproval, and character of service (if approval was recommended).

h. Chapter 6 (Retirements). This chapter applied to officers who had completed 20 or more years of active Federal service and served satisfactorily on active duty in the rank/grade of MAJ/O-4 for at least 6 or more months.

(1) Section I (Overview), paragraph 6-1 (The Officer Retirement Program). All retirements, except for disability separations, that involved commissioned and warrant officers who, since their last promotion, had been the subject of any substantiated adverse finding or conclusion from an officially documented investigation, proceeding or inquiry (except minor traffic infractions) were to be forwarded to ASA, M&RA in accordance with AR 15-80, for a grade determination, provided such information was reflected, or was supposed to be reflected by regulation, in the officer's OMPF.

(2) Section II (Voluntary Retirements), paragraph 6-13 (Approval Authority). The Secretary of the Army was the approval authority for retirements. The Secretary of the Army had delegated approval authority for voluntary retirements (waiver/nonwaiver) to

CG, HRC-Alexandria. CG-HRC-Alexandria could approve, disapprove, or delay/defer the requested retirement date of an officer who had completed 20 but less than 30 years of active Federal service. Delegation of approval authority did not include the following circumstances:

- Retirement with fewer than 20 years of service
- Applications from Soldiers who required any type of a waiver to permit retirement; the retirement application of Soldiers who were “flagged” had to be submitted to HQDA for approval
- Officers pending involuntary separation proceedings, for example, an officer directed to show cause

i. The current version of AR 600-8-24 states:

(1) Paragraph 4-17 (Board of Review or Ad Hoc Review Board).

(a) An officer recommended for elimination by a BOI will have their case referred to a Board of Review if the notification of elimination was signed by the GOSCA and served on the officer before 20 September 2013. For BOI where the notification was signed by the GOSCA and served on the officer after 20 September 2013, a Board of Review will not be required before the Secretary of the Army or designee takes final action on a recommendation of a BOI to eliminate an officer.

(b) Elimination cases served after 20 September 2013 will be reviewed by the Ad Hoc Review Board. The Ad Hoc Review Board is appointed by the Secretary of the Army or designee and has the same board composition as the BOI. The Board of Review, or Ad Hoc Review Board, after thorough review of the records of the case, will make recommendations to Secretary of the Army or designee as to whether the officer should be retained in the Army. Appearance by the respondent (or the counsel) is not authorized.

(c) When the Ad Hoc Review Board recommends elimination, the recommendation will be transmitted to the Secretary of the Army or designee who makes the final decision.

(2) Paragraph 4-20 (Option an Officer Elects while Elimination Action is Pending).

(a) An officer identified for elimination may, at any time during or prior to the final action in the elimination case, elect one of the following options (as appropriate):

- Submit a resignation in lieu of elimination
- Request discharge in lieu of elimination (except probationary officers)

- Apply for retirement in lieu of elimination if otherwise eligible; officer must have at least 19 years and 6 months of active service toward regular retirement

(b) When an option is elected, the GOSCA may suspend elimination proceedings pending final action of the option elected by the officer.

(c) Any officer described in AR 15–80 who is being retired that has been the subject of any substantiated adverse finding or conclusion from an officially documented investigation, proceeding, or inquiry (except minor traffic infractions) since the officer's last promotion, will have the case forwarded to the AGDRB for a grade determination under AR 15–80 to determine the highest grade the officer satisfactorily held while on AD. Final retirement grade determination is made by DASA (RB) or ASA (M&RA), as appropriate.

(3) Ad Hoc Review Board. "The Ad Hoc Review Board is a special advisory board created by ARBA to review cases and advise the DASA (RB) where no statutory or regulatory board is required. Army Ad Hoc Review Boards review records and briefs of officers who have been recommended for elimination for misconduct or substandard performance by BOI; also processes probationary officer elimination cases, resignations/discharges in lieu of elimination, and officer resignations/discharges in lieu of elimination."

7. AR 15-80, currently in effect, prescribes policies and procedures for the AGDRB.

a. Paragraph 1-7 (Secretary of the Army). The Secretary of the Army retains the prerogative to accomplish discretionary grade determinations without referral to the AGDRB. Additionally, the Secretary of the Army or his/her designees retain authority to take final action in any case in which a subordinate authority, including the AGDRB, would otherwise be authorized to take final action. Further, final determinations of grade rest exclusively with the Secretary of the Army and the Secretary's designees.

b. Paragraph 2-1 (AGDRB Establishment). The AGDRB operates within the Office of the Secretary of the Army under the supervision of and as a component board of ARBA. The AGDRB consists of military officers senior in rank to and in at least a grade equal to the highest grade held by the individual whose grade is being considered. Additionally, at least one member of the AGDRB will be at least one grade higher than the highest grade held by the individual whose grade is being considered.

c. Paragraph 2-2 (AGDRB Functions). The AGDRB considers individual cases that are referred to it in accordance with this regulation. It directs or recommends the final grade determination that affects an individual's separation or retired pay. The AGDRB decides cases on the evidence of record. It is not an investigative body. AGDRB

discussions and individual votes of members are privileged and confidential and will be disclosed only to those individuals in the decision-making process with a need to know.

d. Paragraph 2-4 (Grade Determination Considerations). A grade determination is an administrative decision to determine appropriate retirement grade, retirement pay, or other separation pay. Although a lower grade determination may affect an individual adversely, such determinations under this regulation are not punitive. The AGDRB will consider each case on its own merits. Generally, determination will be based on the Soldier's overall service in the grade in question, either on active duty or other service qualifying the Soldier for retirement, receipt of retired pay, or separation for physical disability.

e. Paragraph 2-5 (Unsatisfactory Service). Service in the highest grade or an intermediate grade normally will be considered to have been unsatisfactory when:

- Reversion to a lower grade was the result of misconduct or expressly for prejudice or cause
- There is sufficient unfavorable information to establish that the Soldier's service in the grade in question was unsatisfactory

e. Paragraph 4-1 (Officer Personnel Grade Determination – General). An officer is not automatically entitled to retire in the highest grade served on active duty for regular retirement. Instead, an officer is retired in the highest grade served on active duty satisfactorily for regular retirement, as determined by the SA or the Secretary's designee.

8. Title 10, USC, chapter 60 (Separation of Regular Officers for Substandard Performance of Duty or for Certain Other Reasons):

a. Section 1181 (Authority to Establish Procedures to Consider the Separation of Officers for Substandard Performance of Duty and for Certain Other Reasons).

(1) "Subject to such limitations as the Secretary of Defense may prescribe, the Secretary of the military department concerned shall prescribe, by regulation, procedures for the review at any time of the record of any commissioned officer (other than a commissioned warrant officer or a retired officer) of the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps to determine whether such officer shall be required, because his performance of duty has fallen below standards prescribed by the Secretary of Defense, to show cause for his retention on active duty."

(2) "Subject to such limitations as the Secretary of Defense may prescribe, the Secretary of the military department concerned shall prescribe, by regulation, procedures for the review at any time of the record of any commissioned officer (other

than a commissioned warrant officer or a retired officer) of the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps to determine whether such officer should be required, because of misconduct, because of moral or professional dereliction, or because his retention is not clearly consistent with the interests of national security, to show cause for his retention on active duty."

b. Section 1182 (Boards of Inquiry).

(1) "The Secretary of the military department concerned shall convene boards of inquiry at such times and places as the Secretary may prescribe to receive evidence and make findings and recommendations as to whether an officer who is required under section 1181 of this title to show cause for retention on active duty should be retained on active duty. Each board of inquiry shall be composed of not less than three officers having the qualifications prescribed by section 1187 (Officers Eligible to Serve on Boards) of this title."

(2) "A board of inquiry shall give a fair and impartial hearing to each officer required under section 1181 of this title to show cause for retention on active duty."

(3) "If a board of inquiry determines that the officer has failed to establish that he should be retained on active duty, it shall recommend to the Secretary concerned that the officer not be retained on active duty."

c. Section 1184 (Removal of Officer; Action by Secretary upon Recommendation of Board of Inquiry). "The Secretary of the military department concerned may remove an officer from active duty if the removal of such officer from active duty is recommended by a board of inquiry convened under section 1182 of this title."

d Section 1186 (Officer Considered for Removal: Voluntary Retirement or Discharge).

(1) "At any time during proceedings under this chapter (chapter 60) with respect to the removal of an officer from active duty, the Secretary of the military department concerned may grant a request by the officer – "

(a) "for voluntary retirement, if the officer is qualified for retirement; or"

(b) "for discharge in accordance with subsection (b)(2)."

(2) An officer removed from active duty under section 1184 of this title shall – "

(a) "If eligible for voluntary retirement under any provision of law on the date of such removal, be retired in the grade and with the retired pay for which he would be eligible if retired under such provision; and"

(b) "if ineligible for voluntary retirement under any provision of law on the date of such removal – "

- "be honorably discharged in the grade then held, in the case of an officer whose case was brought under subsection (a) of section 1181 of this title (i.e., officer's performance of duty has fallen below prescribed standards); or"
- "be discharged in the grade then held, in the case of an officer whose case was brought under subsection (b) of section 1181 of this title (because of moral or professional dereliction, or because his retention is not clearly consistent with the interests of national security)"

e. Section 12686a (Reserves on Active Duty within Two Years of Retirement Eligibility: Limitation on Release from Active Duty). This provision applies to mobilized Reserve Component Soldiers who have achieved at least 18 years, but less than 20 years of active Federal service.

(1) Limitation – Under regulations to be prescribed by the Secretary concerned, which shall be as uniform as practicable, a member of a reserve component who is on active duty (other than for training) and is within two years of becoming eligible for retired pay or retainer pay under a purely military retirement system (other than the retirement system under chapter 1223 of this title), may not be involuntarily released from that duty before he becomes eligible for that pay, unless the release is approved by the Secretary..

(2) Waiver – With respect to a member of a reserve component who is to be ordered to active duty (other than for training) under section 12301 (Reserve Components Generally) of this title pursuant to an order to active duty that specifies a period of less than 180 days and who (but for this subsection) would be covered by subsection (a), the Secretary concerned may require, as a condition of such order to active duty, that the member waive the applicability of subsection (a) to the member for the period of active duty covered by that order. In carrying out this subsection, the Secretary concerned may require that a waiver under the preceding sentence be executed before the period of active duty begins.

9. Temporary Early Retirement Authority (TERA) Program.

a. The FY 2012 National Defense Authorization Act (NDAA), Public Law 112-81, enacted 31 December 2011, authorized the military services to offer early retirement to Service members who had completed at least 15 years of active service. This was a

discretionary authority and not an entitlement. The Army elected to use this limited program as part of a comprehensive force management strategy to shape the force.

b. To be eligible for early retirement, a Service member had to:

- Be currently serving on active duty
- Have completed 15 or more, but less than 20 years of active service upon the effective date of retirement
- Have met other grade, skill, years of service, and other eligibility criteria as established by the Secretary of the Army

c. Although the Congressional authority to use TERA does not expire until 31 December 2025, the Army chose to end the TERA program, and advised eligible Soldiers to submit their TERA requests through their chain of command by 15 January 2018. Effective 28 February 2018, the Army terminated the authority to approve TERA.

10. AR 15-185 (ABCMR), currently in effect, states:

a. An applicant must have exhausted all administrative remedies prior to seeking relief from the Board.

b. An applicant is not entitled to a hearing before the Board; however, a panel of the Board or by the Director of ABCMR may authorize a request for a hearing.

11. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and BCM/NRs regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses

or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

//NOTHING FOLLOWS//