

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 16 February 2024

DOCKET NUMBER: AR20230006670

APPLICANT REQUESTS: reconsideration of his previous request to:

- upgrade of his discharge to honorable
- change his reentry (RE) code to RE 1
- change his reason for discharge to secretarial authority
- remove of derogatory information from his record
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Legal Brief in Support of Discharge Upgrade
- DA Form 4833 (Commander's Report of Disciplinary or discharge from Active Duty)

FACTS:

1. Incorporated herein by reference are military records, which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20190003549 on 4 November 2019.

2. The applicant indicates on his application that he suffers from other mental health issues, which is new evidence that was not previously considered by the Board. He states he should be given liberal consideration. He requests a discharge upgrade to honorable with RE code 1 and narrative reason changed to Secretarial Authority. The applicant was erroneously discharged due to both procedural and substantive error. The applicant's request should be reconsidered due to equity considerations. The applicant further defers to his attorney, from his previous case.

3. The Applicant's Brief in Support of Discharge Upgrade, from the applicant's attorney, dated 18 December 2018, states:

a. On behalf of the applicant, the attorney submitted the petition to correct the applicant's military record. This is a case involving a U.S. Army servicemember who

was unjustly and erroneously separated from the U.S. Army with an under other than honorable conditions (UOTHC) discharge in lieu of trial by court-martial. The applicant seeks to remedy this injustice through the ABCMR. The applicant became aware of the existence of the error upon consultation with an attorney in 2018 and then became apprised of the legal errors of his discharge. The applicant has exhausted all administrative remedies under existing law and regulation and requests relief. The applicant wishes the petition be reviewed and in the interest of equity, fairness, and justice that the requested relief be granted.

b. The applicant respectfully requests the Board upgrade his discharge and change the characterization of the discharge to for the Convenience of the Government. The applicant's UOTHC discharge is inequitable and has served its purpose.

c. The attorney is a military attorney who represents the applicant. The applicant is appealing to the ABCMR for a discharge upgrade and change in characterization of discharge. The appeal is based on three errors (1) the underlying basis of his separation was procedurally defective, at the time of discharge; (2) the adverse action, to include the administrative discharge, was unfair at the time; and (3) the UOTHC discharge is inequitable now. On behalf of the applicant, the attorney respectfully requests the Board upgrade his discharge and change the characterization of the discharge to for the convenience of the government. The applicant's UOTHC discharge is inequitable and has served its purpose.

d. Having exhausted all means to appeal locally, and pursuant to Army Regulation (AR) 15-185 (ABCMR) procedures, this appeal is submitted properly before the ABCMR. The applicant has submitted the application outside of the 15-year statute of limitation. The applicant must apply within fifteen years of the date of discharge and any requests for discharge upgrades after 15 years must go through the ABCMR. Veterans must apply to the ABCMR within three years of discovering the error or injustice for which they seek relief. Jurisdictions sometimes conflict about when this time-period begins, but the Court of Appeals for the District of Columbia expressly held that an applicant must have actual knowledge of the error injustice - constructive notice is not enough. In this case, based on the applicant's arguments, it would be inequitable to not allow the waiver of the 15-year statute. Because a preponderance of the evidence shows that an error or injustice exists, the applicant respectfully requests this appeal be granted. The applicant asks that any negative documents be set aside in their entirety. He requests the issuance of a corrected DD Form 215 (Correction to DD Form 214).

e. By statute Title 10 U.S. Code (USC) section 1553, the Secretary of the Army is authorized to correct errors or remove injustices from any military record of their respective service. The Secretary is authorized, and also has an obligation, not only to properly determine the nature of any error or injustice, but also to take such corrective action as will appropriately and fully erase such error or compensate such injustice. To

conduct this review, the Secretary has adopted regulation 32 C.F.R. section 581.3 establishing the Discharge Review Board (DRB). When a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of mandate. The Secretary and his boards have an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant through and fitting relief.

f. Federal Courts review final decisions under the Administrative Procedures Act (APA). Congress exercises oversight functions for the DRBs, and Congress requires that the boards properly exercise their function. To help ensure the independence of the DRBs in the exercise of their responsibilities, Congress mandated the boards have independent legal and medical advisors. To ensure this process is transparent, Congress mandated that the board disclose virtually all communications with anyone outside the agency to the applicant if that communication pertains directly to the applicant's case or has a material effect on the applicant's case. The board does not engage in a do novo review of the applicant's discharge.

g. The ABCMR will grant a discharge upgrade based upon propriety, equity, and an injustice. The applicant carries the burden of proof in demonstrating by a preponderance of the evidence the discharge was improper or inequitable. In order to prove inequity or impropriety, the applicant must overcome the presumption of regularity in the conduct of governmental affairs. This is a rebuttal presumption, but the burden is on the applicant to provide substantial credible evidence of a divergence from that regularity.

h. Inequity exists when the discharge is inconsistent with disciplinary standards at the time, or when the quality of the member's service and capability to perform military service make the discharge unfair. Factors for consideration of the quality of service include the servicemember's ranks, awards and decorations, letters of commendation or reprimand, combat service, acts of merit, length of service, prior military service, courts-martial, and other forms of discipline, and records of unauthorized absence. The Board is required to examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made, and the APA, sets forth the full extent of judicial authority to review executive agency action for procedural correctness. In addition, the APA requires the Court to hold unlawful and set aside any board action, findings, or conclusions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

i. The Secretary of the Army has adopted the procedures directed by 32 C.F.R section 581.3a, which govern the board's activities. The chair of the Board is directed to ensure the applicant receives a full and fair opportunity to be heard, and to certify the record of proceedings. The Board members are instructed to review all applications that are properly before them to determine the existence of error or injustice, and if

persuaded that material error or injustice exists, to direct changes in military records to correct the error.

j. When the statute or governing regulation refers to errors, they are referring to factual or legal errors that can disadvantage a servicemember. The board's objective is to examine the propriety and equity of the applicant's discharge and to effect changes if an injustice exists. The standard of review and the underlying factors, which aid in determining whether the standards are met shall be historically consistent with criteria for determining honorable service.

k. Equity considerations include an evaluation of matters such as age, educational level, and aptitude scores, whether the individual met normal military standards of acceptable behavior. Impropriety may be found when a prejudicial error of fact, law, procedure, or discretion occurred. Impropriety may also be found if an expressly retroactive and favorable change in law or policy has been made.

l. In addition, under the Guidance of the Former Secretary of Defense, the board has extensive directives related to post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI). These issues should be granted liberal considerations before the boards, especially when they are service connected.

m. On 3 September 2014, the Secretary of Defense issued a memorandum providing guidance to the ABCMR as it considers petitions brought by veterans claiming PTSD with UOTHC discharge. This includes a comprehensive review of all materials and evidence provided by the applicant. A memorandum providing further clarifying guidance was issued on 25 August 2017, by the Undersecretary of Defense for Personnel and Readiness. This policy guidance is intended to ease the application process for veterans who are seeking redress and assists the Board in reaching fair and consistent results in these cases. The guidance also mandates liberal waivers of time limits, ensure timely consideration of petitions, and allows for increased involvement of medical personnel in board determinations.

n. The applicant was recruited out of his hometown, entered the military on a delayed entry program (DEP), and was inducted into the United States Army on 20 January 2000, at the age of 18 and became a fire support specialist. During his service in the U.S. Army, he earned Marksman Marksmanship Qualification Badges with Rifle and Grenade Bars. The applicant attended training in Oklahoma.

o. Right after the applicant arrived at his first duty station, Schofield Barracks, Oahu, Hawaii, in August of 2000, he was caught drinking in his room, while under the age of 21. He received an Article 15, summarized with restrictions and was told to revisit it. A few months later, in December 2000, he failed a random urinary analysis.

p. The applicant had used drugs before. Once the U.S. Army Criminal Investigation Division (CID) began interrogating him, he unknowingly incriminated himself on several counts of distribution. At one point, while he was out at a local bar with other Soldiers from his platoon, he purchased pills from a dealer for himself and his friends for use, while they were out at the club. The club they were at was widely known to be an off-limits establishment.

q. CID wanted the applicant to set up a sting operation on the dealer. CID never informed the applicant they would prosecute him for the crime of distribution as well as for every time he admitted he had previously done drugs.

r. During this investigation, in February 2001, the applicant was also convicted of driving under the influence, while driving on base.

s. After speaking with his superiors in his battery, the applicant informed CID that he could not go through with the sting. CID never responded. The applicant then received mail stating he was being court-martialed on the grounds of wrongful use of a controlled substance and multiple charges of distribution, which carried a maximum punishment of 35 years in prison. He felt he had no choice but to request a Chapter 10 discharge. Ultimately, the applicant was separated from the U.S. Army on 27 April 2001 with an UOTHC discharge in lieu of a trial by court-martial.

t. Several years after involuntary separation from the U.S. Army, the applicant attended college to become a licensed vocation nurse (LVN). He has worked steadily for his employer, Mission View Health Center, as an LVN for more than a decade. He maintains his continuing education and many certifications for his LVN license. He now leads a stable and productive life, and has without incident, since his separation from the U.S. Army. He recently married, had his first child, and is father to two-step children. The applicant works hard to be there for his wife and family. He served honorably on active duty. The UOTHC discharge no longer serves a purpose.

u. There is a procedural defect in this case. The request for administrative separation can be both command-initiated and initiated by the servicemember. In this case, there was a hasty command initiated request for separation. The applicant was experiencing substance abuse issues, but the command did not find out if there was any way that they could have helped him.

v. During a command initiated discharge request, under Chapter 10, Army Regulation 635-200 (Personnel Separations - Enlisted Personnel) per reference 10-4(b), consideration should be given to the Soldier's potential for rehabilitation and his/her entire record should be reviewed before taking action. The commanding officer must provide the member reasonable time to overcome deficiencies. In this case, there was a rush to judgment that there was a problem that could not be fixed. The command

should have evaluated the applicant as to whether he had a long-term problem or whether there was an immediate fix.

w. Although the command was authorized to administratively separate the applicant, the fundamental reason for the discharge was substantially deficient. There was no fully determined reason to initiate his elimination. The instruction also allows for the servicemember to be able to fix the problem. The applicant was not allowed these opportunities. The applicant was never offered or provided with rehabilitation. The command in this case did not have the proper authority to administratively separate the applicant.

x. Finally, the UOTHC discharge does not serve a further purpose. The events that took place are no longer relevant to the applicant's life and he has lived since in as responsible a manner as he could. There is no valid equitable purpose in leaving the discharge in place.

y. This appeal should consider, the entirety of the applicant's military career as reflected in his personnel records, medical records, and personal affidavit [not available for the Board's review]. Reviewing his military record, he gave as much as he could to the U.S. Army.

z. The applicant has sought to fix his life, since being involuntarily separated. He received statements from supervisors and friends attesting positively to his character and work ethic, since his separation from the U.S. Army. The applicant's compelling affidavit should also be considered.

aa. The applicant requests that his derogatory information be removed from his record. He asks that this appeal through the ABCMR be given the utmost scrutiny. The success of the appeal and future actions by the U.S. Army and the ABCMR will have a significant impact on his ability to receive proper benefits and recognition. He will continue to fight this derogatory information up through the Secretary of the Army.

4. The applicant provides a DA Form 4833, dated 10 April 2001, which shows in response to the offenses of driving while under the influence and driving the wrong way down a one way street on 1 and 2 February 2001, the resulting administrative action was an administrative discharge under Chapter 10, AR 635-100, effective 19 April 2001.

5. The applicant submitted supporting documentation in his previous case, which is available for the Board's consideration.

6. The applicant's service record contains the following documents:

a. DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States) show the applicant enlisted in the Regular Army on 20 January 2000.

b. DA Form 2627-1 (Summarized Record of Proceedings Under Article 15, UCMJ), dated 4 August 2000 shows the applicant accepted nonjudicial punishment for wrongfully consuming alcohol while under the age of 21. His punishment included extra duty and restriction for 14 days. The applicant did not appeal his punishment.

c. DD Form 458 (Charge Sheet), dated 4 March 2001 shows the applicant's commander preferred charges against the applicant for:

- on or about 18 November 2000, violating a lawful general regulation by wrongfully visiting an off-limits establishment
- on or about 31 October 2000, on or about 11 November 2000, on or about 18 November 2000, on or about 25 November 2000, and on or about 8 December 2000, wrongfully using methylenedioxy-methamphetamine, a controlled substance
- on or about 25 November 2000 and on or about 8 December 2000, wrongfully distributing methylenedioxy-methamphetamine

d. On 15 March 2001, prior to the charges being referred to court-martial, the applicant voluntarily requested discharge in lieu of court-martial. He was making the request of his own free will and had not been subjected to coercion by any person. He had been advised of the implications attached to his request. He acknowledged that he was guilty of one of the charges preferred against him. He stated that under no circumstances did he desire further rehabilitation; he had no desire to perform further military service. Prior to requesting discharge, he had been afforded the opportunity to confer with appointed counsel for consultation. He understood he may be discharged UOTHC. He declined to submit statements on his own behalf. The applicant signed the request.

e. The recommendations made by the applicant's chain of command are not available for the Board's review. On 5 April 2001, the appropriate approval authority approved the applicant's request for discharge in lieu of a trial by court-martial; reduced the applicant to private/E-1 under the provisions of AR 600-8-19 (Enlisted Promotions and Reductions), paragraph 6-15; and directed the issuance of an UOTHC discharge.

f. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows the applicant was discharged in lieu of a trial by court-martial with an UOTHC discharge on 27 April 2001. He had completed 1 year, 3 months, and 8 days of active duty service. He was awarded or authorized the Army Service Ribbon, Marksman Marksmanship Qualification Badges with Rifle Bar and Grenade Bar. His separation code was KFS and his RE code was "3".

g. The applicant's service record is void of, and the applicant did not provide, documentation showing he suffered from other mental health issues or PTSD.

7. On 4 November 2019, the ABCMR denied the applicant's request to upgrade his discharge, correct his RE code and narrative reason for separation. The Board found insufficient evidence in this applicant's records of service to warrant in-service mitigation to overcome the misconduct and there is insufficient post-service evidence to justify a clemency determination. The Board found the UOTHC character of service equitable under the circumstances. Based on a preponderance of evidence, the Board determined that there was no error or injustice in the applicant's discharge or character of service, or basis for clemency.

8. Based on the applicant's assertion he suffered from other mental health issues and his attorney mentioning PTSD in his legal brief, the ARBA Medical Section provided a medical review for the Board's consideration.

MEDICAL REVIEW:

1. The applicant is applying to the ABCMR requesting reconsideration of his previous request for an upgrade of his under other than honorable conditions (UOTHC) characterization of service. He contends he had mental health conditions that mitigated his misconduct.

2. 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 was enlisted in the Regular Army on 20 January 2000; 2) The applicant on 4 August 2000 accepted nonjudicial punishment (NJP) for wrongfully consuming alcohol while under the age; 3) On 4 March 2001, the applicant's commander preferred charges against the applicant for: A) wrongfully visiting an off-limits establishment, B) wrongfully using methylenedioxy-methamphetamine on five occasions, C) wrongfully distributing methylenedioxy-methamphetamine; 4) The applicant was discharged on 27 April 2001- in lieu of a trial by court-martial with an UOTHC characterization of service; 5) On 4 November 2019, the ABCMR reviewed and denied the applicant's request to upgrade his discharge.

3. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and available military service records. The VA's Joint Legacy Viewer (JLV) was also examined. No additional medical documentation was provided for review.

4. The applicant noted mental health conditions as contributing and mitigating factors in the circumstances that resulted in his separation. There was insufficient evidence the applicant reported mental health symptoms while on active service. A review of JLV provided insufficient evidence the applicant has been diagnosed with a service-

connected mental health condition, and he does not receive service-connected disability.

5. Based on the available information, it is the opinion of the Agency BH Advisor that there is insufficient evidence to support the applicant had condition or experience that mitigated his misconduct.

6. Kurta Questions:

a. 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 that contributed to his misconduct.

b. Did the condition exist, or experience occur during military service? Yes, the applicant reports experiencing mental health conditions while on active service.

c. Does the condition experience actually excuse or mitigate the discharge? No, there is insufficient evidence beyond self-report the applicant was experiencing a mental health condition while on active service. The applicant did engage in repeated substance use, which can be a sequela to some mental health conditions, but repeated misconduct is not sufficient to establish a history of a mental health condition during active service. In addition, there is no nexus between the applicant's reported mental health conditions and his misconduct of visiting an off-limits establishment and distributing an illegal substance in that: 1) these types of misconduct are not part of the natural history or sequela of the applicant's reported mental health conditions; 2) the applicant's reported mental health conditions do not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing a mental health condition or an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

1. The Board reviewed the applicant's request, supporting documents, his statement, the evidence in the records, the medical review, and published Department of Defense guidance for consideration of discharge upgrade requests and for liberal consideration of discharge upgrade requests.

2. The Board carefully considered the applicant's request to upgrade his characterization of service to honorable, his reentry code to 1, and his narrative reason for separation to secretarial authority, and determined relief was not warranted. The

Board was in agreement with the ARBA Medical Advisor's opinion, that "there is no nexus between the applicant's reported mental health conditions and his misconduct of visiting an off-limits establishment and distributing an illegal substance in that: 1) these types of misconduct are not part of the natural history or sequelae of the applicant's reported mental health conditions; 2) the applicant's reported mental health conditions do not affect one's ability to distinguish right from wrong and act in accordance with the right."

3. The Board carefully considered the applicant's request to remove derogatory information from his record, and determined relief was not warranted. The applicant did not provide sufficient evidence and argument to show the derogatory documents to which the applicant refers were false, incorrect, or improperly filed therein.

4. The Board carefully considered the applicant's request for a personal appearance hearing. However, by regulation, an applicant is not entitled to a hearing before the Board. Hearings may be authorized by a panel of the Board or by the Director of the ABCMR. In this case, the evidence of record and independent evidence provided by the applicant was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

BOARD VOTE:

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

BOARD DETERMINATION/RECOMMENDATION:

The 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.

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

REFERENCES:

1. AR 15–185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR.

a. 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 will decide cases based on the evidence of record. It is not an investigative agency.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

2. AR 635-200 (Personnel Separations – Active Duty Enlisted Administrative Separations) sets policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons. Readiness is promoted by maintaining high standards of conduct and performance.

a. An honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

c. A general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge. A characterization of under honorable conditions may be issued only when the reason for separation specifically allows such characterization. It will not be issued to Soldiers solely upon separation at expiration of their period of enlistment, military service obligation, or period for which called or ordered to AD.

d. A discharge under other than honorable conditions is an administrative separation from the Service under conditions other than honorable. It may be issued in lieu of trial by court martial.

e. Chapter 5 establishes policy and prescribes procedures for separating members for Secretarial authority convenience of the government. Separation under this paragraph is the prerogative of the Secretary of the Army. Secretarial plenary separation authority is exercised sparingly and seldom delegated. Ordinarily, it is used when no other provision of this regulation applies, and early separation is clearly in the best interest of the Army. Separations under this paragraph are effective only if approved in writing by the Secretary of the Army or the Secretary's approved designee as announced in updated memorandums.

f. Chapter 10 of that regulation provides, in pertinent part, that a member who has committed an offense or offenses for which the authorized punishment includes a punitive discharge may, submit a request for discharge for the good of the service in lieu of trial by court-martial. The request may be submitted at any time after charges have been preferred and must include the individual's admission of guilt. Although an

honorable or general discharge is authorized, a discharge under other than honorable conditions is normally considered appropriate.

g. A Soldier who requests discharge as prescribed in chapter 10 may be discharged under other than honorable conditions if he/she has been afforded the opportunity (not less than 72 hours) to consult with a consulting counsel.

(1) The Soldier must certify in writing that he/she understands that he/she may receive a discharge under other than honorable conditions.

(2) The Soldier must understand the adverse nature and possible consequences of such a discharge.

(3) The Soldier must personally sign a request for discharge. A conditional request is not permitted.

(4) The consulting counsel will sign as a witness, indicating that he/she is a commissioned officer of The Judge Advocate General's Corps. A Soldier may waive consultation with a consulting counsel. Counsel will prepare a statement to this effect that will be attached to the file; the Soldier will state that the right to counsel has been waived.

h. A Soldier who has committed an offense or offenses, the punishment for which under the UCMJ and the Manual for Courts-Martial includes a bad conduct or dishonorable discharge, may submit a request for discharge in lieu of trial by court-martial.

3. AR 635-5-1 (Personnel Separations – Separation Program Designator (SPD) Codes), in effect at the time, prescribes the specific authorities, reasons for separating Soldiers from active duty, and the SPD codes to be entered on DD Form 214. It shows code KFS is used for discharge In Lieu of Trial by Court-Martial.

4. AR 601-210 (Regular Army and Reserve Components Enlistment Program) table 3-1 (U.S. Army reentry eligibility codes) states:

a. RE-1: Applies to: Person completing his or her term of active service who is considered qualified to reenter the U.S. Army.

b. RE-3: Applies to: Person who is not considered fully qualified for reentry or continuous service at time of separation or disqualification is waiverable.

c. RE-4: Applies to: Person separated from last period of service with a nonwaiverable disqualification.

d. RE-4R: Applies to: A person who retired for length of service with 15 or more years active federal service.

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

6. On 25 August 2017 the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. 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. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

7. 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.

8. 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.

9. Army Regulation (AR) 27-10 (Military Justice), in effect at the time, prescribes the policies and procedures pertaining to administration of military justice and implements the Manual for Courts Martial, United States, 2012 hereafter referred to as the MCM and the rules for courts martial (RCM) contained in the MCM.

a. Paragraph 3-37b (1) (Place of filing), the original will be sent to the appropriate custodian for filing in the Official Military Personnel File (OMPF). For those records where punishment is imposed on or after 1 November 1982, the decision to file the original DA Form 2627 on the performance fiche, or the restricted fiche in the OMPF will be determined by the imposing commander at the time punishment was imposed. The filing decision of the imposing commander is final and will be indicated in item 5, DA Form 2627.

b. Paragraph 3-43b (1), enlisted members (E-6 and above), commissioned and warrant officer may request the transfer of records of non-judicial punishment from the performance fiche of their OMPF to the restricted fiche. To support the request, the person must submit substantive evidence that the intended purpose of the Article 15 has been served and that transfer of the records is in the best interest of the Army.

10. AR 600-37 (Unfavorable Information), sets forth policies and procedures to ensure the best interests of both the Army and Soldiers are served by authorizing unfavorable information to be placed in, transferred within, or removed from an individual's Army Military Human Resource Record (AMHRR).

a. Paragraph 3-3 (Filing of information exempt from the referral procedure), the following information may be filed in the performance portion of the AMHRR without further referral to the recipient.

- records – court martials, court martial orders, and records of proceedings pursuant to UCMJ, Article 15
- proceedings of boards of officers
- completed criminal investigative reports
- certified judgement of civilian criminal convictions
- officer and enlisted evaluation reports
- general – other unfavorable information of which the recipient had prior official knowledge and an adequate opportunity to refute

b. Chapter 7 the Department of the Army Suitability Evaluation Board (DASEB), is the initial appeal authority and makes recommendations for removal, alteration, or transfer of unfavorable information entered in the AMHRR. This chapter sets forth the policies and procedures whereby a person may seek removal of unfavorable information from his or her AMHRR, or transfer of unfavorable information from the performance file to the restricted file of the AMHRR.

c. Paragraph 7-2a (4), appeals for Article 15 removal, the DASEB will not consider appeals to remove the records of proceeding under UCMJ, Article 15 from the AMHRR. The authority to adjudicate such claims rests with the ABCMR under AR 15-185.

//NOTHING FOLLOWS//