

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 August 2023

DOCKET NUMBER: AR20230000434

APPLICANT REQUESTS:

- Removal of a General Officer Memorandum of Reprimand (GOMOR) from his Army Military Human Resource Record (AMHRR)
- Changing the Reentry (RE) Code of his separation

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Counsel brief including 26 Exhibits (223 pages)
 - Exhibit A – Brief in Support of Application
 - Exhibit B – Army Discharge Review Board Denial
 - Exhibit C – U.S. Army Human Resources Command (USAHRC), Fort Knox, KY, Memorandum, subject: Department of the Army Notification for Potential Denial of Continued Active Duty Service under the Qualitative Management Program (QMP))
 - Exhibit D – Self-authored letter
 - Exhibit E – U.S. Coast Guard Computation of Retirement Point Credits,
 - Exhibit F – Transcripts
 - Exhibit G – Enlisted Record Brief (ERB)
 - Exhibit H – DA Forms 2166-8 (Noncommissioned Officer Evaluation Report (NCOER))

- Exhibit I – Enlarged Seal from a permanent order
- Exhibit J – Secretary of the Army memorandum, Subject: Army Directive 2014-06 (QMP)
- Exhibit K – USAHRC, Fort Knox, KY letter
- Exhibit L – Statements of support
- Exhibit M – [REDACTED] Affidavits of Complaint
- Exhibit N – Court Order rendered by the Circuit Court for [REDACTED]
- Exhibit O – Medical Record extract
- Exhibit P – Department of Veterans Affairs (DVA) Rating Decision
- Exhibit Q – Response to Reprimand
- Exhibit R – Under Secretary of State memorandum, Subject: Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations, commonly referred to as the "Wilkie Memo"
- Exhibit S – Equifax credit rating
- Exhibit T – State [REDACTED] License and Certificate of Marriage
- Exhibit U – [REDACTED] County, [REDACTED] Decree of Adoption by a Stepparent
- Exhibit V – State [REDACTED], Division of Family and Children Services letter
- Exhibit W – State [REDACTED], Certificate of Live Birth for [REDACTED]
- Exhibit X – Resume
- Exhibit Y – Certificate of Training
- Exhibit Z – Civilian Performance and Development Reviews

FACTS:

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

2. The applicant states, in effect, he currently has a DVA disability rating of 70 percent (%) for post-traumatic stress disorder (PTSD) due to his anxiety, chronic sleep impairment, depressed mood, occupational and social impairment, and suspiciousness. He believes his undiagnosed PTSD led to his misuse of alcohol at the time of the incident, and ultimately led to his receipt of a GOMOR and separation under the QMP.

a. In December of 2009, he was in Kandahar, Afghanistan, waiting on a rotator out of the country. The following day the compound he was on began receiving indirect fire (IDF). After initial impact, Sergeant First Class (SFC) [REDACTED] and the applicant exited the tactical operation center to gain accountability and conduct damage assessment. Upon

exiting the Tactical Operations Center (TOC) additional rounds of IDF impacted within close proximity to them. Luckily, an up-armored Highly Mobile Multi-Wheeled Vehicle was between the impact site and themselves and absorbed the shrapnel. All members assigned and present for duty received a CAB. Since he was in transit, the person that submitted the paperwork omitted him from submission. He provides the USAHRC denial of his request for retroactive award of the CAB because it did not demonstrate that he fulfilled all three basic criteria: 1) Personally present and under hostile fire while performing satisfactorily in accordance with the prescribed rule of engagement; 2) Performing in an offensive or defensive act while participating in combat operations; and 3) Engaging or being engaged by the enemy. Exhibit K.

b. He strongly believes that this incident, which led to deaths of task force members, coupled with the fact that he remained on such high Operational Tempo (OPTEMPO) left him little time to process or seek help for his issues and was the cause of his PTSD.

c. In September 2010, he returned from his 6th combat deployment. The incident that led to his GOMOR and subpar NCOER occurred in November 2010 when he was arrested for suspicion of driving under the influence (DUI) and refused to take a breathalyzer test. This event was his only adverse incident during a career that spanned 17 years of total active and Reserve time. As a result, he received a GOMOR and command referral to the Army Substance Abuse Program (ASAP). After completing intake with ASAP, they recommended an extended treatment program due to his weekly alcohol intake. However, his company commander, Captain (CPT) [REDACTED] signed a waiver for him to complete the shorter treatment plan. When he inquired why he would receive the shorter plan instead of the extended treatment plan, CPT [REDACTED] stated that Lieutenant Colonel [REDACTED] wanted this issue resolved utilizing the quickest possible avenue. At the time, the applicant knew that he had been deployed multiple times and was dealing with significant issues, but wrongly assumed this was normal and that everyone was going through the same thing that he was.

d. Except for the NCOER he received immediately after receiving the GOMOR, he was always rated as "Among the Best."

e. On 1 November 2016, he was separated under the QMP due to the GOMOR he received. Even though he had ten letters of support from supervisors, his appeal failed. He asks that the Board give special consideration to his case in accordance with current guidance and policy for clemency in cases where the applicant has been diagnosed with PTSD and explains how he meets the criterion. He was not diagnosed with PTSD until five years after separation. The current guidance and policies are explained in detail in the "References" portion of this Record of Proceedings.

f. His service before and after the incident was characterized by high marks and meritorious service. Due to the incident, he remained in the rank of staff sergeant

(SSG)/E-6 from 2009 until he was discharged in 2016 and was prevented from career expanding assignments throughout the duration.

g. He now has a letter of support from the General Officer who imposed the GOMOR asking for it to be removed along with other letters of support from superiors. Additionally, he has a letter from a Soldier who knew him well during the time of the incident that confirms behavior consistent with PTSD.

h. He humbly requests the board consider approving his request to remove the GOMOR and change his RE code so he can return to service in the Army. Being discharged involuntarily is one of the two biggest embarrassments of his life. The other was the incident that led to his GOMOR. So again, please consider his upgrade request, which will allow him to continue serving his country, overcome his mistake, and leave the Army the right way.

3. Counsel states, the applicant was involuntarily discharged from the Army in November 2016 through the QMP. From a process perspective, it would be difficult to allege the Army did anything technically wrong; however, the applicant being involuntarily separated was so unfortunate, unwarranted, and inequitable that they believe this Board should use its authority and discretion to finally right this wrong.

a. The applicant had seven combat deployments in less than three years, six times to Afghanistan and once to Iraq, prior to his alcohol-related incident that occurred as a direct result of him self-medicating with alcohol to cope with symptoms of his then-undiagnosed PTSD.

b. His one mistake resulted in him receiving a GOMOR, the only derogatory mark on his nearly 13-year active duty career. The GOMOR issuing authority is now requesting that it be removed from his record because it was never intended to end the applicant's career, especially six years, another combat deployment, and three "Among the Best" rated NCOERs later.

c. Prior to enlisting in the Army, the applicant served honorably in the U.S. Coast Guard (USCG) Reserve, earned a Bachelor of Arts degree, and an Associate of Applied Science degree. Exhibits E and F.

d. His duty stations, assignments, and deployments should have been granted significantly more weight than they were. Even with the GOMOR, his time in the 160th Special Operations Aviation Regiment (Airborne) and 82nd Airborne Division, his eight combat deployments in less than five years, and his stellar NCOERs should have been given deference to his peers. It should be noted that his first two deployments are not visible on his ERB because the document only has space for the six most recent deployments. Although none of his deployments were longer than six months, most

servicemembers would find it psychologically easier to go on two or three longer deployments than shorter, but more frequent deployments. Exhibits G and H.

e. His deployments were not without incident, as he earned a CAB during his 2012 deployment to Afghanistan when his location received IDF from the enemy. This very well should have been his second CAB, as he more than earned a CAB when several rockets impacted with 25 meters of his location on 3 December 2009, while deployed to Afghanistan. (See Exhibit K for a copy of the packet submitted to USAHRC) Exhibit I.

f. Apparently, the QMP only performed a surface review because it is difficult to imagine there are too many other SSGs of the applicant's caliber who put themselves in harm's way so selflessly and often. Although the QMP's process of flagging records, putting them into piles of "GOMORs" versus "Non-GOMORs," and then expelling the GOMORs is technically the process it is not the most effective manner to determine who is fit for continued service. There should have been a more in-depth analysis of his record.

g. Refusing to submit to a breathalyzer is not moral or ethical misconduct, so the GOMOR alone should not have resulted in his separation. At no point did he lie or commit any type of obstruction during this single act of alleged misconduct. There are no aggravating factors as part of this alcohol-related incident, as he was not driving recklessly, there were no injuries, and he was not driving on a suspended license.

h. The applicant has been diagnosed with PTSD. His symptoms began shortly after the incident that should have resulted in his first CAB in 2009. These symptoms led to him self-medicating with alcohol, which led to his alcohol-related incident in November 2010 and resulted in the GOMOR which was the sole basis for his separation under the QMP. Exhibit C.

i. The arrest and conviction resulting from the 10 November 2010 incident were expunged from his record by court order. The applicant has obtained a letter from the commanding general (CG) who issued the GOMOR, who is requesting this Board to remove the GOMOR from his record. Had he obtained the letter while serving on active duty and known about the Department of the Army Suitability Evaluation Board (DASEB), the GOMOR likely would have been removed and prevented the initiation of the QMP in the first place.

j. Counsel and the applicant provide a detailed account of the 2009 incident during which the applicant came close to being killed in action, the negative psychological effect it had upon him, and USAHRC's denial of his request for award of the CAB because his packet did not contain evidence that he was "performing in an offensive or defensive act while participating in combat operations, engaging, or being engaged by the enemy." In addition to two letters from fellow Soldiers attesting to the applicant's

presence during the incident, he provides the following justification for his award of the CAB:

On 3 December 2009, SFC [REDACTED] was present for duty at Camp Nomad, Kandahar Airfield, Afghanistan during operation ENDURING FREEDOM conducting his duties as the rotary wing aviation senior intelligence officer for a Special Operations Command (SOCOM) Vehicle Interdiction Strike Force when three 107 millimeter (mm) rockets impacted within 25 meters of the 160th SOAR [Special Operations Aviation Regiment] (A) TOC. Shrapnel embedded in the S4 office adjacent to the S2 Sensitive Compartmented Information Facility (SCIF) and [Toyota] Hilux and tactical vehicles parked in front of the TOC where the S2 SCIF was located. SFC [REDACTED] who had been conducting Relief in Place with the outgoing S2, [the applicant], assisted the S3 noncommissioned officer in charge (NCOIC) and fellow Night Stalkers gain accountability of personnel and sensitive equipment. SFC [REDACTED] and [the applicant] informed the AH-6 Little Bird helicopter pilots of the Point of Origin (POO) and kept the 160th Commander and staff advised of the changing situation as information came in on the POO and possible Persons of Interest.

SFC [REDACTED] and [the applicant] could have been reasonably injured by the 107mm rocket shrapnel, but the vehicles parked in front of the TOC absorbed the impact of the projectiles most likely to hit the S2 SCIF. SFC [REDACTED] and [the applicant] were standing together, SFC [REDACTED] was uninjured, but [the applicant] was affected by the incident which contributed to his PTSD. SFC [REDACTED] should have been on the roster and supporting documents of personnel submitted by S3 NCOIC [REDACTED] for Night Stalker personnel to receive the CAB but was not due to an administrative oversight as the Strike Force resumed its high OPTEMPO conducting Direct Actions targeting SOCOM High Value Targets. Exhibit K.

k. After he redeployed from his seventh combat deployment on 19 September 2010, he found himself relying more and more on alcohol to cope with his symptoms. As can be seen by Captain (CPT) [REDACTED] statement of support, it was evident to those around him that the applicant was drinking heavily while stationed at Fort Campbell, KY, and it really appeared to be directly related to PTSD and frequent deployments at the time. Less than six weeks after redeploying, he made the mistake of driving on one of those nights he was using alcohol to help suppress symptoms. During his arrest, he was always cooperative, and he was not charged with and alcohol-related offense, which is proof that all charges and convictions related to this offense have been expunged. Exhibits M and N.

l. Although brief, the applicant benefited from behavioral health counseling. However, although it was noted there was a suspicion that he had drug/alcohol problem, no one counseled him or took steps to assist him. In fact, on 22 November 2010, a note indicated he did meet the criteria for an Alcohol Abuse diagnosis.

However, his commander stated he should be entered into the shortened Alcohol Drug Abuse Prevention and Treatment (ADAPT) program as opposed to the more intensive ASAP. The applicant took immediate action to rehabilitate himself. Exhibits L and O.

m. Counsel notes the applicant provides several letters in support of removing the GOMOR from his record, specifically the letter from the CG who imposed the GOMOR wherein he states he believes the GOMOR served its intended purpose of teaching the applicant a valuable lesson and improving his judgment.

n. On the night of the incident, the applicant was following the advice of a family member attorney who instructed him to refuse a breathalyzer from the police. This family member had never served in the military and was unfamiliar with the military's strict rules on alcohol-related incidents and how implied consent laws are treated in the eyes of Army regulations. The most unfortunate part of this advice is that it would have been highly likely for him to pass the breathalyzer, but he feared blowing anything above 0.0 blood alcohol content could be treated as an alcohol-related offense. Unfortunately, he was not afforded a second opportunity to take a breathalyzer and he was charged with violating the state's implied consent law, resulting in a civil penalty of losing his driver's license for one year. He was initially only pulled over for driving 10 miles per hour (mph) over the 70 mph speed limit. Tennessee opted not to prosecute him for DUI, or any alcohol-related offense, charging him only with reckless driving: a misdemeanor to which he pleaded guilty. This is the same offense that was expunged in August 2018. Exhibits A and N.

o. Counsel cites current guidance and policies regarding clemency when Soldiers have been diagnosed with PTSD and other behavioral health conditions which could have been contributing and/or mitigating factors in their misconduct. Exhibit R.

p. Up until fiscal year (FY) 2018 (FY18), the directives and guidance addressing QMPs called for a RE code of "4" for individuals involuntarily separated as a result of the QMP. However, after that date, the guidance has clearly shifted to mandate an RE code of "3." Had the applicant gone through the QMP process after FY18, he would at least have an RE code of "3" that he could attempt to have waived and at least reenlist into the National Guard or Reserves. Furthermore, in addition to making the specified RE code 4 to RE code 3 change, the newest version of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 19, released in 2021 is the first time the Regulation specifically provides guidance to Soldiers regarding removing unfavorable information with DASEB.

q. The applicant has had no incidents since his arrest in 2010, and has been a model Soldier, citizen, father, and husband ever since. The applicant has continued to work in the intelligence field in a variety of roles and attended numerous courses to remain proficient in his field. He married in 2018 and adopted two boys who his wife

was fostering prior to their marriage, and they are in the process of adopting two more children. He would love nothing more than for them to be able to see him in uniform, serving this great country once again. This would be the ultimate lesson to his children to never give up; that good things happen to good people; and to make the most of second chances when life blesses you with them.

r. The memorandum notifying the applicant of his selection for QMP stated that the QMP process was, "[Designed] to ensure NCOs serve in a manner that is consistent with good order and discipline, and that those serving in positions of authority perform in an exemplary manner. It is intended to deny continued service to NCOs whose performance, conduct, and/or potential to serve in positions of increasing responsibility do not meet Army standards." Even reading those sentences and that criterion, one should be able to see and understand how and why the applicant would not have thought in a million years that this was at all applicable to him and his accomplishments.

s. Even if anyone could argue that QMP was proper six years after the date of his incident, it certainly would not hold true that after another six years he has not proven his worth and value to the Army. In either case, the appropriate relief for the applicant is for this Board to reinstate him on active duty, where he may continue to serve out his indefinite reenlistment contract.

4. On 5 January 2006, following a previous period of honorable service in the USCG Reserve, the applicant enlisted in the Regular Army for a period of 3 years.

5. The applicant deployed to the following designated imminent danger pay areas for the periods shown:

- Iraq – from 26 December 2007 until 3 February 2008
- Afghanistan – from 27 June 2008 until 11 September 2008
- Afghanistan – from 9 October 2008 until 7 December 2008
- Afghanistan – from 27 February 2009 until 3 May 2009

6. He reenlisted on 22 October 2008 and was promoted to SSG on 1 August 2009.

7. The applicant deployed to Afghanistan from 25 August 2009 until 4 December 2009, from 8 February 2010 until 8 May 2010; and from 29 July 2010 until 19 September 2010.

8. He reenlisted for a period of six years on 29 October 2010.

9. On 10 November 2010, the applicant was arrested for DUI and speeding after being clocked by radar at 80 mph in a 70 mph zone. The arresting officer detected the smell of

alcohol on the applicant's breath. He refused to submit to chemical tests to determine the alcohol or drug content of his blood.

10. On 2 December 2010, the Fort Campbell CG imposed a GOMOR on the applicant for refusing to take a lawfully requested test to measure the alcohol content of his breath when there was reasonable belief of DUI, in violation of the Implied Consent Law in the State of Tennessee, on 10 November 2010.

a. The CG advised him that this reprimand was an administrative action and not punishment under the Uniform Code of Military Justice. He further advised the applicant he intended to file the reprimand permanently in his OMPF and afforded him an opportunity to provide matters for consideration.

b. The applicant provided a written response wherein he apologized for the bad judgment he exhibited by refusing to take an intoximeter test and operating a motor vehicle after consuming alcoholic beverages and took full responsibility for his actions. He attested this incident was not representative of the type of NCO that he was and provided a copy of his most recent NCOER to illustrate his performance and potential. He stated it was his goal to serve as a Sergeant Major and asked that the CG please forgive him and not file the GOMOR in his OMPF. He further stated he had learned from his mistake and the GOMOR.

11. On 6 January 2011, after reviewing the administrative reprimand, chain of command recommendations, and any matters submitted by the applicant, the CG directed the GOMOR be filed in the applicant's OMPF.

12. The applicant's NCOER for the period of 1 February 2010 through 31 January 2011 shows both his Rater and Senior Rater provided favorable comments regarding his performance and potential. It was noted he needed some improvement in the "Leadership" portion wherein the Rater stated, "displayed poor judgment which led to an alcohol related incident; and resulted in the immediate release of two critical MOS [military occupational specialty] Soldiers which severely impacted the shop." His Rater indicated his overall potential for promotion and/or service in positions of greater responsibility was fully capable. His Senior Rater indicated his overall performance was successful, and his overall potential was superior. The Reviewer concurred with the Rater and Senior Rater.

13. The applicant deployed to Afghanistan from 21 March 2012 until 11 September 2012. Permanent Order 157-60 issued by 1st Brigade Combat Team, 82d Airborne Division, Forward Operating Base Warrior, Afghanistan on 7 June 2012, show the applicant was awarded the CAB for personally engaging, or being engaged by the enemy on 19 May 2012.

14. On 1 May 2014, the applicant reenlisted for an indefinite period of time.

15. USAHRC, Fort Knox, KY memorandum, Subject: Department of the Army Notification for Potential Denial of Continued Active Duty Service under the QMP, dated 8 December 2015, notified the applicant the QMP board would convene on 1 March 2016 to consider him for separation as a result of the GOMOR on 2 December 2010. He was advised the QMP was established as a means of improving the enlisted career force. It is designed to ensure NCOs serve in a manner that is consistent with good order and discipline, and that those serving in positions of authority perform in an exemplary manner. It is intended to deny continued service to NCOs whose performance, conduct, and/or potential to serve in positions of increasing responsibility do not meet Army standards. The applicant was afforded an opportunity to submit matters of mitigation or extenuation for consideration. He was further advised the QMP process stems from a presumption of administrative finality. The presumption is that adverse documents (unfavorable information) filed within his record are properly filed, administratively correct, and filed pursuant to an objective decision by a competent authority. Because of this underlying premise, he should be aware of the following:

a. If he sought removal of an unfavorable document from his record, he could petition to do so by applying to the DASEB in accordance with existing procedures outlined in Army Regulation 600-37 (Unfavorable Information), Chapter 7, Appeals and Petitions. The intent of Army Regulation 600-37 is to ensure that only information that is substantiated, relevant, timely, and complete is filed in his record and to ensure that the best interests of both the Army and the individual Soldier are served by authorizing unfavorable information to be placed in and, when appropriate, removed from official personnel records.

b. Army Regulation 15-185 (ABCMR) establishes the ABCMR as the highest level of administrative review within the Department of the Army to correct errors in or remove injustices from Army military records. All soldiers have the right to apply for correction of error or injustice in their OMPF.

c. A separate QMP notification memorandum would be forwarded to him identifying the board's decision. Should the QMP board identify him for denial of continued service, he would be involuntarily discharged effective the 1st day of the 7th calendar month following the date the board results were approved.

d. The applicant submitted a response wherein he explained the facts and circumstances that led to his GOMOR and accepted full responsibility for this one-time lapse in judgment in his otherwise stellar career. He contended his military service record clearly showed he did not meet the selection criteria for denial of continued service under the QMP, and respectfully requested that he be retained on active duty.

He also provided several letters of support from fellow Soldiers and supervisors who all had favorable comments regarding his performance and potential.

16. The applicant's record is void of the QMP board's notification, it's decision, and the options available to the applicant.

17. Orders and the applicant's DD Form 214 shows he was honorably discharged in the rank of SSG on 1 November 2016, under the provisions of Army Regulation 635-200, Chapter 19, by reason of "Non-Retention on Active Duty." He was assigned SPD code "JGH" and RE code "4." He was credited with completion of 10 years, 9 months, and 27 days of net active service this period. His DD Form 214 shows he was awarded or authorized the CAB.

18. The applicant petitioned the Army Discharge Review Board (ADRB) to change the narrative reason for his separation and his RE code so he could return to service in either the National Guard or U.S. Army Reserve. On 8 February 2021, the ADRB determined he was properly and equitably discharged. Accordingly, his request for a change in the narrative reason for his discharge was denied.

19. In addition to the previously discussed evidence, the applicant provides:

a. Exhibit E – A Department of Homeland Security, USCG Computation of Retirement Point Credits form that shows he was credited with 6 years, 4 months, and 5 days of qualifying years of service for retirement between 27 July 1999 and 1 December 2005.

b. Exhibit F – Transcripts which show he was awarded a Bachelor of Arts degree in Political Science [REDACTED] University [REDACTED] on 17 December 2005 and an Associate of Applied Science degree in Intelligence Operations [REDACTED] College, [REDACTED] on 11 May 2007.

c. Exhibit J – Secretary of the Army memorandum, Subject: Army Directive 2014-06 (QMP), dated 10 April 2014, which revised Army policies for the QMP.

d. Exhibit L – Statements of support for removal of the GOMOR from the applicant's record, including the one from the retired General Officer who imposed the GOMOR upon the applicant.

e. Exhibit N – A Court Order rendered by the Circuit Court [REDACTED] County, [REDACTED] on 13 August 2018 which shows the applicant's Record of Conviction was expunged based upon his completion of all necessary probationary requirements and payment of all fines and court costs established by the original judgment entered on 8 December 2011.

f. Exhibit O – Medical Record extracts which show the applicant received an ASAP evaluation on 22 November 2010 that determined he met the criteria for an Alcohol Abuse diagnosis, but his company commander, CPT [REDACTED] recommended he be enrolled in ADAPT instead of ASAP because he was pending a permanent change of station in December 2010.

g. Exhibit P – A DVA Rating Decision which shows the applicant was awarded a total combined disability rating of 100%. In part, he was awarded a rating of 70% for service connected PTSD related to combat.

h. Exhibit S – A document showing he was awarded an Equifax credit rating of 807, as of 19 June 2022.

i. Exhibit T – A State [REDACTED] License and Certificate of Marriage which shows he was married on 25 July 2018.

j. Exhibit U – A [REDACTED] County, [REDACTED] Decree of Adoption which shows he adopted his stepson on 11 November 2021.

k. Exhibit V – A State [REDACTED] Division of Family and Children Services letter, dated 8 March 2019, which shows two children were placed with the applicant's family for foster care.

l. Exhibit W – A State [REDACTED] Certificate of Live Birth, which shows the applicant's son [REDACTED] was born on 7 September 2020.

m. Exhibit X – The applicant's professional resume.

n. Exhibit Y – A DA Form 87 (Certificate of Training) which shows the applicant successfully completed the 12-hour ADAPT Prime for Life course on 8 December 2010.

o. Exhibit Z – The applicant's Civilian Performance and Development Reviews rendered for the period of 26 September 2019 to 31 December 2021.

20. The available record is void of evidence and the applicant has not provided evidence showing he was diagnosed with PTSD during his period of service. Additionally, there is no evidence showing that on 3 December 2009 he was:

a. Personally present and under hostile fire while performing satisfactorily in accordance with the prescribed rules of engagement.

b. Performing in an offensive or defensive act while participating in combat operations, and engaging or being engaged by the enemy.

21. By regulation, The ABCMR is not an investigative body. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires. In reaching its determination, the Board can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance.

22. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting changes to his military records. He contends he had PTSD that mitigates his misconduct.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following: 1) The applicant enlisted in the Regular Army on 5 January 2006 following honorable service in the USCG Reserve; 2) The applicant was deployed multiple times to a combat zone between 2007-2010; 3) On 10 November 2010, the applicant was arrested for DUI speeding. He refused to submit to chemical tests to determine the alcohol or drug content of his blood. On 2 December 2010, the Fort Campbell CG imposed a GOMOR on the applicant for refusing to take a lawfully requested test to measure the alcohol content of his breath when there was reasonable belief of DUI; 4) USAHRC, Fort Knox, KY memorandum, Subject: Department of the Army Notification for Potential Denial of Continued Active Duty Service under the QMP, dated 8 December 2015, notified the applicant the QMP board would convene on 1 March 2016 to consider him for separation as a result of the GOMOR on 2 December 2010. The applicant's record is void of the QMP board's notification, its decision, and the options available to the applicant; 5) The applicant was discharged on 1 November 2016, under the provisions of Army Regulation 635-200, Chapter 19, by reason of "Non-Retention on Active Duty." He was assigned SPD code "JGH" and RE code "4"; 6) The applicant petitioned the Army Discharge Review Board (ADRB) to change the narrative reason for his separation and his RE code so he could return to service in either the National Guard or U.S. Army Reserve. On 8 February 2021, the ADRB determined he was properly and equitably discharged. Accordingly, his request for a change in the narrative reason for his discharge was denied.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service and medical records. The VA's Joint Legacy Viewer (JLV) and additional hardcopy records provided were also examined.

d. The applicant asserts he was experiencing PTSD as a result of his combat deployments, which mitigates his misconduct. There is evidence the applicant was seen for a Command Referral to the Army Substance Abuse Program (ASAP) on 15 November 2010 following an "allegation" of drunk driving incident. He was diagnosed

with alcohol abuse, and he was referred to the Alcohol and Drug Abuse Prevention Training (ADAPT) program. The applicant provided the certificate of training that he did complete this training from 7-8 December 2010. There was insufficient evidence the applicant was diagnosed with PTSD during his remaining time on active service. However, a review of JLV provided evidence the applicant was diagnosed with service-connected PTSD (70%) in 2021.

e. Based on the available information, it is the opinion of the Agency BH Advisor that there is sufficient evidence to support the applicant was experiencing PTSD while on active service, and this condition partially mitigated his misconduct.

Kurta Questions

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends he was experiencing symptoms of PTSD that contributed to his misconduct. He has also been diagnosed with service-connected PTSD since 2021.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he was experiencing symptoms of PTSD that contributed to his misconduct. He has also been diagnosed with service-connected PTSD since 2021.

(3) Does the condition or experience actually excuse or mitigate the discharge? Partially, there is sufficient evidence that the applicant was experiencing PTSD while on active service. The applicant had a history of alcohol abuse also while on active service. PTSD can be associated with avoidant behavior. The applicant's alcohol abuse could be an attempt to self-medicate or to avoid his negative emotional state. Avoidant behaviors are often a natural sequelae to PTSD. Therefore, his misconduct of driving under the influence of alcohol can be mitigated by PTSD. Yet, there is no nexus between the applicant's PTSD and the applicant's misconduct of refusing to engage in chemical tests to determine the alcohol or drug content of his blood given that: 1) this type of misconduct is not part of the natural history or sequelae of PTSD; 2) his PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right.

BOARD DISCUSSION:

After reviewing the application, all supporting documents and the evidence found within the military record, the Board determined that relief not warranted. The Board carefully considered the applicant's contentions and the circumstances of the misconduct that resulted in the GOMAR. Based upon the available documentation, the Board made the following findings and recommendations related to the requested relief:

- Removal of GOMOR: DENY, based upon the available evidence that all applicable regulatory guidance was followed when issuing the GOMOR and that all appropriate due process rights were afforded the applicant at the time of processing.
- Changing (RE) Code: DENY, based upon the narrative reason for separation (QMP) and the regulatory guidance on Soldiers separated until such circumstances, as well as the findings of only partial mitigation by the medical advisor for those circumstances leading to separation, the Board concluded there was insufficient evidence of an error or injustice warranting a change to the (RE) code.

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:

The Board determined 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.

9/21/2023

X █

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

REFERENCES:

1. Title 10, USC, Section 1552(b), provides that applications for correction of military records must be filed within three years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the three-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. Title 10, USC, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or

Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

3. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation provides that the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

4. Army Regulation 635-200 sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 3-7a provides that an honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

b. Chapter 4 provides a Soldier will be separated upon expiration of enlistment or fulfillment of service obligation.

c. Chapter 19 contains policies and procedures for voluntary and involuntary separation, for the convenience of the Government, of Regular Army NCOs and U.S. Army Reserve NCOs serving in Active Guard Reserve status, under the QMP. The service of a Soldier discharged under this chapter will be characterized as honorable.

(1) NCOs whose performance, conduct, and/or potential for advancement do not meet Army standards, as determined by the approved recommendations of HQDA centralized selection boards responsible for QMP screening, will be denied continued service.

(2) The QMP is not intended as a substitute, and does not relieve commanders of the responsibility, for initiation of separation proceedings under other provisions of this regulation when required or appropriate.

(3) Unless another basis of separation exists, Soldiers with less than 120 days to Expiration Term of Service (ETS) at the time of decision not to appeal, or denial of appeal, will not be discharged prior to ETS. Soldiers in this category will be discharged at ETS under the provisions of chapter 4.

5. Army Regulation 601-210 (Regular Army and Army Reserve Enlistment Program) covers eligibility criteria, policies, and procedures for enlistment and processing into the Regular Army, U.S. Army Reserve, and Army National Guard. Table 3-1 provides a list of RE codes.

- RE code "1" applies to Soldiers completing their term of active service, who are considered qualified for enlistment if all other criteria are met
- RE code "2" is no longer in use but applied to Soldiers separated for the convenience of the government, when reenlistment is not contemplated, who are fully qualified for enlistment/reenlistment
- RE code "3" applies to Soldiers who are not considered fully qualified for reentry or continuous service at time of separation, whose disqualification is waivable – they are ineligible unless a waiver is granted
- RE code "4" applies to Soldiers separated from last period of service with a non-waivable disqualification

6. Army Regulation 635-5-1 (SPD Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the separation codes to be entered on the DD Form 214. It states that the separation code "JGH" is an appropriate code to assign to Soldiers separated under the provisions of Army Regulation 635-200, Chapter 19, by reason of Non-Retention on Active Duty.

7. Army Regulation 600-8-22 (Military Awards) states the requirements for award of the Combat Action Badge are branch and MOS immaterial. Assignment to a combat arms unit or a unit organized to conduct close or offensive combat operations or performing offensive combat operations is not required to qualify for the Combat Action Badge. However, it is not intended to award the Combat Action Badge to all Soldiers who serve in a combat zone or imminent danger area. The Soldier must be performing assigned duties in an area where hostile fire pay or imminent danger pay is authorized. The Soldier must be personally present and actively engaging or being engaged by the enemy and performing satisfactorily in accordance with the prescribed rules of engagement. The Soldier must not be assigned or attached to a unit that would qualify the Soldier for the Combat Infantryman Badge or the Combat Medical Badge. Award of the Combat Action Badge is authorized from 18 September 2001 to a date to be determined. Only one Combat Action Badge may be awarded during a qualifying period.

8. Army Regulation 600-8-104 (AMHRR Management) prescribes Army policy for the creation, utilization, administration, maintenance, and disposition of the AMHRR. It states the purpose of the AMHRR is to preserve permanent documents pertaining to enlistment, appointment, duty stations, assignments, training, qualifications, performance, awards, medals, disciplinary actions, insurance, emergency data, separation, retirement, casualty, administrative remarks, and any other personnel actions. This regulation and the USAHRC website provide a listing of documents

authorized for filing and state to file letters of reprimand, censure, or admonition in the performance folder unless directed otherwise by the DASEB. Folders and documents previously authorized for filing in any part of the AMHRR will remain in the AMHRR. The AMHRR is an administrative record as well as the official permanent record of military Service belonging to a Soldier. The AMHRR is the historical and authoritative source for authentication of veteran or Service-related benefits, entitlements, and services.

9. Army Regulation 600-37 sets forth policies and procedures to authorize placement of unfavorable information about Army members in individual official personnel files; to ensure that unfavorable information that is unsubstantiated, irrelevant, untimely, or incomplete is not filed in individual official personnel files; and to ensure that the best interests of both the Army and the Soldiers are served by authorizing unfavorable information to be placed in and, when appropriate, removed from official personnel files.

10. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) to carefully consider the revised PTSD criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged under other than honorable conditions and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

11. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD; traumatic brain injury; sexual assault; or sexual harassment. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part to those conditions or experiences. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

12. 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, Boards 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//