

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 11 October 2024

DOCKET NUMBER: AR20230007014

APPLICANT REQUESTS:

- Medical disability retirement; or be referred to the legacy Disability Evaluation System (DES); and
- Correction to his DA Form 2166-9-1 (Noncommissioned Officer Evaluation Report (NCOER)) for the period ending 14 September 2020, or remove the NCOER from his Army Military Human Resource Record (AMHRR)

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

- DD Form 149 (Application for Correction of Military Record) (Enclosure 1)
- Letter from Defense Counsel
- Enclosure 2 - Power of Attorney
- Enclosure 3 - DD form 214 (Certificate of Release or Discharge from Active Duty), 22 June 2021
- Enclosure 4 - DA Form 2166-9-1 (NCOER), 14 September 2020
- Enclosure 5 - Letter from Defense Counsel
- Enclosure 6 - Medical Evaluation Board (MEB) Proceedings
- Enclosure 7 - Letter from G- A. W- Esq.
- Enclosure 8 - Applicant statement regarding NCOER
- Enclosure 9 - Applicant statement regarding MEB
- Enclosure 10 - Military records sent by the Army

FACTS:

1. The applicant states, he and his attorney believe the applicant was improperly separated from the Army without properly being directed to the DES. He was already documented to not meet retention standards in the service for post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI). Accordingly, the Army should have ascertained whether the disability would result in a military disability retirement; however, they never did.

2. The applicant's attorney states, on behalf of the applicant:

a. The applicant was in the process of going through an MEB, when he was suddenly cut from the program and separated from the Army. The final portion to be completed was a Physical Evaluation Board (PEB), which did not occur. Further, his NCOER contained derogatory information that was an allegation without a determination made by the civilian jurisdiction. It is against Army regulation for a rater to put unverified allegations in an observation report. This is the applicant's first attempt at petitioning the Board and he exhausted all previous administrative remedies available to him. Therefore, they request he be granted a medical disability retirement or in the alternative be referred into the legacy DES for his PTSD, mild TBI (mTBI) residual of neurocognitive impairment, migraine headaches, and mTBI residue of partial empty sella syndrome . Additionally, they request his NCOER be corrected to remove any mention of a civilian criminal charge or case, or be removed from his AMHRR in its entirety.

b. He was improperly separated from the Army without properly being referred to the DES. He was already documented to have not met retention standards by the service for PTSD and mTBI. Accordingly, the Army should have ascertained whether this disability would result in a military disability retirement; however, they did not. As a result of the errors associated with this case, he was improperly separated from the Army. At the same time, he received an NCOER that discussed a civilian criminal case that still has not been adjudicated, which is in direct violation of the Army regulation. As such, he now requests that these errors and injustices be remedied, something only this Board has the authority to correct.

c. Pursuant to Title 10 U.S. Code (USC) Section, 1552, the Board has the authority to review and remove injustices from Army military records. This request is timely because it is within three years since the discovery of the error and injustice. Additionally, the applicant has exhausted all administrative remedies available to him and this Board is the only agency with the authority to grant the relief requested herein. For the aforementioned reasons, the Board has the appropriate jurisdiction to correct the error and injustice, in this case.

d. Prior to joining the military, the applicant worked in a variety of jobs, played sports, and enjoyed going out in public. He is the oldest of three siblings and had the responsibility of taking care of his family since his father was not around. He took the lead in supporting his mother and family. He worked in security jobs, Dish Network, and volunteered with his local fire and rescue. He enlisted in the military because his grandfather was in the Army, during WWII, and he had an uncle who served in the Navy. He believed in the military with the structure and discipline it would provide for him. Additionally, he sought to honor his family. In 2009, he enlisted in the Army with the Military Police (MP) and went to Fort Leonard Wood for his initial training. He deployed to Afghanistan from 2011 to 2012, Guantanamo Bay in 2015, and was called to active duty from 2018 to 2021 at Fort Dix, New Jersey.

e. He received an NCOER with a through date of 14 September 2020 that stated he was arrested, while on duty, for allegations of having sexual contact with a minor, during the rating period, and he was marked that he did not meet the standard for character. His senior rater also marked him as not qualified and stated he should not be promoted or sent to professional military education, at the time, while awaiting adjudication of felony criminal charges in the State of New Jersey. Another point of contention is the comment "displayed poor judgment in failing to notify his chain of command regarding a scheduled medical procedure, which limited his ability to perform his duties." However, he had numerous scheduled appointments related to his MEB. Sergeant First Class (SFC) F- asked that he give the SFC notice about his appointments and when he would be back to his computer since he was working from home due to the COVID-19 pandemic. All of his medical appointments were approved by the 87th Medical Group at Fort Dix, and he was referred to West Point for his MEB. He made his appointments directly with his providers and informed SFC F- of all of his appointments. The NCOER in question was not written by SFC F-, but by First Sergeant (1SG) B- which caused confusion since the applicant was communicating with SFC F-. The only Soldier who oversaw the applicant was SFC F-.

f. He was in the process of an MEB when he was suddenly discharged from the Army. He was referred to the MEB because his medication for mTBI was being increased. His medical process began in April 2021, but his separation date was going to be June 2021. The paperwork for an extension to complete his MEB was sent to his command; however, the paperwork was never signed by his command. He was, therefore, never medically processed in the separation process, despite being found unretainable.

g. He was referred to the Integrated Disability Evaluation System (IDES) for mTBI with migraine headache residual on 9 Jun 2021. The IDES determined three conditions did not meet the retention standards: PTSD, mTBI residuals of neurocognitive impairment and migraine headaches, and mTBI residual of partial empty sella syndrome. The IDES went on to say he has had adequate evaluation for the brain injury condition to reliably determine the course of this condition and it is unlikely that any further interventions for this condition would have returned him to duties consistent with his rank and military occupational specialty/area of concentration within 12 months. He was beyond one year of being diagnosed with the mTBI residuals condition and it appears to not meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), paragraph 3-31k.

h. IDES determined he had three stressor events related to his PTSD. First, during his first deployment he was in the shower and a civilian opened a stall and saw someone look at him through the air vents. He reported that based on previous reports of harassment and rape that the event was troubling to him. He reported that his team leader and another Soldier were sexually assaulted by Afghan National Army (ANA)

Soldiers and he was constantly concerned that it may happen to him, especially with someone trying to look at him in the shower. He later indicated it was unclear if it was sexual assault or the ANA being physically aggressive/threatening. He reported there were people watching him, in the shower.

i. Second, he reported he had to deal directly with detainees who would have needles and glass as weapons, while trying to attack him. He reported these difficulties occurred, during his combat and non-combat deployments. He reported that he also witnessed detainees that had been injured from combat and "thrown around" in the facilities by other inmates. Third, the base he was on would take incoming fire and he witnessed explosions. IDES stated he was not likely to have significant improvement over the next three years that would meet retention standards. His symptoms are likely to remain unchanged and medication would likely be required in the future.

j. His second and third diagnosis are related to his mTBI. IDES stated his conditions fail to meet retention standards. In 2012, he was deployed to Afghanistan as an MP and put various detainees in cells. During various training events, he hit his head on a mat and against a dashboard. While participating in a simulated HMMWV exercise with simulated rocking maneuvers, he hit the side of his head. He had some headaches initially, but they eventually dissipated.

k. In 2012, he collapsed and fell to the ground, while walking to his duty station. He was hospitalized for a few days, then resumed his duties, but did not regain his normal energy. Additionally, in 2012, he was hit by a taser, during training, and fell to the ground where he hit his face on a mat. He says he was out of it for a few minutes and felt like he was spinning.

l. In 2015, he was in Guantanamo Bay and was in a vehicle with detainees, when they pushed the two MPs to the side and hit one of them in the stomach, while the applicant hit the side panel of the truck. It was again determined he is not likely to have significant improvement over the next three years that would meet retention standards. His symptoms are likely to remain unchanged and medications will likely be required in the future.

m. On 11 June 2021, the MEB determined he had three conditions that did not meet the retention standard according to Army Regulation 40-501, and each did not exist prior to service. His diagnosis were for PTSD under chapter 3-33, mTBI residuals of neurocognitive impairment and migraine headaches under chapter 3-31, and mTBI residual of partial empty sella syndrome under chapter 3-31. Further, all three conditions originated in 2012. The MEB also recommended he be referred to a PEB, which never happened.

n. Since separating from the military, he has been trying to get Department of Veterans Affairs (VA) benefits but has yet to receive them. He is now forced to file unemployment because he is unable to find employment due to his disabilities. When he is interviewed for a job, he addresses his medical conditions, and they prevented him from being hired. He is suffering from PTSD, mTBI, vertigo, headaches, and trouble with retaining memories. Additionally, he cannot run due to his issues with his knees and lungs.

o. The lack of a completed medical evaluation, and an NCOER discussing an ongoing civilian case are both errors and injustices. A review of the relevant instructions and publications on point reveals that his case was not properly handled. The numerous procedural errors, in a legal and medical sense, amounted to a severe injustice where a servicemember was separated without a proper medical evaluation. A careful review of the record demonstrates that had the command properly allowed him to complete the DES, many of these errors would not have occurred. Instead, he was rushed through the separation process and ultimately pushed out of the Army. This action becomes even more shocking when it is apparent his immediate command ignored objective and neutral recommendations from medical providers regarding his diagnosis and Army retention standards.

p. He was also erroneously marked, on his NCOER, that he had an ongoing civilian criminal case discussing matters pertaining to his civilian case. This was a clear violation of Army Regulation 623-3 (Evaluation Reporting System) that forbids raters from discussing a case that has not been adjudicated. Further, his rater marked a clear error of discussing medical appointments that was an effort of his command to further impede his military career. To discharge him without a DES referral and discussing an ongoing civilian case, were both an error and injustice that only this Board can correct.

q. The command failed to coordinate, address, and treat the applicant's PTSD and TBI. His pre-discharge medical conditions were at a level that required further medical evaluation and an assignment of a medical disability rating. As a result of the personal trauma that occurred, while on active duty, he suffered from PTSD and TBI. As addressed specifically in Army Regulation 40-501, chapter 3, section 3 "Soldiers with disqualifying conditions listed in this chapter who do not meet the required medical standards will be referred to the DES in accordance with Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation).

r. This provision explicitly states that those individuals whose continued service is questionable shall be referred for an evaluation by a medical board. The applicant was going through the medical evaluation process but was inexplicitly separated from the service. The MEB proceedings, on 11 June 2021, stated he had three conditions that did not meet retention standards. What makes the failure to properly refer him into the

DES even more concerning is the fact that there were numerous medical documents that demonstrate his underlying medical conditions. Specifically, the IDES, on 9 June 2021 held at West Point, stated he was referred to IDES for mTBI with migraine headache residual. Additionally, the board found his PTSD and mTBI residual of partial empty sella syndrome also did not meet retention standards. Specifically, the board made the following notes, "[The applicant] may not carry and fire individual assigned weapons; live in an austere environment without worsening the medical conditions; may not perform the two mile run; does not comply with deadlines; and his conditions were not likely to improve to a level that will see significant improvement over the next three years to meet retention standards."

s. The applicant never completed his DES process and was instead notified of his separation the same month he was going through the process. According to Army Regulation 635-40, chapter 4, section 10, the MEB is convened to document a Soldier's medical status and duty limitations insofar as duty is affected by the Soldier's status. Further, a decision is made regarding the Soldier's medical qualification for retention based on the criteria in Army Regulation 40-501, chapter 3. If the MEB determines the Soldier does not meet retention standards, the board will recommend referral of the Soldier to a PEB. This is exactly what the MEB determined in the case of the applicant; yet, he never fully completed the process. Department of Defense Instruction 1332.18 (Disability Evaluation System), under enclosure 3 states the the MEB documents detailing a service member has a medical condition (whether singularly, collectively, or combined) that prevents him or her from reasonably performing his or her duties. If he or she cannot perform the duties the MEB will refer the case to the PEB. The MEB did document three conditions that were found to make the applicant unfit for retention standards. The case was referred to the PEB, but he was suddenly separated from the Army.

t. He continues to suffer from these conditions that impact him on a daily basis and negatively affects his career prospects. The 9 June 2021 IDES and 11 June 2021 MEB proceedings even memorialized the connection in a Narrative Summary (NARSUM) and DA Form 3947 (MEB Proceedings) respectively. Still, for no acceptable reason, the applicant was deprived of a complete DES evaluation.

u. His NCOER has improper comments that violates Army Regulation 623-3. His NCOER improperly states material that had not been adjudicated. According to Army Regulation 623-3 section 3-20 "any mention of unproven derogatory information in an evaluation report can become an appealable matter if the derogatory information is shown to be unfounded." As the NCOER states, he was awaiting adjudication of the charges. He has not been found guilty of anything, not even a violation; thus, the comments and markings are improper. Further Army Regulation 623-3 section 3-20(a) states "no reference will be made to an incomplete investigation (formal or informal) concerning a Soldier." The applicant has been found guilty of absolutely nothing to this

point. He is facing charges and is assumed innocent unless proven guilty. The intent behind this section of the Army regulation is to prevent unverified derogatory information from being included in evaluation reports. Further, it prevents unjustly prejudicial information from being permanently included in a Soldier's AMHRR. The two examples under Army Regulation 623-3 section 3-20(c) specifically discuss charges that are later dropped and charges of incidents where a Soldier may be later cleared. The applicant is the example of this intent.

v. The applicant currently has derogatory information in his AMHRR for unsubstantiated and unverified charges. Furthermore, while the fact that a rated Soldier is under investigation or on trial may not be mentioned in an evaluation until the investigation or trial is completed, this does not preclude verified information. Yet, there is nothing verified regarding the charges he is facing. Army Regulation 623-3, section 3-26 discusses evaluation of adverse actions that may be mentioned. However, it is only when there are substantiated investigations. Again, nothing has been substantiated, not even a command investigation. He is facing charges and going through the criminal justice system, at this time, has not stipulated to any acts, and is innocent of the charges. It is clear that his NCOER is full of serious irregularities and errors as well as lacking objectivity. As demonstrated by his criminal defense attorney's letter, 4 May 2021, he has not been convicted of any charges. In fact, he is still fighting the charges in the Passaic County Superior Court. Therefore, any comments related to these charges in his NCOER is plain error. Accordingly, they respectfully request the Board grant relief to correct these issues.

w. The applicant was going through the process to determine if he would receive a military disability separation or retirement. While going through this process, he was inexplicitly separated from the Army even though the MEB found he did not meet the retention standards of Army Regulation 40-501; he was never able to complete the DES process. He must be able to complete the DES process that was stopped with his separation. At the time, he was inexplicitly given an NCOER that is counter to Army regulations. The comments recorded on his NCOER are without merit as there is no adjudication in the case that he is fighting in a civilian capacity. They respectfully request that he be granted a medical disability retirement or be referred into the Legacy DES for his PTSD and TBI. At the same time, they request his NCOER be removed, or in the alternative part IV (Senior Rater Overall Potential) be redacted with regards to the rating and comments.

3. The applicant provides the following documents:

a. Letter from the applicant's defense counsel, 4 May 2021, states he represents the applicant in the civilian criminal matter. At the time, the matter had not concluded and was still ongoing in the court.

b. DA Form 3947 (MEB Proceedings) 11 June 2021, shows he did not meet retention standard for PTSD, mTBI residuals of neurocognitive impairment and migraine headache, and mTBI residual of partial empty sella syndrome. The board recommended he be referred to a PEB. The NARSUM and General Medical Separation Health Assessment Disability Benefits Questionnaire are available for the Board's review and will be reviewed by the Army Review Board's Agency (ARBA) medical section who will provide an advisory opinion, for the Board's consideration.

c. The applicant's statement concerning his NCOER states, in effect:

(1) He was reporting what he knew to the best of his ability that any medical issues or concerns about scheduling appointments that were mentioned in his NCOER, had been addressed with his commander Major A- after his shoulder surgery on 8 September 2020 and starting in November with SFC F- regarding him being referred for the MEB.

(2) Prior to this, SFC F- only asked that he give the SFC notice about the appointments and when the applicant would be back on his computer, since at the time of the pandemic, they all worked from home with minimum contact with the reserve center.

(3) All of his medical appointments were approved by the 87th Medical Group. The appointments were with specialists and general follow up appointments for his MEB at West Point. He made the appointments with the medical providers directly to avoid confusion and he informed SFC F- about the appointments.

(4) Since the pandemic had Soldiers working from home, the schedule was as long as you were on your computer and were in meetings, when they were scheduled, you were being active. When his NCOER was written, his rater SFC F- did not write it. 1SG B- did, which caused confusion even for the chain of command. SFC F- was the only person that dealt directly with him regarding his work and performance. It is a concern when the main contact and overseeing noncommissioned officer is cut out of writing his NCOER to address that he was in text message and email contact with the applicant regarding his appointments.

d. The applicant's statement concerning his MEB process states, in effect:

(1) He was in the process of an MEB that started in November 2020, after it was identified that his medication for his TBI would be increased. He sustained the TBI in 2012 during Operation Enduring Freedom in Afghanistan.

(2) His MEB started in April 2021. His expiration term of service (ETS) was 22 June 2021 and he needed to be extended on duty to complete the IDES process. The paperwork to extend his ETS was started and sent to his command. Due to confusion by Human Resources Command and his unit, the timeframe elapsed and so he was discharged due to his ETS. He was never medically out processed from Fort Dix, New Jersey. He received his DD Form 214 (Certificate of Release or Discharge from Active Duty) that only identified he had an honorable discharge, but his physical and mental disabilities were not listed. From the Army's MEB, he was un-retainable.

(3) Prior to joining the military, he worked in security jobs, played sports, and even enjoyed being out in the public's eye from singing karaoke to being in New York City walking around. He is the oldest of two brothers. He had the responsibility for taking care of his family since his father was not around. He took the lead in helping his mother in supporting the family and their home. He worked for companies from Dish Network as a customer service to security for Carter Jewelry to support his family. He even took interest in the emergency services as a volunteer with fire and rescue.

(4) He entered the military because his grandfather was in the Army, during WWII and his uncle served a short time in the Navy, during peace time. He believed in everything the military offered from structure to discipline, which is what he wanted and needed, at that point in his life, to honor his family.

(5) He enlisted in August 2009 and wanted to be an MP to reach his goals of serving and protecting, while honoring his grandfather's legacy. On 5 January 2010, he was sent to Fort Leonard Wood for his basic training. After that he was deployed to Afghanistan from 2011 to 2012. When he returned from deployment, he was stationed at different armories in the United States to stand guard as an MP.

(6) In 2015, he was deployed to Guantanamo Bay, Cuba. He then waited for orders to be cut for him to go on active duty from 2018 to 2021. He would be stationed at Fort Dix, New Jersey. He spoke with his doctor regarding his physical and mental condition being diminished, which included his sexual ability being limited and his memory loss with mood swings. He was told he had low testosterone, but there was no understanding why.

(7) He then saw a different doctor who only recommended injections to fix the issue, but it would make him infertile over the period of taking it. In March 2020, he was being evaluated for erectile dysfunction treatments and a blockage in his dorsal artery was found. In 2020 he had other tests done to understand why he had headaches, vertigo, light sensitivity, ringing in his ears, memory loss, personality changes, and even his low energy level. Finding out he had TBI along with spinal damage and nerve damage set the conditions for him being identified as un-retainable in the military. He was also told his lung damage had increased, he had spinal damage to his C5 and C7

which needed to be replaced or he would lose the use of his right arm, he had a rotator cuff tear in his left shoulder with a bicep tendon tear, a herniated disc in his L5 with arthritis below the L5, both of his knees had worsened due to his bilateral deviated patella, he had nerve damage in both feet, flat foot, and suffered from PTSD. All of this resulted in a medical review that determined he was not retainable in the Army.

(8) Since he has been separated from the Army, he has been seeking guidance with the VA on getting his disability claim. It was processed, while he was on active duty, and he is now 100 percent disabled according to his case worker. He has not seen progress in getting his benefits, so he sought to file for unemployment, but there is a waiting period to file. He is unemployed due to his medical conditions, which makes it hard to find employment. During the interview process he had to address that he had several medical conditions that would hinder him from the position he was applying for. He cannot lie so being service connected for PTSD and TBI that causes vertigo and headaches through the day is not something that supports him as the best candidate for a job. The fact that he does not retain the memories of the full day makes it hard to balance activities. At the same time, not being able to run due to his knees and lungs does not make him a healthy candidate.

(9) The injuries impacted his ability to work in the military by making him a danger to himself and others as explained with PTSD and TBI causing him to lose control of his body whether driving a vehicle or maintaining property such as a weapon was not safe. Not being able to remember or focus on tasks causes a mission priority concern that could not be overlooked. Not being able to physically perform the tasks of having full range of movement in his left arm, both knees, and spine impaired his ability to function effectively.

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

a. DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States) shows he enlisted in the U.S. Army Reserve (USAR) on 23 June 2009. He remained in the USAR through reenlistments.

b. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was ordered to active duty, as a member of the USAR, on 6 January 2010 and was honorably released on 27 May 2010 for completion of his required active service.

c. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was ordered to active duty, as a member of the USAR, on 16 November 2011 and was honorably released on 19 December 2012 for completion of his required active service. He had service in Afghanistan from 29 November 2011 through 4 November 2012.

d. Orders R-05-801074, published by U.S. Army Human Resources Command (AHRC), 16 May 2015 show he was ordered to active duty in an Active Guard/Reserve (AGR) status with a reporting date of 25 June 2018 for a period of three years.

e. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was ordered to active duty, as a member of the USAR, on 18 October 2015 and was honorably released on 16 October 2016 for completion of his required active service. He had service in Guantanamo Bay, Cuba from 2 December 2015 through 26 August 2016.

f. Orders R-05-801392, published by AHRC, 23 May 2018 ordered him to active duty in AGR status with a reporting date of 25 June 2018 for a period of three years.

g. DA Form 2166-9-1 (NCOER) from 23 August 2019 through 14 September 2020, shows he was rated as:

(1) Character, did not meet standard; was arrested, while on duty, for allegations of having sexual contact with a minor, during the rated period.

(2) Presence, met standard; consistently arrives early to perform his duties in a diligent and reliable manner; demonstrated military bearing and respect for customs and courtesies.

(3) Intellect, did not meet standard; displayed poor judgement in failing to notify his chain of command regarding a scheduled medical procedure, which limited his ability to perform his duties; has had difficulty properly prioritizing and completing core tasks before volunteering to take on extra tasks for the battalion.

(4) Leads, met standard; facilitated the ordering and receipt of over 1,000 CDC compliant masks and other COVID mitigation equipment to ensure continuity of battalion training; displayed concern for superiors, peers, and subordinates alike.

(5) Develops, met standard; provided support in preparation for an overseas mobilization by a headquarters company element of 15 Soldiers; made an effort to ensure new arrivals received necessary Organizational Clothing and Individual Equipment to effectively participate in unit training and operations.

(6) Achieves, met standard; effectively maintained a property book with an assigned value of \$8,821,788; assisted with the receipt and installation of the new Blue Force Tracker systems, worth a total amount of \$215,101 in ten vehicles.

(7) Rater overall performance; ensured the unit complies with safety, security, and supply programs.

(8) Senior Rater Overall Potential, not qualified; NCO refuses to sign. NCO was notified and acknowledged receipt. Do not promote or send to professional military education, at this time. Soldier is awaiting adjudication of felony criminal charges in the state of New Jersey.

h. General Officer Memorandum of Reprimand (GOMOR), 3 May 2021, shows the applicant was reprimanded for sexual assault of a child. On two occasions, on or about 30 August 2019 and 21 September 2019, he exploited his part time employment as a ride-share driver to manipulate and groom a fifteen-year-old female passenger into having multiple sexual encounters within or in close proximity to his personally owned vehicle. On 5 May 2021, the applicant acknowledged receipt of the GOMOR and stated he would submit matters within 30 calendar days.

i. Memorandum for Record (MFR), 7 June 2021, states the applicant's defense counsel confirmed receipt of the GOMOR on 4 May 2021. On 10 May 2021, the defense counsel furnished an email with the applicant's acknowledgement, 5 May 2021. As of the date of the MFR, neither the defense counsel nor the applicant had provided written matters to rebut the GOMOR. On 7 June 2021, the issuing authority forwarded the GOMOR to AHRC for filing in the applicant's AMHRR.

j. Orders 166-0005, published by AHRC, 15 June 2021, honorably discharged the applicant from the USAR effective 22 June 2021. The orders state a separation physical was mandatory and must be scheduled sufficiently in advance to assure completion prior to separation date.

k. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was ordered to active duty as a member of the USAR on 26 June 2018 and was honorably released on 22 June 2021 for completion of required active service.

l. The applicant's service record is void of an extension on duty to complete the MEB Process. It did not contain medical documentation to include his MEB or referral to a PEB nor a separation physical.

5. Based on the applicant's MEB paperwork and the applicant's claim of PTSD and TBI, the ARBA Mental Health Staff provided a medical review for the Board's consideration.

#### 6. MEDICAL REVIEW:

1. The applicant is applying to the ABCMR requesting medical disability retirement or to be referred to the legacy Disability Evaluation System (DES) and correction of his DA Form 2166-9-1 (Non-commissioned Officer Evaluation Report (NCOER)). Correction of his NCOER is outside of the scope of this advisory and will not be addressed. On his DD Form 149, the applicant asserts that he was improperly separated from the Army

without being referred to the DES as it was documented in his records that he did not meet retention standards based on diagnoses of Posttraumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI). 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 U.S. Army Reserve (USAR) on 23 June 2009 and remained in the USAR through his reenlistments, 2) he had several deployments during his service to include Afghanistan (29 November 2011 to 04 November 2012) and Guantanamo Bay, Cuba (02 December 2015 to 26 August 2016), 3) on 03 May 2021, the applicant was reprimanded for sexual assault of a child. It was noted that on two occasions, 30 August 2019 and 21 September 2019, he exploited his part-time employment as a ride-share driver to manipulate and groom a fifteen-year-old passenger into having multiple sexual encounters within or in close proximity to his personally owned vehicle. The applicant asserted this information should not have been included as part of his NCOER as the case had not been adjudicated in the civilian courts, 4) an MEB proceedings form dated 11 June 2021 shows the applicant was found by the Medical Evaluation Board (MEB) to not meet retention standards and recommended he be referred to the Physical Evaluation Board (PEB). The applicant's MEB started in April 2021 and his expiration term of service (ETS) was 22 June 2021. It was asserted that, although the paperwork to extend his ETS was sent to his command, due to confusion by HRC and his unit, the timeframe elapsed and so he was discharged due to his ETS. The applicant's record is void of an extension on duty to complete the MEB process. 5) the applicant was honorably discharged from the USAR on 22 June 2021 for completion of required active service.

2. The Army Review Board Agency (ARBA) Medical Advisor reviewed the ROP and casefiles, supporting documents and the applicant's military service and available medical records. No records were available in MEDCHART. The VA's Joint Legacy Viewer (JLV) was also examined. Lack of citation or discussion in this section should not be interpreted as lack of consideration.

3. In-service records were available for review via JLV from 07 January 2010 through 17 June 2021 and includes medical treatment provided through the Department of Defense (DoD) and VA. The applicant was evaluated by BH at a demobilization site on 08 November 2012 due to family stress, a recent break-up, and was requesting services. He was not diagnosed with any BH conditions and was released without limitations. The applicant self-referred to BH on 25 February 2020 following a primary care appointment due to reporting he did not know how to answer questions related to suicidal ideation. During the BH visit, he denied experiencing suicidal ideation and stated he responded incorrectly. He endorsed experiencing the following symptoms since his deployment to Afghanistan approximately 8 years ago: poor sleep, worrying, a feeling of dread, feeling numb, changes in appetite, sadness/depression, sexual dysfunction, low motivation, low energy, decreased interests, anxiety, and high/low sex drive. He denied having any history of BH treatment and reported no history of suicidal

ideation or homicidal ideation. The provider diagnosed the applicant with Relationship Distress with Spouse or Intimate Partner with rule outs (R/O) of Anxiety Disorder, Depressive Disorder, and Trauma-Related Disorder. It was noted that the applicant was not interested in BH treatment at the time, did not require a profile, and he was not referred for an MEB. On 31 December 2020, the applicant completed a BH intake and at the time of the visit he denied experiencing work-related problems and noted no disciplinary issues. He endorsed difficulty due to inability to conceive another child naturally and reported experiencing anxiety and depression most days of the week as well as disrupted sleep. The applicant reported a history of TBI in 2012 while working as Military Police (MP) in Afghanistan and documented several instances where he hit his head. The applicant reported he has experienced frequent vertigo and tinnitus in his right ear and that he had headaches on a daily basis to which treatment had been ineffective. He also endorsed experiencing changes in his attention and memory, difficulty remembering faces of people he has known, and loses track of time. It was documented that he was being considered for an MEB for TBI due to numerous medical concerns. The applicant was diagnosed with Adjustment Disorder with Mixed Anxiety and Depressed Mood and was scheduled for individual psychotherapy. At the time of his BH appointment on 10 February 2021, it was documented that the applicant was increasingly aggressive and assertive which was attributed to having started hormone replacement therapy. He also endorsed experiencing increased irritability, angry outbursts, low motivation, impaired memory and concentration, and anxiety that impaired his sleep at times. The applicant had an appointment with his primary care manager (PCM) on 09 March 2021 to discuss his medical evaluation board. It was documented that he had been previously evaluated for migraine headaches that were associated with a history of multiple TBIs. It was noted he had been evaluated by neurology for migraine headaches and underwent multiple treatment modalities between March 2020 and February 2021 without improvement and continued to experience migraine headaches on a daily basis. The provider noted specific to the applicant's history of TBI, he had been diagnosed with MCI by neurology with additional reported personality changes and mood swings that affected his duty status and ability to function within his unit. His mood changes were noted to be exacerbated by hypogonadism. The provider diagnosed the applicant with TBI and Mild Cognitive Impairment (MCI) with personality changes and mood swings affecting his duty status. The provider noted that during the applicant's separation physical in December 2020 an MEB was recommended but not initiated in MEDRPROS. The provider documented the applicant did not meet retention standards IAW AR 40-501, Chapter 3-1 (ongoing significant debilitation and limitation), Chapter 3-31 (1) due to frequent migraines occurring more than three times per week despite at least 6 months of therapy, and TBI with MCI, sensory disturbance, and change in personality. The provider recommended a referral to the MEB and IDES for further evaluation and an S3 profile was entered. The provider diagnosed the applicant with Personal History of Traumatic Brain Injury, and Other Migraine, not intractable, without status migrainosus. On 10 March 2021, it was documented that the applicant reported his MEB was stalled and that he was

experiencing stress due to the MEB process. The applicant was diagnosed with Adjustment Disorder with Depressed Mood and TBI R/O PTSD. On 24 March 2021, his BH provider diagnosed him with Depressive Disorder due to a Medical Condition and TBI with a R/O of PTSD. The applicant continued to endorse previously reported symptoms and noted receiving feedback from others that he 'presents oddly with unexpected reactions and detachment.' The provider opined that the applicant was likely observing the effects of multiple TBIs and recommended that he seek long-term follow-up to establish baseline cognitive and executive functions. The provider documented he was undergoing an MEB for combat PTSD and TBIs. On 22 April 2021, his BH provider documented he was experiencing increased problems with memory and depression following discontinuation of hormone treatment. He reported suicidal ideation without plan or intent and was documented to not be at elevated risk for harm to self. He was diagnosed with Depressive Disorder due to a Medical Condition, TBI, and PTSD. The provider documented that the applicant was undergoing an MEB due to a history of combat PTSD and TBIs. He was released without limitations, his prognosis was documented as fair, and the provider noted no command consultation was required at the time of the visit. On 20 May 2021, he requested an off-base referral for BH treatment. His last BH note dated 10 June shows conflicting information stating that neither MEB processing or administrative separation was recommended or warranted; however, it also said that he was not cleared for mobilization, that he required an MEB recommendation/administrative separation for his BH condition and was not suitable for continued military service. The provider documented his diagnoses as TBI and Mood Disorder due to known physiological conditions. He was released with duty limitations (*Advisor's Note*: the duty limitations were not specified).

4. The applicant underwent several Compensation and Pension (C&P) examinations while in-service as part of his disability evaluation processing. Only those conducted for TBI and PTSD will be summarized here. The applicant was diagnosed with TBI via a C&P examination on 05 May 2021 with the date of diagnosis noted as 2012-2019. The evaluator documented several events when the applicant hit his head while in service to include putting people in cells, hitting a mat during a training exercise, hitting his head against a vehicle dashboard during a training exercise, falling to the ground after being hit by a taser during a training exercise, hitting the side panel of a truck after being pushed, and a motor vehicle accident in 2019. The applicant was rated to have mild impairment in the following areas: memory, attention, concentration, and executive functions; judgment; and subjective symptoms. The other measured domains were documented to be within normal limits. The provider further noted residuals associated with TBI as headaches, including migraine headaches. The applicant completed a BH C&P examination on 12 May 2021 and was diagnosed with PTSD and Mild Neurocognitive Disorder (MNCD) (noted to be due to TBI with behavioral disturbance). The provider checked the box that the applicant had occupational and social impairment with deficiencies in most areas (e.g., work, school, family relations, judgment, thinking and/or mood). There were two in-service stressors associated with his diagnosis of

PTSD to include his experience(s) with detainees and inmates as well as exposure to incoming fire and explosions while deployed. The evaluating provider noted his symptoms of anxiety, depression, and concentration were subsumed under his PTSD diagnosis, symptoms of personality changes and loss of focus were attributed both to PTSD and MNCD/TBI, and that his memory loss was attributed to MNCD/TBI.

5. As part of his application, the applicant provided a copy of in-service MEB proceedings and the associated NARSUM which was outlined in detail in the ROP. As such, only a brief overview will be provided here as it relates to this Advisory. The NARSUM dated 09 June 2021 detailed that he was referred to IDES for mild Traumatic Brain Injury (mTBI) with migraine headache residual and was found to have three conditions that did not meet retention standards. The applicant's PULHES was drafted (312113) to reflect the MEB administrative process and it was noted that most of the information was provided by the Compensation and Pension (C&P) evaluations (as described above). On 11 June 2021, the MEB proceedings document shows that he had three conditions that did not meet retention standards in accordance with (IAW) Army Regulation 40-501 and recommended that he be referred to a Physical Evaluation Board (PEB). The diagnoses that fell below retention standards were documented to have started in 2012 and noted as: Chapter 3-33 c (2) for PTSD, Chapter 3-31 k for mTBI residuals of neurocognitive impairment and migraine headaches, and mTBI residual of partial empty Sella Syndrome.

6. A review of JLV shows the applicant is 100% service-connected through the VA, 70% for PTSD and 50% for migraine headaches. He is also service-connected for numerous other physical-health conditions. The applicant initiated an evidence-based treatment (EBP) for treatment of PTSD on 07 February 2022 though was paused on 13 April 2022 due to psychosocial stressors and has not re-engaged in BH treatment through the VA since that date. Records indicate he requested additional treatment for TBI through the VA on 24 July 2023 due to ongoing problems with memory.

7. The applicant is applying to the ABCMR requesting medical disability retirement or a referral to the legacy DES. The applicant asserts that he was improperly separated from the Army without being referred to the DES for PTSD and TBI. Review of the applicant's records shows that he was diagnosed and referred for an MEB due to mTBI with migraine headache residual, to which the MEB found that he did not meet retention standards for three conditions: PTSD, mTBI residuals of neurocognitive impairment and migraine headaches, and mTBI residual of partial empty Sella Syndrome. The associated NARSUM drafted his updated PULHES profile to show 312113, indicating a permanent profile was warranted for both 'P' and 'S' (physical capacity/stamina and psychiatric). The MEB recommended the applicant be referred to the PEB; however, there is no documentation available for review that the applicant was referred for PEB prior to his separation. As the applicant's case was already reviewed by an MEB while he was in-service and found three conditions did not meet retention standards IAW AR

40-501, it is recommended that the applicant's case be referred to IDES for further processing.

8. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? N/A. Request is for medical retirement.

(2) Did the condition exist or experience occur during military service? N/A. Request is for medical retirement.

(3) Does the condition or experience actually excuse or mitigate the discharge? N/A. Request is for medical retirement.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding the applicant's case should be referred to IDES for further processing. Based on the medical opine, the Board determined there is sufficient evidence to support referring the applicant's case to DES.

2. However, the Board found there is insufficient evidence to support removal of the applicant's NCOER from his Army Military Human Resource Record (AMHRR). However, the Board determined based on regulatory guidance AR 623-3 (Evaluation Reporting System) which states no reference will be made to an incomplete investigation concerning a Soldier. References will be made only to actions or investigations that have been processed to completion, adjudicated, and had final action taken before submitting and evaluation. As such, the Board determined there is prohibited content in the applicant's NCOER that should be redacted in accordance with the regulation. Therefore, the Board granted partial relief to refer the applicant to Disability Evaluation System (DES) and redact prohibited comments from his NCOER.

3. The purpose of maintaining the Army Military Human Resource Record (AMHRR) is to protect the interests of both the U.S. Army and the Soldier. In this regard, the AMHRR serves to maintain an unbroken, historical record of a Soldier's service, conduct, duty performance, and evaluations, and any corrections to other parts of the AMHRR. Once placed in the AMHRR, the document becomes a permanent part of that

file and will not be removed from or moved to another part of the AMHRR unless directed by an appropriate authority. The Army has an interest in maintaining the integrity of its records for historical purposes. The information in those records must reflect the conditions and circumstances that existed at the time the records were created. In the absence of evidence that shows a material error or injustice, there is a reluctance to recommend that those records be changed.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by

- redacting prohibited comments from the applicant’s DA Form 2166-9-1 (NCOER) from 23 August 2019 through 14 September 2020, which state under 1. Character “ for allegations of having sexual contact with a minor, during the rated period”

and

- directing the applicant be entered into the Disability Evaluation System (DES) and a Medical Evaluation Board concerned to determine whether the applicant’s conditions(s), met medical retention standard at the time-of-service separation.

a. In the event that a formal physical evaluation board (PEB) becomes necessary, the individual concerned may be issued invitational travel orders to prepare for and participate in consideration of his case by a formal PEB if requested by or agreed to by the PEB president. All required reviews and approvals will be made subsequent to completion of the formal PEB.

b. Should a determination be made that the applicant should have been separated under the DES, these proceedings will serve as the authority to void his administrative separation and to issue him the appropriate separation retroactive to his original separation date, with entitlement to all back pay and allowances and/or retired pay, less any entitlements already received.

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to correction to his DA Form 2166-9-1 (Noncommissioned Officer Evaluation Report (NCOER)) for the period ending 14 September 2020, or remove the NCOER from his Army Military Human Resource Record (AMHRR).

■ [REDACTED]

■ [REDACTED]

[REDACTED]

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

REFERENCES:

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

2. Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation) 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. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with AR 40-501, chapter 3, as evidenced in a medical evaluation board (MEB); when they receive a permanent physical profile rating of "3" or "4" in any functional capacity factor and are referred by a Military Occupational Specialty Medical Retention Board; 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 or 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 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 are either 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 onetime 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 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 medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

3. Title 10, USC, 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, USC, 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.

4. Army Regulation 40-501 (Standards of Medical Fitness), provides policies and procedures on medical fitness standards for induction, enlistment, appointment, and retention. Paragraph 3-33 (anxiety, somatoform, or dissociative disorders) states the causes for referral to an MEB are as follows:

- persistence or recurrence of symptoms sufficient to require extended or recurrent hospitalization; or
- persistence or recurrence of symptoms necessitating limitations of duty or duty in protected environment; or
- persistence or recurrence of symptoms resulting in interference with effective military performance

5. Title 38, USC, sections 1110 and 1131, permits the VA to award compensation for disabilities that were incurred in or aggravated by active military service. However, an award of a higher VA rating does not establish error or injustice on the part of the Army. The Army rates only conditions determined to be physically unfitting at the time of discharge which disqualify the Soldier from further military service. The VA does not have the authority or responsibility for determining physical fitness for military service. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge, to compensate the individual for loss of civilian employability. These two government agencies operate under different policies. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

6. 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.

7. Army Regulation 623-3 (Evaluation Reporting System), effective 1 April 2014 and in effect at the time, prescribed the policies and tasks for the Army's Evaluation Reporting System.

a. Paragraph 2-12 (The Rater) states the rater will document any substantiated finding an an Army or Department of Defense investigation or inquiry, that the rated Soldier committed an act of sexual harassment or sexual assault. Paragraph 2-14 (The Senior Rater) will do the same.

b. Paragraph 3-5 (Army Performance objectives and special interest items) states Army Regulation 60-20 (Army Command Policy) provides policy for when items will be mentioned in a Soldier's evaluation report when substantiated by a completed command or other official investigation to include investigations by civil authorities.

c. Paragraph 3-19 (Unproven derogatory information) states no reference will be made to an incomplete investigation concerning a Soldier. References will be made only to actions or investigations that have been processed to completion, adjudicated, and had final action taken before submitting and evaluation.

d. Paragraph 3-19d states any verified derogatory information may be entered on an evaluation report. This is true whether the rated Soldier is under investigation, flagged or awaiting trial. While the fact that a rated Soldier is under investigation or on trial may not be mentioned in and evaluation until the investigation or trial is completed, this does not preclude the rating chain's reference to verified derogatory information. For example, when an interim evaluation report with verified information is made available to a commander, the verified information may be included in the evaluation report. For all evaluation reports, if previously reported information later proves to be incorrect or erroneous, the Soldier will be notified and advised of the right to appeal the evaluation report.

e. Paragraph 3-37 (Modifications to Previously Submitted Evaluation Reports) stated an evaluation report accepted by Headquarters, Department of the Army (HQDA), and included in the official record of a rated Soldier is presumed to:

(1) be administratively correct,

(2) have been prepared by the properly designated rating officials who meet the minimum time and grade qualifications, and

(3) represent the considered opinions and objective judgment of the rating officials at the time of preparation.

f. Section II (Commander's or Commandant's Inquiry), paragraph 4-3 (Applicability), stated:

(1) Commanders are required to look into alleged errors, injustices, and illegalities in evaluation reports.

(2) Upon receipt of a request for a Commander's or Commandant's Inquiry, the commander or commandant receiving the request will verify the status of the NCOER in question. If the evaluation has been submitted and received at HQDA for processing, but has not been filed in the Soldier's AMHRR, the commander or commandant will notify the Evaluations Appeals Office via email with a request to have the evaluation placed in an administrative temporary hold status until completion of the inquiry.

g. Paragraph 4-5 (Policy) stated:

(1) A Commander's or Commandant's Inquiry will not be used to document differences of opinion among members of the rating chain about a rated Soldier's performance and potential. The evaluation system establishes rating chains and normally relies on the opinions of the rating officials. Rating officials will evaluate a rated Soldier and their opinions constitute the organization's view of that Soldier. However, the commander may determine through inquiry that the report has serious irregularities or errors. Examples include:

(a) improperly designated, unqualified, or disqualified rating officials; that is, a rating official not in the published rating chain, a rating official without the minimum required time to render an evaluation report, or a rating official who, through an official investigation, has had a substantiated adverse finding against them that results in their relief or calls into question the rating official's objectivity;

(b) inaccurate or untrue statements; and

(c) lack of objectivity or fairness by rating officials.

(2) The inquiry will be made by a commander in the chain of command or military school commandant above the designated rating officials involved in the allegations. In headquarters and other military organizations lacking a commander or commandant, the inquiry will be conducted by the next higher official in the rating chain above the designated rating officials involved in the allegations.

(3) To ensure the availability of pertinent data and timely completion of an inquiry conducted after the evaluation in question has been accepted at HQDA for inclusion in the rated Soldier's AMHRR, the inquiry will be conducted by either the commander or commandant at the time the evaluation was rendered who is still in the command position, or by a subsequent commander or commandant in the position. Requests for inquiry will occur no later than 60 days after the signature date of the rated Soldier (or senior rater, if rated Soldier's signature is omitted). The results of the inquiry will be forwarded to HQDA not later than 120 days after the signature date of the senior rater.

(4) The official conducting the inquiry will not pressure or force rating officials to change their evaluations.

(5) The official conducting the inquiry may not evaluate the rated Soldier, either as a substitute for, or in addition to, the designated rating officials' evaluations.

(6) The rating chain or official conducting the inquiry will not use the Commander's or Commandant's Inquiry provisions to forward information derogatory to the rated Soldier. If the inquiry reveals matters that might have resulted in a lower evaluation of a rated Soldier, the information will be addressed in the memorandum outlining the results of the inquiry by the commander or commandant responsible for the inquiry in accordance with paragraph 3-39. No changes will be made to an evaluation report to reflect a lower evaluation of a rated Soldier following the results of a Commander's or Commandant's Inquiry.

(7) If, upon completion of the inquiry, the official conducting the inquiry determines the report has serious irregularities or errors or any violation of policy, the official will ensure that all members of the original rating chain are allowed to correct or edit the evaluation as necessary. The commander's or commandant's memorandum to U.S. Army Human Resources Command will state that all members of the rating chain have been allowed to add or change comments in accordance with the findings and recommendations, and it will list those who did not choose to edit the evaluation.

(8) If the evaluation was previously referred, and after editing the evaluation, it is still referred, the rating chain will refer the final evaluation to the rated Soldier for acknowledgment and the opportunity to submit comments before sending it (and any signed comments) to HQDA.

(9) The results of the inquiry forwarded to HQDA will include the specific findings, conclusions, and recommendations in a memorandum that will be filed with the evaluation report in the rated Soldier's AMHRR for clarification purposes. The results will include the commander's or commandant's signature, will stand alone without reference to other documentation, and will be limited to one page. Sufficient evidence

and documentation, such as completed Army Regulation 15-6 (Procedures for Administrative Investigations and Boards of Officers) investigations, reports, and statements, will be attached to justify the conclusions.

(10) If the commander finds no fault with the evaluation, then the Commander's or Commandant's Inquiry is filed locally and a copy given to the rated Soldier. There is no requirement to send the Commander's or Commandant's Inquiry forward to HQDA.

h. Paragraph 4-7f (Policies) stated an appeal will be supported by substantiated evidence. An appeal that alleges an evaluation report is incorrect, inaccurate, or unjust without usable supporting evidence will not be considered. The determination regarding adequacy of evidence may be made by the HQDA Evaluation Appeals Branch, National Guard Bureau Appeals Section, or the appropriate State Adjutant General (Army National Guard).

i. Paragraph 4-8 (Timeliness) stated substantive appeals will be submitted within 3 years of an evaluation report "THRU" date. Failure to submit an appeal within this time would require the appellant to submit his or her appeal to the ABCMR. The Army Special Review Board will not accept appeals over 3 years old or appeals from Soldiers who are no longer serving on active duty or as part of the U.S. Army Reserve or Army National Guard.

j. Paragraph 4-11 (Burden of Proof and Type of Evidence) stated the burden of proof in the appeal process rests with the appellant. Accordingly, to justify deletion or amendment of an evaluation report, the appellant will produce evidence that establishes clearly and convincingly that:

(1) the presumption of regularity will not be applied to the evaluation report under consideration and

(2) action is warranted to correct a material error, inaccuracy, or injustice.

k. Clear and convincing evidence will be of a strong and compelling nature, not merely proof of the possibility of administrative error or factual inaccuracy. If the adjudication authority is convinced that an appellant is correct in some or all of the assertions, the clear and convincing standard has been met with regard to those assertions.

l. For a claim of administrative error, appropriate evidence may include:

(1) the published rating scheme used by the organization during the period of the evaluation report being appealed;

- (2) assignment, travel, or temporary duty orders;
- (3) DA Form 705 (Army Physical Fitness Test Scorecard), DA Form 5500 (Body Fat Content Worksheet (Male)), and DA Form 5501 (Body Fat Content Worksheet (Female));
- (4) leave records;
- (5) organization manning documents;
- (6) hospital admission, diagnosis, and discharge sheets;
- (7) statements of military personnel officers or other persons with knowledge of the situation pertaining to the evaluation report in question;
- (8) the results of a Commander's or Commandant's Inquiry, Inspector General, and/or Equal Opportunity investigation; and
- (9) other relevant documents.
- (10) Editable documents must be marked certified true copies. This applies to documents submitted as evidence in support of either an administrative or substantive claim.

m. For a claim of inaccuracy or injustice of a substantive type, evidence will include statements from third parties, rating officials, or other documents from official sources. Third parties are persons other than the rated officer or rating officials who have knowledge of the appellant's performance during the rating period. Such statements are afforded more weight if they are from persons who served in positions allowing them a good opportunity to observe firsthand the appellant's performance as well as interactions with rating officials. Statements from rating officials are also acceptable if they relate to allegations of factual errors, erroneous perceptions, or claims of bias. To the extent practicable, such statements will include specific details of events or circumstances leading to inaccuracies, misrepresentations, or injustice at the time the evaluation report was rendered. The results of a Commander's or Commandant's Inquiry or Army Regulation 15-6 (Procedures for Administrative Investigations and Boards of Officers) investigation may provide support for an appeal request.

n. Paragraph 4-12 (Appeals Based on Substantive Inaccuracy) states a decision to appeal an evaluation report will not be made lightly. Before deciding whether or not to appeal, the prospective appellant will analyze the case dispassionately. The prospective appellant will note that:

(1) pleas for relief citing past or subsequent performance or assumed future value to the Army are rarely successful and

(2) limited support is provided by statements from people who observed the appellant's performance before or after the period in question (unless performing the same duty in the same unit under similar circumstances), letters of commendation or appreciation for specific but unrelated instances of outstanding performance, or citations for awards, inclusive of the same period.

o. Once the decision has been made to appeal an evaluation report, the appellant will state succinctly what is being appealed and the basis for the appeal. For example, the appellant will state:

(1) whether the entire evaluation report is contested or only a specific part or comment and

(2) the basis for the belief that the rating officials were not objective or had an erroneous perception of the performance. A personality conflict between the appellant and a rating official does not constitute grounds for a favorable appeal; it must be shown conclusively that the conflict resulted in an inaccurate or unjust evaluation.

p. Most appellants will never be completely satisfied with the evidence obtained. A point is reached, however, when the appellant will decide whether to submit with the available evidence or to forgo the appeal entirely. The following factors are to be considered:

(1) The evidence must support the allegation. The appellant needs to remember that the case will be reviewed by impartial board members who will be influenced only by the available evidence. Their decision will be based on their best judgment of the evidence provided.

(2) Correcting minor administrative errors or deleting one official's rating does not invalidate the evaluation report.

8. Department of the Army Pamphlet 623-3 (Evaluation Reporting System), 31 March 2014, provided procedural guidance for completing and submitting evaluation reports and associated support forms to HQDA that are the basis for the Army's Evaluation Reporting System. Paragraph 6-1 (Deciding to Appeal) states an appellant who perceives that an evaluation report is inaccurate in some way has the right to appeal for redress to the appropriate agency. However, before actually preparing an appeal, an objective analysis of the evaluation report in question should be made.

9. Army Regulation 600-8-104 (Army Military Human Resource Records Management) prescribes Army policy for the creation, utilization, administration, maintenance, and disposition of the AMHRR. The AMHRR includes, but is not limited to the Official Military Personnel File, finance-related documents, and non-service-related documents deemed necessary to store by the Army.

a. Paragraph 3-6 (Authority for Filing or Removing Documents in the AMHRR Folders) provides that once a document is properly filed in the AMHRR, the document will not be removed from the record unless directed by the ABCMR or another authorized agency.

b. Appendix B (Documents Required for Filing in the AMHRR and/or Interactive Personnel Electronic Records Management System) shows memorandums of reprimand, censure, and admonition are filed in accordance with Army Regulation 600-37.

//NOTHING FOLLOWS//