

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 January 2024

DOCKET NUMBER: AR20230005875

APPLICANT REQUESTS:

- physical disability discharge in lieu of administrative discharge due to a condition, not a disability
- restoration of his rank/grade to sergeant (SGT)/E-5
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- self-authored statement
- Bravo Detachment, 38th Personnel Services Battalion Permanent Order 226-36, 13 August 2004
- two DA Forms 4187 (Personnel Action), 16 September 2005
- two DA Forms 4856 (Developmental Counseling Form), 16 September 2005 and one undated
- DA Form 2627 (Record of Proceedings under Article 15 of the Uniform Code of Military Justice (UCMJ)), 21 October 2005
- Headquarters, 1st Infantry Division Permanent Orders 332-157, 28 November 2005
- Company B, 1st Battalion, 34th Armor memorandum, undated
- Headquarters, 1st Battalion, 34th Armor memorandum, 9 December 2005
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 3 January 2006
- Department of Veterans Affairs (VA) letter, 8 March 2023

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. The applicant states:

a. He is requesting his narrative reason for separation be changed from condition, not a disability to service-connected disability. He is also requesting reinstatement of his rank/grade to SGT/E-5.

b. When he returned stateside from Iraq, he was spiraling from undiagnosed post-traumatic stress disorder (PTSD) and depression as a result of his time overseas. He agreed to "chapter out" because he was led to believe he might have to ship out again while he was waiting for the disability paperwork to go through.

c. He lost his SGT/E-5 rank due to being absent without leave (AWOL) after breaking out in full body hives from the stress of going back. When the hives cleared, he was still suffering from severe PTSD and could not bring himself to do anything, let alone report for another tour. On 18 August 2020, the VA approved benefits for his service-connected disability.

d. When he returned from his tour in Iraq, he had lost so many people, including his closest friend. He was being sent to a new unit to deploy again; with people he had never even met. He was reeling from survivor's guilt and the effects of untreated PTSD. The day before he was supposed to leave to report to Fort Riley, KS, he broke out in full body hives. He went to the emergency room, where the doctor told him it was a reaction to stress and to remain nearby for a few days while taking antihistamines for the hives. Even after he recovered from the hives, he could hardly get himself up to do anything, let alone report for another tour. He was angry, having outbursts, and above all, grieving for the friends he lost.

e. He finally reported to Fort Riley and during his psychiatric evaluation, he told them he did not want to deploy because he did not know or trust the people with whom he was going. He was dealing with severe PTSD and night terrors, to that point that he was assigned to a different room at the request of the guy he was rooming with. The commanding officer demoted him for being AWOL and berated him for being a disgrace. He was told that if he did not want to ship out with his new unit, he should not request disability until after he was out. They told him that the paperwork might not go through in time for him to avoid being shipped out.

f. By that point, the depression and guilt were so bad that he did not think he deserved the help anyway. He signed the paperwork for his demotion and did not even ask to plead his case. He took the discharge for a non-service-related anxiety condition and was made to feel grateful for even getting an honorable discharge.

g. After a few months, his parents encouraged him to apply for VA disability so he could get PTSD care at the hospital. He did not understand the process for applying,

which was so convoluted and hard to understand then. When his paperwork was sent back denied, it just reaffirmed to him that he did not deserve the help. He did not reapply to the VA until nearly 15 years later, after he was married, and his wife encouraged him to apply. It took her years to convince him he deserved it at all. He eventually began a cognitive behavioral therapy (CBT) program with a VA psychiatrist at the ██████████ VA Medical Center. After spending months working with her, he finally let enough of the guilt go to try applying again. This time, the process was much easier to understand, and he was given a 70 percent disability rating for his PTSD.

h. Losing his rank while he was grieving was one of the hardest things he endured. He gained that rank protecting his unit and serving his country and it was one of the proudest moments of his life. If nothing else, he hopes the Board will understand that he was in a terrible place when he made the decision to be AWOL and that he was not entirely capable of making a sound decision in that mental state.

3. The applicant enlisted in the Regular Army on 19 June 2001.

4. The applicant served in Iraq from 12 February 2004 through 13 February 2005.

5. While deployed to Iraq, Bravo Detachment, 38th Personnel Services Battalion Permanent Order 226-36, dated 13 August 2004, awarded him the Army Good Conduct Medal (1st award) for the period 19 June 2001 through 18 June 2004.

6. The applicant's Enlisted Record Brief (ERB) shows he was promoted to the rank/grade of SGT/E-5 on 1 March 2005.

7. Two DA Forms 4187 reflect following duty status changes pertaining to the applicant:

- his status changed from in transit to AWOL on 13 August 2005
- his status changed from AWOL to present for duty (PDY) on 11 September 2005

8. A DA Form 4856 shows:

a. The applicant was counseled by his first sergeant on 16 September 2005, regarding his period of AWOL from 13 August 2005 through 11 September 2005.

b. The key points of discussion show the applicant was on leave from his prior duty station from 2 August 2005 through 12 August 2005, and turned himself in to the 1st Replacement Company on 11 September 2005, after 29 days of AWOL.

c. The applicant stated he initially wanted to get 3 extra days of leave, so he did not report to the Replacement Company and had his mother call to see if he was reported as AWOL. He then ended up receiving quarters from the Charleston Naval Hospital for

15 and 16 August 2005, after he was already in an AWOL status, for a diagnosis of Urticaria (skin rash), resulting in hives. The doctor advised him against driving for an extended period, fearing his throat could swell from the medication and the hives.

d. After his quarters were over, the applicant remained AWOL until 11 September 2005, when he reported to the Replacement Company and stated he considered not coming back. He was advised he was being recommended for nonjudicial punishment (NJP) under Article 15 of the UCMJ.

9. A DA Form 2627 shows:

a. On 21 October 2005, the applicant accepted NJP under Article 15 of the UCMJ for being AWOL from 13 August 2005 through 11 September 2005.

b. The imposed punishment included reduction to the rank/grade of specialist (SPC)/E-4.

c. He was advised of his right to appeal and on 25 October 2005, and indicated he did not appeal or submit additional matters for consideration.

10. A physical profile is used to classify a Soldier's physical disabilities in terms of six factors or body systems, as follows: "P" (Physical capacity or stamina), "U" (Upper extremities), "L" (Lower extremities), "H" (Hearing), "E" (Eyes), and "S" (Psychiatric) and is abbreviated as PULHES. Each factor has a numerical designation: 1 indicates a high level of fitness, 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a severity that performance of military duties must be drastically limited. Physical profile ratings can be either permanent or temporary.

11. The applicant's ERB shows:

- he was demoted to the rank/grade of SPC/E-4 effective 21 October 2005
- as of the brief date, 27 October 2005, his PULHES was "111111."

12. Headquarters, 1st Infantry Division Permanent Orders 332-157, dated 28 November 2005, awarded the applicant the Combat Action Badge for actively engaging or being engaged by the enemy in support of Operation Iraqi Freedom for the period of service from 20 December 2004 through 27 December 2004, this award is not reflected on his DD Form 214. His record will be administratively corrected without action by the Board to add this award.

13. A second DA Form 4856 shows the applicant was counseled by his first sergeant on 29 November 2005, to inform him he was being separated from the Army under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), paragraph 5-17 for other physical/mental condition. The key points of discussion show:

a. A U.S. Army Medical Command (MEDCOM) Form 4038 (Report of Behavioral Health Evaluation) shows an Irwin Army Community Hospital (IACH), Department of Behavioral Health, psychiatrist recommended the applicant's administrative discharge under the provisions of Army Regulation 635-200, paragraph 5-17, after psychiatric evaluation conducted on 6 October 2005. The psychiatrist indicated the applicant did not have a major mental illness that was [sufficiently] severe to [affect] his ability to effectively perform his assigned military duty. His diagnosis was anxiety disorder, not otherwise specified.

b. The psychiatrist indicated the applicant would not respond to command efforts at rehabilitation, such as transfer, disciplinary action, or reclassification, or to any behavioral health treatment methods currently available in any military health facility. He also stated the applicant was likely a high risk to himself and to his unit if deployed.

14. The above-referenced MEDCOM Form 4038, dated 6 October 2005, is not in the applicant's available records for review.

15. An undated memorandum shows the applicant was notified by his immediate commander of his initiation of action to separate him with an honorable characterization of service under the provisions of Army Regulation 635-200, paragraph 5-17, because of other designated physical or mental condition not amounting to a disability, due to his diagnosis of anxiety disorder, not otherwise specified. The applicant was advised of his right to consult with counsel and submit statements in his own behalf.

16. On 4 December 2005, the applicant acknowledged receipt of correspondence notifying him of the initiation of his separation under the provisions of Army Regulation 635-200, paragraph 5-17, and his right to consult with counsel prior to making any election of rights.

17. On 6 December 2005, the applicant acknowledged he was afforded the opportunity to consult with appointed counsel prior to making his election of rights and accepted the opportunity. He was advised by his consulting counsel of the basis for the contemplated action to separate him because of other designated physical or mental condition under Army Regulation 635-200, paragraph 5-17, its effect, and the rights available to him. He did not submit statements in his own behalf and did request consulting counsel representation.

18. On 9 December 2005, the applicant's battalion commander recommended approval of the applicant's honorable discharge under the provisions of Army Regulation 635-200, paragraph 5-17.

19. On 13 December 2005, the approval authority directed the applicant's honorable discharge under the provisions of Army Regulation 635-200, paragraph 5-17, due to other designated physical or mental condition.

20. The applicant's DD Form 214 shows he was honorably discharged on 3 January 2006, under the provisions of Army Regulation 635-200, paragraph 5-17, due to a condition, not a disability, with corresponding separation code JFV (Physical condition, not a disability).

21. A VA letter, dated 8 March 20223, shows the applicant has one or more service-connected disabilities with a combined service-connected evaluation of 70 percent. His disabling condition(s) are not listed on the letter.

22. The Army rates only conditions determined to be physically unfitting at the time of discharge, which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career. The VA does not have authority or responsibility for determining physical fitness for military service. The VA may compensate the individual for loss of civilian employability.

24. The applicant provided argument or evidence that the Board should consider in accordance with the published equity, injustice, or clemency determination guidance.

25. MEDICAL REVIEW:

a. Request: The applicant his requesting a physical disability discharge instead of an administrative discharge due to a condition, not a disability, as well as restoration of his rank/grade to sergeant (SGT)/E-5. The applicant contends his VA service-connection for PTSD as related to his request.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Below is a brief summary of information pertinent to this advisory:

- The applicant enlisted in the Regular Army on 19 June 2001.
- Applicant served in Iraq from 12 February 2004 through 13 February 2005.
- Applicant was on leave from his prior duty station from 2 August 2005 through 12 August 2005, and turned himself in to the 1st Replacement Company on 11 September 2005, after 29 days of AWOL.

- An Enlisted Record Brief dated, 21 October 2005, indicates his PULHES was “111111.”
- An undated memorandum shows the applicant was notified by his immediate commander of his initiation of action to separate him with an honorable characterization of service under the provisions of Army Regulation 635-200, paragraph 5-17, because of other designated physical or mental condition not amounting to a disability, due to his diagnosis of anxiety disorder, not otherwise specified.
- Applicant’s DD Form 214 shows he was honorably discharged on 3 January 2006, under the provisions of Army Regulation 635-200, paragraph 5-17, due to a condition, not a disability, with corresponding separation code JFV (Physical condition, not a disability).

c. Review of Available Records Including Medical:

The Army Review Boards Agency (ARBA) Behavioral Health (BH) Advisor reviewed this case. Documentation reviewed included the applicant’s completed DD Form 149, self-authored statement, VA letter dated 8 March 2023, ABCMR Record of Proceedings (ROP), and documents from his service record and separation packet. The VA electronic medical record and DoD health record available for review through Joint Longitudinal View (JLV). Lack of citation or discussion in this section should not be interpreted as lack of consideration.

d. The applicant states when he returned from Iraq, he was spiraling from undiagnosed post-traumatic stress disorder (PTSD) and depression as a result of his time overseas. He agreed to “chapter out” because he was led to believe he might have to ship out again while he was waiting for the disability paperwork to go through. He lost his SGT/E-5 rank due to being absent without leave (AWOL) after breaking out in full body hives from the stress of going back. When the hives cleared, he was still suffering from severe PTSD and could not bring himself to do anything, let alone report for another tour. On 18 August 2020, the VA approved benefits for his service-connected disability.

e. The applicant’s electronic medical record is void of any encounters related to behavioral health concerns. A Developmental Counseling Form dated 29 November 2005 references a U.S. Army Medical Command (MEDCOM) Form 4038 (Report of Behavioral Health Evaluation) from Irwin Army Community Hospital (IACH), Department of Behavioral Health, with a psychiatric recommendation of the applicant’s administrative discharge under the provisions of Army Regulation 635-200, paragraph 5-17, after a psychiatric evaluation conducted on 6 October 2005. The applicant was diagnosed with Anxiety Disorder, Not Otherwise Specified. The psychiatrist indicated the applicant did not have a major mental illness that was sufficiently severe to affect his ability to effectively perform his assigned military duty. The Mental Status Evaluation dated 6 October 2005 was not available for review, but there is reference to it, indicating the applicant had no major mental health diagnosis, could understand and participate in

administrative proceedings, and appreciated the difference between right and wrong, and met medical retention standards. An Enlisted Record Brief dated, 21 October 2005, indicates his PULHES was "111111", S" is psychiatric and the designation of 1 indicates "a high level of fitness". Overall, the applicant's available service record does not show he was issued a permanent physical profile rating, suffered from a mental health condition that affected his ability to perform the duties, failed retention standards, or rendered him unfit for military service. The applicant's behavioral health condition of Anxiety Disorder while in service did not require admission to a psychiatric hospital or facility, his symptoms did not impede his ability to perform his duties, and there was no evidence of manifestation of his behavioral health condition while performing his duties.

f. The VA electronic record indicates the applicant is currently 70% service connected for PTSD with an effective date of 26 May 2020. The VA electronic record indicates the applicant initially received mental health services via the VA from January 2006 to January 2008. He discontinued services and did not reinstate treatment until May of 2016 and has been receiving services intermittently.

g. Based on all available information, it is the opinion of this Agency Behavioral Health Advisor that there is insufficient evidence to support a referral to the IDES process at this time. Although the applicant has been service connected for PTSD, VA examinations are based on different standards and parameters; they do not address whether a medical condition met or failed Army retention criteria or if it was a ratable condition during the period of service. Therefore, a VA disability rating would not imply failure to meet Army retention standards at the time of service. A subsequent diagnosis of PTSD through the VA is not indicative of an injustice at the time of service. Furthermore, even an in-service diagnosis of PTSD is not automatically unfitting per AR 40-501 and would not automatically result in the medical separation processing. Based on the documentation available for review, there is no indication that an omission or error occurred that would warrant a referral to the IDES process. In summary, his separation process appears proper, equitable and free of error, and insufficient new evidence has been provided to determine otherwise.

#### Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Not applicable.

(2) Did the condition exist or experience occur during military service? Not applicable.

(3) Does the condition or experience actually excuse or mitigate the discharge? Not applicable.



BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found relief is not warranted. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.
2. The Board found insufficient evidence of mitigating factors that might excuse the applicant’s period of AWOL. The Board determined the evidence does not demonstrate that his reduction in rank was in error or unjust.
3. The Board considered a medical review and published Department of Defense guidance for liberal consideration of requests for changes to discharges. The Board concurred with the conclusion of the ARBA BH Advisor that the evidence does not indicate the applicant had any conditions of such severity that they warranted his referral to the Disability Evaluation System to be considered for discharge or retirement due to disability. Based on a preponderance of the evidence, the Board determined the reason for the applicant’s discharge was not in error or unjust.
4. The Board concurred with the correction described in Administrative Note(s) below.

BOARD VOTE:

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

BOARD DETERMINATION/RECOMMENDATION:

Other than the correction addressed in Administrative Note(s) below, the Board determined the evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are otherwise insufficient as a basis for correction of the records of the individual concerned.

4/24/2024

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.

ADMINISTRATIVE NOTE(S):

A review of the applicant's records shows his DD Form 214 covering the period ending 3 January 2006 should be amended to add the Combat Action Badge.

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. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder (PTSD), traumatic brain injury, sexual assault, or sexual harassment. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based, in whole or in part, on those conditions or experiences.

3. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NRs) regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the 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. This guidance does not mandate relief, but rather provides standards and principles to guide BCM/NRs in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment. 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.

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 (DES) and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 (Discharge Review Board (DRB) Procedures and Standards) and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an Military Occupational Specialty (MOS) Medical Retention Board (MMRB); and/or they are command-referred for a fitness-for-duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and Physical Evaluation Board (PEB). The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before

an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

c. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of his or her office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

5. Army Regulation 635-40 establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

a. Disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

b. Soldiers who sustain or aggravate physically-unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

c. The percentage assigned to a medical defect or condition is the disability rating. A rating is not assigned until the PEB determines the Soldier is physically unfit for duty.

Ratings are assigned from the Department of Veterans Affairs (VA) Schedule for Rating Disabilities (VASRD). The fact that a Soldier has a condition listed in the VASRD does not equate to a finding of physical unfitness. An unfitting, or ratable condition, is one which renders the Soldier unable to perform the duties of their office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of their employment on active duty. There is no legal requirement in arriving at the rated degree of incapacity to rate a physical condition which is not in itself considered disqualifying for military service when a Soldier is found unfit because of another condition that is disqualifying. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

6. Title 10, U.S. Code, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent. Title 10, U.S. Code, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30 percent.

7. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations) sets forth the basic authority for the separation of enlisted personnel.

a. Paragraph 5-17 states a service member may be separated for other designated physical or mental conditions that potentially interfere with assignment to or performance of duty not amounting to disability under Army Regulation 635-40 and excluding conditions appropriate for separation processing under paragraphs 5-11 (Separation of personnel who did not meet procurement medical fitness standards) or 5-13 (Separation because of personality disorder) Such conditions may include, but are not limited to, the following:

- chronic airsickness
- chronic seasickness
- enuresis
- sleepwalking
- dyslexia
- severe nightmares
- claustrophobia
- other disorders manifesting disturbances of perception, thinking, emotional control or behavior sufficiently severe that the Soldier's ability to effectively perform military duties is significantly impaired

b. When a commander determines a Soldier has a physical or mental condition that potentially interferes with assignment to or performance of duty, the commander will refer the Soldier for a medical examination and/or a mental status evaluation in

accordance with Army Regulation 40-501. A recommendation for separation must be supported by documentation confirming the existence of the physical or mental condition. Members may be separated for physical or mental conditions not amounting to disability sufficiently severe that the Soldier's ability to effectively perform military duties is significantly impaired.

c. Separation processing may not be initiated under this paragraph until the Soldier has been counseled formally concerning deficiencies and has been afforded ample opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records. A Soldier being separated under this section will be awarded a character of service of honorable, under honorable conditions, or uncharacterized if in an entry-level separation. An under honorable conditions characterization of service which is terminated under this paragraph is normally inappropriate.

8. Army Regulation 27-10 (Military Justice) prescribes the policies and procedures pertaining to administration of military justice and implements the Manual for Courts-Martial. It provides that the use of nonjudicial punishment (NJP) is proper in all cases involving minor offenses in which non-punitive measures are considered inadequate or inappropriate. Whether to impose punishment and the nature of the punishment are the sole decisions of the imposing commander. Among the kinds of punishment authorized under Article 15 of the Uniform Code of Military Justice (UCMJ) is reduction in grade. The grade from which the Soldier is reduced must be within the promotion authority of the imposing commander or of any officer subordinate to the imposing commander. When a Soldier is reduced in grade as a result of an unsuspended reduction, the date of rank in the grade to which reduced is the date the punishment of reduction was imposed.

9. Title 38, U.S. Code, section 1110 (General – Basic Entitlement) states 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.

10. Title 38, U.S. Code, section 1131 (Peacetime Disability Compensation – Basic Entitlement) states 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.

11. Title 10, U.S. Code, section 1556 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.

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

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

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

13. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. Paragraph 2-11 states applicants do not have a

right to a formal hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//