

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 April 2024

DOCKET NUMBER: AR20230001210

APPLICANT REQUESTS: in effect, the following records corrections -

a. remove the General Officer Memorandum of Reprimand (GOMOR), 7 May 2014 and all allied documents from his Army Military Human Resource Record (AMHRR); and

b. remove the DA Form 2627, Record of Proceedings Under Article 15, Uniform Code of Military Justice (UCMJ), 9 May 2014, OR strike the punishment of forfeiture of \$2000/month for two months; and

c. remove the entire Board of Inquiry (BOI) proceeding, 14 July 2014, or in the alternative strike the recommendation and approval; and

d. rescind his request for retirement in lieu of elimination and show he retired due to length of service pursuant to Title 10, U.S. Code, Section 12686a (sanctuary) OR that he should have been retained on active duty until retirement or considered for continuation; and

e. reinstate Orders 194-0330, 13 July 2015; and

f. find an abuse of discretion in the Army's refusal to process the applicant's Temporary Early Retirement Authority (TERA) application, August 2015; and

g. revoke Orders 303-0311, 31 October 2015; and

h. correct DD Form 214, Certificate of Release or Discharge from Active Duty, 13 November 2015, to show he was retired due to a permanent disability in accordance with Army Regulation (AR) 635-40, Physical Evaluation for Retention, Retirement, or Separation, Chapter 4 and 5, with a Separation Program Designator (SPD) - RFJ.

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

- DD Form 149, Application for Correction of Military Record
- 40 enclosures listed as follows -
 - Previous DD Forms 214
 - Member's narrative
 - Record of nonjudicial punishment (NJP)
 - GOMOR with allied documents
 - Record of counseling
 - Service Treatment Records (2)
 - GOMOR permanent filing
 - First resignation request
 - Memorandum appointing BOI
 - Physical profile
 - Report of Board Proceedings
 - Request for retirement in lieu of elimination
 - Memorandum on prejudicial effects
 - 15-day ex parte letter
 - Memorandum approving Board findings
 - Physical Disability Evaluation System (PDES) commander statement
 - Medical Evaluation Board (MEB)
 - MEB Narrative Summary
 - MEB Proceedings
 - Memorandum on discrimination concerns
 - Memorandum on medical concerns
 - Physical Evaluation Board (PEB) referral to the Department of Veterans Affairs (VA)
 - VA Rating Decision for MEB/OEB
 - Informal PEB report and Physical Disability Retired List (PDRL) result
 - PDRL retirement orders
 - Orders revoking retirement orders
 - Orders revoking disability retirement
 - Non-retention notification
 - Memorandum directing Reserve retirement
 - Officer Record Brief (ORB)
 - Final DD Form 214
 - 30-day request for redacted Criminal Investigation Division (CID) report
 - 30-day request for signed DD Form 149
 - Memorandum terminating PEB
 - Memorandum, grade determination

- Mental Health provider letter (2)
- Updated VA Rating Decision
- VA Summary of Disability Rating
- TERA documents
- Security clearance verification
- Timeline of events and list of exhibits
- Representative Articles

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. Counsel states, in effect:

a. This is a case about a Soldier with over 27 years (18 years active duty) of faithful service, including three, 1-year deployments to the Middle East, who was essentially forced to request a U.S. Army Reserve (USAR) retirement under the very certain threat of losing any military retirement (medical, Reserve, or Regular Army), and other Department of Veterans Affairs (VA) disability benefits, to all of which the applicant was clearly entitled.

(1) He was put in this "no win" situation on the basis of misconduct that amounted to nothing more than *solicitation* of gay voyeurism during two, one-month time periods. The voyeurism itself was never charged, let alone substantiated. *This entire case is based only on solicited voyeurism.* The applicant did no harm to anyone, there was no impact on good order and discipline or to the discredit of the service, there was no unprofessional relationship, there was no abuse of authority, there was no drug use, there was no adultery, there was no fraternization, and there certainly was no serious criminal misconduct.

(2) What is more, the alleged (but essentially unsubstantiated) misconduct was alleged as occurring off post and well after duty hours. And finally, the Command never revoked or even suspended the applicant's security clearance - showing that the Command's true assessment of the alleged misconduct was that it was barely noteworthy.

b. A Board of Officers recommended elimination with an Under Other Than Honorable Conditions (UOTHHC) characterization of service, which the Commanding General approved, notwithstanding the applicant's ongoing medical board (which

resulted in a 60% medical retirement order being issued), and notwithstanding nearly 18 years of active-duty service. The applicant had no real choice in the matter. It was either lose everything on the basis of the gay voyeurism allegations, or request Reserve retirement. Anyone in his position would have chosen Reserve retirement, but Soldiers, even Officers, rarely if ever have faced such a choice due to solicited voyeurism with no other impact or effect outside of the solicitation itself and is not sufficient basis upon which to eliminate an Officer with an UOTHC characterization of service.

c. In short, the Command's actions were not based on the objective evidence and customs of the service, but on disapproval of the applicant's gay lifestyle and an unsubstantiated, outdated, and unlawful assumption that his lifestyle was harmful to the Army.

d. In evaluating the petition, counsel requests the Board procure a psychologist's advisory opinion as to the observed or probable impacts of the applicant's mental health, relative to the alleged misconduct that led to his adverse administrative actions.

e. In evaluating the petition, counsel requests the Board procure a psychologist's advisory opinion as to the observed or probable impacts of the applicant's sexual orientation, with service prior to repeal of Don't Ask Don't Tell (DADT) and after repeal of DADT, relative to the duress he asserts was the cause of his requesting reserve retirement in lieu of elimination.

f. As to retirement orders and DD Form 214: Correction of the record on the basis of an injustice due to the applicant's sexual orientation, considering the insufficiency of evidence against him for alleged misconduct, considering the favorable results of the PEB's Proceedings (60% PDRL), and considering a PDRL retirement order was issued but then revoked.

g. Correction of the record on the basis that the applicant was ultimately retired as a member of the USAR and would have had over 18 years active federal service at the time of his mandatory separation date of 1 February 2016: (1) Find that he qualified for sanctuary pursuant to Title 10, U.S. Code, section 12686a, and therefore should have been allowed to continue his active-duty service through active-duty retirement; OR (2) if he did not qualify for sanctuary as a reservist, find that the applicant was within 2 years of retirement and pursuant to Title 10, U.S. Code, section 632, should have been retained on active duty until retirement; OR (3) find that pursuant to Department of Defense Instruction (DoDI) 1320.08, Continuation of Commissioner Offers on Active Duty, paragraph 3.3(a), the applicant should have been considered for continuation, as such an officer "will normally be selected for continuation if the offer will qualify for retirement...within 4 years of the required date of discharge..."

h. Strike the applicant's 15 September 2014 "Retirement in lieu of elimination" request submitted while under duress, while suffering the effects of service-connected debilitating mental health disorders, and while under imminent threat of being separated without retirement (for which he was already eligible), and without further VA benefits (for which he would soon be eligible), due to an UOTHC elimination recommendation by a Board of Officers, such recommendation made without sufficient evidence or findings.

i. Reinstate the applicant's "ORDERS 194-0330," 13 July 2015 (effective 8 October 2015), by which he was "released from assignment and duty because of physical disability incurred while entitled to basic pay...with basic pay calculated based on 27 years, 6 months, 19 days..." AND/OR *in the alternative* amend DD Form 214, 13 November 2015, to reflect:

- Type of Separation: Retirement
- Reason for Separation: Permanent Disability Retirement
- Separation Authority: AR 635-40, Chapter 4 and Chapter 5
- Separation Code: RFJ

j. Strike the applicant's "ORDERS 303-0311," 31 October 2015 (effective 13 November 2015), by which he was "released from active duty not by reason of physical disability..."

k. As to adverse administrative actions: On the basis of insufficiency of evidence, disproportionate treatment, and the fact that the Board of Officers' findings necessarily undermine the GOMOR, 7 May 2014 that preceded all other adverse administrative actions:

(1) Strike the GOMOR, 7 May 2014, and the subsequent filing determination, 21 May 2014, directing the GOMOR be forwarded to AMHRR for permanent filing.

(2) Strike the Article 15 proceedings, 9 May 2014 and record; OR in the alternative, if not the entire proceeding and record, strike the punishment of forfeiture of \$2,000/month for two months.

(3) Strike the entire Report of Board Proceedings for the Board of Officers appointed 14 July 2014 and commenced 22 August 2014 and the Appointing Authority's approval of the recommendation, 4 March 2015; OR in the alternative, if the entire proceedings are not to be stricken - Strike the recommendations of the Board of Officers appointed, 14 July 2014, and commenced on 22 August 2014 and the Appointing Authority's approval of the recommendation 4 March 2015.

l. As to an unprocessed TERA application: Find an abuse of discretion in the Army's refusal to process the applicant's August 2015 TERA request.

m. Summary of Timeline. The applicant served honorably for well over two decades. He deployed for one year to Iraq (2003-2004). He deployed for a second time to Iraq (2008-2009). He deployed for nearly one year to Afghanistan (2010-2011). This Soldier put in his time, and much of that time was downrange in austere conditions. The applicant summarized his experiences, duty stations, and deployments during service from 2002 - 2012 in a narrative included with the supporting documents.

(1) Prior to entering Reserve retirement status on 13 November 2015, the applicant was a Soldier for 27 years of his life. His service spanned from 1988 – 2015, and although "DADT" was repealed in 2011, the effects of that policy lingered on well after that, especially for Soldiers who prior to the repeal were necessarily closeted. The evidence in this case will show the applicant was disproportionately scrutinized and punished, not based on objective evidence, but on leadership's unsubstantiated, outdated, and unlawful assumption that his gay lifestyle was harmful to the Army.

(2) The applicant was investigated for serious misconduct that was ultimately unfounded, and without evidence to substantiate the allegation, was issued a GOMOR as if serious misconduct had been committed. The GOMOR was then used in an elimination proceeding. Ultimately, the only misconduct proven by the Army by the lower preponderance of the evidence standard, fell short of even the UCMJ's standard for adultery or fraternization. At best, the applicant was found to have committed solicitation of voyeurism in a private setting with other consenting adults, with no other member of the public or military aware or involved and with no impact on good order and discipline or to the discredit of the service.

(3) Notwithstanding the lack of evidence and the insignificant nature of the offenses, a Board of Officers recommended the applicant's elimination with an UOTHC characterization of service. The record reflects his Command was intent on executing that recommendation. Under imminent threat of elimination with an UOTHC discharge, the applicant submitted a request for Reserve retirement in lieu of elimination.

(4) During this same time, he was also subject to the Integrated Disability Evaluation System (IDES) for unfitting conditions incurred in the line of duty. The IPEB returned a recommendation for medical retirement at 60%. The applicant was in fact issued medical retirement orders, given a 60% disability, and placed on the PDRL in July 2015. Two days later that order was revoked and then, more than three months later, the Commanding General Officer issued a memorandum "accepting" the applicant's request for Reserve retirement in lieu of elimination. The PEB was cancelled on 19 November 2015 and a reserve retirement order was issued.

(5) Under a grade determination process, the applicant was found to have last served honorably in the grade of major (MAJ/O-4). A security clearance verification, 9 January 2015 shows the applicant's security clearance was active. Also, during this

same time period, the applicant was notified he was non-selected for lieutenant colonel (LTC/O-5) - something certainly due to the adverse administrative actions taken against him by his Command for unsubstantiated serious criminal allegations.

(6) In response to the mandatory separation (with over 17 years of active-duty service), the applicant (July 2015) submitted a TERA application. Even after the elimination proceedings were concluded, the Army failed to process the TERA application. The applicant under these circumstances (minor misconduct; solicitation of gay voyeurism; 17+ years of faithful active-duty service) should have either -

(a) received a 60% medical retirement consistent with the order actually issued in July 2015.

(b) been processed pursuant to TERA authority and his TERA application; or

(c) been allowed to continue to serve to earn an active-duty retirement under a finding of sanctuary or based on equity and as allowed by regulation.

(7) The applicant was forced, under duress, to request reserve retirement or be eliminated with an UOTHC characterization under a cloud of embarrassment and shame and a total loss of DoD retirement and VA post-service entitlements and benefits.

n. The applicant presents five major points to support his request. (1) His Command's administrative actions were tainted by disdain for his private sexual behavior, as well as the charged misconduct that was ultimately unfounded; (2) Similarly, the command's administrative actions were tainted by their explicitly stated beliefs that he was deliberately frustrating the administrative processes, when the weight of credible evidence shows this was not true and when it was improper to retain a Soldier solely for the purpose of being administratively discharged; (3) The Army referenced and relied on improper authority when revoking the PDRL 60% disability retirement order; (4) The applicant's mental health condition incurred in the line of duty impacted his performance of duty, even prior to the alleged misconduct and prior to the BOI, but was not considered by the Board of Officers, or by the Commanding General Officer in matters of the elimination recommendation, the resignation request, and the IPEB's report; (5) Fairness and due process guarantees weigh in favor of the requested relief. The applicant and his counsel believe the Board will find it in the interest of justice to grant the requested relief on the grounds of propriety and equity. The five major points in support are presented in further detail as follows:

(1) Command's administrative actions were tainted by disdain for the applicant and his private sexual behavior, as well as the grotesque nature of alleged misconduct

that was ultimately unfounded. The applicant during the majority of his career was a closeted homosexual. His defense counsel wrote on his behalf on 15 September 2014 -

"Before the repeal of Don't Ask, Don't Tell, he maintained the façade of a heterosexual married officer in order to preserve his career and future. It is unsurprising then that he would discreetly pursue same-sex relationships during his marriage, given his orientation...It is unclear why his actions would be service discrediting or unbecoming an officer, given the private nature of what he was doing. In fact, the general public had no knowledge of his actions. The only other people aware of his actions were other individuals seeking consensual, same-sex relationships. Army agents seized his personal computer and searched his email applications...it was otherwise unknown to all persons."

(a) It is also similarly unsurprising that the applicant suffered significant deleterious effects on his mental health throughout his career, due to actual and perceived hostility, bias, harassment, and due to his essentially living two lives. The applicant addressed these concerns of discrimination and disparate treatment in a memorandum, 12 May 2015.

(b) The Commanding General Officer issued the applicant a GOMOR alleging rape of a mentally disabled minor person. That highly inflammatory GOMOR, along with the re-iterated highly inflammatory allegation, was sent to a Board of Officers. Ultimately on that allegation, the Board found nothing more than that the applicant "initiated contact with a local 17-year-old male...[and]...brought the minor to his apartment." There is no other explanation for the Board's recommendation for elimination with an UOTHC (and the Commander's approval of that recommendation), other than that the Board took into account the unsubstantiated misconduct, and/or treated the case disparately because of the homosexual nature of the case. Soliciting voyeurism on the internet during two, one-month time periods and taking a 17-year-old to one's apartment cannot, and should not, result in elimination with an UOTHC.

(2) The Command's administrative actions were tainted by their explicitly stated beliefs that the applicant was deliberately frustrating the administrative processes, when the weight of credible evidence shows this was not true and when it was improper to retain a Soldier solely for the purpose of being administratively discharged.

(a) In a "Commander's Performance and Functional Statement," 1 April 2015 made by the applicant's commander, the Commander states that the applicant "is using his medical condition to delay his pending Administrative Separation and forcing the unit to commit more resources than should be required to lead a MAJ...He has gamed the system by packing his schedule full of medical appointments...He has "misunderstood" clearly defined tasks and requirements in order to delay...This has caused me personally as the Commander to waste over three weeks of cumulative time...The best

example of this is the applicant's delaying of his separation physical long enough to get his [permanent] P3 Profile and enter the IDES/MEB process." The Commander also recommended "retaining the applicant for medical purposes in order to allow him to complete his Administrative Separation."

(b) The Command clearly did not think the applicant worthy of an objective assessment of injuries and disabilities incurred in the line of duty. The Command clearly saw the applicant so one-sidedly at this point that everything he did was construed as cheating and lying. The Command was therefore willing to unlawfully recommend retaining an otherwise unfit Soldier for the sole purpose of pushing through an administrative separation.

(c) The applicant addressed these allegations in a memorandum, 12 May 2015. The Command's perceptions were just that - perceptions. The evidence does not support the Command's animosity toward the applicant. The applicant's military mental health provider observed: "I had the pleasure of working with [Applicant] for approximately two years...to address his depression and anxiety...that initially developed in the context of occupational and combat stress while stationed at Fort Sill, Oklahoma." The provider concluded by stating: "During treatment [Applicant] consistently attended appointments and participated in therapeutic interventions. He was working diligently when he was discharged from the Army...."

(d) Even in matters related to the applicant's IDES/MEB for conditions that clearly preceded the alleged misconduct, the Command is shown to have had an inability to objectively assess his behavior, intent, and situation. This is further evidence that the applicant was being treated disparately, based on his sexual orientation and the inflammatory nature of the unproven allegations.

(3) The Army referenced and relied on improper authority when revoking the PDRL 60% disability retirement order. The applicant was referred to the IDES and the VA was requested to rate the applicant's mental health condition and his neck/spine injury (he had a multi-level laminoplasty on his C-spine). The initial IDES Rating Decision has been provided.

(a) The mental health condition was rated at 50% and the back condition was rated at 10%. Eventually, the VA re-rated his neck injury at 30% and he is now rated as totally and permanently disabled due to service-connected injuries. Under these circumstances and considering the minor nature of the offenses that led to the threatened elimination with an UOTHC, justice required a medical retirement. For two days, the applicant was in fact a retired U.S. Army MAJ, placed on the PDRL with a 60% medical retirement; and then the Commander revoked that retirement order, citing "AR 635-40" as the authority for the revocation. However, "AR 635-40" does not provide authority for a Commander to revoke a PDRL retirement order. The medical retirement

"ORDERS 194-0330" should be reinstated in the interest of justice and on the basis of the Army's lack of authority for the revocation.

(4) The applicant's mental health condition, which was incurred in the line of duty, impacted his performance of duty, even prior to the alleged misconduct and prior to the BOI, but was not considered by the Board of Officers, or by the Commanding General Officer in matters of the elimination recommendation, the resignation request, and the IPEB's report.

(a) The applicant's military service pre-dated the repeal of DADT by over 20 years, meaning he, wanting to serve honorably as a Soldier, was forced to live a double life. Abundant scholarly literature supports the conclusion that living a double life under these circumstances is highly detrimental to one's mental health. Indeed, for the applicant, it was. His military mental health provider observed: "There is little doubt that his depressive symptoms and anxious distress are/were directly related to work, particularly combat stress and his persistent fear of being intimidated and/or negatively evaluated by leadership and peers." Because his symptoms were related to combat stress and because the applicant's combat tours preceded the alleged misconduct, his mental health must necessarily have been evaluated relative to Board's inquiry, the Commanding General Officer's approval of the recommendation, and ultimately the Commanding General Officer's acceptance of the resignation request at the cost of the applicant 60% medical retirement.

(b) The applicant's record contains no Army memorandum or document suggesting the applicant's mental health was considered as required. The medical records relevant to the applicant's mental health condition after the time of the alleged misconduct are provided. The applicant's post-service VetCenter mental health provider states that the applicant had onset of depressive symptoms in 2002, during which time he was "subjected to maltreatment from his superiors and peers in the form of humiliation, ridicule, and degradation."

(5) Fairness and due process guarantees weight in favor of the requested relief. The applicant was issued a GOMOR on 7 May 2014. This GOMOR includes a highly inflammatory, unsubstantiated allegation that has tainted the Command's actions since that day. It is outrageous that the Command memorialized this in a GOMOR without even a preponderance of the evidence to support it.

(a) The GOMOR alleges that on 16 April 2013, the applicant brought a mentally disabled 17-year-old "minor" to his apartment to be sodomized by another person and that even worse, the applicant failed to intervene when the "minor" said it was painful and asked for "the unknown male to stop the sexual act." In other words, the Command alleged the applicant was a co-conspirator in the rape of a mentally disabled child. It is difficult to imagine a more inflammatory and prejudicial allegation. If you assume this

was substantiated, then all of Command's subsequent actions make sense. But a Board of Officers eviscerated this allegation just three months after the GOMOR was issued - the Board found nothing more on this allegation than that the applicant brought a 17-year-old person to his apartment. All other aspects of that grotesque allegation were not substantiated by even a preponderance of the evidence (at Board hearing), let alone by proof beyond a reasonable doubt.

(b) It is notable the Command could have added the highly inflammatory allegation as to a "minor" person being forcibly sodomized, to the charges in the Article 15 that would be offered just two days later. However, and presumably for lack of evidence, the Command chose to leave the allegation in the GOMOR, where it required essentially no proof and where it was essentially unassailable by the applicant.

(c) The GOMOR also alleges that the applicant did "solicit" sexual activity on the internet from other members of the Armed Forces without regard to marital status or rank and that he did this while he was married. What the GOMOR did not allege was that the applicant actually engaged in any sexual activity with anyone, that he actually engaged in the voyeurism, that any solicited individual was in fact an enlisted member, or that he committed adultery. Indeed, the GOMOR only alleged the "solicitation" of these voyeuristic acts with individuals who may or may not have been enlisted or married.

(d) The applicant was offered an Article 15 on 9 May 2014. This NJP charged the applicant with "soliciting anonymous individuals on the Internet to engage in sexual acts in your presence while you sexually gratified yourself, to the disgrace of the Armed Forces," and with, holding "yourself out as a member of the Armed Forces, while emailing unsolicited images of your genitalia to anonymous individuals on the internet, to the disgrace of the Armed Forces" during the period of 22 March 2013 – 30 April 2013.

(e) The Army was forced to charge these under the "catch-all" Article 133 as "Conduct Unbecoming an Officer," because the alleged conduct could not possibly be substantiated as any specific criminal charge. These two charges of "conduct unbecoming" amount to nothing more than solicitation for voyeuristic acts and neither the charges nor the evidence show how this could have "disgraced the Armed Forces."

(f) More importantly, during this NJP process, the Command had the duty to charge the serious misconduct (rape of mentally disabled minor) and prove it beyond a reasonable doubt (i.e., the evidentiary standard under the NJP process. The Command was charging misconduct from exactly the same time period in 2013, more than a year after the CID investigation had begun. And yet, the Command chose to address it in the GOMOR, (which adverse administrative action has essentially no evidentiary standard,

and therefore limited due process protections). Then, the GOMOR was permanently filed.

o. If the command actually believed there was a substantiated allegation of forcible rape of an incapacitated minor, the command's clear duty was to prefer charges and refer the matter to a general court-martial; but neither the Army nor the local jurisdiction prosecuted the matter. Instead, the Command made the inflammatory allegation in a GOMOR after a CID investigation failed to produce evidence to substantiate the charges. It was an abuse of authority to use the inflammatory nature of the charge in a GOMOR and a subsequent BOI while knowing it could not be substantiated.

p. Under the shame and embarrassment of the recent administrative actions, and with declining mental health, the applicant submitted a "Resignation in Lieu of Elimination Proceedings," on 3 July 2014, contingent on receiving at least a general, under honorable condition characterization of service. This request was denied, as the Commanding General chose to move forward with the Board of Officers and elimination proceedings - apparently dead set on procuring the UOTHC characterization.

(1) A Board of Officers was convened to address the allegations from the GOMOR and from the Article 15 (22 August 2014). The Board only substantiated the most minor of the charged misconduct. And yet, as if the Board had substantiated the more serious misconduct, the applicant found himself facing the Board's recommendation for elimination with an UOTHC, which was approved by the Commanding General Officer.

(2) Notwithstanding the ongoing PEB, the applicant was now in jeopardy of losing military retirement and entitlement to VA disability compensation, due to the Board's recommendation for an UOTHC characterization. On 15 September 2014, the applicant submitted a request for Reserve retirement in lieu of elimination. On 4 March 2015, the Commanding General Officer approved the Board of Officers recommendation for elimination with UOTHC.

(3) On 1 April 2015, the Company Commander wrote in his statement for the applicant's ongoing PEB that his recommendation was to "retain" the applicant, stating, "I recommend retaining [Applicant] for medical purposes in order to allow him to complete his Administrative Separation." (This should be obvious - but to recommend retaining a Soldier not medically fit for the sole purpose for discharging with an UOTHC shows an abuse of discretion and a personal prejudice.)

(4) On 18 June 2015, the IPEB recommended the applicant be placed on the PDRL with a 60% medical retirement. Furthermore, on 13 July 2015, he was in fact "released from assignment and duty because of physical disability..." with a 60% medical retirement. The applicant was treated like no other active-duty O-4 would have

been treated for similarly unsubstantiated allegations of similar misconduct in a heterosexual context. The moment the BOI found the allegations of serious misconduct to be unsubstantiated, the option of elimination with an UOTHC should have come off the table. Instead, the Command continued to pursue the elimination without evidence of anything more than solicitation of voyeurism. The Command's actions were biased and unfairly prejudicial and should be found an abuse of authority and an abuse of discretion.

q. In conclusion, on balance, the record and the evidence weigh in favor of the applicant. In the interest of justice, equity, and propriety, and for all of the reasons provided here, we respectfully request the Board grant the requested relief.

3. Having prior enlisted service in the Regular Army, the applicant was commissioned as a Reserve officer on 15 May 1993. His ORB shows he entered active duty on 25 September 2001 and his area of concentration was 74A, chemical officer.

4. His ORB shows he completed one deployment to Afghanistan (11 months) and two deployments to Iraq (both one year).

5. The applicant was assigned to Fort Polk, Louisiana (LA) on 31 October 2012.

6. The applicant's medical documents show, in effect -

a. On 8 May 2013, the applicant was diagnosed with depression as the result of numerous social stressors involving a pending divorce, his military future, and legal/CID investigation for sexual acts with a minor he received behavioral health treatment.

b. On 9 May 2013, the applicant was examined at the State of Louisiana, Office of Mental Health. The physician reported the applicant was suicidal and a danger to himself. The applicant's presented with multiple stressors of which one was the ongoing CID investigation.

7. His record contains a police report, 10 May 2013 which shows, in effect, that on 17 April 2013 at approximately 2335 hours a deputy responded to a report of a vehicle stopped at a location on S. 5th Street with two occupants in a unique situation. The driver was identified as the applicant and the passenger was a 17-year-old male. When the officer came into contact with the passenger, he advised the officer that he was being held against his will and he wanted to go home. The driver indicated that he saw the teenage male walking along the road and offered him a ride. At this point both occupants were escorted to the police department for interviews. The passenger indicated that he would like to press charges.

a. The alleged victim indicated that he met the applicant after answering an ad on "Craigslist" and later communicated with him through text and over the telephone. He provided the applicant with his address and instructions on when to pick him up. The alleged victim indicated that he believed the applicant just wanted a friend and that he was going to the applicant's house to hang out. After he arrived at the home the applicant invited an unknown black male to the apartment. The applicant asked him to have sex with the black male so that he could watch. The alleged victim complied but later asked the black male to stop because it was hurting. He went to the bathroom and when he came back the black male was gone. The alleged victim asked to be taken home and he left the apartment with the applicant. Shortly thereafter they came into contact with the police.

b. The alleged victim's mother informed the police that her son had an IQ of 61. The alleged victim had done this type of thing before, but no one was willing to help because it was somewhat his fault. The alleged victim became terribly upset the investigator wanted to take his telephone in order to conduct the investigation and demanded to go home. He refused to cooperate therefore the investigation could not move forward. The alleged victim's mother asked that the applicant's chain of command be notified as this was not the first time that a Soldier from Fort Polk, LA had taken advantage of her son. The investigator told her that he would advise the applicant not to contact her son and he would notify officials at Fort Polk, LA.

8. On 7 May 2014, the applicant was reprimanded by a general officer for initiating contact with a 17-year-old male with an IQ below 70. The applicant had brought the male to his apartment, where he arranged for him to be sodomized by another male while the applicant watched.

a. As the applicant watched, the minor asked the unknown male to stop the sexual act, because it was painful. The applicant did nothing to intervene. The unknown male continued the sexual act. After further pleas from the minor, the unknown male ceased the sexual act, and the minor fled into the bathroom. The unknown male then left the apartment. The applicant did not call police to report a sexual assault. Instead, the applicant and the minor left in his vehicle.

b. A sheriff's deputy initiated a traffic stop on his vehicle. When the deputy inquired about the minor in the vehicle, the applicant lied, stating that he did not know the minor and that he had merely picked him up and was taking him home.

c. Between the period from 3 September 2011 to 4 October 2011, the applicant solicited sexual activity on the internet from other members of the Armed Forces. In some instances, he made these solicitations without regard to the individual's marital status or rank. In all instances, he engaged in this activity while he was married.

According to a sworn statement from his wife, he engaged in activities of this nature for approximately seven years of his marriage.

d. The general officer indicated that he had grave concerns and doubt about the applicant's ability to hold future positions of leadership, responsibility, and trust in the Army.

9. The applicant acknowledged the GOMOR on 9 May 2014 and subsequently submitted a rebuttal. In his rebuttal the applicant took responsibility for his actions. He indicated that in the past year he had taken corrective action by participating in regular counseling sessions with a behavioral health professional. He also participated in a 12-step recovery program and was in contact with his religious leader. He would like to continue his service. He had completed 23 years (16.5 years toward retirement) of service (USAR and Regular Army) and three combat tours. He was doing volunteer work and had received two Military Outstanding Volunteer Service Medals. He was still in contact with his former wife and involved in the lives of his children.

10. The General Court-Martial Convening Authority (GCMCA) directed the GOMOR be permanently filed in the applicant's Army Military Human Resource Record (AMHRR) on 21 May 2014. This GOMOR with allied documents is filed in the performance section of the applicant's Official Military Personnel File (OMPF).

11. The applicant accepted NJP under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) on 21 May 2014 for –

a. On divers occasions, near Fort Polk, LA, between on or about 22 March 2013 and on or about 30 April 2013, hold himself out as a member of the Armed Forces, while soliciting anonymous individuals on the internet to engage in sexual acts in his presence while he sexually gratified himself, to the disgrace of the Armed Forces.

b. On divers occasions, near Fort Polk, LA, on or about 22 March 2013 and on or about 30 April 2013, hold himself out as a member of the Armed Forces, while emailing unsolicited images of his genitalia to anonymous individuals on the internet, to the disgrace of the Armed Forces.

12. In conjunction with the processing of this case the sanitized military police report, 2 May 2013, shows the applicant was charged with the following offenses –

- conduct unbecoming an officer which occurred on 29 April 2013
- other sex offenses-conspiracy to commit other sex offenses (off post)
- sexual assault (adult)(for offenses occurring on or after 28 June 2012)(off post)

13. The applicant did not appeal his NJP. His punishment included forfeiture of \$2000 pay per month for two months. The DA Form 2627, Record of proceedings Under Article 15, UCMJ, is filed in the performance section of his OMPF.

14. A DA Form 4856, Developmental Counseling Form, 8 May 2013, notified him that he was the subject of a CID investigation.

15. On 3 July 2014 -

a. The applicant acknowledged that he was being considered for elimination, and voluntarily tendered his resignation from the Army under the provisions of AR 600-8-24, Officer Transfers and Discharges, chapter 4, in lieu of further elimination proceedings, conditions upon receiving no less than a "general under honorable conditions" characterization of service.

b. His chain of command concurred with the applicant's request for resignation in lieu of elimination but did NOT support the applicant receiving an honorable characterization of service.

16. The applicant submitted a statement, 8 July 2014, wherein he requested his service be characterized as honorable based on his 26 years of service of honorable service to his country, including his combat tours and volunteer work.

17. The BOI proceedings show, on 14 July 2014, the Commander, JRTC and Fort Polk, Fort Polk, LA appointed a board of officers to established and record the facts concerning misconduct, moral, or professional dereliction and to make a recommendation as to whether the applicant should be retained in the Army.

18. On 23 July 2014, after reviewing the applicant's request for resignation and his additional matters the Commander, Joint Readiness Training Center (JRTC) and Fort Polk, Fort Polk, LA disapproved his voluntary resignation and directed the applicant to show cause for retention on active duty before a BOI.

19. His medical records show he was issued a temporary profile on 4 August 2014, for a herniated disc lumbar spine and neck pain.

20. On 22 August 2014, the BOI found that the allegation "IS supported by a preponderance of the evidence" – that between 3 September 2011 and 4 October 2011, the applicant solicited sexual activity on the internet from other members of the Armed Forces; that in some instances, the applicant made these solicitations without regards to the individual's marital status or rank; that in all instances, the applicant engaged in this activity while he was married; and the he engaged in similar activity for approximately

seven years of his marriage. The Board recommended he be involuntarily eliminated with an UOTHC characterization of service.

21. On 15 September 2014, the applicant requested retirement in lieu of elimination. In his request, the applicant stated he wanted to be placed on the retirement list as soon as practicable. He further indicated he completed over 22 qualifying years of combined active and Reserve federal service on the requested retirement date.

22. A memorandum, 15 September 2014, shows the applicant's defense counsel requested the Army Grade Determination Review Board (AGDRB) find the applicant performed his duties as a MAJ. Counsel stated, in effect that although the applicant, received a GOMOR and an Article 15 for his actions, there was no evidence to suggest that he performed his duties as a Major in the Army unsatisfactorily. His grade should not be reduced upon retirement simply because of his sexual orientation and manner of pursuing same-sex relationships while trying to maintain the outward appearance of a heterosexual.

23. The final CID investigation report, 28 October 2014, states that the investigation established probable cause to believe that the applicant committed the offenses of conduct unbecoming of an officer and misprision of serious offense when he arranged the sexual encounter between the alleged victim and the unknown male, then allowed the sexual encounter to continue after the alleged victim expressed that he wanted it to stop. The investigation DID NOT establish probable cause to believe the applicant committed the offenses of sexual assault and conspiracy.

24. A DA Form 4833, Commander's Report of Disciplinary or Administrative Action, 28 October 2014, shows the applicant entered a plea of guilty to NJP, and was found guilty in a NJP hearing. The applicant also received a letter of reprimand.

25. A security clearance verification form, dated 9 January 2015, show his clearance was active.

26. The BOI approval authority, a general officer (GO), stated in a memorandum, dated 4 March 2015 -

a. He initiated elimination action against the applicant on 30 May 2014 under the provisions of AR 600-8-24, Chapter 4-2(b), for misconduct and moral or professional dereliction.

b. On 22 August 2014, a BOI convened and recommended the applicant be involuntarily eliminated with an under other than honorable conditions discharge. The applicant was provided with a copy of the BOI report, and he submitted an appellate brief.

c. He approved the BOI's findings and recommendations

d. He states, the applicant appeared to be eligible for non-regular retirement, and he submitted a request for retirement in lieu of elimination. As such the GO was forwarding this matter for further action. Additionally, the applicant had entered the MEB process. The results of the MEB process would be forwarded upon completion.

27. A DA Form 7652, Physical Disability Evaluation System (PDES) Commander's Performance and Functional Statement, dated 1 April 2015, shows the applicant's commander states, in Section III D, Comment Section, in effect, that the applicant did not perform his duties and was pending an Administrative Separation and therefore not performing duties specific to his military occupational specialty but performing short term projects....his medical conditions/limitations affect unit accomplishing mission. [Applicant] was using his medical condition to delay his pending Administrative Separation and forcing the unit to commit more resources than should be required to lead a MAJ. He recommended the applicant be retained for medical purposes in order to allow him to complete his administrative separation. The commander notes the applicant's repeated failure to schedule a separation physical as evidence of his intentional abuse of the process.

28. His MEB Narrative Summary, 27 April 2015 and MEB Proceedings, 28 April 2015 show the applicant was referred to a PEB for the unfitting conditions of (1) cervical spondylosis with residuals from multilevel cervical surgery; (2) major depressive disorder, recurrent, moderate and panic disorder; and (3) lumbar strain.

29. He was issued a permanent profile on 28 April 2015, for neck pain, low back pain, and hearing loss.

30. A letter to the U.S. Army Human Resources Command (AHRC), Officer Eliminations, 12 May 2015, shows the applicant requested a retirement in lieu of elimination. He contended that the BOI determined that there was no criminal wrongdoing on his part but found that he engaged in homosexual lifestyle based on the preponderance of the evidence. He indicated, in effect, that he was being targeted as a gay man despite the repeal of the DADT policy. Further, it should not be surprising that a homosexual member of the military may engage in same-sex relationships for any reason. His years in the service had taken a toll on his physical and mental health and thus he was currently in the MEB process, and he had three conditions that did not meet retention standards.

31. On 18 June 2015, an Informal PEB convened to evaluate the applicant's unfitting conditions. The PEB:

a. recommended a disability rating of 50 percent for major depressive disorder, recurrent, moderate, and panic disorder without agoraphobia.

b. recommended a disability rating of 10 percent for cervical spondylosis with residuals from multilevel cervical surgery; and

c. found the applicant was physically unfit and recommended a disposition of permanent disability retirement.

32. The applicant concurred with the findings and recommendation and waived a formal hearing on 29 June 2015. The applicant's case was adjudicated as part of the IDES.

33. Headquarters, JRTC & Fort Polk, Fort Polk, LA, Orders 194-0330, 13 July 2015, show the applicant was being retired due to a permanent physical disability, effective on 8 October 2015, and he would be placed on the retirement list, effective 9 October 2015.

34. Orders 196-0311, published by the same organization above, on 15 July 2015, revoked the applicant's retirement Orders 194-0330, 13 July 2015.

35. Notification of Separation Due to Non-Selection for Promotion, 10 August 2015. The document notified the applicant that he was not among those selected for promotion by the Fiscal Year 2015, Lieutenant Colonel, Operations, Operations Support, and Force Sustainment, Promotion Selection Boards. He was informed that he had a mandatory separation date of 1 February 2016, and he was required to select a retirement option. The applicant selected option d: "I am a Regular Army Officer and desire to request early retirement under the Temporary Early Retirement Authority (TERA) program. I understand that TERA is not an entitlement. I understand that if I am flagged for adverse action, or undergoing an elimination proceeding, my request for TERA will not be processed until the conclusion of that action. I also understand that I must submit a TERA request IAW MILPER 14-308, to usarmy.knox.hrc.mbx.opmd-retirements-branch@mail.mil, as soon as possible and that my monthly retirement pay will be reduced IAW ALARAC 281/2012." This form does not contain the applicant's signature.

36. Email, 10 August 2015, wherein the applicant was directed to acknowledge the non-selection for promotion memorandum and return it to AHRC, Special Actions, Officer Retirements and Separations.

37. Email, 12 August 2015, wherein the applicant acknowledged the separation due to non-selection for promotion and he was attaching his TERA election. The applicant's signed election was attached. The applicant also provides applicable military messages

related to TERA. He requested release from active duty and assignment on 31 January 2016, in accordance with TERA. He indicated that he would have 17 years of active service on the requested retirement date.

38. A Request for Redress Under Article 138, UCMJ, 26 October 2015. In this request the applicant indicates that LTC W failed to process his voluntary retirement packet to the CG, AHRC, and the applicant felt that his refusal to process was unreasonable. He asked that his voluntary early retirement packet be forwarded for processing.

39. On 27 October 2015, after reviewing both the Informal PEB Proceeding (18 June 2015) and the applicant's application for non-regular retirement in lieu of elimination, the Office of the Assistant Secretary, Manpower and Reserve Affairs, Deputy Secretary of the Army (DASA), Army Review Boards accepted the applicant's application for non-regular retirement in lieu of elimination and referred his case to the AGDRB.

40. A military message, 28 October 2015, Subject: Retirement in Lieu of Elimination-Regular Retirement Grade Determination Case. The DASA, Army Review Boards, approved the non-regular retirement of the applicant with an honorable characterization of service. The reason for separation was acts of misconduct and moral or professional dereliction.

41. Orders 303-0311, 30 October 2015, published by Headquarters, JRTC & Fort Polk, Fort Polk, LA, directed the applicant to be released from active duty on 13 November 2015, and transferred to the USAR Control Group (Reinforcement).

42. The U.S. Army Physical Disability Agency administratively terminated the applicant's PEB proceeding on or about 19 November 2015 due to the applicant receiving a non-regular retirement in lieu of elimination.

43. The applicant was honorably released from active duty on 13 November 2015. His DD Form 214 shows:

a. The reason and authority for discharge was AR 635-40, paragraph 4-2B and 4-24A, due to unacceptable conduct.

b. He was credited with 14 years, 1 month, and 19 days of net active service this period and 3 years, 2 months, and 8 days of prior active service, amounting to 17 years, 3 months, and 27 days of net active service. He also had 10 years, 6 months, and 5 days of total prior inactive service.

c. His unqualified resignation constituted the applicant's acceptance of appointment as Reserve commissioned officer. No oath was required.

44. The applicant was assigned to the Retired Reserve on 14 November 2015. On 30 December 2015, the applicant was notified of eligibility for retired pay at non-regular retirement.

45. The applicant provides the following documentation, which was not previously addressed in this Record of Proceedings:

a. A list of exhibits.

b. A chronological record of his assignments wherein he provided examples, in effect, of his insecurities about his ability to perform his duties due to his lack of experience as a chemical officer and being left out and set up for failure by his fellow officers and chain of command. He also recounts times when he felt hopeless and had suicidal ideations.

c. His petition to the AGDRB, 28 January 2016.

d. VA Rating Decisions, 6 June 2015 and 21 May 2018. The culmination of these documents indicates the applicant has disability rating of 100 percent for numerous medical conditions. There does not appear to be a rating for a mental health condition.

e. Articles related to the health, mental health characteristics, and well-being of the LGBTQ veterans and those currently serving in the Armed Forces.

46. MEDICAL REVIEW:

a. The applicant makes various requests as outlined in the ROP and appears to contend his misconduct was related to Other Mental Health Issues and issues related to DADT.

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) Having prior enlisted service in the Regular Army, the applicant was commissioned as a Reserve officer on 15 May 1993. His ORB shows he entered active duty on 25 September 2001; 2) On 7 May 2014, the applicant was reprimanded by a general officer for initiating contact with a 17-year-old male with an IQ below 70. The applicant had brought the male to his apartment, where he arranged for him to be sodomized by another male while the applicant watched; 3) Between the period from 3 September 2011 to 4 October 2011, the applicant solicited sexual activity on the internet from other members of the Armed Forces. In some instances, he made these solicitations without regard to the individual's marital status or rank. In all instances, he engaged in this activity while he was married; 4) The applicant accepted NJP under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) on 21 May 2014 for on divers occasions, near Fort Polk, LA, between on or about 22 March 2013 and on or about 30

April 2013, hold himself out as a member of the Armed Forces, while soliciting anonymous individuals on the internet to engage in sexual acts in his presence while he sexually gratified himself, to the disgrace of the Armed Forces, and on divers occasions, near Fort Polk, LA, on or about 22 March 2013 and on or about 30 April 2013, hold himself out as a member of the Armed Forces, while emailing unsolicited images of his genitalia to anonymous individuals on the internet, to the disgrace of the Armed Forces; 5) In conjunction with the processing of this case the sanitized military police report, 2 May 2013, shows the applicant was charged with conduct unbecoming an officer which occurred on 29 April 2013, other sex offenses-conspiracy to commit other sex offenses, and sexual assault (adult)(for offenses occurring on or after 28 June 2012); 6) On 3 July 2014 the applicant acknowledged that he was being considered for elimination, and voluntarily tendered his resignation from the Army under the provisions of AR 600-8-24, Officer Transfers and Discharges, chapter 4, in lieu of further elimination proceedings, conditions upon receiving no less than a "general under honorable conditions" characterization of service; 7) On 23 July 2014 the Commander, Joint Readiness Training Center (JRTC) and Fort Polk, Fort Polk, LA disapproved his voluntary resignation and directed the applicant to show cause for retention on active duty before a BOI. On 22 August 2014, the BOI found that the allegation "IS supported by a preponderance of the evidence" – that between 3 September 2011 and 4 October 2011, the applicant solicited sexual activity on the internet from other members of the Armed Forces; that in some instances, the applicant made these solicitations without regards to the individual's marital status or rank; that in all instances, the applicant engaged in this activity while he was married; and the he engaged in similar activity for approximately seven years of his marriage. The Board recommended he be involuntarily eliminated with an UOTHC characterization of service; 8) The final CID investigation report, 28 October 2014, states that the investigation established probable cause to believe that the applicant committed the offenses of conduct unbecoming of an officer and misprision of serious offense when he arranged the sexual encounter between the alleged victim and the unknown male, then allowed the sexual encounter to continue after the alleged victim expressed that he wanted it to stop; 9) The BOI approval authority, a general officer (GO), stated, in part, in a memorandum, dated 4 March 2015 that he initiated against the applicant for misconduct and moral and professional dereliction on 30 May 2015. That the applicant had submitted a request for non-regular retirement in lieu of elimination, which was being forwarded for further action, and that the applicant had entered the MEB process; 10) On 18 June 2015, an Informal PEB convened and found the applicant had unfitting conditions of MDD moderate and Panic Disorder w/o Agoraphobia, and cervical spondylosis and recommended permanent retirement; 11) Orders 196-0311, published by the same organization above, on 15 July 2015, revoked the applicant's retirement Orders 194-0330, 13 July 2015; 12) On 27 October 2015, after reviewing both the Informal PEB Proceeding (18 June 2015) and the applicant's application for non-regular retirement in lieu of elimination, the Office of the Assistant Secretary, Manpower and Reserve Affairs, Deputy Secretary of the Army (DASA), Army Review Boards accepted the applicant's

application for non-regular retirement in lieu of elimination and referred his case to the AGDRB; 13) The U.S. Army Physical Disability Agency administratively terminated the applicant's PEB proceeding on or about 19 November 2015 due to the applicant receiving a non-regular retirement in lieu of elimination; 14) The reason and authority for discharge was AR 635-40, paragraph 4-2B and 4-24A, due to unacceptable conduct.

c. The military electronic medical record (AHLTA) VA electronic medical record (JLV), ROP, and casefiles were reviewed. A review of AHLTA shows the applicant's initial BH engagement, during service, occurred in December 2007 whereby he and his wife self-reported to FAP and underwent couple's counseling on 3 and 13 December 2007. The encounter documentation was not clear on presenting problems but did note no domestic violence was indicated but there were behaviors on the part of the applicant with onset 8 years prior that the wife wanted addressed prior to a pending PCS to Fort Drum. The diagnosis of record reflected Partner Relational Problem. The applicant's next BH-related encounter occurred on 12 September 2011 whereby he was seen for a Post Deployment Health Assessment and reported no BH-related concerns. On 15 February 2012 the applicant underwent a Post Deployment Health Reassessment and again reported no BH-related concerns. The applicant next BH encounter occurred on 9 May 2013 whereby the applicant was command referred for reported SI w/plan in the context of legal, occupational, and relational stressors. The patient reported being recently divorced and under CID investigation for sexual misconduct. The provider noted the applicant had been seen by two other BH providers the same day and failed to contract for safety. The provider further noted that although the applicant currently denied SI, he did so tenuously and given the absence of protective factor, referral for a higher level of care was indicated. The applicant was diagnosed with Adjustment Disorder with Depressed Mood and Suicide Risk and referred for psychiatric hospitalization at Crossroads Hospital. Inpatient records were not available for review.

d. Encounter note dated 22 May 2013 shows the applicant presented for a follow-up BH visit. It was noted the applicant had been psychiatrically hospitalized from 9 – 15 May 2013 due to SI. The patient reported his current mood as neutral and noted being more optimistic about the future. He did however, report continued worries related to family, legal, and occupational problems. He was diagnosed with Adjustment Disorder with Depressed Mood and scheduled for follow-up. Records suggest he was seen by psychiatry on 3 June 2013, started on antidepressant medications, and scheduled for continued outpatient treatment of Adjustment Disorder with Depressed Mood. Records show the applicant engaged in outpatient BH treatment for Adjustment Disorder with Depressed Mood consistently through November 2015. Records show his primary complaints related to legal (CID investigation), occupational (disciplinary action), and relational stressors (family estrangement). Over the course of treatment, the applicant reported symptom improvement through June 2014 but reported worsening symptoms on 30 June 2014 after his ex-wife decided against reconciliation. He again reported improved symptoms beginning 15 September 2014 with noted improved relationships

with his family, belief that he and his ex-wife would reconcile, and his optimism related to life after the military.

e. Records show the applicant underwent a Report of Mental Status Evaluation on 6 February 2015, whereby he was found to meet diagnostic criteria for Adjustment Disorder. It was noted that he was suffering mild to moderate symptoms of anxiety and depression secondary to significant stressors related to criminal investigation, subsequent disciplinary actions, and the impending loss of his military career. It was also noted that he screened negative for PTSD and TBI and was psychiatrically cleared for any administrative actions deemed appropriate by command. Included in the applicant's casefile was a IPEB dated 8 June 2015 that found the applicant was unfit for MDD with onset in May 2013. Also included in the applicant's casefile was a memorandum dated 19 November 2015 that shows the IPEB was terminated due to applicant accepting non-regular retirement. Records show the applicant final BH treatment encounter, during service, occurred on 9 November 2015, whereby he presented for out-processing.

f. A review of JLV shows the applicant 100 percent SC for various physical disabilities. JLV also shows the applicant with a diagnosis of MDD, however, the diagnosis is not listed along with other SC disabilities. VA C&P Examination dated 26 March 2016, shows the examiner diagnosed the applicant with MDD with panic attacks "incurred in active military service". The symptom onset reportedly occurred secondary to the applicant being charged with sexual misconduct, occupational, and familial problems. The applicant reported that during service he was "gay and the Army wanted to make an example of [him] and appear tough on sexual harassment". He noted that he was charged with unacceptable conduct, and he realized that the Army was going to do what was best for the Army and not for himself. He reportedly felt "under the microscope", and he endured helplessness and hopelessness for the last two years of service.

g. Records show the applicant received outpatient treatment for MDD at the VA from August 2017 through December 2023 with good results. Records shows the applicant reported MDD symptom onset during military service that persists to date. He endorsed living a double life during the military characterized by presenting himself as a happily married, church going man, with a successful career. He reportedly, however, struggled with same sex attraction, began acting out on them, resulting in several affairs. He reportedly lost everything upon it was discovered, to include his military career, marriage, and reputation. He initially reported cycles of depression every two to three weeks, triggered by situational stressors, often in the context of his wife blaming him for their children's poor decisions and negative behavior. Over the course of treatment the applicant reported significant improvements in his relationships with his ex-wife and children, and improvement in his depressive and panic symptoms due to being medication compliant and financially stable.

h. The applicant makes various requests as outlined in the ROP and appears to contend his misconduct was related to Other Mental Health Issues and issues related to DADT. A review of the records shows the applicant is 100 percent SC for various physical disabilities and is diagnosed with MDD with panic disorder with onset during active service. Records show the applicant's MDD developed secondary to dealing with the repercussion of his behavior that led to a CID investigation, divorce, and career uncertainty. Given the applicant's misconduct preceded the onset of his MDD and that the MDD appears to have been precipitated by stress and negative consequences associated with his misconduct, the misconduct is not mitigated by MDD. Additionally, although the applicant asserts administrative actions were the result of his sexual orientation, records do not support that the applicant was unfairly treated due to his sexual orientation but instead due to misconduct characterized by conduct unbecoming an officer; holding himself out as a member of the Armed Forces while soliciting anonymous individuals on the internet to engage in sexual acts; holding himself out as a member of the Armed Forces while emailing unsolicited images of his genitalia to anonymous individuals on the internet, to the disgrace of the Armed Forces, all occurring while married; and for initiating contact with a 17-year old with low IQ for the purpose of sexual gratification. It is reasonable to conclude that such misconduct would have resulted in the same or similar administrative actions, regardless of sexual orientation. Also, neither the applicant's MDD nor asserted sexual orientation impaired his ability to differentiate between right and wrong and adhere to the right.

i. Based on the available information, it is the opinion of the Agency BH Advisor that while the applicant had an experience or condition during his time in service, the experience or condition did not mitigate his misconduct. However, he appears to contend his misconduct was related to Other Mental Health Issues and issues related to DADT, and per liberal guidance his assertion is sufficient to warrant the Board's consideration.

Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes. The applicant appears to contend his misconduct was related to Other Mental Health Issues and issues related to DADT.

(2) Did the condition exist or experience occur during military service? Yes.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. A review of the records shows the applicant is 100 percent SC for various physical disabilities and is diagnosed with MDD with panic disorder with onset during active service. Records show the applicant's MDD developed secondary to dealing with the repercussions of his behavior that led to a CID investigation, divorce, and career uncertainty. Given the applicant's misconduct preceded the onset of his MDD and that

the MDD appears to have been precipitated by stress and negative consequences associated with his misconduct, the misconduct is not mitigated by MDD. Additionally, although the applicant asserts administrative actions were the result of his sexual orientation, records do not support that the applicant was unfairly treated due to his sexual orientation but instead due to misconduct characterized by conduct unbecoming an officer; holding himself out as a member of the Armed Forces while soliciting anonymous individuals on the internet to engage in sexual acts; holding himself out as a member of the Armed Forces while emailing unsolicited images of his genitalia to anonymous individuals on the internet, to the disgrace of the Armed Forces, all occurring while married; and for initiating contact with a 17-year old with low IQ for the purpose of sexual gratification. It is reasonable to conclude that such misconduct would have resulted in the same or similar administrative actions, regardless of sexual orientation. Also, neither the applicant's MDD nor asserted sexual orientation impaired his ability to differentiate between right and wrong and adhere to the right.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, a medical review, and the evidence found within the military record, the Board found relief is not warranted.
2. The Board found insufficient evidence of a clear and convincing nature that the GOMOR the applicant received is untrue or unjust, in whole or in part, thereby warranting its alteration or removal from his AMHRR. The Board found that all decisions made relative to the applicant's misconduct, to include the decision to impose nonjudicial punishment, were substantiated by a preponderance of the evidence. The Board concurred with the conclusion of the medical advising official that the record does not indicate the applicant had any conditions that would have mitigated his misconduct.
3. The Board further found the applicant received full due process during the BOI, noting that the BOI's recommendation was ultimately not executed when the applicant was allowed to resign in lieu of elimination to afford him the opportunity to eventually receive non-regular retired pay upon reaching age 60. Although the recommendation of the BOI was not executed, the Board determined it is in the best interest of the Army to maintain a record of all actions taken related to the applicant's release from active duty in 2015.
4. The Board found insufficient evidence that would support a recommendation to revoke the applicant's unqualified resignation. While it is clear his motivation for requesting resignation was to avoid an outcome that would deprive him of eligibility for retired pay and other benefits, the Board determined there are no underlying errors or injustices that would be a basis for the relief he now seeks, to include correction of his

record to show he was retired for length of service, that he was retained on active duty to complete 20 years of active Federal service, or that he was retired under TERA.

5. The Board found the revocation of his physical disability retirement was fully supported by the evidence. The decision authority had before her all relevant information when the determination was made to accept his application for non-regular retirement in lieu of elimination. The Board determined the termination of the PEB and subsequent revocation of disability retirement orders was not in error or unjust. Absent a reason to reinstate the disability retirement, the Board determined there is also no basis for making any of the requested changes to the applicant's DD Form 214 for the period ending 13 November 2015.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
█	█	█	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

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.

9/3/2024

X

CHAIRPERSON

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

REFERENCES:

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

2. Department of Defense Instruction (DODI) 1320.08, paragraph 3.3a, Officers in the Grade of O-4 Approaching Retirement Eligibility. Pursuant to Title 10, U.S. Code, Section 611(b) (Convening of selection Boards) , a board may consider for continuation a commissioned officer on the Active Duty List (ADL) in the grade of O-4 who is subject to discharge pursuant to Title 10, U.S. Code, section 632 (Effect of failure of selection for promotion: captains and majors of the Army, Air Force, and Marine Corps and lieutenants and lieutenant commanders of the Navy) of and will qualify for retirement pursuant to Title 10, U.S. Code, section 3911 (Twenty years or more: regular or reserve commissioned officers), between 2 to 6 years after the required date of discharge. Such an officer will normally be selected for continuation if the officer will qualify for retirement pursuant to Title 10, U.S. Code, section 3911, of, within 4 years of the required date of discharge; however, there is no entitlement to continuation. Selection or non-selection will be based on the criteria set by the Secretary of the Military Department concerned. Officers who are between 4 and 6 years away from qualifying for retirement may be continued based on the criteria set by the Secretary of the Military Department concerned.

3. Title 10, U.S. Code, section 632, states each officer of the Army, Air Force, Marine Corps, or Space Force on the active-duty list who holds the grade of captain or major, and each officer of the Navy on the active-duty list who holds the grade of lieutenant or lieutenant commander, who has failed of selection for promotion to the next higher grade for the second time and whose name is not on a list of officers recommended for promotion to the next higher grade shall if on the date on which he is to be discharged is within two years of qualifying for retirement under section 7311 (Twenty years or more: regular or reserve commissioned officers), of this title, be retained on active duty until he is qualified for retirement and then retired under that section, unless he is sooner retired or discharged under another provision of law.

4. Title 10, U.S. Code, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 and Army Regulation (AR) 635-40, Physical Evaluation for Retention, Retirement, or Separation.

5. Title 10, U.S. Code, section 12686a. Reserves on active duty within two years of retirement eligibility: limitation on release from active duty -

a. 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.

b. 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 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.

6. AR 27-10, Legal Services-Military Justice, prescribes the policies and procedures pertaining to the administration of military justice. Chapter 3 implements and amplifies Article 15, UCMJ, and Part V, Manual for courts-Martial. Paragraph 3-28 contains guidance on setting aside punishment and restoring rights, privileges, or property affected by the portion of the punishment set aside. It states that the basis for any set aside action is a determination that, under all the circumstances of the case, the punishment has resulted in a clear injustice. "Clear injustice" means that there exists an unwaived legal or factual error that clearly and affirmatively injured the substantial rights of the Soldier. An example of clear injustice would be the discovery of new evidence unquestionably exculpating the Soldier. Normally, a Soldier's uncorroborated sworn statement will not constitute a basis to support the setting aside of punishment.

7. Article 133 of the Uniform Code of Military Justice defines conduct unbecoming an officer and a gentleman. It is a unique provision aimed at preserving the honor, integrity, and decorum expected of military officers. Enlisted personnel are not subject to this article. When you are commissioned as an officer in the US Armed Forces, you are not just taking on a job; you are assuming a role steeped in tradition and responsible for setting the standard for those you lead. The UCMJ does not explicitly list every action that could be considered unbecoming. Instead, it considers offences that may discredit the armed services or are harmful to their good order and discipline. Acts considered unbecoming include but are not limited to dishonesty or fraud, conduct that dishonors or

embarrasses the military, actions that demonstrate a disregard for the law or military regulations.

8. AR 600-37, Unfavorable Information, provides that an administrative memorandum of reprimand may be issued by an individual's commander, by superiors in the chain of command, and by any general officer or officer exercising general court-martial jurisdiction over the Soldier.

a. The memorandum must be referred to the recipient and the referral must include and list applicable portions of investigations, reports, or other documents that serve as a basis for the reprimand. Statements or other evidence furnished by the recipient must be reviewed and considered before a filing determination is made.

b. A memorandum of reprimand may be filed in a Soldier's OMPF only upon the order of a general officer-level authority and is to be filed in the performance folder. The direction for filing is to be contained in an endorsement or addendum to the memorandum. If the reprimand is to be filed in the OMPF, the recipient's submissions are to be attached. Once filed in the OMPF, the reprimand and associated documents are permanent unless removed in accordance with this regulation.

c. Once an official document has been properly filed in the OMPF, it is presumed to be administratively correct and to have been filed pursuant to an objective decision by competent authority. Thereafter, the burden of proof rests with the individual concerned to provide evidence of a clear and convincing nature that the document is untrue or unjust, in whole or in part, thereby warranting its alteration or removal from the OMPF.

d. Only memoranda of reprimand, admonition, or censure may be the subject of an appeal for transfer to the restricted folder. Normally, such appeals will be considered only from Soldiers in grades E-6 and above, officers, and warrant officers. The above documents may be appealed on the basis of proof that their intended purpose has been served and that their transfer would be in the best interest of the Army. The burden of proof rests with the recipient to provide substantial evidence that these conditions have been met. Appeals approved under this provision will result in transfer of the document from the performance folder to the restricted folder of the OMPF.

e. Appeals submitted under this provision will normally be returned without action unless at least 1 year has elapsed since imposition of the memorandum and at least one evaluation report, other than academic, has been received in the interim.

9. AR 600-8-24, Officer Transfers and Discharges, chapter 4, establishes policy and prescribes procedures for eliminating officers in the Active Army for substandard performance of duty, misconduct, moral or professional dereliction, and in the interests of national security. It states that an officer identified for elimination may at any time

during or prior to the final action in the elimination case, elect to submit a resignation in lieu of elimination.

10. AR 635-40, Disability Evaluation for Retention, Retirement, or Retention, Retirement, or Separation, Paragraph 4-1, Scope of the Disability Evaluation System. Public Law 110-181 defines the term, Physical Disability Evaluation System (PDES), in part, as a system or process of the DOD for evaluating the nature and extent of disabilities affecting members of the Armed Forces that is operated by the Secretaries of the military departments and is comprised of Medical Evaluation Boards (MEB), Physical Evaluation Boards (PEB), counseling of Soldiers, and mechanisms for the final disposition of disability evaluations by appropriate personnel. A Soldier may not be discharged or released from active duty because of a disability until they have made a claim for compensation, pension, or hospitalization with the VA or have signed a statement that their right to make such a claim has been explained or have refused to sign such a statement.

a. The objectives of the DES are to (1) Maintain an effective and fit military organization with maximum use of available manpower; (2) Provide benefits for eligible Soldiers whose military Service is terminated because of a disability incurred in the LOD. (3) Provide prompt disability processing while ensuring that the rights and interests of the Government and the Soldier are protected.

b. The DES consists of the three systems. (1) The Legacy Disability Evaluation System. Under the legacy system, for cases referred under the duty-related process, the PEB determines fitness and determines the disability rating percentages using the Veterans Administration Schedule for Rating Disabilities (VASRD). The legacy process also includes the Reserve component non-duty related referral process. No disability ratings are assigned for non-duty related cases. (2) Integrated Disability Evaluation System (IDES). The IDDES features- (a) A single set of disability medical examinations that may assist the DES in identifying conditions that may render the Soldier unfit. (b) A single set of disability ratings provided by VA for use by both departments. The DES applies these ratings to the conditions it determines to be unfitting and compensable. The Soldier receives preliminary ratings for their VA compensation before the Soldier is separated or retired for disability. (3) Expedited Disability Evaluation System. A voluntary process for Soldiers unfit for catastrophic injuries or diseases in which USAPDA may permanently retire the Soldier for disability without referral to the PEB based on the MTF's medical narrative summary (NARSUM).

11. AR 635-40 also provides guidance for Soldiers pending adverse actions or involuntary administrative separation. It states –

a. When Soldiers are under investigation for, or charged with, a civil criminal offense (misdemeanor or felony) and they are incarcerated in civilian confinement, pre or post trial, or are being held pending psychiatric evaluation or treatment, they are ineligible to continue any phase of the DES. If they are present for duty (on bail), they are eligible to complete the MEB.

b. The Soldier, to include if on bail, becomes eligible for the PEB or disability disposition when the Soldier is cleared of the offense and has a military status (continues on active duty or in an RC active status), or the command, after conviction, specifically declines in writing to separate the Soldier on the basis of conviction by civil court (see AR 135–175, Separation of Officers, AR 135–178, Enlisted Administrative Separations, AR 600–8–24, Officer Transfers and Discharges, and AR 635–200, Active Duty Enlisted Administrative Separations).

c. Officers pending administrative elimination under AR 600–8–24 are normally dual processed for the elimination action and completion of the DES. For dual processing to occur, referral to the MEB must occur before the date the Deputy Assistant Secretary of the Army (Review Boards) approves the officer's elimination.

12. AR 635-5-1, Separation Program Designator (SPD) Codes, provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the separation code to be entered on the DD Form 214. It identifies the separation code "JNC" as the appropriate code to assign to officers under the provisions of AR 600-8-24, paragraph 4-2b, based on the narrative reason of unacceptable conduct.

13. The Army has ended the Temporary Early Retirement Authority (TERA) program.

a. Service members eligible for TERA must have submitted a request through their chain of command by January 15, 2018 for early retirement consideration. The authority to approve TERA was terminated on February 28, 2018.

b. The authority to utilize TERA until December 31, 2025 is for force-shaping of active military forces. So, while the use of TERA is still authorized, the conditions for its use are not applicable at the present time.

c. 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 have completed at least 15 years of active service. This is a discretionary authority and not an entitlement. The Army has elected to use this limited program as part of a comprehensive force management strategy to shape the force. It does not apply to Service members of the Army National Guard or the U.S. Army Reserve.

14. Title 38, USC, section 1110 (General - Basic Entitlement): For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

15. Title 38, USC, section 1131 (Peacetime Disability Compensation - Basic Entitlement): For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

16. The Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records on 25 July 2018, regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. Boards for Correction of Military/Naval Records may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

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.

17. The "Don't Ask, Don't Tell" policy was implemented in 1993 during the Clinton presidency. This policy banned the military from investigating service members about their sexual orientation. Under that policy, service members may be investigated and administratively discharged if they made a statement that they were lesbian, gay or bisexual; engaged in physical contact with someone of the same sex for the purposes of sexual gratification; or married, or attempted to marry, someone of the same sex.

18. Section 1556 of Title 10, U.S. Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

19. AR 15-185, ABCMR, prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR will decide cases on the evidence of record. It is not an investigative body.

//NOTHING FOLLOWS//