

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 13 August 2024

DOCKET NUMBER: AR20230013118

APPLICANT REQUESTS:

- reinstated at the rank/grade of major (MAJ)/O-4 with a date of rank of 7 April 2018
- entitlement to back pay and allowances
- rescind involuntary separation order
- removal of two General Officer Memorandums of Reprimand (GOMOR)
- removal of referred Officer Evaluation Report (OER) and any reference to alleged misconduct
- retirement upon reaching 20 years of active federal service
- [alternately] entered into the Integrated Disability Evaluation System (IDES) and further considered for medical retirement
- discharge upgrade from "General, Under Honorable Conditions" to "Honorable"
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Legal counsel argument
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Photographs
- DA Forms 2823 (Sworn Statement)
- Character Reference letters
- DA Form 4037 (Officer Record Brief)
- DA Forms 67-10-2 (Field Grade Plate (O4-O5; CW3-CW5) Officer Evaluation Report) and allied documents
- The Adjutant General (TAG) Approval Brief – Retirement
- Photographs
- News articles and miscellaneous reported resources
- DA Forms 2823 and associated Article 15-6 Investigation documents
- Photographs
- DA Form 2823
- Self-authored letter

- Army National Guard (ARNG) Administrative Separation Checklist
- Memorandum – Subject: Involuntary Separation from the Louisiana Title-32 Active Guard/0Reserve (AGR) Program
- Memorandum – Subject: Involuntary Separation from the LAARNG T32 AGR Program
- Memorandum – Subject: Involuntary Removal from the AGR Program
- DA Form 1574-1 (Report of Proceedings by Investigating Officer)
- Memorandum – Subject: Findings and Recommendations for AR 15-6 Investigation
- Article 15-6 Investigation and associated documents
- Memorandum – Subject: Notification of Involuntary Release from Full-Time National Guard Duty (FTNGD)
- Memorandum – Subject: Response to Notification of Involuntary Release from FTNGD
- Memorandum – Subject: Recommendation for Involuntary Separation from the LAARNG AGR Program
- Memorandum – Subject: Rebuttal to Notification of Recommendation Involuntary Release from FTNGD
- National Guard Bureau (NGB) Form 23B (ARNGG Retirement Points History Statement)
- Retirement Pay Calculation information
- Freedom of Information Act (FOIA) request and supporting documents
- Memorandum – Subject: Notification of Consideration by the Calendar Year (CY) 2023 Officer AGR Release from Active Duty (REFRAD) Board/Active Status Management Board (ASMB)

#### FACTS:

1. The applicant, represented by legal counsel, provides in pertinent part that he was subjected to a command investigation directed by a disgraced and terminated commander (Colonel (COL) S\_ D\_). He contests that there is no more egregious conflict than the approval authority supervising the conduct of the investigation into sexual harassment allegations when he himself engaged in sexual harassment and was engaged in an intimate relationship with a complainant in his case. The applicant notes that all administrative actions that followed the first compromised command investigation revealed that the chain of command committed a material error and injustice in violation of the applicant's rights when they facilitated the following administrative actions:

- failed to present DA Form 7279 (Equal Opportunity Complaint Form) thereby denying the applicant proper notice, ability to exercise his rights to include his right to appeal

- issuance of two GOMOR's
- relief from assigned position as Executive Officer
- release from FTNGD
- withdrawal of Federal recognition
- loss of active-duty retirement or in the alternative, loss of a Reserve retirement

The applicant further argues that these actions occurred after he should have been referred to a medical board in 2018 after he underwent quadruple bypass surgery. Further, in 2022, the applicant received extensive inpatient care for anxiety and depression.

On 2 June 2023, the applicant was discharged from military service, approximately 4 months prior to reaching 20 qualifying years of service with 18.5 of those years being on active duty. Consequently, on 23 February 2023, the applicant was released from FTNGD, approximately 15 months prior to securing an active-duty retirement.

The applicant alleges (in relation to the sexual harassment investigation) that the complainants simply expressed feeling uncomfortable and the processing for separation was not required. He contests that the subsequent actions resemble that of a court martial for felony conviction involving serious theft or fraud against the government rather than an orders violation. He further provides reference to other cases wherein in the alleged were allowed to retire. Also, neither of the complainants felt that the alleged conduct was worthy of being reported nor could they say that the interactions negatively impacted their careers. Instead, the accused were motivated by the opportunity for advancement under COL S\_ D\_ and their disdain for the applicant. For these reasons his involuntary separation should be revoked, and he be permitted to retire.

The applicant further provides that while working through a difficult period in his life, he acknowledges having made comments that may have been perceived by others as unprofessional. He notes that these comments were largely innocuous but included the use of vulgarity and the playing of a song that included some crude lyrics; this song has been played for over 12 years by at least three previous commanders to include the current one who was away while the applicant led the battalion. He further argues that none of these actions ever progressed beyond superficial banter and never resulted in a physical or sexual relationship. The applicant accepted responsibility for his actions, was relieved of his duties, received two GOMORs, was released from FTNGD and subsequently discharged from the ARNG. The applicant alleges that the investigation conducted was deficient and plagued with errors and irregularities. He further provides that the ultimate failure preventing him from being considered for a medical retirement or permitted to reach voluntary retirement eligibility was by design and a coordinated effort.

In summary the applicant alleges that the command misinterpreted and misapplied the separation guidance. Further, the involuntary separation was intended as punishment; his request to be transferred into the U.S. Army Reserve (USAR) was denied further preventing he and his family's ability to receive continued healthcare. He also feels that the punishment was unjust and disproportionate to the alleged offenses. The action of permitting COL S\_ D\_, a sexual harasser, to serve as the appointing and approval authority of the first command investigation was unjust; COL S\_ D\_ was subsequently fired for engaging in sexual harassment during the period of the investigation. The command also did not attempt to resolve the issue at the lowest level nor did they provide a warning/counseling or afford the applicant the opportunity for rehabilitation. Upon his discharge from active duty, the DD Form 214 incorrectly cited Army Regulation (AR) 600-8-24 (Officer Transfers and Discharges) rather than AR 135-175 (Separation of Officers); the applicant served in a Title 32 status vice Title 10. As such he was erroneously separated. A detailed account of the applicant's argument is further provided in its entirety within the supporting documents for the Boards review.

2. A review of the applicant's available service records reflects the following:

a. On 2 October 2003, the applicant enlisted in the ARNG.

b. On 3 January 2007, the NGB issued Orders Number 1 AR announcing Federal recognition of the applicant's initial appointment as an officer in the LAARNG, effective 20 August 2006.

c. On 24 March 2017, the applicant received a permanent performance limiting medical profile for bilateral ankle pain. No additional DA Forms 3349 (Physical Profile) are reflected within the applicant's available service records. Further, this document does not direct the requirement for referral to IDES.

d. On 7 April 2018, the applicant was promoted to the rank/grade of MAJ/O-4.

e. While serving in the LAARNG, the applicant performed multiple periods of FTNGD in an AGR status (Title 32) with his most recent period beginning on 17 May 2021 as directed by Orders Number 027-023 issued by the Joint Force Headquarters – LAARNG on 27 January 2021.

f. On or about 24 November 2021, the applicant was reprimanded by the LAARNG, Director of the Joint Staff (Brigadier General (BG) T\_ F\_) in the form of a GOMOR for committing multiple acts of sexual harassment. On 18 May 2021, a Report of Investigation (ROI) conducted in accordance with AR 15-6 substantiated allegations that he engaged in repeated inappropriate conversations with fellow Soldiers; created a hostile work environment for fellow Soldiers by subjecting them to unwanted and

unsolicited comments of a sexual nature; and engaged in unwanted touching of fellow service members.

g. On 13 January 2022, the applicant requested that the proposed reprimand be filed locally, and no additional action be taken. A copy of his rebuttal is further provided in its entirety within the supporting documents for the Board's review.

h. On 28 January 2022, BG T\_ F\_ directed that the GOMOR be permanently filed within the applicant's permanent Official Military Personnel File (OMPF) noting that the applicant did not submit any documents in extenuation, mitigation or rebuttal in his OMPF.

i. On 23 February 2023, the applicant was released from active duty in accordance with AR 600-8-24 and transferred back into a Title 32, U.S.C. status. DD Form 214 reflects the following:

- Item 12c. (Net Active Service this Period) – 1 year, 9 months, and 7 days
- Item 12d. (Total Prior Active Service) – 16 years, 5 months, and 13 days
- Item 24 (Character of Service) – (General) Under Honorable Conditions
- Item 28 (Narrative Reason for Separation) – Non-Retention on Active Duty

j. On 2 June 2023, the LAARNG issued Orders Number 4929233 involuntarily discharging the applicant from the ARNG, effective 1 June 2023. NGB Form 22 (Report of Separation and Record of Service), item 10a (Net Service this Period) reflects 19 years and 8 months; item 24 (Character of Service) reflects honorable.

k. On 23 June 2023, Special Orders Number 220 AR was issued announcing the withdrawal of the applicant's Federal recognition, effective 1 June 2023

3. The applicant provides the following a:

a. Photographs reflective of various individuals engaging in handshakes wherein at least one of the parties involved places one hand on the other persons bicep region.

b. DA Forms 2823 reflective of various persons statements regarding an incident occurring on or about 7 December 2020, wherein in the applicant "pulled the waistband of his pants away from his body" noting that he did not have Physical Training (PT) shorts on underneath them. All parties noted that the applicant did not expose himself but did note that they were able to see that he had on blue undergarments. These documents are further provided in their entirety for the Board members review within the supporting documents.

c. Character Reference letters, reflective of several service members personal experience and knowledge of the applicant's performance and overall character as a service member in the ARNG. Collectively, all parties refer to the applicant as a person of strong moral value who does not accept failure from his subordinates and is fondly looked upon by all members within his office. Further the applicant is consistently commended for his professionalism even while providing a relaxed environment whereby Soldiers can focus on their performance rather than the pressure of being surrounded by members of their leadership. These documents are further provided in their entirety for the Board members review within the supporting documents.

d. DA Form 4037 reflective of the applicant's pertinent personnel and administrative information to include assignment history. Throughout his career, the applicant has served in varying positions of increased responsibility to include Operations Officer, Executive Officer, and Commander.

e. DA Forms 67-10-2 and allied documents, reflective of the applicant's duty performance as assessed by members of his immediate leadership from December 2014 – June 2023. Upon review of his most recent evaluation, notably the applicant's leadership determined that he did not uphold the command's Sexual Harassment/Assault Response Programs (SHARP) and policies resulting in the issuance of a GOMOR for creating a hostile work environment. The applicant was deemed unqualified to serve as a commissioned officer. Prior evaluations refer to the applicant as ranking in the top 5 – 25 percent of his peers with a recommendation that he be assigned to the most challenging positions of increased responsibility. These documents are further provided in their entirety for the Board members review within the supporting documents.

f. The Adjutant General Approval Brief – Retirement, reflective of the concurrence of all parties involved in reviewing the applicant's request for retirement in that he be permitted to retire in lieu of the CY23 ASMB noting that the applicant has a pending involuntary separation action. Validation that this will have no effect on the involuntary separation action.

g. Photographs reflective of various pictures of service members and military memorabilia.

h. News articles and miscellaneous reported resources reflective of information and resources related to COL S\_ D\_, while serving as a brigade commander, being fired for engaging in inappropriate actions (text messaging). COL S\_ D\_ was subsequently reassigned to serve as a training coordinator and director of doctrine and education. These documents further provide reference situations whereby other service members (officers) were prosecuted for unsolicited sexual activities yet were permitted to retire.

i. DA Forms 2823 and associated Article 15-6 Investigation documents related to the applicant's actions (pulling his waistband out during a field event) as well as activities involving female officers, First Lieutenant (1LT) L\_ and 1LT C\_ both of which are involved in the alleged complaint. In the applicant's statement, he denies conducting himself in an unprofessional manner (pulling his waistband out during a field event) and notes that he is an imperfect leader with room for growth. The applicant further provides information pertaining to how he addressed information provided by 1LT C\_ regarding potential SHARP related activities involving her and her former boyfriend. He also addresses communication personal in nature; he denies making overtly inappropriate comments but acknowledges the use of vulgar language. These documents (a rebuttal of the recommendation that the applicant be involuntarily released from FTNGD) along with other related documents, are further provided in their entirety for the Board members review within the supporting documents.

j. Photographs reflective of mass text messages distributed to various service members.

k. DA Form 2823, reflective of a statement provided by Sergeant First Class (SFC) R\_ M\_ concerning the investigation into allegations made by 1LT L\_ against the applicant in relation to violation of the Army's SHARP. SFC R\_ M\_ recalls in pertinent part that 1LT L\_ mentioned initiating a SHARP complaint against the applicant after feeling pressured to do so by captain (CPT) C\_.

l. Self-authored letter reflective of the applicant's statement generated while receiving treatment for depression, anxiety and trauma. The applicant notes that he was self-referred and admitted on 13 March 2023. He refers to the accusations made against him as the catalyst prompting him to seek professional help. The applicant further requested to be permitted to remain in the partial hospitalization program for the six-week duration and asked for the opportunity to speak with the leadership regarding his release. This document is further provided in its entirety for the Board members review within the supporting documents.

m. ARNG Administrative Separation Checklist reflective of a listing of the required documents being submitted in support of the separation action.

n. Memorandum – Subject: Involuntary Separation from the Louisiana Title-32 AGR Program, reflective of the LAARNG, TAG (Major General D\_ W\_) endorsement of the request that the applicant be involuntarily separated from the LAARNG AGR program noting that he had been accused of multiple incidents of sexual harassment in 2021. These claims were substantiated by two separated AR 15-6 investigations. The first investigation was conducted while the applicant was mobilized in a Title10 status at Fort Bliss, TX preparing for a deployment. As a result of the substantiated findings in that investigation, the convening authority issued him a GOMOR and released him back to

Title 32 status. A subsequent investigation was conducted based on information obtained during the previous investigation of incidents that happened prior to the mobilization. Based upon the substantiated findings in the second investigation, his command recommended an involuntary separation from the AGR program. After careful consideration, TAG approved this request after affording the applicant the opportunity to rebut these findings. The applicant was able to achieve sanctuary (completion of 18 years of active federal service) prior to the effective date of the separation; therefore, TAG requested the involuntary separation from the AGR program through the appropriate separation authority.

o. Memorandum – Subject: Involuntary Separation from the LAARNG T32 AGR Program, reflective of the TAG directing that the applicant be processed for separation from the AGR program and returned to a Title 32 status at the conclusion of any remaining leave balance.

p. Memorandum – Subject: Involuntary Removal from the AGR Program, reflective of the LAARNG, Chief Military Justice, MAJ G\_ R\_ review of the applicant's separation packet and finding it to be free of error and thereby legally sufficient to warrant removal from the AGR program. During the investigative process, the investigative officer found that the applicant had committed 11 counts of sexual harassment.

q. DA Form 1574-1 reflective of information pertaining to the AR 15-6 investigation conducted between 25 April 2021 and 16 May 2021. The actual findings were constructed on a separate document provided below.

r. Memorandum – Subject: Findings and Recommendations for AR 15-6 Investigation, reflective of a non-all inclusive list of the facts associated with the investigation conducted regarding the applicant's actions as alleged by 1LT C and 1LT L\_. The evidence revealed that the applicant had sexually harassed or created a hostile work environment by repeatedly engaging in sexually oriented conversations and actions. However, except for the accusations during the hurricane operations it was unclear if these actions and conversations were conducted during this timeframe. This document is further provided in its entirety for the Board members review within the supporting documents.

s. Article 15-6 Investigation and associated documents reflective of the appointment memorandum authorizing the investigative officer to conduct administrative fact-finding actions in relation to allegations of misconduct (sexual harassment) as performed by the applicant. Further contained within is a chronological document of events or actions performed by the investigative officer in the performance of his duties, sworn statements, character reference letters, assignment orders, evaluations, rebuttal of the investigative findings etc. related to the allegations of sexual harassment. These

documents are further provided in their entirety for the Board members review within the supporting documents.

t. Memorandum – Subject: Notification of Involuntary Release from FTNGD, reflective of the applicant being notified of by the LAARNG, J5 (COL R\_ B\_) recommendation that he be involuntarily released from FTNGD due to a substantiated sexual harassment complaint as determined by an AR 15-6 investigation. The applicant was afforded 30-days to respond and consult with legal counsel.

u. Memorandum – Subject: Response to Notification of Involuntary Release from FTNGD, reflective of the applicant's acknowledged receipt of the notification and his election to seek counsel. The applicant waived his rights to obtain copies of documents and understood his rights to submit statements on his behalf.

v. Memorandum – Subject: Recommendation for Involuntary Separation from the LAARNG AGR Program, reflective of the LAARNG, J5 COL A\_ D\_ recommendation that the applicant be released from the AGR program with a "non-retention on active duty" separation code.

w. Memorandum – Subject: Rebuttal to Notification of Involuntary Release from FTNGD, reflective of the applicant's submitted rebuttal to his proposed separation from the AGR program. The applicant provides an account of several highlights of his military career as a testament to his commitment to military service. He further recounts how immediately following his quadruple bypass surgery, he expedited his recovery as evidenced by maxing the Army Physical Fitness test nine- weeks later. The applicant provides that over the course of a year, he has been subjected to and punished by an investigation initiated by a complainant that has previously wreaked havoc on the organization since she was assigned. He notes that the complainant repeatedly lied and lacked integrity exhibited by the use of ulterior motives not considered during the course of the investigation. The applicant notes that this was well known throughout the command yet ignored. He further pleaded to remain in the AGR program in any capacity without regard to location of assignment. This document is further provided in its entirety within the supporting documents for the Board member's review.

x. NGB Form 23B reflective of the applicant's cumulative qualifying service performed between October 2003 to June 2022. During this period the applicant was awarded 6661 total career retirement points with 6408 total points for retired pay; 18 years of creditable service for retired pay.

y. Retirement Pay Calculation information reflective of information pertaining to varying retirement plans (High 3 and Blended Retirement).

z. FOIA request and supporting documents, reflective of the submitted request to receive all information pertaining to the conducted AR 15-6 pertaining to the investigation conducted involving the applicant between 2020 – 2023.

aa. Memorandum – Subject: Notification of Consideration by the CY 2023 Officer AGR REFRAD Board/ASMB, reflective of the applicant being notified that he would be considered by the CY23 REFRAD board for release from the AGR program. The applicant was permitted until 11 January 2023 to update his records.

4. On 5 June 2023, NGB Form 23A (ARNG Current Annual Statement) was prepared recognizing the applicant's 19 years and 8 months of creditable qualifying service (6,940 retirement points); 6,843 active-duty points; 7,208 total career points.

5. On 29 May 2024, the NGB, Chief, Special Actions Branch, provide an advisory opinion recommending disapproval of the applicant's request noting that he received a GOMOR (26 February 2021) while on AGR duty because of the AR 15-6 investigation that was substantiated. The applicant was relieved from his position as an Executive Officer and returned to Title 32 status in the LAARNG. A second AR 15-6 investigation was conducted resulting in the applicant receiving an additional GOMOR (27 November 2022) for substantiated results of the AR 15-6 investigation. The applicant also received two referred evaluations; he appealed one of the evaluations. A Withdrawal of Federal Recognition (WOFR) board was initiated between 6-8 July 2022. The WOFR determined that the applicant's Federal recognition would be withdrawn on 2 June 2023 based on the two substantiated AR 15-6 investigations. On 23 February 2023, despite being in sanctuary with 19 years active service, the Acting Assistant Secretary of the Army approved the involuntary request for separation as it was in the best interest of the Army and directed the release from active Federal service characterized as "General, Under Honorable Conditions." Regarding the removal of the OERs – in accordance with AR 623-3 (Evaluation Reporting System), Soldiers with substantiated sexual harassment investigations must include a comment and be referred during the rating period when investigations were substantiated. Therefore, it is their recommendation that the request for removal of these documents be denied.

6. On 3 June 2024, the applicant [counsel] was provided with a copy of the advisory opinion and afforded 15 days to provide comments. On 18 July 2024 counsel responded requesting extension of the required response until 31 July 2024.

7. On 31 July 2024, Counsel responded in contention with the previously provided advisory opinion noting that it was provided by the LAARNG, by way of the NGB, the very organization whose missteps and failures resulted in the unlawful acts in contention. Counsel notes that it is improper to ask the subjects of any complaint to essentially investigate themselves. Counsel further argues the following points of contention:

- Reference a "conflict of interest" as stated in paragraph one of the advisory opinion. Counsel notes that this was not the applicant's only objection and the implication that it was is materially false
- Reference paragraph 3d. of the advisory opinion, Counsel argues the accuracy of the statement "...the applicant did not submit any evidence" contesting that this statement is false in that the applicant did in fact call witnesses and submitted witness testimony as evidence

Counsel further provides that the brevity of the provided advisory clearly reflects that the author failed to read beyond the applicants 'bottom line up front" statement to this Board, thereby proving the source of their petition. Counsel again restates their elements of contention and requested relief. This document is further provided in its entirety within the supporting documents for the Board member's review.

#### 9. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (EMR – AHLTA and/or MHS Genesis), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, the Army Aeromedical Resource Office (AERO), and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting revocation of his discharge and reinstatement into the Army. In the alternative, he is requesting referral to the Disability Evaluation System (DES). He had indicated on his DD 149 that other mental health conditions are related to his request.

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His DD 214 for the period of Service under consideration shows the former Army National Guard Officer entered the active duty on 17 May 2021 and received an under honorable conditions (general) discharge 23 February 2023 under provisions in AR 600-8-24, Officer Transfers and Discharges (8 February 2020): Non-retention on Active Duty.

d. The outside advisory from the Army National Guard provides an excellent outline of the applicant's misconduct and the associated processes and investigations which led to his involuntary release from active duty. It states the 15-6 investigations substantiated multiple incidents of sexual harassment, the former officer received two

General Officer Memorandums of Reprimand for this misconduct, and the approval of his involuntary release from active duty was by the acting assistant secretary of the Army as it was in the “best interest of the Army.”

e. Counsel appears to assert the applicant’s misconduct was related to physical and mental health conditions:

“While going through a difficult season in his personal life, having survived a heart attack and quadruple bypass surgery, and plagued by anxiety and depression, MAJ [applicant] acknowledges having made comments, albeit sparsely, that could be perceived by some who do not know him to be unprofessional. The comments and/or actions were largely innocuous but included using some vulgarity at times and playing a song in a Tactical Operations Center (TOC) that included crude lyrics.”

f. The Army has made sexual assault and sexual harassment training an annual requirement for all Soldiers for years, training it is almost a certainty the applicant had received and participated in multiple times. Neither his physical nor mental health conditions impaired his ability to differentiate right from wrong and adhere to the right and so cannot mitigate or otherwise excuse his misconduct.

g. While no medical condition for referral to the DES was directly identified, counsel stated:

“MAJ [Applicant] has been treating at behavioral health since 15 April 2021. He has made significant progress with his mental and physical health; however, he still must manage his depression and anxiety and associated stressors daily using medication and coping mechanisms that he has learned from his counselor. The gravity of this situation, seemingly exacerbated by the severity of punishment, mainly the administrative separation, has operated to hinder his swift recovery.”

h. The only medical documented submitted in a non-duty limiting permanent physical profile for bilateral foot/ankle pain dated 24 March 2017. No other conditions were listed on the profile. The applicant was marked as capable of performing all the functional activities required of all Soldiers, including live in an austere environment. The profile simply allowed the applicant to perform an alternate aerobic event in lieu of the 2-mile run event for his Army Physical Fitness Test (APFT). Subsequent permanent profiles were issued for the same condition to allow for modifications of his requirements for the newer Army Combat Fitness Test, but no new medical conditions were added.

i. The one contemporaneous behavioral health encounter in the EMR is the results of a 17 December 2020 phone call between the applicant and a behavioral health (BH) nurse case manager:

“This nurse called the SM [service member] and offered him BH services but the Soldier stated he was ‘fine’ and did not want any help from BH at this time. The Soldier was reminded that he did not need a consult to come to BH and would only need to call and he agreed to do so should he change his mind.”

j. There is no probative evidence the applicant had a mental health or other medical condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his discharge. Thus, there was no cause for referral to the Disability Evaluation System. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his discharge.

k. Review of his records in JLV shows he has been awarded multiple VA service-connected disability ratings, including one for PTSD. However, the DES only compensates an individual for service incurred medical condition(s) which have been determined to disqualify him or her from further military service and consequently prematurely ends their career. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

l. It is the opinion of the ARBA Medical Advisor that a referral of this case to the DES is not warranted.

m. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? YES: PTSD

(2) Did the condition exist or experience occur during military service? YES: PTSD has been service connected by the VA

(3) Does the condition or experience actually excuse or mitigate the discharge? NO: PTSD does not impair one’s ability to differentiate right from wrong and adhere to the right and so cannot mitigate the misconduct which led to his involuntary separation.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not 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, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant's petition, available military records, National Guard Bureau (NGB)-Special Actions Branch and medical review, the Board concurred with the advising official finding that a referral of this case to the DES is not warranted.
2. Furthermore, the Board concurred with the NGB advising official recommendation for denial finding the applicant was investigated per AR 15-6, based on substantiated allegations of sexual harassment. Evidence in the record show the applicant received a GOMOR after allegations were substantiated. The Board found the applicant has not demonstrated that a procedural error occurred that was prejudicial to the applicant and by a preponderance of evidence that the contents of the GOMOR and OER are substantially incorrect and support removal. The Board determined the applicant was involuntary separated from the AGR program despite being in sanctuary with 19 years active federal service per regulatory guidance. The Board noted, the applicant's NGB Form 22 shows the applicant has a honorable discharge, as such no action will be taken by the Board regarding the applicant's request for an upgrade of his general under honorable conditions discharge.
3. The Board found insufficient evidence to support the reinstatement of the applicant's rank to major (MAJ/O-4) and his requested date of rank 7 April 2018. The applicant provided no evidence that support an entitlement to back pay and allowances. Based on the advising opine, the Board found rescinding the applicant's involuntary separation orders is without merit. Therefore, the Board denied relief.
4. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

BOARD VOTE:

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

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.



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 135-18 (The Active Guard Reserve Program), Chapter 5 (Separation) provides that all separations, voluntary or involuntary, from the AGR Program will be governed by the following regulations:

- a. ARNG Soldiers, released from active duty, while serving in the AGR Program under the provisions of Title 10, USC are subject to separation under the provisions of AR 600-8-24

b. ARNG Soldiers released from active duty, while serving in the Title 32 AGR Program under the provisions of 32 USC are subject to separation under provisions of AR 135–175.

2. AR 135-175 (Separation of Officers), Chapter 2 (Involuntary Separation – ARNG), provides that an officer is permitted to serve in the Army because of the special trust and confidence the President and the nation have placed in the officer's patriotism, valor, fidelity, and competence. An officer is expected to display exemplary conduct and responsibility commensurate to this special trust and confidence, and act with the highest personal integrity at all times. An officer who will not or cannot maintain those standards will face separation proceedings. Recommendations for elimination action will not be based on generalities and vague impressions. It is necessary to document, in writing, the specific and precise reasons an officer is considered ineffective. Recommendations to initiate separation will clearly state the reasons for involuntary separation and will be supported by all documentary and physical evidence which can be reasonably included. Involuntary separation cases will be given prompt attention and handled as expeditiously as possible. If it is determined that sufficient basis exists to initiate involuntary separation action, the area commander or CG, HRC will –

- notify the officer concerned of the requirement to show cause for retention
- advise the officer in the above notification, if appropriate, that he or she may elect to submit a resignation in lieu of involuntary separation
- advise the officer of the requirement to acknowledge receipt of the above notification within 15 days of receipt

a. On completion of the board, the board will make separate findings with respect to each allegation whether the respondent should be retained in the Army. The recommendations of the board must be appropriate to and warranted by the findings. When the findings have been determined, the recommendations will be limited to the following: retention or involuntary separation. Recommendation for involuntary separation of an officer must also include a recommendation for the type of discharge to be issued. A General (Under Honorable Conditions) characterization of service may only be recommended when the board makes a finding against the officer that includes an act or acts of misconduct, moral or professional dereliction, or in the interest of national security.

b. Paragraph 4-3 (Removal from Active Status) provides that members of the USAR will be removed from an active status for any of the reasons in paragraphs 4–3a(1) through 4-3a(17) to include withdrawal of Federal recognition. An officer will be discharged for any one of the reasons in paragraphs 4–3b(1) – 4-3b(7) to include Officers who are determined administratively unfit to perform military duty by appropriate military authority based on objective evidence of such unfitness will be discharged, without his or her consent if he or she has less than 5 years of

commissioned service or with his or her consent if he or she has at least 5 years of commissioned service. If an officer who has at least 5 years of commissioned service does not give his or her consent, discharge will be accomplished only on the approved recommendations of a board of appointed officers.

3. AR 600-8-24 (Officer Transfers and Discharges), provides that the Department of the Army Active Duty Board (DAADB) (qualitative ) is the Army's tool for ensuring that only an Reserve Component officers who consistently maintains high standards of performance, efficiency, morality, and professionalism are permitted to serve on Active Duty. Paragraph 2-17 (Involuntary Early Release of ARNG and U.S. Army Reserve Officers on Active Duty for Training or Active Duty for Operational Support) provides that ARNG and USAR commissioned and warrant officers may be involuntarily released early from active duty based upon an officer's conduct, degree of efficiency, or manner of performance is seriously deficient.

a. Chapter 4 (Eliminations) provides the rules and steps for eliminating officers for substandard performance of duty, misconduct, moral or professional dereliction, and in the interests of national security. Commanders, and/or initiating officials designated in paragraph 4-18a of this regulation, will initiate elimination action of any officer convicted of a sex offense, as defined in 34 USC 20911 or AR 27-10, whose conviction did not result in a dismissal. This applies to all officers regardless of when the conviction for a sex offense occurred, except when the officer has already been subject to an elimination action and has been retained. While not all inclusive, when one of the following or similar conditions exist, elimination action may be or will be initiated as indicated when the officer exhibits substandard performance or performs acts of misconduct, moral or professional dereliction, or in the interests of national security.

b. Paragraph 6-12 (Approval Authority) provides that the SECARMY is the approval authority for retirements. SECARMY has delegated approval authority for voluntary retirements (waiver/nonwaiver) to CG, HRC (RA and USAR Soldiers); Chief, NGB (10 USC ARNG Soldiers); state adjutants general (for 32 USC ARNG Soldiers); and Chief, Colonels Management Office for RA Army competitive category colonels and promotable lieutenant colonels. Retirement approval authorities may approve, disapprove, or delay/defer the requested retirement date of an officer who has completed 20 but less than 30 years of AFS. Voluntary retirements may be denied or delayed based on the needs of the Army, and each application will be evaluated on its individual merits. Approval authority for voluntary retirements requiring a waiver is HRC, ARNG state, or NGB, as applicable, and, in some cases, SECARMY.

4. Title 10 U.S.C. Section 12686 (Reserves on Active Duty within 2 years of Retirement Eligibility: Limitation on Release from Active Duty) provides that under regulations to be prescribed by the Secretary concerned, which shall be as uniform as practicable, a member of a reserve component who is on active duty (other than for training) and is

within two years of becoming eligible for retired pay or retainer pay under a purely military retirement system (other than the retirement system under chapter 1223 of this title), may not be involuntarily released from that duty before he becomes eligible for that pay, unless the release is approved by the Secretary.

5. National Guard Regulation 600-5 (AGR Program, Title 32, FTNGD Management) provides that Commanders have the primary responsibility to maintain good order and discipline. Involuntary release from AGR service is a mechanism for TAGs to ensure the effective administration, operation, and training of the National Guard. Commanders and supervisors will initiate involuntary release from AGR service when a Soldier's substandard duty performance or persistent inefficiency hinders the administration, operation, or training of the National Guard and when corrective action or rehabilitation efforts have not provided the necessary results, or for any other reason permitted by Army or ARNG regulations for separation from service, withdrawal of Federal Recognition, release from active duty or disqualification for subsequent AGR duty. Single acts of misconduct; including, but not limited to, those involving violence, hostile work environment, integrity, or moral turpitude may warrant initiating release without prior corrective action or rehabilitation. Commanders determine if the basis of a proposed involuntary release warrants release from FTNGD and separation from the ARNG.

a. AGR Soldiers may be given the opportunity, but are not required, to request voluntary release from FTNGD in lieu of involuntary release. The commander or supervisor may approve the Soldier's voluntary request for release or deny the Soldier's request and proceed with the involuntary release process. The AGR Soldier will be afforded 30 days to rebut or comment.

b. If the Commander decides to pursue the involuntary release after reviewing the rebuttal, the recommendation and all supporting documents will be forwarded through command channels and the Office of the Staff Judge Advocate to the HRO/AGR Manager for action. The HRO/AGR Manager will conduct administrative review and forward the packet to TAG for final determination.

c. When involuntary release is approved by TAG, the effective date of releasing a Soldier from FTNGD will be determined by the HRO/AGR Manager and will include use of accrued leave for transition leave. Soldiers in sanctuary status by virtue of reaching greater than 18 but less than 20 years of qualifying active service will have their involuntary REFRAD packet including TAG recommendation, submitted through ARNG-HRH-M for approval by the Secretary of the Army.

6. AR 635-40 (Disability Evaluation for Retention, Retirement or Separation) provides that when a Soldier is issued a DA Form 3349 (Physical Profile) with a P3/P4 in at least one of the profile serial factors for a medical condition(s) that meet the medical retention

standards of AR 40–501 (Standards of Medical Fitness). Any DA Form 3349 generated for a USAR Soldier in a drilling troop program unit or AGR status must be validated by the U.S. Army Reserve Command's Medical Management Center before their referral. Soldiers, being processed for administrative separation under AR 600-8-24 will not be referred to the IDES.

7. AR 600-8-104 (Army Military Human Resource Records Management) provides that documents required for filing will be periodically reviewed by the Official Records Custodian to identify documents no longer required for filing in the AMHRR. Documents are removed from the required document list when they become obsolete or are no longer required for filing in the AMHRR (deprecated). A document properly filed in the AMHRR based on previous requirements is considered to be permanently filed and cannot be removed unless it meets the criteria listed in paragraph 3-7. Paragraph 3-7 provides that once properly filed in the AMHRR (as defined in table 3 – 1), the document will not be re-moved from the record unless directed by the ABCMR.

8. Title 10, USC, section 1552 states, the Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army.

9. AR 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicant's do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//