

IN THE CASE OF: [REDACTED]

BOARD DATE: 7 December 2023

DOCKET NUMBER: AR20230003626

APPLICANT REQUESTS: through counsel, expunction of the Military Police Report (MPR), 23 June 2010, from his military records, including the U.S. Army Criminal Investigation Command (CID) databases, Defense Central Index of Investigations (DCII), and all other federal agency criminal databases.

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

- DD Form 149 (Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552)
- Counsel's Brief in Support of Application for Correction of Record, undated, with supporting documents organized and labeled as exhibits –
  - Exhibit 1 – DD Form 4 (Enlistment/Reenlistment Document – Armed Forces of the United States), 30 November 2000
  - Exhibit 2 – DD Form 214 (Certificate of Release or Discharge from Active Duty) for the period ending 12 February 2011
  - Exhibit 3 – DD Form 4, 12 December 2003, with auxiliary documents (immediate reenlistment)
  - Exhibit 4 – DA Form 1695 (Oath of Extension of Enlistment), 6 June 2006, with allied document
  - Exhibit 5 – DD Form 4, 2 October 2007, with auxiliary documents
  - Exhibit 6 – Headquarters, U.S. Army Medical Center and School and Fort Sam Houston, Fort Sam Houston, TX, Orders 108-810, 18 April 2006
  - Exhibit 7 – DA Form 2166-8 (Noncommissioned Officer (NCO) Evaluation Report (NCOER)) covering the period 1 July 2006 through 30 June 2007
  - Exhibit 8 –
- Headquarters, U.S. Army Recruiting Command, Fort Knox, Memorandum (Relief for Cause Report Directed by an Official Other Than Rater or Senior Rater), 16 December 2008
- U.S. Army Human Resources Command (HRC), Alexandria, VA, Memorandum (Administrative Removal from the Promotion Selection List), 24 March 2010

- HRC memorandum (Headquarters, Department of the Army, Enlisted Standby Advisory Board (STAB) Removal Decision Pertaining to (Applicant)), 25 March 2010
- Exhibit 9 –
- Section VII (Narrative) of DA Form 3975 (MPR) (page 5 only)
- Headquarters, U.S. Army Garrison Command, Fort Knox, Memorandum (Separation (Redacted) (Applicant), Headquarters Company, Garrison, Fort Knox), undated
- Exhibit 10 – Headquarters, U.S. Army Garrison Command, Fort Knox, Memorandum (Request for Conditional Waiver – Administrative Separation Board under Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter (should read Paragraph) 14-12c(2)), 29 September 2010, with allied documents
- Exhibit 11 – Headquarters, U.S. Army Garrison Command, Fort Knox, Memorandum (Request for Conditional Waiver of Separation under Provisions of Army Regulation 635-200, Chapter (should read Paragraph) 14-12c(2)), 12 October 2010
- Exhibit 12 –
- Headquarters, U.S. Army Accessions Command and Fort Knox, Memorandum (Review of Separation Board Proceedings (Army Regulation 635-200, Chapter (should read Paragraph) 14-12c(2), (Applicant)), 23 November 2010
- U.S. Army Trial Defense Service, Fort Knox, Memorandum (Chapter Appeal – (Applicant)), 28 October 2010
- Administrative Separation Board Findings and Recommendations, undated
- Exhibit 13 – Headquarters, U.S. Army Accessions Command and Fort Knox, Memorandum (Separation (Redacted), (Applicant), Headquarters Company, Garrison, Fort Knox), 10 December 2010
- Exhibits 14-18 – numerous Department of Veterans Affairs (VA) Medical Documents
- Exhibit 19 – Counsel's Memorandum to Director, U.S. Army Crime Records Center (CRC) (Amendment of Criminal Investigative Division Records), 26 May 2022
- Exhibit 20 – CID/CRC Letter, 22 August 2022
- Exhibit 21 –
- ██████████ Technical and Community College Associate of Technical Study – Law Enforcement Diploma, 17 August 2013

- University ██████████ Bachelor of Science Diploma, 2 May 2015
- University ██████████ College of Allied Health Sciences Master of Social Work Diploma, 27 April 2017
  
- Exhibit 22 – Ohio Peace Officer Training Commission Diploma, December 2013
- Exhibit 23 – ██████████ Professional License – Licensed Independent Social Worker, 12 December 2020
  
- VA Board of Veterans' Appeals Letter, 17 July 2013, with auxiliary documents

FACTS:

1. The applicant defers to counsel.
  
2. Counsel states the applicant respectfully requests correction of his military records by removing the charges of "Controlled Substance Violations, Other – Possession of Other (Article 112(a), UCMJ [Uniform Code of Military Justice]"; "Controlled Substance Violations, Opiates – Determined by Urinalysis Test (Article 112(a), UCMJ)"; "Soliciting Another to Commit an Offense (Article 134, UCMJ)"; and "Derelict Duties – Willful (Article 92, UCMJ)" under a theory of material error and material injustice.

a. Statement of Facts.

(1) The applicant enlisted in the U.S. Army Reserve under the Delayed Entry/Enlistment Program (DEP) on 30 November 2000 for a term of 8 years with a 3-year active duty commitment. He was discharged from the DEP and enlisted in the Regular Army on 29 August 2001 in military occupational specialty 12B (Combat Engineer). After a series of extensions and reenlistments, he was promoted to the rank/grade of staff sergeant/E-6 on 18 April 2006 (see exhibits 1-6).

(2) The applicant's NCOER covering the period 1 July 2006 through 30 June 2007 shows his rater recommended him for promotion to sergeant first class/E-7 ahead of his peers while working as a recruiter (see exhibit 7). However, as a result of minor misconduct, he was relieved of his duties as a recruiter and he was removed from the E-7 promotion list on 25 March 2009 (see exhibit 8).

(3) The applicant received numerous awards and decorations during his service (see exhibit 2).

(4) The applicant served honorably until he participated in minor misconduct with fellow Soldiers. On 1 June 2009, the military police opened an investigation into him for a violation of Article 112(a), UCMJ, for "Controlled Substance Violations, Other –

Possession of Other Controlled Substance." This investigation was following an in-person report by a witness to the misconduct in that the applicant took oxycontin provided by another Soldier while on his boat. He was subsequently titled with two violations of Article 112(a), UCMJ; one violation of Article 134, UCMJ; and one violation of Article 92, UCMJ (see exhibit 9). On 23 September 2010, he requested a waiver of his appearance before an Administrative Retention Board on the condition that he be retained on active duty (see exhibit 10). On 12 October 2010, the conditional waiver request was denied, and it was opined that the seriousness of the charges had compromised him as a Soldier (see exhibit 11). An Administrative Separation Board convened wherein he submitted a letter taking full responsibility for his actions but showing his ability to rehabilitate and continue serving by completing the Army Substance Abuse Program. The separation board found the violations to be an aggravating factor against his retention in that he was the Unit Prevention Leader at the time of his offenses. The board did, however, recognize the mitigating factor of the extreme familial stress he was facing at the time (see exhibit 12). On 10 December 2010, the board recommended his separation with an "Under Honorable Conditions (General)" service characterization (see exhibit 13).

(5) The applicant was discharged on 3 February 2011. His service was characterized as "Under Honorable Conditions (General)" with a narrative reason for separation of "Misconduct (Drug Abuse)," and a reentry eligibility code of 4. He served 9 years, 5 months, and 14 days (see exhibit 2).

(6) In 2012, the applicant was diagnosed with post-traumatic stress disorder (PTSD) by a VA hospital in [REDACTED]. He has also been diagnosed with an adjustment disorder with depressed mood (see exhibit 14). During his service, he admitted to struggling with stress and how to cope, as his mother had ovarian cancer and his job was providing him with little purpose. He also admitted to feeling useless (see exhibit 15). After being discharged, he expressed his guilt and shame about his pain medicine abuse following a voluntary vasectomy, which resulted in extended pain and discomfort, and stated he felt depressed most days (see exhibit 16). In 2015, he was placed on an anti-depressant (see exhibit 17). On 31 August 2017, he underwent an outpatient suicide assessment, where he was found not to be a current risk, but there were significant risk factors present, such as legal troubles with his divorce and a false report made to police by his ex-wife (see exhibit 18).

(7) On 26 May 2022, the applicant applied for an amendment of his CID records. He requested removal of the incomplete and inaccurate information in his CID records regarding the four UCMJ charges (see exhibit 19). These records are inaccurate and incomplete as the mitigating factors of his PTSD and other mental health issues were unknown and therefore not considered. On 22 August 2022, his amendment request was denied and it was determined that his name will remain in the National Crime Information Center (NCIC) database (see exhibit 20).

b. Argument.

(1) Material Error.

(a) In this case, it is respectfully submitted that a material error has occurred in not removing the four charges from the applicant's military records. Army Regulation 190-45 (Law Enforcement Reporting), paragraph 3-6, dictates that "An amendment of records is appropriate when such records are inaccurate, irrelevant, untimely, or incomplete." Here, his CID records are clearly incomplete as they do not include his PTSD and depression diagnoses. These mental health issues were present at the time of his misconduct and would have provided the investigation with mitigating and exculpatory factors. Without the inclusion of these factors, and therefore a lack of completeness of the CID records, the circumstances surrounding his UCMJ violations were not accurately portrayed.

(b) The applicant acknowledges that he was wrong in taking unprescribed controlled substances and knows that was the wrong method of trying to self-medicate his PTSD and depression. He apologizes for his decisions and wishes he had been able to get the help he needed instead of using drugs. However, the failure to consider his mental health struggles during the investigation and punishment was a material error that must be rectified. The failure of inclusion of all relevant factors was a material error itself, and the material error was amplified when the charges were not removed from his CID records. He respectfully requests that the Board rectify the material error suffered by him and remove the four charges from his records.

(2) Material Injustice.

(a) In this case, it is also respectfully submitted that the applicant has suffered a material injustice. The inaccurate and incomplete information contained in his CID records led to an "Under Honorable Conditions (General)" service characterization and a premature discharge. This status, as well as the record of charges contained in the NCIC, has had lasting negative effects on his after-discharge life. These incomplete records can be found when he is subjected to a background investigation, which will affect his ability to obtain certain types of employment. He has been improperly stigmatized and harmed by his discharge status, which has been recognized by various courts. This stigmatization of characterization of status, coupled with the inaccurate records that follow him, is a great material injustice.

(b) Despite the material error and material injustice the applicant has been faced with, he has been able to have some successes in civilian life. He successfully completed an Associate in Law Enforcement, a Bachelor of Science from the University of ██████████ of Education Criminal Justice and Human Services, and a Master of Social Work from the ██████████. He also completed the ██████████ Peace

Officer Basic Training Program at the [REDACTED] Police Academy on 18 December 2012. In 2020, he additionally received his Independent Social Work license from the State of [REDACTED] (see exhibits 21-23). He hopes the Board can help him continue to excel in his civilian career.

d. Conclusion. Considering the facts and arguments presented herein, the applicant respectfully requests correction of his military records by removing the charges against him.

3. The applicant enlisted in the U.S. Army Reserve under the DEP for a period of 8 years on 30 November 2000. On 29 August 2001, he was discharged from the DEP and enlisted in the Regular Army in the rank/grade of private first class/E-3.

4. Headquarters, U.S. Army Medical Center and School, Fort Sam Houston, TX, Orders 108-810, 18 April 2006, promoted him to the rank/grade of staff sergeant/E-6 effective 1 May 2006.

5. The DA Form 3975, 23 June 2010, with DA Forms 3975-1 (MPR – Additional Offense), notes the MPR shows the applicant was cited for the offense of possessing/concealing controlled substance violations, other – possession of other controlled substance (Article 112a, UCMJ) on 14 June 2010 at Fort Knox, KY (see attachments and allied documents). Section VII (Narrative) of the DA Form 3975 states:

On 20100614 [14 June 2010], at 1016 hrs [hours], this station was notified in person by [redacted], that [Applicant] and [Redacted] were suspected of consuming a controlled substance (Oxycotin [OxyContin – oxycodone used to treat moderate to severe pain]). A command directed urinalysis was given on 20100616 [16 June 2010] to [Applicant] and [Redacted]. [Applicant] reported to this station where he was advised of his legal rights, which he waived, rendering a written sworn statement admitting to the offenses. [Redacted] reported to this station where he was advised of his legal rights, which he invoked, requesting a lawyer. [Applicant] and [Redacted] were processed and released to their unit (1SG [First Sergeant] [Redacted]) on DD Form 2708 [Receipt for Pre-Trial/Post-Trial Prisoner or Detained Person]. On 20100706 [6 July 2010], at 1300 hrs [hours], this station received an e-mail from the Ft [Fort] Meade Laboratory with the results of [Redacted] and [Applicant's] urinalysis. The laboratory results revealed that [Applicant] and [Redacted] tested positive for oxycodone/oxymorphone. Further investigation revealed that [Applicant] and [Redacted] were not prescribed oxycodone/oxymorphone. On 20100707 [7 July 2010], at 0930 hrs [hours], [Redacted] reported to this station and was advised of his legal rights, which he invoked, requesting a lawyer. [Redacted] was further processed and released to his unit on DD Form 2708.

On 20100719 [19 July 2010], SJA [Staff Judge Advocate] [Redacted] was contacted and briefed on all aspects of this investigation. [Redacted] opined sufficient evidence exists to title [Applicant] with controlled substance violations, other – possession of other controlled substance (Article 112a, UCMJ), controlled substance violations, opiates – determined by urinalysis test (Article 112a, UCMJ), soliciting another to commit an offense (Article 134, UCMJ), and dereliction in the performance of duties (Article 92, UCMJ). (Note: The remainder of the MPR relates to the other Soldier).

6. In an undated memorandum, the applicant's immediate commander recommended his separation from the Army under the provisions of Army Regulation 635-200, paragraph 14-12c(2) with characterization of his service as general under honorable conditions. His specific reasons for the proposed action were that the applicant was investigated by Fort Knox military police investigators for illegal possession of a controlled substance (OxyContin); use of a controlled substance, which was verified by urinalysis; dereliction of duty as Unit Prevention Leader; and soliciting another to commit an offense. His illegal possession and use of controlled drugs, soliciting a subordinate Soldier to commit an offense, and abuse of his authority as an NCO and Unit Urinalysis Program Manager all reflect a lack of quality demanded of our Soldiers and NCOs.

7. The U.S. Army Garrison Command, Fort Knox, memorandum from the Commander (Appointment of Administrative Separation Board), 23 September 2010, appointed a board to determine whether the applicant should be separated from the U.S. Army in accordance with Army Regulation 635-200, paragraph 14-12c(2), for misconduct – illegal use of drugs.

8. The applicant's Fort Knox Form 9586-E (Request for Conditional Waiver – Separation under Army Regulation 635-200), 23 September 2010, states he voluntarily waived consideration of his case by an administrative separation board contingent upon being retained in the U.S. Army.

9. The Headquarters, U.S. Army Garrison Command, Fort Knox, memorandum from the Administrative Separation Board assistant recorder (Notification to Appear before an Administrative Separation Board, (Applicant)), 27 September 2010, notified the applicant to appear before the Administrative Separation Board on 14 October 2010. The applicant acknowledged receipt of the notification on 29 September 2010.

10. The U.S. Army Garrison Command, Fort Knox, memorandum from the Commander (Request for Conditional Waiver of Separation under Provisions of Army Regulation 635-200, Chapter (should read Paragraph) 14-12c(2)), 12 October 2010, denied the applicant's request for a waiver, stating the seriousness of the charges has compromised the applicant, both as a Soldier and as an NCO.

11. An Administrative Separation Board convened at Fort Knox on 26 October 2010. The Findings and Recommendation show the Board determined:

a. Findings.

(1) The allegation of misconduct, possession of a controlled substance, to wit: OxyContin, in the notification of proposed separation is supported by a preponderance of the evidence.

(2) The allegation of misconduct, use of controlled substance, to wit: OxyContin, in the notification of proposed separation is supported by a preponderance of the evidence.

(3) The allegation of dereliction in the performance of duties in the notification of proposed separation is supported by a preponderance of the evidence.

(4) The allegation of solicitation of another to commit an offense in the notification of proposed separation is supported by a preponderance of the evidence.

(5) The findings do warrant separation with respect to the applicant.

b. Recommendations. In view of the above findings, the board recommends the applicant's separation from the U.S. Army with characterization of his service as general (under honorable conditions).

12. The applicant's memorandum for the Commander, U.S. Army Garrison, Fort Knox (Chapter Appeal – (Applicant)), 28 October 2010, requested retention in the U.S. Army and reduction in grade to whatever the commander deems appropriate. He apologized and took full responsibility for the use of a prescription drug. He stated he had personal and professional issues and became addicted to prescription medication to cope with the issues. He has completed the Army Substance Abuse Program and would like to continue to serve.

13. The U.S. Army Accessions Command and Fort Knox memorandum from the Military Law and Ethics Attorney for the Staff Judge Advocate (Review of Separation Board Proceedings (Army Regulation 635-200, Chapter (should read Paragraph) 14-12c(2)) (Applicant)), 23 November 2010, states the legal review of the applicant's Administrative Separation Board determined the record was legally sufficient to support the board's recommendation to separate him with a general (under honorable conditions) characterization of service.

14. On 10 December 2010, the Commander, Headquarters, U.S. Army Accessions Command and Fort Knox, recommended the applicant's separation under the provisions



of Army Regulation 635-200, paragraph 14-12c(2), with characterization of his service as under honorable conditions (general).

15. The applicant's DD Form 214 shows he was discharged on 12 January 2011 in the rank/grade of staff sergeant/E-6 under the provisions of Army Regulation 635-200, paragraph 14-12c(2), by reason of misconduct (drug abuse). He completed 9 years, 5 months, and 14 days of net active service during this period. His service was characterized as under honorable conditions (general).

16. Counsel submit a letter to CID/CRC, 2 May 2022, requesting amendment of the applicant's records by removing the four aforementioned charges as they were inaccurate and incomplete information was given that caused the applicant to be titled.

17. The CID/CRC letter, 22 August 2022, responded to the applicant's request to amend his records within the CID files. After review and consideration of his request and the available evidence, CID denied his request. The information presented did not constitute as new or relevant information needed to amend the MPR. A check of the Federal Bureau of Investigation NCIC reflects him as the subject in the MPR in their database. Consistent with Department of Defense (DOD) Instruction (DODI) 5505.11 (Fingerprint Reporting Requirements), his name will remain in the NCIC. He may appeal to the Army Board for Correction of Military Records (ABCMR) if he disagrees with the amendment denial.

18. His military records do not contain evidence showing he failed to meet medical retention criteria in accordance with Army Regulation 40-501 (Standards of Medical Fitness), which would warrant his processing for separation through medical channels.

19. The applicant, through counsel, provided the following evidence in addition to those documents discussed above:

a. Exhibit 7 contains the applicant's NCOER covering the period 1 July 2006 through 30 June 2007 showing his senior rater evaluated him as "Among the Best" and recommended him for promotion to sergeant first class/E-7. (Note: This NCOER occurred 3 years before the MPR).

b. Exhibit 8 contains the following:

(1) Headquarters, U.S. Army Recruiting Command, Fort Knox, memorandum (Relief for Cause Report Directed by an Official Other Than Rater or Senior Rater), 16 December 2008, showing the applicant was relieved from his duties as a recruiter. This relief was as a result of a 26 March 2008 investigation concerning improper recruiting practices. It noted the preponderance of the evidence established the

applicant committed a recruiting impropriety by falsifying and forging a judge's name to a court document with the intention of enlisting an applicant.

(2) The HRC memorandum (Administrative Removal from the Promotion Selection List), 24 March 2010, shows the applicant was considered and selected for promotion on the Sergeant First Class Promotion List and his name was administratively removed from the list based on the results of the Fiscal Year 2010 Sergeant First Class STAB.

(3) The HRC memorandum (Headquarters, Department of the Army, Enlisted STAB Removal Decision Pertaining to (Applicant)), 25 March 2010, shows the applicant was considered for removal from the Sergeant First Class Promotion List by a Department of the Army Enlisted STAB which convened 15 February 2010. The board recommended, and the Director of Military Personnel Management approved, removal of his name from the Fiscal Year 2009 Promotion Selection List. The memorandum noted he would be eligible to compete in subsequent boards if otherwise qualified.

c. Exhibits 14-18 contain numerous VA medical documents showing his medical treatment visits and diagnoses. One document notes he was evaluated for depression due to his mother's cancer diagnosis. Another document notes his diagnosis of adjustment disorder with depressed mood (see attachments).

d. Exhibits 21-23 contain civilian advanced education diplomas showing he successfully completed an Associate degree in Law Enforcement, a Bachelor of Science degree from the University of Cincinnati College of Education Criminal Justice and Human Services, and a Master of Social Work degree from the University of Cincinnati after his military service. He also completed the [REDACTED] Peace Officer Basic Training Program at the [REDACTED] Police Academy on 18 December 2012. In 2020, he received his Independent Social Work license from the State of Ohio.

e. The VA Board of Veterans' Appeals letter, 17 July 2023, with auxiliary documents shows he appealed his disability rating. The VA Board of Veterans' Appeals granted him service connection for major depressive disorder, to include related anxiety disorder (also major depressive disorder and PTSD: non-combat) with a disability rating of 50 percent on 9 November 2022, an increase from its original disability rating of 30 percent that was granted on 7 December 2016.

## 20. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting an expunction of the Military Police Report (MPR), 23 June 2010, from his military records, including the U.S. Army Criminal Investigation Command (CID) databases, Defense Central Index of

Investigations (DCII), and all other federal agency criminal databases. He contends he had mental health conditions including PTSD that mitigated 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 29 August 2001; 2) The applicant was promoted to the rank of staff sergeant on 1 May 2006; 3) On 16 December 2008, the applicant was relieved from his duties as a recruiter. This was due to an investigation which found the applicant had falsified and forged a judge's name to a court document with the intention of enlisting an applicant; 4) On 19 July 2010, a Staff Judge Advocate opined there was sufficient evidence to title the applicant with possession of a controlled substance, use of opiates (determined by urinalysis test), soliciting another to commit an offense, and dereliction in the performance of duties; 5) In an undated memorandum, the applicant's immediate commander recommended his separation from the Army, Chapter 14-12c(2) with characterization of his service as general under honorable conditions. His specific reasons for the proposed action were that the applicant was investigated by Fort Knox military police investigators for illegal possession of a controlled substance (OxyContin); use of a controlled substance, which was verified by urinalysis; dereliction of duty as Unit Prevention Leader; and soliciting another to commit an offense; 6) Administrative Separation Board convened at Fort Knox on 26 October 2010. The Findings and Recommendation show the Board determined all allegations were supported by a preponderance of the evidence. The Board also recommended the applicant's separation from the U.S. Army with a characterization of his service as general (under honorable conditions); 7) The applicant was discharged on 12 January 2011 in the rank of staff sergeant, Chapter 14-12c (2), by reason of misconduct (drug abuse). His service was characterized as under honorable conditions (general).

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service and medical records. The Armed Forces Health Longitudinal Technology Application (AHLTA), the VA's Joint Legacy Viewer (JLV), and hardcopy VA behavioral health records were also examined.

d. On his application, the applicant noted mental health conditions including PTSD were related to his request, as mitigating factors in the circumstances that resulted in his misconduct. The applicant has no history of being deployed to a combat environment. There is also no evidence the applicant ever failed to meet the medical retention criteria in accordance with Army Regulation 40-501 (Standards of Medical Fitness) during his military service. He was first seen in behavioral health services on 22 June 2005 for a Drill Sergeant/ Recruiter Duty Psychological evaluation. The evaluation consisted of an interview and psychological testing. The evaluation revealed no evidence the applicant could not perform the duties of a Drill Sergeant of a Recruiter.

e. The applicant was seen at the Army Substance Abuse Program (ASAP) for his initial intake evaluation on 25 June 2010. He was reported to be abusing pain medication and was diagnosed with a Substance Use Disorder. The applicant began to formally attend substance abuse treatment at ASAP on 28 June 2010. He reported no substance or alcohol abuse at that time. He was also referred to outpatient behavioral health by ASAP for additional assistance with stress on 15 July 2010. The applicant stated that his mother had cancer, and he was experiencing occupational problems. He also reported having a medical procedure a year prior. He had experienced some complications, and he was prescribed pain medication as a result. The applicant reported abuse of the medication, but he was not diagnosed with an addiction to opiates. The applicant was instead diagnosed with an Adjustment Disorder with Anxiety, and he was recommended for stress management and a follow-up appointment. The applicant did not follow-up with outpatient behavioral health. The applicant was recommended for Intensive Outpatient program at Lincoln Trail Behavioral Health System by his ASAP provider, and he began the 4-week program on 26 July 2010. The applicant returned to ASAP on 18 August 2010. He continued in regular weekly substance abuse counseling till October 2010. He was never diagnosed with any mental health condition beyond opioid or substance abuse. The applicant had admitted to abusing opioids for five months prior to his positive urinalysis. He was identified to be in remission on 19 October 2010. There was also evidence the applicant also attended Narcotics Anonymous (NA) for six months as well.

f. An examination of JLV provided evidence the applicant has been seen at the VA for behavioral health treatment. The applicant has reported to continue to abstain from substance abuse, but he has been seen for symptoms of depression and anxiety. He was seen for an initial mental health intake on 23 November 2011. He was diagnosed with Depression. The applicant has continued in the VA for behavioral health treatment till present. The applicant did report experiencing symptoms of depression while on active service and symptoms associated with PTSD. However, he attributed his symptoms associated with PTSD to the legal and occupational consequences of his drug abuse and the death of one of his recruits in combat, which he did not witness. As a result, the applicant has not been diagnosed with PTSD. However, he has been diagnosed with service-connected Major Depressive Disorder since December 2016.

g. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence to support the applicant had a condition or experience that 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 mental health conditions including PTSD while on active service. The applicant was seen for one appointment at outpatient behavioral health while on active service, and he was diagnosed with an Adjustment Disorder with Anxiety. After his discharge, the applicant was diagnosed with service-connected Major Depressive Disorder.

(2) Did the condition exist or experience occur during military service? Yes, the applicant contends he was experiencing mental health conditions including PTSD while on active service. The applicant was seen for one appointment at outpatient behavioral health while on active service, and he was diagnosed with and Adjustment Disorder with Anxiety. After discharge, the applicant was diagnosed with service-connected Major Depressive Disorder.

(3) Does the condition or experience actually excuse or mitigate the discharge? No, the applicant was predominately diagnosed with a substance abuse disorder while on active service. The applicant was found guilty, and he admitted to abusing opiates while on active service. He did attend one session of outpatient behavioral health treatment, and he was diagnosed with an Adjustment Disorder with Anxiety. However, the applicant was not ever found to fail to meet the medical retention criteria in accordance with Army Regulation 40-501 (Standards of Medical Fitness) during his military service. After his discharge, the applicant was diagnosed with service-connected Major Depression related to his report of depressive symptoms as the result of him learning about the death of a recruit in combat, his mother's cancer, and occupational problems. The applicant has not been diagnosed with service-connected PTSD. It is likely the applicant did obtain and abuse opiate medication to assist in managing his negative emotions surrounding these events. However, there is insufficient evidence the applicant was ever diagnosed with a mental health condition which would result in his inability to understand the difference between right and wrong and act in accordance with the right. In addition, the applicant's misconduct of soliciting another to commit an offense and dereliction in the performance of duties as the Unit Prevention Leader are not natural sequela to Major Depression.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the applicant's military records, the Board found relief is not warranted.

2. The Board found no basis for removing the MPR, 23 June 2010, documenting charges against the applicant. Based on the positive urinalisys results, witness statements, and Applicant's admissions, tthe Board found probable cause clearly existed at the time to warrant entry of Applicant's name as having committed the alleged offenses. The Board further found, based on evidence presented at Applicant's separation board, the results of the board, and the lack of new information to contravert the evidence existing at the time, that probable cause continues to exist. While Applicant's mental health conditions are mitigating evidence, the Board found that their inclusion or lack thereof did not affect whether probable cause existed at the time of the investigation or now. Based on a preponderance of the evidence, the Board determined the presence of the MPR in question in Army records and related databases is not in error or unjust.

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.

2/12/2024

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. Army Regulation 15-185 (Army Board for Correction of Military Records) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. The ABCMR considers individual applications that are properly brought before it. The ABCMR will decide cases on the evidence of record; it is not an investigative body. 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. The ABCMR members will direct or recommend changes in military records to correct the error or injustice, if persuaded that material error or injustice exists and that sufficient evidence exists in the record.

2. Army Regulation 40-501 (Standards of Medical Fitness), 14 December 2007 and in effect at the time, governed medical fitness standards for enlistment, induction, appointment, retention, separation, and retirement. Chapter 3 (Medical Fitness Standards for Retention and Separation, Including Retirement) provided guidance on the various medical conditions and physical defects that may render a Soldier unfit for further military service and that fall below the standards required for service. These medical conditions and physical defects, individually or in combination, are those that significantly limit or interfere with the Soldier's performance of their duties; may compromise or aggravate the Soldier's health or well-being if the Soldier were to remain in the military service; may compromise the health or well-being of other Soldiers; or may prejudice the best interests of the Government if the individual Soldier were to remain in the military service.

3. Title 38, U.S. Code, permits the VA to award compensation for a medical condition which was incurred in or aggravated by active military service. The VA, however, is not required by law to determine medical unfitness for further military service. The VA, in accordance with its own policies and regulations, awards compensation solely on the basis that a medical condition exists and that said medical condition reduces or impairs the social or industrial adaptability of the individual concerned. The VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

4. Army Regulation 190-45 (Law Enforcement Reporting) establishes policies and procedures for offense and serious-incident reporting within the Army; for reporting to the DOD and the Department of Justice, as appropriate; and for participating in the Federal Bureau of Investigation NCIC, Department of Justice Criminal Justice Information System, National Law Enforcement Telecommunications System, and State criminal justice systems.

a. Paragraph 3-6a (Amendment of Records) states an amendment of records is

appropriate when such records are established as being inaccurate, irrelevant, untimely, or incomplete. Amendment procedures are not intended to permit challenging an event that occurred. Requests to amend reports will be granted only if the individual submits new, relevant, and material facts that are determined to warrant their inclusion in or revision of the police report. Requests to delete a person's name from the title block will be granted only if it is determined that there is no probable cause to believe the individual committed the offense for which he or she is listed as a subject. It is

emphasized that the decision to list a person's name in the title block of a police report is an investigative determination that is independent of whether subsequent judicial, nonjudicial, or administrative action is taken against the individual.

b. Paragraph 4-3a states an incident will not be reported as a founded offense unless adequately substantiated by police investigation. A person or entity will be reported as the subject of an offense on the Law Enforcement Report (LER) when credible information exists that the person or entity has committed a criminal offense. The decision to title a person is an operational, rather than a legal, determination. The act of titling and indexing does not, in and of itself, connote any degree of guilt or innocence; rather, it ensures that information in a report of investigation can be retrieved at some future time for law enforcement and security purposes. Judicial or adverse administrative actions will not be based solely on the listing of an individual or legal entity as a subject on the LER.

c. Paragraph 4-3d states that when investigative activity identifies a subject, all facts of the case must be considered. When a person, corporation, or other legal entity is entered in the "subject" block of the LER, their identity is recorded in Department of the Army automated systems and the DCII. Once entered into the DCII, the record can only be removed in cases of mistaken identity or if an error was made in applying the credible information standard at the time of listing the entity as a subject of the report. It is emphasized that the credible information error must occur at the time of listing the entity as the subject of the LER rather than subsequent investigation determining that the LER is unfounded. This policy is consistent with DOD reporting requirements. The Director, CRC, enters individuals from the LER into the DCII.

d. Paragraph 4-7 (DA Form 4833) states the DA Form 4833 is used with the LER to record actions taken against identified offenders and to report the disposition of offenses investigated by civilian law enforcement agencies.



5. DODI 5505.7 contains additional legal guidance.

- a. Section 6.1. Organizations engaged in the conduct of criminal investigations shall

place the names and identifying information pertaining to subjects of criminal investigations in title blocks of investigative reports. All names of individual subjects of criminal investigations by DOD organizations shall be listed in the DCII. (This instruction does not preclude the titling and indexing of victims or "incidentals" associated with criminal investigations.) Titling and indexing in the DCII shall be done as early in the investigation as it is determined that credible information exists that the subject committed a criminal offense.

b. Section 6.3. The DOD standard that shall be applied when titling and indexing subjects of criminal investigations is a determination that probable cause exists indicating the subject committed a criminal offense.

c. Section 6.6. Once the subject of a criminal investigation is indexed, the name shall remain in the DCII, even if a later finding is made that the subject did not commit the offense under investigation, subject to the following exceptions:

(1) Section 6.6.1. Identifying information about the subject of a criminal investigation shall be removed from the title block of a report of investigation and DCII in the case of mistaken identity (i.e., the wrong person's name was placed in the ROI as a subject or entered into the DCII).

(2) Section 6.6.2. Identifying information about the subject of a criminal investigation shall be removed from the title block of an ROI and the DCII if it is later determined a mistake was made at the time the titling and/or indexing occurred in that credible information indicating that the subject committed a crime did not exist.

d. Section 6.9. The reviewing official shall consider the investigative information available at the time the initial titling decision was made to determine whether the decision was made in accordance with the standard stated in paragraph 6.3.

8. DODI 5505.11 (Fingerprint Card and Final Disposition Report Submission Requirements) establishes policy, assigns responsibilities, and prescribes procedures for defense criminal investigative organizations and other DOD law enforcement organizations to report offender criminal history data to the Criminal Justice Information Services Division of the Federal Bureau of Investigation for inclusion in the NCIC

criminal history database. It is DOD policy that the defense criminal investigative organizations and other DOD law enforcement organizations submit the offender criminal history data for all members of the military service investigated for offenses, to include wrongful use of a controlled substance, to the Criminal Justice Information Services Division of the Federal Bureau of Investigation, as prescribed in this instruction and based on a probable cause standard determined in conjunction with the servicing staff judge advocate or other legal advisor.

9. The National Defense Authorization Act, Fiscal Year 2021, section 545 (Removal of Personally Identifying and Other Information of Certain Persons from Investigation Reports, the DCII, and other Records and Databases), states not later than 1 October 2021, the Secretary of Defense shall establish and maintain a policy and process through which any covered person may request that the person's name, personally identifying information, and other information pertaining to the person shall, be corrected in, or expunged or otherwise removed from a law enforcement or criminal investigative report of the DCII, an index item or entry in the DCII, and any other record maintained in connection with a report of the DCII, in any system of records, records database, record center, or repository maintained by or on behalf of the Department.

a. Basis for Correction or Expungement. The name, personally identifying information, and other information of a covered person shall be corrected in, or expunged or otherwise removed from, a report, item or entry, or record of the DCII, in the following circumstances:

(1) probable cause did not or does not exist to believe that the offense for which the person's name was placed or reported, or is maintained, in such report, item or entry, or record occurred, or insufficient evidence existed or exists to determine whether or not such offense occurred;

(2) probable cause did not or does not exist to believe that the person actually committed the offense for which the person's name was so placed or reported, or is so maintained, or insufficient evidence existed or exists to determine whether or not the person actually committed such offense; and

(3) such other circumstances, or on such other bases, as the Secretary may specify in establishing the policy and process, which circumstances and bases may not be inconsistent with the circumstances and bases provided by subparagraphs (1) and (2).

b. Considerations. While not dispositive as to the existence of a circumstance or basis set forth in subparagraph (1), the following shall be considered in the determination whether such circumstance or basis applies to a covered person for purposes of this section:

(1) the extent or lack of corroborating evidence against the covered person concerned with respect to the offense at issue;

(2) whether adverse administrative, disciplinary, judicial, or other such action was initiated against the covered person for the offense at issue; and

(3) the type, nature, and outcome of any action described in subparagraph (2) against the covered person.

//NOTHING FOLLOWS//