

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 May 2024

DOCKET NUMBER: AR20230007553

APPLICANT REQUESTS: This case comes before the Army Board for Correction of Military Records (ABCMR) on a remand from the United States District Court of Federal Claims. The Court directs the ABCMR to:

- consider all the legal violations alleged in the applicant's complaint
- consider any additional evidence or arguments presented by the applicant in writing
- obtain any advisory opinions or information the ABCMR believes will assist it
- reconsider fully the Army's previous decision in the applicant's case, without deference to the Army's previous decisions
- issue a new decision, with reasoned analysis, on the applicant's claims for relief

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

- DD Form 149 (Application for Correction of Military Record)
- Exhibit 1 – DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Exhibit 2 – Enlisted Record Brief (ERB)
- Exhibit 3 – Notification
- Exhibit 4 – Election of Rights
- Exhibit 5 – Appeal
- Exhibit 6 – Court's Order
- Exhibit 7 – FOIA (Freedom of Information Act) Request
- Exhibit 8 – Emails
- Exhibit 9 – Retirement Request
- Exhibit 10 – Second Retirement Request
- Exhibit 11 – Appointment Memorandum
- Exhibit 12 – Commander's Report
- Exhibit 13 – SGM (Sergeant Major) S__ Memorandum for Record (MFR)
- Exhibit 14 – Statement of Service
- Exhibit 15 – Continuance Request
- Exhibit 16 – Motion for Bill of Particulars
- Exhibit 17 – Estimated Retirement Benefits

FACTS:

1. On 21 November 2022, following his 21 September 2021 separation under other than honorable conditions, the applicant filed a lawsuit in the U.S. Court of Federal Claims; he alleged the Army had violated his due process rights and wrongfully separated him. The applicant asked the court to:

- Enter a judgment against the Army for "the maximum amount allowed by law"
- "Set aside his administrative separation"
- Correct the applicant's records to show he was not discharged, on 21 September 2021 but continued his service without interruption
- Allow "such other relief as may be deemed necessary or appropriate in order to accord full, just, and complete relief"
- Reimburse the applicant's legal fees
- "All other relief this Honorable Court deems proper"

2. On 28 March 2023, the government filed a motion for a voluntary remand, and a stay in court proceedings pending remand results; on 7 June 2023, the court directed the remand of the applicant's case. On 7 July 2023, the applicant, through counsel, provided the ABCMR with a DD Form 149 and evidence; he requests the following relief:

- Correction of his records to show his honorable retirement, vice under other than honorable conditions discharge, on 21 September 2021 or before, and in the rank of either sergeant first class (SFC/E-7) or staff sergeant (SSG/E-6)
- Alternatively, allow him to retire and permit the Grade Determination Review Board to consider all of the allegations against him
- Grant any other relief that may be just, proper, and fair, under the circumstances

3. Counsel additionally asks the Board to give the applicant's case priority processing, and he offers arguments related to the 3-year statute of limitations, noting the applicant initiated his request within that 3-year limit. Counsel goes on to request assistance in obtaining additional documents/evidence that pertain to the applicant's petition; he points out the applicant filed a FOIA request but did not receive a response. Counsel states the applicant seeks the following records:

- "the entire administrative separation board packet presented by recorder to the administrative separation board members, including all government exhibits, slides, and all other documents and records"
- "the entire administrative separation board file presented by [applicant's] defense team"
- "all audio-recordings from the administrative separation board hearing"

- "the entire record of proceedings from the administrative separation board hearing, chain of command recommendations, and all related documents"
- "the entire CID (U.S. Army Criminal Investigation Command) investigation concerning the allegation of sexual assault, including audio recordings of the person making the allegations against [applicant], and agent's investigative reports, LER (Law Enforcement Report)-SIR (Serious Incident Report) NumberX"
- "all of [applicant's] personnel records, including (his) Official Military Personnel File (OMPF) and Army Military Human Resource Records (AMHRR)"

4. Counsel asserts the Army committed fundamental errors and injustices in the applicant's separation processing; based on the below-listed errors and injustices, the applicant's separation should be set aside.

a. The administrative separation board recorder accused the applicant of committing rape, rather than the lesser charge of sexual assault, and he used slides to communicate that allegation to the board.

(1) Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations) and Department of Defense Instruction (DODI) 1332.14 (Enlisted Administrative Separations) both require individuals pending separation to be advised of the specific allegations on which the proposed action is based.

(2) The command never mentioned rape in its separation notification; rather, the applicant's commander stated, "On 18 May 2018, you sexually assaulted Mrs. (sic) N.T." The recorder's actions wronged the applicant by using inflammatory and prejudicial language and creating a "trial by ambush."

b. Paragraph 2-6 (Composition of the Board), (current version of AR 635-200), states, "The board is composed of experienced, unbiased NCOs (noncommissioned officers) and officers"; however, "all board members were selected from the same unit." Also, the recorder introduced Colonel (COL) M__ A. W__'s character of service recommendation to the board, and, during voir dire, the board president revealed that COL W__ was his senior rater, that he worked with COL W__ daily, and that COL W__ was late in completing the board president's evaluation. Despite counsel's objections, the board president remained on the board and participated in the proceedings.

c. During the applicant's elimination proceedings, the Army failed to inform him that he "could submit a conditional waiver to waive his right to a hearing in exchange for another favorable administrative action"; as a result, the applicant never asked for this waiver, and, had he done so, he might have received a general discharge under honorable conditions instead of the under other than honorable conditions separation.

d. The applicant's expiration term of service (ETS) was scheduled for October 2020, but the unit improperly and without authority, retained him until 21 September 2021.

e. Based on the foregoing, counsel argues the applicant's separation should be set aside, and he should be allowed to retire because "his separation proceedings violated his due process rights under DODI 1332.14, AR 600-35 (Army Force Stabilization System), and AR 15-6 (Procedures of Administrative Investigations and Board of Officers)."

(1) "At the time of his separation, [applicant] has served 20 years, 11 months and 17 days on active duty. The value of his estimated military retirements benefits, in the rank of E-6, ranged between \$1,694,875 and \$1,948,895."

(2) Counsel notes, Federal law mandates that the Board correct military records, but such corrections "do not equate to condoning the alleged conduct in question – instead they focus on correcting errors and injustices." Citing a U.S. Court of Claims case, counsel quotes, "When a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate. And such a violation, contrary to the evidence, is arbitrary and capricious." Additionally, a U.S. Court of Federal Claims case states, "In cases of clear injustice, the board has a moral duty to take steps to grant thorough and fitting relief. When the board does not act to redress clear injustice, its decision is arbitrary and capricious and must be overturned upon review by the court."

5. In support of the applicant's contentions, counsel submits documents from the applicant's service record and separation packet; a FOIA request, with emails reflecting efforts to obtain evidence; and a memorandum for record from SGM J__ S__, dated 22 May 2020. SGM J__ S__ wrote the following:

a. SGM S__ states that he and the applicant were stationed together at Fort Jackson, SC, from 2010 to 2012, and, during that period, the SGM was able to observe the applicant's duty performance.

b. The SGM affirms the applicant consistently performed well and ensured all requirements were met. SGM S__ declared the applicant should be retained on active duty, and he would have no problem with adding the applicant to his team.

6. A review of the applicant's service record reveals the following:

a. On 5 October 2000, the applicant enlisted into the Regular Army for 5 years; upon completion of initial entry training and the award of military occupational specialty (MOS) 91Q (Pharmacy Specialist), orders assigned him to a medical center at Fort Rucker, AL; he arrived at his new unit, on or about 17 October 2001.

b. The applicant continued his service, through immediate reenlistments, and served in the continental United States (CONUS), Germany, and Korea; additionally, he deployed to Iraq, in 2008, and redeployed in 2009. Effective 1 September 2010, his chain of command promoted him to SSG. On 9 December 2011, the applicant immediately reenlisted for an indefinite term of service.

c. In March 2017, based on permanent change of station orders, the applicant transferred from Fort Jackson to Germany, and he arrived at his new unit, a major medical center, on 15 March 2017. On 14 August 2017, and while in a leave status, the applicant married Ms. T__ D. C__ in South Carolina; he subsequently returned to Germany.

d. On 6 November 2017, the applicant's command initiated an AR 15-6 investigation against him due to allegations the applicant had committed BAH (Basic Allowance for Housing) fraud and engaged in adultery with a U.S. Air Force (USAF) Master Sergeant (MSgt/E-7). On 16 November 2017, the 15-6 Investigating Officer (IO) reported the results of his investigation:

(1) With regard to BAH fraud, the IO determined the applicant had made inadvertent errors, and, upon receiving notification of a debt due to overpayment, the applicant took appropriate actions.

(2) Concerning the adultery allegation, the IO found that, in or around April 2017, the applicant and MSgt S__ W__ met at work, and their initially platonic relationship became more intimate. Because the applicant was not married at that time, their relationship did not violate the Uniform Code of Military Justice (UCMJ); however, after the applicant returned from leave in South Carolina, his marital status had changed.

(3) The applicant failed to disclose that he was married, and he continued having intimate relations with MSgt W__. The IO reported, "According to the testimonial account of [applicant] and in his own declaration, the relationship with MSgt W__ was brought to a conclusion on/about his departure to CONUS, on 13 AUG 2017. MSgt W__'s assertion is that the relationship continued as it left off upon his return, until her happenstance discovery of [applicant's] marital status occurring via social media."

(4) "During the course of my investigation, a pattern of conduct concerning [applicant] and his previous relationships were brought forth to illuminate the characterization of [applicant's] interactions with former spouses."

(a) "On 15 SEP 2017, A__ C__ informed MSgt W__ of numerous illicit marriages and a history of extra-marital affairs involving [applicant]. A__ C__ also informed MSgt W__ of [applicant's] marital status as being married and insisted for

MSgt W__ to check [applicant's] DEERS (Defense Enrollment Eligibility Reporting System) enrollment for verification."

(b) "Initially when asked, A__ C__ stated she is a mutual acquaintance of [applicant], however based upon the evidence gathered, I find A__ C__ was a pseudo-name used by SSG N__ B__ ([applicant's] 3rd ex-wife)."

(5) Despite the applicant's protestations to the contrary, the IO determined the preponderance of the evidence showed the applicant had continued his intimate relations with MSgt W__ after marrying Ms. T__ C__. The IO added, "During the investigation, it is my determination that [applicant] displayed a history of physical abuse directed towards his spouses. With the testimonial account obtained by SSG B__ (applicant's 3rd ex-wife) and CPT T__ A__ (another of the applicant's former spouses), along with the evidence of physical abuse provided, it is my recommendation these claims be pursued by a professional-law enforcement entity to verify the veracity of these claims and proceed with any necessary action. Based upon these findings, I find concern for SSG N__ B__'s safety."

e. On 19 May 2018, Ms. N__ N__ T__ filed a complaint with German National Police; Ms. N__ T__ identified herself as a single German National, and she provided the following sworn statement:

(1) On 18 May 2018, she and her friend, Ms. A__ M__, went to a local bar; they arrived around 0020 hours. The bar is frequented by Americans, and, during the course of the night, they met a man who introduced himself as [applicant's last name].

(2) Around 0430 hours, they left for another establishment, where they had some pizza. About 0515 hours, Ms. N__ T__'s friend decided to take a taxi back to her friend's place. Ms. N__ T__ stated she did not know how to get back home, and the applicant offered to book a hotel room for her; after some back and forth, the applicant suggested Ms. N__ T__ could come back to his place. The applicant told her he would sleep on the couch while she slept in the bed, and he hoped this would okay with her; after another friend told her the applicant was a "decent man," Ms. N__ T__ decided to go with the applicant to his place.

(3) When they entered the gate to the military post, the applicant signed her in, and they took a cab to the applicant's on-post apartment. The applicant said he was going to take a shower, and Ms. N__ T__ should go to sleep in the bed. She took off her jeans and was only wearing a long top; she got into the bed and soon fell asleep.

(4) At some point, the applicant got into the bed with her and told her to give him a kiss; Ms. N__ T__ said she only wanted to sleep because she was really exhausted. The applicant turned her onto her back and started kissing her neck; he then laid on top

of her. Ms. N__ T__ told him to get off and that she did not want to have sex with him. She explained that she had recently received medical treatment for a cyst in her ovaries and that having sex might rupture the cyst; the applicant did not care about that.

(5) Ms. N__ T__ tried to push the applicant off of her but could not; he is a 6-foot tall man. When Ms. N__ T__ asked him to get off of her, he only talked about how horny he was and that he could not sleep like that. He pulled down Ms. N__ T__'s panties and began to rub his private parts on hers; after he penetrated, Ms. N__ T__ was able to push him off. She eventually was able to jump out of bed; she started crying as she put on her clothes, and she told the applicant she could not stay and that she just wanted to leave. This was when the applicant realized she was crying and he jumped out of bed and apologized.

(6) Ms. N__ T__ left the apartment and the applicant followed her into the street; the applicant explained that, because he had signed her into the base, he would need to sign her out. Ms. N__ T__ said she did not care, she just wanted to leave, and she handed him the papers she had received at the gate. The applicant said that it did not matter, but that she should not leave crying because everyone would see that something had happened.

(7) Ms. N__ T__ called her friend R__ M. N__, a USAF Staff Sergeant (SSgt/E-5) and asked him to come pick her up and take her home. She then walked to the large gate; the applicant followed her the whole way, telling her to "please be very careful whom to tell about this as he had a child and good job. He said that he was a good guy and that there was a lot at stake for him."

(8) Ms. N__ T__ continued, "I kept walking until I reached an intersection in [the nearby city]. He then told me to follow him, and that he would drive me home. He said that we could still be friends, and that it was not so bad. He then told me again to please think of his daughter. I then told him, that I was just going to leave, and that I did not care about what he thought. Maybe he ought to think about how he treated other people."

(9) Ms. N__ T__ then walked off and met her friend, and her friend took her to the police where she filed a complaint. She noted, "I did not sustain any injuries. I simply tried to push [applicant] away from me. He did not hit me or anything, and I did not sustain any injuries." "[Applicant] had also been drinking alcohol that night, but I don't think he was so intoxicated as to not know what he was doing." Ms. N__ T__ indicated that she agreed to undergo an examination; she was still wearing the same clothes and had not showered.

f. On 19 May 2019, CID initiated an investigation after receiving a report from German National Police that the applicant may have committed a sexual assault; CID

interviewed the applicant but he invoked his legal rights and requested legal counsel. On 1 June 2018, USAF SSgt R__ M. N__ provided a sworn statement to CID. SSgt N__ stated:

(1) On the night of 18 May 2018, Ms. N__ T__ told him she was going to hang out with one of her friends, and she asked him to give her a ride home as they were going to have a few drinks; SSgt N__ agreed.

(2) Around 0619, Ms. N__ T__ called him; she seemed to be walking along the side of a road, and she sounded "very scared, like she was crying and upset." SSgt N__ asked what was wrong and where she was; she responded she did not know where she was but that she was running away from someone. She sent him her location via phone, and he picked her up near an eatery; she looked very sad and was crying and upset.

(3) SSgt N__ asked again what was wrong, and, with a lot of tears, she replied, "she's never going out again and that she had been raped. She said that she was waiting on her friend to come downstairs for 45 min, and she went upstairs and some guy opened the door and told her she can sit on the sofa while she waits for the friend. Then she said her friend took a long time and the guy "pulled out his penis and forced himself on to her" and that he "penetrated her a few times."

(4) "She kept telling me that her (private parts were) hurting very bad while she was crying. So I told her that she should report the situation. She was very scared and she didn't want to go to the police because she felt no one would believe her. She thought that people would think it's the stereotypical 'German woman like black military man' case and no one would believe her. She also kept saying that the guy was in the Army (E6) and he was chasing after her saying please don't tell anyone because he wouldn't be able to see his daughter again and he would lose his job."

(5) SSgt N__ finally convinced her to go to the police; later that day, Ms. N__ T__ asked him to drop off some clothes for her at the hospital because they were taking the clothes she had been wearing. Around 1500, SSgt N__ picked up Ms. N__ T__ from hospital and the police station and took her home; she was still crying the whole time and saying she was going to try and forget that this had ever happened.

(6) The CID Special Agent asked if SSgt N__ had noted any changes in Ms. N__ T__'s demeanor after the incident. SSgt N__ answered, "She is always sad now-a-days. She took a week off work because she said she can't focus and is always crying. She said she would never go out again and tried to forget about it. I try to keep her mind off it when I talk to her but sometimes somethings trigger those memories and she becomes frustrated with the process. Ms. N__ T__ even one time said she felt suicidal. That's why I keep checking on her regularly."

g. On 10 September 2018, CID reviewed its investigation with a Judge Advocate General (JAG) officer; the JAG officer opined that probable cause existed to believe the applicant had committed the offense of sexual assault. On 22 February 2019, a trial counsel advised COL T__ L. H__, Office of the Staff Judge Advocate, 21st Theater Sustainment Command that SSG N__ B__ and Ms. N__ T__, both victims in the case against the applicant, had declined to participate in a court-martial, and, absent their testimony, the alleged offenses against the applicant could not be proven.

h. On 9 April 2019, the Commanding General (CG) of the 21st Theater Sustainment Command issued the applicant a general officer memorandum of reprimand (GOMOR). The CG reprimanded the applicant for having multiple extramarital sexual relationships, for being physically and verbally abusive towards his intimate partners, and for making false official statements about these relationships. On 29 April 2019, the applicant acknowledged receipt of the GOMOR and indicated his intent to submit a rebuttal.

i. On 31 May 2019, a paralegal NCO affirmed in an MFR that, although the applicant had elected to submit matters in rebuttal, as of that date, the applicant had provided no response. On 13 June 2019, the GOMOR imposing official directed the GOMOR's placement in the applicant's OMPF.

j. On 5 August 2019, the applicant underwent a behavioral health evaluation; a behavioral health provider completed a DA Form 3822 (Report of Mental Status Evaluation) and indicated the applicant had "positive screens" on "BHDP; however, pt (patient) reported symptoms are linked to legal circumstances and not currently impacting functioning." The report further indicated the applicant met the behavioral health medical retention standards outlined in AR 40-501 (Standards of Medical Fitness).

k. On 8 November 2019, the applicant submitted a request for voluntary retirement, effective 1 November 2020; on 8 November 2019, the supporting transition center forwarded the applicant's retirement application through the Commander, Regional Health Command, Europe to the U.S. Army Human Resources Command (HRC).

l. On 6 April 2020, the applicant's company commander advised him, via memorandum, that he was initiating separation action against the applicant, under the provisions of paragraph 14-12c (Acts of Patterns of Misconduct – Commission of a Serious Offense), AR 635-200.

(1) The commander stated, "The reasons for my proposed action are: Between 6 May 2017 to 7 September 2017, on several occasions, you had an inappropriate adulterous relationship with MSgt S.W., a woman not your wife. On 18 May 2018, you sexually assaulted Mrs. (sic) N.T."

(2) The commander further indicated he would be recommending the applicant for an under other than honorable conditions character of service, but the final decision rested with the separation authority (identified as Commander, Headquarters, Department of the Army (DA) (AHRC-EPR-F), 2461 Eisenhower Avenue, Alexandria, VA 22332-0478).

m. On 10 April 2020, after consulting with counsel (a JAG officer), the applicant acknowledged counsel had advised him of the basis for his pending separation action and explained the separation actions effects, the rights available to him, and the effect of waiving those rights. The applicant elected to appear personally with counsel before an administrative separation board; the election document additionally includes a lined-out sentence that reads, "I have been advised of my right to submit a conditional waiver of my right to have my case considered by an administrative separation board."

n. On 21 May 2020, the applicant's commander submitted his separation recommendation; he identified the specific reasons for his action as being, "Between 6 May 2017 to 7 September 2017, on divers occasions, the SM (service member) had inappropriate adulterous relationship with MSgt S.W., a woman not his wife. Additionally on 18 May 2018, he sexually assaulted Mrs. (sic) N.T." The commander went on to state, "SM had multiple serious offenses, did not show remorse and engaged in additional misconduct. His service should be terminated." He additionally noted that "SM has always had a positive attitude, even (throughout) the 33 months of being flagged and losing his promotable status. He has complied with all legal instructions."

o. On 28 May 2020, the applicant's battalion commander, Lieutenant Colonel C__ M. B__, recommended the applicant's separation and advocated for a general discharge under honorable conditions. On 29 May 2020, the Medical Center commander, COL M__ A. W__ added his endorsement, recommending the applicant's separation with an under other than honorable conditions character of service.

p. On 31 August 2020, the applicant received notification to appear before an administrative separation board; the applicant acknowledged receipt that same date.

q. Counsel provides a document, filed by the applicant's civilian counsel, on 11 September 2020, and titled, "Motion for Bill of Particulars and Motion to Exclude Evidence Unrelated to 6 April 2020 Notice of Separation under AR 635-200 ICO [applicant]."

(1) Counsel argued the separation notification had explicitly identified two matters: the applicant's inappropriate and adulterous relationship with MSgt S.W. and the sexual assault of Ms. N.T.

(2) Despite the clarity of the foregoing language, the board recorder now sought to "unilaterally introduce additional allegations which the Commanding General has clearly not authorized, as taken from the prior 9 April 2020 GOMOR, which reads, 'you were physically and verbally abusive towards one of your spouses' and 'made a false official statement...to an investigating officer regarding the nature of your many inappropriate relationships.'"

(3) "Moreover, while the undersigned has yet to download the CID file, as it weighs 1.7 GB, out of an abundance of caution, the undersigned requested brief Bill of Particulars to clarify the issues in this case."

(4) "Conclusion. The Commanding General's identified two bases for involuntary separation in his notice to [applicant]. Although the Recorder may have provided a board file that includes information that is not relevant to the specific allegations in the notification memoranda, it is my recommendation that this material be removed from the board packet and not considered as a potential basis for separation. Of course, should the Board determine separation warranted upon the noticed offenses, the Recorder may then seek to admit this evidence for characterization of service, which the Respondent will then contest."

(5) Counsel requested, "In sum, the Government should withdraw the current board file, removing and/or redacting references to alleged misconduct outside the scope of the 6 November (sic) 2020, separation memorandum; and the board members should be directed to not consider any material they may have reviewed as part of the current board file."

r. On 14 September 2020, an administrative separation board convened to determine whether the applicant should be retained or separated; the applicant, his civilian counsel, and military counsel were present.

(1) During voir dire, two board members were dismissed so the applicant's counsels could further question the board president; after a recess, the entire board reconvened, and counsel requested the board president be excused because COL M__ A. W__ was the board president's senior rater. The board recorder removed the chain of command recommendations from the board's packets, but the board president continued his participation on the board.

(2) The applicant's counsel requested that a portion of the supporting documents be redacted or removed and held, pending the board's outcome; the board's summarized proceedings does not show the result of that request. The board recorder then offered documents in evidence and the applicant's counsel did not object; the recorder did not call any witnesses.

(3) Applicant's counsel submitted evidence for the board's consideration, but also did not call any witnesses. Following closing arguments, the board recessed but reconvened to ask its legal advisor a question about witnesses; the summarized proceedings states, "The legal advisor advised the board members of the lack of notice required to call any witnesses IAW (in accordance with) para 2-10b (Board Procedures) of AR 635-200." (Paragraph 2-10b for the version of AR 635-200 that was in effect at the time states, "The Soldier will be notified of names and addresses of witnesses expected to be called at the board hearing. The Soldier will also be notified that the recorder of the board will, upon request of the Soldier, try to arrange for the presence of any available witness that he/she desires").

(4) After deliberations, the board announced the following findings and recommendations:

(a) The board determined the preponderance of evidence supported that the applicant had had an inappropriate and adulterous relationship with MSgt S__ W__ and that the applicant had sexually assaulted Ms. N__ T__.

(b) The board recommended the applicant's elimination from the service with an under other than honorable conditions character of service.

s. On 16 September 2020, the applicant's civilian counsel requested the disapproval of the board's findings and recommendations and asked that the separation authority (HRC) convene a new board to consider the applicant's case. Counsel argued:

(1) The applicant was protected by Title 10 (Armed Forces), United States Code (USC), section 1076 (sic, 1176 (Enlisted Members: Retention after Completion of 18 or more, but Less than 20, Years of Service)) because he had completed over 18 years of active duty service. Nonetheless, he would be reaching his 20-year mark, on 31 October 2020, and "as such, HRC is arguably destined to examine this case very closely with the benefit of a verbatim board transcript."

(2) The administrative separation board "harshly eviscerated the entirety of [applicant's] future promotion, retirement, health care benefits, VA (Department of Veterans Affairs) benefits, and left him a private E-1." "This draconian result occurred is made all the more untenable by the insufficiency of the evidence, which unquestionably permeates this case."

(3) Counsel then enumerated the board's prejudicial errors. The board found the applicant committed adultery with MSgt W__ and sexually assaulted Ms. N__ T__ despite the "palatable lack of evidence." "In order to accomplish its far-fetched aims, the government relied upon a 'completely paper case' and the board was unable to address inconsistencies."

(a) Concerning the sexual assault, the government only presented two statements: the complaining witness and her "'outcry' male friend." The government possessed the complete CID investigation, to include Ms. N__ T__'s 60-minute audio-taped interview but did not offer it into evidence. Furthermore, the government failed to present any forensic or physical evidence.

- Counsel maintained Ms. N__ T__ had declared she was unafraid of the applicant during the alleged incident, and she admitted she had "wholeheartedly 'lied to her friend about the entirety of the incident"; the board never learned of these admissions
- Additionally, the board recorder explained inconsistencies in Ms. N__ T__'s statements by claiming she was in a "state of shock after the rape"
- The applicant submitted himself to thorough, extensive, and meticulous SANE (Sexual Assault Nurse Examiner) examinations, and the fact that the government offered no forensic evidence proved that there was none

(b) As to the allegation of adultery, the government failed to show the board a contradictory statement made by MSgt W__ to CID; instead, the board recorder "almost half-heartedly argued that romantic banter was the same as sex," an absurd notion that the board nonetheless accepted.

(4) Counsel continued, "This case was also even momentarily dissatisfying to the ASB (administrative separation board), as they asked about their intrinsic right to 'call witnesses,' but the legal advisor arbitrarily denied the request for witnesses." The legal advisor also denied counsel's request to remove the board president after counsel identified the apparent undue influence of COL M__ A. W__, a member of the applicant's chain of command and the board president's senior rater. COL W__'s influence also affected the other board members, as they all came from the same unit.

t. On 21 September 2020, Major (MAJ) D__ E. W__ prepared a memorandum in which he confirmed he had been the board's legal advisor; he responded to counsel's arguments.

(1) Regarding counsel's request to remove the board president, after a thorough voir dire, no bias was found; additionally, the board president unequivocally stated he could be fair, impartial, and objective, and he would not give COL W__'s recommendations any greater weight. Counsel neglected to mention that he (MAJ D__ E. W__) had upheld the objection to remove chain of command recommendations from the board's packets.

(2) Concerning counsel's allegation that he (MAJ D__ E. W__) arbitrarily denied the request for witnesses, MAJ W__ provided some context:

(a) Counsel initially objected to the board seeing any parts of the investigation that alleged misconduct not already addressed in the applicant's separation notification. Because the information was "inextricably co-mingled" with other evidence, both counsel and the board recorder agreed to only show the information if the board voted to separate the applicant.

(b) At some point during deliberations, the board contacted the legal advisor to ask if they could call witnesses, specifically, one or both of the complaining witnesses; neither the government nor the applicant had asked for witnesses to be called. After researching AR 635-200 and AR 15-6, the legal advisor determined that calling witnesses would be unfair to the applicant because he would not have received proper notice, as required by the regulation. Neither side objected when the legal advisor announced his decision.

(c) "Several hours later, the board again contacted me and said both parties had some things they wanted to put on the record that could require a decision by me. At this point, I was informed the board had already deliberated and voted that [applicant] had committed the alleged misconduct and that it warranted separation. As such, they were now in the part of the hearing where the board hears evidence on possible characterizations of service and then votes accordingly."

(d) "At this time, [applicant's civilian counsel], among other things, wanted it noted that he too wanted both complaining witnesses called by the convening authority and since the board wanted them as well, by denying their request, his client was being denied a due process right. He wanted the board informed by me that it was their right to call witnesses. Before I ruled, I asked [applicant's civilian counsel] if he agreed that the regulation also discussed his client's right to call any witnesses he felt were relevant to the proceedings and that the regulation also stated he had an obligation to do his due diligence in preparing his case. He responded in the affirmative to both questions."

(e) "[Applicant's civilian counsel] further stated that both he and [applicant's military counsel] were available approximately the second week of October if the board would like to pause where it was to allow the convening authority to call the witnesses in question. He stated that his client would waive any regulatory waiting/notice periods and continued to press the issue. He asked that the board be informed that it did have the right to call witnesses, to which I agreed, however I caveated that statement by saying that generally speaking the board had the right to call witnesses, however, because of the unique situation we found ourselves, thanks to the redaction of the government's evidence, where findings had been announced as to separation but not characterization, it was too late and more importantly it would have been improper to

reopen the hearing, introduce new evidence and potentially go back and change what the board had already voted on and announced."

(f) "It's worth noting that at no time prior to the initial announcement of findings of the board did [applicant's civilian counsel] ever bring this issue of wanting the two complaining witnesses called, waiting instead until after the board announced its findings as to whether or not separation was warranted to raise it as an issue. Not after my original ruling and not in the intervening several hours between my original ruling and when findings were announced."

(g) "The fact of the matter is if [applicant's civilian counsel] wanted the two witnesses in question because he thought they could help his client's case, he could have called them, per AR 15-6 para 7-8 (Presentation of Evidence). Waiting to see how the board ruled and then complaining his client's rights were violated is a last-ditch effort to try to extend this case as close as possible to October 31, when his client reaches 20 years. The fact of the matter is that [applicant's civilian counsel] is now asking for you to provide a solution to a situation he created by deciding not to call any witnesses. While the decision to not to put on a case or not call witnesses is one the respondent certainly has a right to exercise, he also must bear the consequences of any choices he makes. Here, [applicant's civilian counsel] made that decision and when he didn't like the outcome he decided to cry foul, hoping you wouldn't see through what he is actually trying to do."

(h) "In closing, ask yourself this, if the information these two witnesses have is so important to [applicant's civilian counsel] client's due-process rights and they must be forced to face the crucible of cross examination and the board absolutely must hear their testimony, so important that [applicant's civilian counsel] is now asking to you invalidate an entire board proceeding, why didn't he just call them as witnesses? They either have information helpful to the board and his client or they don't, and if they don't, that's probably why he didn't call them. And if they don't have helpful, or even potentially harmful, information, why on earth would he advocate for the entire board to be invalidated so they can now be called?"

u. On 8 October 2020, the CG, 21st Theater Sustainment Command recommended the applicant's separation under other than honorable conditions. On 19 October 2020, the Medical Center commander, COL M__ A. W__, requested the Deputy Chief of Staff (DCS), G-1 to authorize an exception to policy allowing the applicant to remain on active duty past 31 October 2020, the applicant's ETS and his retention control point (RCP). (Per Army policy, Soldiers are permitted to serve on active duty until they reach the RCP for their respective rank; for the rank of SSG, the maximum is 20 years).

v. In a memorandum, dated 20 October 2020, the DCS, G-1 approved an exception to the policies outlined in paragraph 1-26 (Retention for Miscellaneous Reasons), AR 635-200 and table 3-6 (RCPs), DA Pamphlet (DA PAM) 601-280 (Army Retention Program Procedures).

w. Counsel provides a copy of the applicant's second request for voluntary retirement, dated 17 November 2020. The request indicates the applicant asked for a 1 May 2021 effective date. On 13 November 2020, the local transition center forwarded the applicant's retirement request to the regional health command.

x. On 10 August 2021, the Assistant Secretary of the Army for Manpower and Reserve Affairs (ASA, M&RA) directed the applicant's separation under other than honorable conditions. On 21 September 2021, orders discharged the applicant accordingly; his DD Form 214 shows he completed 20 years, 11 months, and 17 days of net active duty service, with continuous honorable service, from 20001004 through 20111208. Item 13 (Decorations, Medals, Badges, Citations, and Campaign Ribbons Awarded or Authorized) lists the following:

- Army Commendation Medal (5th Award)
- Army Achievement Medal (5th Award)
- Army Good Conduct Medal (5th Award)
- National Defense Service Medal
- Global War on Terrorism Service Medal
- Korea Defense Service Medal
- Armed Forces Service Medal
- Iraq Campaign Medal with two bronze service stars
- NCO Professional Development Ribbon with Numeral "3"
- Army Service Ribbon
- Overseas Service Ribbon with Numeral "4"
- U.S. Army Excellence in Competition Badge, Bronze, Pistol
- Expert Marksmanship Qualification Badge with Pistol Bar

7. On 6 October 2023, after obtaining a redacted CID Law Enforcement Report (LER) that pertained to the sexual assault allegation against the applicant, the Army Review Boards Agency (ARBA) provided the applicant and his counsel a copy for review and the opportunity to submit a statement or additional evidence on his own behalf. With the LER, ARBA also sent the following additional documents:

- Administrative Separation Packet with CD-DVD
- Administrative Separation Packet (Part 1)
- Administrative Separation Packet (Part 2)
- Supporting Documents (Tabs B1 through B5)

- Physical Examination (Tab C)
- Retirement Documents (Tab D)
- Trial Counsel Recommendation on Disposition of Case
- Article 15 – Mental, Medical REFRAD Counseling
- ASA, M&RA Decision Memorandum

8. On 24 October 2023, counsel responded with a supplemental petition and 7 exhibits.

a. In his petition, counsel emphasized that the recent release of additional information did not include the two most important items of evidence: the audio recording, in which Ms. N__ T__ admitted that she had lied, and the board recorder's slides, wherein he indicated the applicant had raped Ms. N__ T__.

(1) "This is particularly important because [applicant] was separated from active duty with over 20 years of service and the recorder withheld this exculpatory evidence before, during, and after the administrative separation board hearing."

(2) "Had [applicant] received this exculpatory information before his separation proceedings, it is likely that the board members would have considered it, found that there was no rape and no sexual assault, and likely recommended his retention. Because of this violation, [applicant] was denied proper consideration for retirement that was estimated to be approximately \$1,948,895 – if he lives until the age of 87."

b. Counsel contended that the remainder of the evidence corroborated the applicant's assertions that he was denied due process and should be entitled to relief.

(1) Counsel argued that the first error in the applicant's record was that the Army improperly twice extended the applicant beyond his ETS; the second error was the Army's failure to notify the applicant until his administrative separation board that he was accused of rape.

(2) Additional violations included bias on the part of the board president and counsel not being allowed to call witnesses. The final issue was that the Army denied the applicant proper consideration for retirement and an assessment of his appropriate retirement grade by the Army Grade Determination Review Board.

c. Counsel addressed the timeliness of his response to the Ex-Parted material, summarized the applicant's service, and noted the applicant was considered for promotion and selected to E-7; additionally, the applicant requested to voluntarily retire twice and his unit failed to appropriately process his requests. Despite all of the foregoing injustices, the applicant continued to serve faithfully and honorably; in fact, COL J__ H. G__ approved the applicant for a Humanitarian Service Award, based on

the applicant's contributions to COVID-19 operations and in accordance with MILPER (Military Personnel) Message Number 20-236.

d. Counsel describes the applicant's separation, the lawsuit he filed in November 2022, and the arguments counsel made; counsel then addresses the government's motion for a remand, and the court's issuance of the remand order. On 10 October 2023, the government filed a status report indicating the ABCMR had obtained the full separation board file and CID investigation with redactions and would be forwarding the documents to counsel. Counsel then restated earlier arguments.

e. With regard to the 1,373 pages of additional documents, counsel provides the following responses:

(1) Legal Review dated 28 September 2020: the legal review failed to meaningfully address and consider the errors and due process violations; specifically:

- The applicant's retirement eligibility – had the applicant's unit properly processed the applicant's voluntary retirement request, the Secretary of the Army could have approved the retirement and referred the applicant to the Grade Determination Review Board
- Trial by Ambush – instead of having a fair hearing where both sides could make arguments and the board could consider all evidence, the recorder tilted the scales of justice in his favor by withholding the exculpatory evidence
- Withholding exculpatory evidence – Ms. N.T. admitted she had lied about her allegation and affirmed the applicant did not frighten her; this was particularly problematic since the recorder introduced SSgt R__ M. N__'s statement which alleged the applicant had raped Ms. N.T.
- No Witnesses – the board members requested witnesses, but the legal advisor stated witnesses could not be called, per paragraph 2-10b, AR 635-200; however, the rule does not prohibit witnesses, rather it simply requires the Soldier pending an administrative separation board to be notified
- No Due Process – because the board president knew his senior rater's character of service recommendation, the board president was biased against the applicant, and the legal advisor failed to excuse him

(2) Commander's Report – Proposed Separation dated 21 May 2020: "The commander's report states that it recommended to separate [applicant] from the Army prior to the expiration of his current term of service. It also stated that his length of term for which he enlisted was indefinite. However, [applicant] was supposed to ETS on 31 October 2020."

(3) Request for Exception to Policy – "The memorandum states that paragraph 1-26 restrictions were waived to complete the separation process at HQDA (Headquarters, Department of the Army). Paragraph 1-26 states that retention beyond a Soldier's ETS to process administrative separation proceedings is not authorized. It states that in order for a Soldier to be retained beyond the ETS for any reason other than paragraph 1-21 to 2-14 (sic), a request must be submitted to either AHRC-EPR-F, AGR or DARP-ARE."

(a) "In [applicant's] case, the extension was authorized by DAPE-MPE. Because this violates AR 635-200, the extension was improper."

(b) This is also arbitrary and capricious because, on one hand, the unit delayed the processing of [applicant's] retirement request by almost a year, and on the other hand – it kept inappropriately extending him."

(4) DA Form 3822 – "This form shows that [applicant] was screened for Post-Traumatic Stress Disorder, Depression, Traumatic Brain Injury, Substance Misuse and Sexual Trauma, on or about August 5, 2019. The provider's notes state that 'positive screens observed on BHDP.' While [applicant] indicated that this was due to his legal concerns, further examination should have been considered to determine the actual symptoms. Merely indicating that a Soldier had 'positive screens' and concluding that this is due to legal issues amounts to a superficial and perfunctory medical examination."

(5) Additional Evidence – "The injustices and errors in [applicant's] records are highlighted by his 2018 selection for promotion to the rank of Sergeant First Class. Once the allegations started, he continued to be flagged and extended without due process, and his 2019 retirement request was not properly processed for about 1 year. In addition, [applicant] served faithfully and honorably and he was recommended for the Humanitarian Service Medal."

f. Counsel concludes, "The grievous errors relating to: (1) the withholding of exculpatory evidence, (2) improper extensions, (3) failure to properly notify [applicant] about the grounds for separation merit relief in this case, and (4) denial of witnesses to the board members merit relief in this case. For this reason, [applicant] should be entitled to relief."

g. As exhibits, counsel provided documents ARBA had previously Ex Parted to the applicant and counsel; as new evidence, counsel submitted a One-Star Note from Brigadier General R__ T. S__, congratulating the applicant on his selection for promotion to SFC, and documentation indicating the applicant was recommended and approved for the Humanitarian Service Medal.

9. On or about 2 November 2023, ARBA provided two audio files from the applicant's administrative separation board. On 16 November 2023, counsel provided his response, contending, "The audio-recordings corroborate the identified due process violations and they warrant granting relief to [applicant] in this case. In addition, the audio recordings reveal additional due process violations."

a. Due Process Violations.

(1) Violation #1 – "Recorder's slides alleged rape, when Respondent was merely on notice for sexual assault." "In his legal deficiency memorandum, dated September 16, 2020, [applicant's civilian defense counsel] noted that [applicant's] notice rights were violated. [Applicant] was given one reason for separation, but in the Trial Counsel's (sic, board recorder) slides presented during closing arguments the Trial Counsel presented another reason. This violates AR 635-200 and amounts to trial by ambush."

- Applicant was notified that he would be separated for sexual assault; however, "during the hearing, the recorder alleged that [applicant] effectively committed the offense of rape by using force against the complaining witness"
- "According to the second audio-recording file, Trial Counsel made closing argument...where he referenced about 21 different slides"
- "Despite [applicant's] requests to obtain the slides to the ABCMR, his former trial defense counsel, and through FOIA requests, the slides have not been provided to [applicant]"
- "Right from the start of his closing arguments, the Trial Counsel erroneously told Board members that [applicant] effectively raped the complaining witness by asserting that [applicant] used force to sexually assault the complaining witness – which fits the definition of rape, not sexual assault"
- Additionally, the Trial Counsel told the board members elements of proof for sexual assault; but the elements he stated actually described rape
- "To make matters, worse, [applicant's] counsel – who reviewed the interview of the complaining witness – also explained that she recanted her allegation, but the Trial Counsel failed to produce the interview during the hearing"
- Further, the Trial Counsel introduced the GOMOR, despite the GOMOR not being a basis for separation; Trial Counsel claimed the applicant never asked to have the GOMOR removed from the board's packet, but this was not true; the Trial Counsel actions were prejudicial and violated the applicant's rights

(2) Violation #2 – "Board President Bias Due." "The audio recordings corroborate that the Board president was biased and [applicant's] civilian counsel specifically moved to excuse him." "Ultimately, the conflicted board president presided over the separation board for [applicant] that fulfilled with COL W__'s recommendation for separation with an other than honorable characterization of service."

(3) Violation #3 – "Improper Denial of Witnesses to the Board and [applicant]."

(a) "After the board members recommended to separate [applicant] – but before they made a recommendation on his characterization of service – the board members requested to call witnesses. However, the legal advisor told them that it was too late." "In addition, [applicant's] counsel also requested to call 2 witnesses – MSgt W__ and the complaining witness."

(b) "However...the legal advisor denied this request because the board members made a recommendation on separation. However – the board members could have considered the testimony of these witnesses for the characterization of service. This is particularly important since [applicant's] counsel pointed out that the complaining witness recanted her allegation of sexual assault and the trial counsel withheld her CID interview."

(c) Further, "[applicant's] counsel pointed out that MSgt W__ changed her previous statement concerning her relationship with [applicant]."

(4) Violation #4 – "Erroneous Advice to Board Members Concerning Characterization of Service."

(a) "Without conducting additional legal research – the Legal Advisor erroneously advised the board members about different characterizations of service. The erroneous advice led two out of three board members to conclude that the proper characterization of service was other than honorable. The board members had questions about the difference between an honorable characterization of service and a general under honorable conditions."

(b) The Legal Advisor effectively said that an honorable characterization of service amounts to having no misconduct while serving in the Army. The Legal Advisor said that a general discharge denied GI educational benefits. The Legal Advisor also explained that an other than honorable characterization of service denied most of benefits."

(c) The Legal Advisor's inadvertent actions resulted were unjust, with the result being that the applicant received an under other than honorable conditions character of service. "This is even more concerning because the first allegation dated back to 2017, the second allegation dated back to 2018, and [applicant] was separated in 2021 – with no further misconduct between 2018 and 2021 that strongly suggested full rehabilitation."

b. In conclusion, counsel states, "The grievous errors relating to: (1) accusing [applicant] of rape but notifying him that he was proposed for separation for sexual

assault, (2) board president bias, (3) improper denial of witnesses, and (4) erroneous advice concerning the honorable characterization of service merit relief in this case. For this reason, [applicant] should be entitled to relief."

10. On 9 January 2024, counsel submitted documents showing the U.S. Army Crime Records Center granted partial relief to the applicant.

a. DA CID Memorandum, dated 16 December 2023 and subject: "Legal Review of Request for Amendment of Record [Applicant]." An attorney-advisor wrote:

(1) This responds to your request for a review of [applicant's] request for amendment of Law Enforcement Report (LER) 000XX-20XX-CIDXXX-00XXX-6E. Based on the review of the LER and amendment packet, there is probable cause to believe [applicant] committed the offense for which he was titled."

(2) The memorandum goes on to cite Public Law 116-283 (William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021), section 545 (Removal of Personally Identifying and Other Information of Certain Persons From Investigative Reports, The Department of Defense Central Index of Investigations, and Other Records and Databases). This provision requires the Secretary of Defense to establish policies and procedures for an individual to request the amendment, correction, expungement, or removal of and LER when it is determined probable cause that the individual committed the alleged offenses did not exist.

(3) "[Applicant] (then Staff Sergeant [Applicant]) was titled for violation of Article 120, Sexual Assault, Uniform Code of Military Justice, when he had sexual intercourse with a female German citizen against her will and without her consent. In accordance with DoDI 5505.7 (Titling and Indexing by DOD Law Enforcement Activities), paragraph 3.2 (Considerations), I have reviewed the LER and amendment request and concur with the Trial Counsel there is probable cause to believe [applicant] violated the offense for which he was titled."

(4) "Consistent with the direction received from the Secretary of the Army and DoDI 5505.7, since probable cause existed to believe [applicant] committed the offenses listed in the LER, his record should not be amended to remove his name from the title block and any corresponding entry into the Defense Central Index of Investigations (DCII) should remain."

(5) "I note that [applicant] was titled for the offense of sexual assault under Article 120 and Article 120b, UCMJ. Recommend the LER be amended to only reflect a violation of Article 120 and not Article 120b, UCMJ. Article 120b's offense is Rape and Sexual Assault of a Child. There is no evidence in the LER that [applicant] was

investigated for a violation of Article 120b. The victim of the sexual assault was an adult; therefore, Article 120b is not correct."

b. DA CID letter dated 4 January 2024 and addressed to the applicant. CID's Chief, FOIA/PA (Privacy Act) advised the applicant that, after a review under the provisions of DODI 5505.07 and Public Law 116-283, section 545, CID partially granted the applicant's request. CID made corrections to the DA Form 4833 (Commander's Report of Disciplinary or Administrative Action), dated 5 October 2018, and the final Report of Investigation in which the applicant had been titled. CID provided the applicant redacted versions of both documents.

11. On 26 January 2024, ARBA provided the applicant and his counsel four documents received from the Office of the Deputy Chief of Staff (DCS), G-1; the documents consisted of the following:

a. Landstuhl Regional Medical Center (LRMC) memorandum, addressed to DCS, G-1 and dated 26 February 2021, with subject: Request for Exception to Policy (ETP) – Army Regulation (AR) 635-200, Paragraph 1-26 (Retention Beyond ETS (sic)) and Army Directive (AD) 2016-19, Retaining a Quality Noncommissioned Officer Corps (Retention Beyond RCP) – [Applicant]. The LRMC commander requested authorization to retain the applicant beyond his ETS and RCP due to the time required for HQDA to consider and process the applicant for separation under other than honorable conditions. The applicant's Enlisted Record Brief was included as an attachment.

b. Two divisions within the DCS, G-1 separately approved, via memoranda, an extension of 180 days beyond the applicant's ETS and RCP. As their authorities, both listed paragraph 1-26, AR 635-200; however, the Chief, Enlisted Career Systems Division further cited DA PAM (Department of the Army Pamphlet) 601-280 (Army Retention Program Procedures), while the Chief, Military Personnel Enlisted Division referenced AD 2016-19.

12. On 7 February 2024, counsel submitted the following response and supporting documents:

a. "BLUF (bottom line up front). The 26 January 2024 letter shows that [applicant] was illegally and involuntarily extended on active duty beyond his ETS. Instead of being allowed to retire pursuant to (Title) 10 U.S.C. (section) 1176 (Enlisted Members: Retention after Completion) because he had 20 years of qualifying service, he was improperly extended and separated. (Counsel cites a 2005 U.S. Court of Federal Claims case that addressed retaining a Soldier selected for involuntarily separation if he/she is within 2 years of qualifying for retirement, per Title 10, section 1176(a)). This error resulted in the injustice of being separated with an other than honorable characterization of service after over 20 years and 11 months of active duty service –

while also being selected for promotion to the rank of SFC. The first undated extension request relied on invalid grounds for the extension which in turn rendered all other extensions invalid as well. Consistent with (Title) 10 USC 1552 (Correction of Military Records: Claims Incident Thereto), [applicant] should be entitled to relief in this case."

b. Counsel addressed the timeliness of his response and provided a summary of the applicant's case.

c. "Specific Responses: The additional correspondence proved that [applicant] was illegally extended on active duty. The correspondence contains 2 extension requests (1 is not dated, and 1 is dated 26 February 2021) and 1 undated approval." "Both references concern Soldiers desirable for retention. The first undated request, subject: ETP, refers to paragraph 1-26 and AD 2016-19. AD 2016-19 concerns retaining high quality NCOs."

(1) "Because at the time [applicant] was facing numerous adverse actions, received a reprimand, and the unit wanted to administratively separate him without retirement – this was not a proper mechanism to retain him for 180 additional days. The unit should have expedited the processing or stopped proceedings and allowed him to retire pursuant to (Title) 10 U.S.C. (section) 1176. Based on this, the extension was illegal and all decisions based on it also violate(d) his rights. This violation is not harmless because [applicant] lost his retirement after almost 20 years of honorable and impeccable service."

(2) "The second memorandum is dated 26 February 2021. It references the 14 September 2020 administrative separation board. Because the first request was invalid, this request is also is (sic) invalid because there was a break in service. [Applicant] never agreed to the extension and he wanted to retire at 20 years of service."

(3) "The third undated memorandum states that the request under AR 635-200, paragraph 1-26 (retention beyond ETS of desirable Soldiers) and DA PAM 601-280 is approved. However, neither of the 2 requests referenced DA PAM 601-280. To the extent that there is another extension request, it was not provided to [applicant]."

(4) "While there are 2 extension requests, there is only 1 approval. By 5 October 2020, [applicant] had 20 year of service, all administrative proceedings should have stopped and he should have been allowed to retire. Because his unit illegally extended him until 21 September 2021, his due process rights were violated. Despite this, [applicant] continued to serve faithfully and honorably."

(5) "Consistent with (Title) 10 U.S.C. (section) 1552, the error here is that the record shows that [applicant] was illegally extended beyond his ETS. (21 September

2021 instead of 5 October 2020). The injustice here is that he was separated with an other than honorable characterization of service and no retirement after having served for 20 years, 11 months and 17 days. The delays occurred because of the allegation that was subsequently recanted – as explained by [applicant's] attorney. No audio-recording of the complaining witness has been provided to [applicant]. Based on this, he should be entitled to relief. Granting relief in this case is not tantamount to condoning the underlying allegations but is consistent with the ABCMR fulfilling its mandate under (Title) 10 U.S.C. (section) 1552 to correct errors and injustices."

d. With his response, counsel submits a copy of AD 2016-19, dated 26 May 2016.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The Board reviewed the AR 15-6 and CID investigations' findings and recommendations as well as the evidence presented during the administrative separation board. The Board noted several inconsistencies in the allegations made against the applicant. The Board weighed the varying version of events involving the alleged sexual assault and found the applicant's account to be more credible. The Board noted the lack of physical evidence and the decisions by both the Army and German police not to pursue charges. The Board also considered the length and quality of the applicant's service and the multiple extensions, while allowable under Army regulations, beyond his retention control point in order for to complete the elimination action. Based on a preponderance of evidence, the Board found the decision to involuntarily separate the applicant, who had over 20 years of active federal service, with a less than honorable service characterization to be unjust. The Board determined correction to the applicant's record is warranted to set aside the administrative separation action and show he was retired in the grade/rank of E-6/SSG effective 21 September 2021.

2. Counsel requests the applicant be retired as either an E-6 or E-7 and his file considered by a grade determination board. Enlisted Soldiers usually retire in the grade held on the day before their placement on the retired list. They are generally not subject to grade determinations except for disability separations and 30-year cases, neither of which is applicable here. Further, while the applicant was selected for promotion to E-7, he was never promoted to that grade. The highest grade the applicant held on active duty was as an E-6/SSG. The Board determined the applicant should be retroactively placed on the retired list in that grade and rank.

3. Finally, the Board noted that the applicant has not requested any additional relief in the form of removal of the underlying derogatory information or to be untitled. The Board

does not correct records absent a request for the individual concerned. As such, the Board limited its consideration to those corrections requested by the applicant.

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 that the evidence presented was 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:

- Setting aside the applicant’s administrative separation under chapter 14 of Army Regulation 635-200
- Placing the applicant on the retired list in his retired grade of staff sergeant (SSG)/E-6 effective the date he was discharged with back retired pay
- Issuing the applicant appropriate retirement orders and resultant DD Form 214 as a result of this correction

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 any relief in excess of that described above.

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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 635-200, in effect at the time, prescribed policies and procedures for enlisted administrative separations.

a. Proponent and Exception Authority. The proponent of this regulation is the DCS, G-1. The proponent has the authority to approve exceptions or waivers to this regulation that are consistent with controlling law and regulations. The proponent may delegate this approval authority, in writing, to a division chief within the proponent agency or its direct reporting unit or field operating agency, in the grade of colonel or the civilian equivalent.

b. Paragraph 1-26 stated:

(1) Retention beyond a Soldier's ETS to process administrative separation proceedings pursuant to this regulation was not authorized. If it was desirable to retain a Soldier beyond the ETS for any reason other than those covered by paragraphs 1-21 (Time Lost to be Made Good), 1-22 (When Investigation is Initiated with View to Trial by Court-Martial or Soldier is Awaiting Trial, or Result of Trial), 1-23 (En Route to United States or to Territory of Origin), or 1-24 (Medical/Dental Care Required or Sick in Hospital when Period of Service Expires), requests for approval of such action for Regular Army personnel had to be submitted to: Headquarters, DA (AHRC-EPR-F), 200 Stovall Street, Alexandria, VA 22332-0478.

(2) The Army issued a revision of AR 635-200, effective 28 July 2021, and in this new iteration, the contents of paragraph 1-26 were moved to paragraph 1-27; per the current regulation, the DCS, G-1 is the approval authority for extending Regular Army Soldiers beyond their ETS for the purposes of processing an administrative separation.

c. Section II (Administrative Board Procedure).

(1) Paragraph 2-4 (Notice). When the reason for separation requires the administrative board procedure, the commander will notify the Soldier in writing that his/her separation has been recommended per this regulation.

(a) In the notification, the commander will:

- cite the specific allegations on which the proposed action is based
- include the specific provisions of AR 635-200 authorizing separation
- advise whether the proposed separation could result in discharge or release from active duty and the least favorable character of service he/she could receive

- inform the Soldier of the initiating commander's character of service recommendation, and that intermediate commanders could recommend a less favorable character of service or type of discharge
- additionally, advise that the separation authority is not bound by the recommendations of subordinate commanders; however, the separation authority will not authorize the issuance of a type of discharge or character of service less favorable than that recommended by the board

(b) The Soldier will be advised of the rights to confer with counsel, obtain copies of documents being sent to separation authority, appear personally with counsel before an administrative separation board, or to waive the foregoing rights.

(2) Paragraph 2-5 (Waiver).

- When a Soldier waives his/her right to a hearing before an administrative board and the separation authority approves the waiver, the case will be processed without convening a board
- A Soldier may also wish to waive his/her right to a hearing before an administrative separation board contingent upon receiving a characterization of service or description of separation more favorable than the least favorable characterization authorized for the Soldier's separation
- In these cases, the Soldier must submit a completed Request for Conditional Waiver; separation authorities may approve or disapprove the conditional waiver; if disapproved, the case is referred to an administrative separation board
- Waivers of the board hearing will not be accepted in the cases of Soldiers who have completed 18 years or more active Federal service

(3) Separation Authority Action after Board Hearings.

(a) When the board is completed, the board proceedings will be reviewed by a qualified officer fully cognizant of applicable regulations and policies to determine whether the action meets the requirements of this regulation. When the board recommends that a discharge under other than honorable conditions be issued, the proceedings will be reviewed by an officer of The Judge Advocate General's Corps.

(b) Soldier who has completed 20 or more years of active service creditable toward retirement and for whom separation is recommended to HQDA will be given the opportunity of applying for retirement. He/she will be told that authority to submit the application does not assure that it will be approved; a DA Form 2339 (Application for Voluntary Retirement) will be attached when the case is sent to HQDA.

(4) Paragraph 2-7 (Composition of the Board).

(a) A board convened to determine whether a Soldier should be separated under the administrative board procedure will consist of at least three experienced commissioned, warrant, or NCOs. Enlisted Soldiers appointed to the board will be in grade sergeant first class (SFC) or above, and senior to the respondent.

(b) Care will be exercised to ensure that the board is composed of experienced, unbiased officers. The officers should be fully aware of applicable regulations and policies pertaining to cases for which the board is convened. If the respondent is a member of a minority group, the board will, upon written request of the respondent, include as a voting member a member who is also a minority group member, if reasonably available.

(c) The president will preside and rule finally on all matters of procedure and evidence. The rulings of the president may be overruled by a majority of the board. If appointed, the legal advisor will rule finally on all matters of evidence and challenges except to himself/herself.

(5) Paragraph 2-10 (Board Procedures).

(a) A Soldier under military control will be notified in writing of the convening date of the board at least 15 days before the hearing.

(b) The Soldier will be notified of names and addresses of witnesses expected to be called at the board hearing. The Soldier will also be notified that the recorder of the board will, upon request of the Soldier, try to arrange for the presence of any available witness that he/she desires.

(c) Factors to be considered include the cost of producing the witness; the timing of the request for production of the witness; and the potential delay in the proceedings that may be caused by producing the witness or the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training. However, if the convening authority determines that the personal testimony of a witness is required, the hearing will be postponed or continued, if necessary, to permit the attendance of the witness.

(d) The hearing will be continued or postponed to provide the respondent with a reasonable opportunity to obtain a written statement from the witness if a witness requested by the respondent is unavailable in the following circumstances:

- When the presiding officer determines that the personal testimony of the witness is not required

- When the commanding officer of a military witness determines that military necessity precludes the witness's attendance at the hearing
- When a civilian witness declines to attend the hearing

(6) Paragraph 2-11 (Evidence). The rules of evidence for court-martial and other judicial proceedings are not applicable before an administrative separation board. Reasonable restrictions will be observed, however, concerning relevancy and competency of evidence.

(7) Paragraph 2-12 (Findings and Recommendations of the Board).

(a) The board will determine whether each allegation in the notice of proposed separation is supported by a preponderance of the evidence; the board will then determine whether the findings warrant separation.

(b) A board convened to determine whether a Soldier should be separated for misconduct will recommend that the Soldier be:

- Separated because of misconduct; the board will recommend a characterization of service of honorable, general (under honorable conditions), or under other than honorable conditions
- Separated because of unsatisfactory performance
- Retained in the Service

(c) When board action is completed on a Soldier with over 18 years of service, the findings and recommendations of the board, with complete documentation and the recommendation of the convening authority, will be forwarded to Headquarters, DA (AHRC-EPR-F), 2461 Eisenhower Avenue, Alexandria, VA 22332-0478, for final determination when the convening authority recommends discharge.

d. Paragraph 3-7a (Honorable Discharge). An honorable discharge was a separation with honor.

(1) The honorable characterization was appropriate when the quality of the Soldier's service generally had met the standards of acceptable conduct and performance of duty for Army personnel or was otherwise so meritorious that any other characterization would be clearly inappropriate.

(2) When a Soldier was discharged before ETS for a reason for which an honorable discharge is discretionary, the following considerations applied:

- Where there had been infractions of discipline, the extent thereof should be considered, as well as the seriousness of the offense or offenses

- Soldiers were not necessarily to be denied an honorable discharge solely by reason of the number of convictions by court-martial or actions under the Uniform Code of Military Justice, Article 15
- Conviction by a general court-martial or by more than one special court-martial did not automatically rule out the possibility of awarding an honorable discharge
- An honorable discharge could be furnished when disqualifying entries in the Soldier's military record were outweighed by subsequent honest and faithful service over a greater period of time during the current term of service
- It was the pattern of behavior and not the isolated incident that should be deemed the governing factor in determination of character of service
- Unless otherwise ineligible, a Soldier could receive an honorable discharge if he/she had, during his/her current enlistment, period of obligated service, or any extensions thereof, received a personal decoration

e. Paragraph 3-7-b (General Discharge). 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.

f. Chapter 14 (Separation for Misconduct), paragraph 14-12c (Commission of a Serious Offense). Commission of a serious military or civil offense if the specific circumstances of the offense warrant separation and a punitive discharge is, or would be, authorized for the same or a closely related offense under the Manual for Courts-Martial. A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under chapter 14. However, the separation authority may direct a general discharge if such is merited by the Soldier's overall record.

2. The Manual for Courts-Martial, in effect at the time, showed that violations of Article 134 (General Article – Extramarital Sexual Conduct) and Article 120 (Sexual Assault) included punitive discharges among the maximum punishments.

3. AR 601-280 (Army Retention Program), currently in effect, defines NCO career status program reenlistments:

a. A reenlistment period of an "indefinite or unspecified" term. A Soldier on the NCO career status program has no actual ETS date. The Soldier's service is governed by maximum RCPs for the specific rank held (see DA Pam 601 – 280). Generally, the Soldier is permitted to serve up to the RCP for current rank, unless sooner separated or removed from active duty under other law or policies.

b. DA PAM 601-280, currently in effect, shows, in table 3-6, that the RCP for Soldiers in the rank of SSG is 20 years. Extensions may be granted but cannot exceed 23 months.

4. DODI 1332.14, in effect at the time, established DOD policies and procedures for enlisted administrative separations.

a. Enclosure 3 (Reasons for Separation), paragraph 10 (Misconduct).

(1) An enlisted Service member may be separated for misconduct when it is determined that the enlisted Service member is unqualified for further military service by reason of the commission of a serious offense.

(2) A serious offense is one for which a punitive discharge would be authorized for the same or closely related offense in the Manual for Courts-Martial.

(3) Characterization of service will normally be under other than honorable conditions, but characterization as general (under honorable conditions) may be warranted.

b. Enclosure 5 (Procedures for Separation), paragraph 3 (Administrative Board Procedure). If an administrative board is required, the respondent will be notified in writing of the following:

(1) The basis of the proposed separation, including the circumstances upon which the action is based and reference to the applicable provisions of the Military Department's implementing regulation.

(2) Whether the proposed separation could result in discharge, release from active duty to a Reserve Component, transfer from the Selected Reserve to the IRR (Individual Ready Reserve), release from the custody or control of the Military Services, or other form of separation.

(3) The least favorable characterization of service or description of separation authorized for the proposed separation.

(4) The respondent's rights are:

- consult with counsel
- obtain copies of documents that will be forwarded to the separation authority supporting the basis of the proposed separation
- request a hearing before an administrative board
- present written statements instead of board proceedings

- have representation at the administrative board either by military counsel appointed by the convening authority or by military counsel of the respondent's own choice
- have representation at the administrative board by civilian counsel at the respondent's own expense
- waive the foregoing rights

(5) If the respondent requests a hearing, the convening authority will appoint an administrative board of at least three experienced commissioned, warrant, or noncommissioned officers.

(a) The president will preside and rule finally on all matters of procedure and evidence, but the rulings of the president may be overruled by a majority of the board. If appointed, the legal advisor will rule finally on all matters of evidence and challenges except challenges to themselves.

(b) The respondent may request the attendance of witnesses in accordance with the implementing instructions of the Military Department concerned. If the convening authority determines that the personal testimony of a witness is required, the hearing will be postponed or continued if necessary to permit the attendance of the witness.

(c) The hearing will be continued or postponed to provide the respondent with a reasonable opportunity to obtain a written statement from the witness if a witness requested by the respondent is unavailable because the presiding officer or legal officer determines that the personal testimony of the witness is not required, or if a civilian witness declines to attend the hearing.

(d) The board will determine whether each allegation in the notice of proposed separation is supported by a preponderance of the evidence. The board will make recommendations on retention or separation, suspension of separation, and character of service.

5. AR 15-6, currently in effect, prescribes policies and procedures for investigating boards.

a. Paragraph 3-3 (Challenges). Any person who is aware of facts indicating a lack of impartiality or other disqualification on the part of a board member will present the facts to the appointing authority.

b. Paragraph 3-7 (Rules of Evidence and Proof of Facts). Proceedings under this regulation are administrative, not judicial. Therefore, boards are not bound by the rules

of evidence for courts-martial or court proceedings generally; anything that a reasonable person would consider relevant and material to an issue may be accepted as evidence.

(1) Although administrative proceedings governed by this regulation generally are not subject to exclusionary or other evidentiary rules precluding the use of evidence, the following limitations do apply:

- Evidence must be relevant
- Privileged communications with lawyers, clergy, spouses, psychotherapists, and victim advocates are protected
- Evidence of an alleged victim's sexual behavior or sexual disposition is not relevant
- Polygraph tests will not be considered without the consent of the person to whom the test was administered

(2) Boards generally do not have the authority to subpoena witnesses to appear and/or testify. Although the direct testimony of witnesses is preferable, a board may use any previous statements of a witness as evidence on factual issues, whether or not the following conditions exist:

- The proceedings are an investigation or board
- The witness is determined to be unavailable
- The witness testifies
- Prior statements were sworn or unsworn
- Prior statements were taken during the course of an investigation

6. DODI 5505.07, currently in effect, prescribes policies and procedures for titling persons, corporations, and other legal entities in DOD law enforcement activity (LEA) reports, as well as indexing them in the DCII. Paragraph 3.2 addresses considerations the must be made when reviewing a request for correcting or expunging a law enforcement report or removal from the DCII.

a. When reviewing a covered person's titling and indexing review request, the expungement official will consider the investigation information and direct that the covered person's information be corrected, expunged, or otherwise removed from the DoD LEA report, DCII, and any other record maintained in connection with the DoD LEA report when:

- Probable cause did not or does not exist to believe that the offense for which the covered person was titled and indexed occurred, or insufficient evidence existed or exists to determine whether such offense occurred
- Probable cause did not or does not exist to believe that the covered person committed the offense for which they were titled and indexed, or insufficient evidence existed or exists to determine whether they committed such offense

- Such other circumstances as the DoD LEA head or expungement official determines would be in the interest of justice, which may not be inconsistent with the circumstances and basis in Paragraphs 3.2.a.(1) and (2)

b. In accordance with Section 545 of Public Law 116-283, when determining whether such circumstances or basis applies to a covered person when correcting, expunging, or removing the information, the DoD LEA head or designated expungement official will also consider:

- The extent or lack of corroborating evidence against the covered person with respect to the offense
- Whether adverse administrative, disciplinary, judicial, or other such action was initiated against the covered person for the offense
- The type, nature, and outcome of any adverse administrative, disciplinary, judicial, or other such action taken against the covered person for the offense

//NOTHING FOLLOWS//