

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 1 November 2024

DOCKET NUMBER: AR20240000782

APPLICANT REQUESTS: via remand by the United States District Court for the District of Columbia, reconsideration of Army Board for Correction of Military Records (ABCMR) Docket Numbers AR20120006588 on 6 December 2012, AR20180007124 on 11 May 2020, AR20200004203 on 11 September 2020, and AR20210011094 on 17 May 2022. Specifically:

- determine and explain whether the applicant has met his burden to require changes or redactions for:
  - payment of non-cash compensation
  - removal of the DA Form 2627 (Record of Proceedings under Article 15 of the Uniform Code of Military Justice (UCMJ)) [not in Army Military Human Resource Record (AMHRR)]
- determine and explain whether the applicant has met his burden to require changes to any noncommissioned officer evaluation reports (NCOER) between 2005 and 2007
- reexamine and explain whether changes need to be made to the Board's decision regarding the applicant's request for promotion and awards, specifically:
  - consideration by a Standby Advisory Board (STAB) for promotion to sergeant first class (SFC)
  - if he meets the time in grade and time in service at the SFC rank, to be evaluated for promotion to the rank of master sergeant (MSG) by waiving the advance noncommissioned officer course (ANCOC) requirement
  - a permanent change of station (PCS) award and retirement award

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

- United States District Court for the District of Columbia Order, 26 October 2023
- Applicant Complaint to the United States District Court for the District of Columbia, 11 April 2021
- Applicant's Amended Complaint to the United States District Court for the District of Columbia, 10 October 2022

- DD Form 149 (Application for Correction of Military Record), 19 May 2024
- Applicant's Memorandum in Support of DD Form 149 Submission, 20 May 2024

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the ABCMR in Docket Numbers AR20120006588 on 6 December 2012, AR20180007124 on 11 May 2020, AR20200004203 on 11 September 2020, and AR20210011094 on 17 May 2022.

2. In a complaint to the United States District Court for the District of Columbia on 11 April 2021 and as amended by his complaint on 10 October 2022, the applicant states:

a. He retired from active duty on 13 April 2015 due to permanent disability. The claims listed occurred between 1 October 2013 and 12 April 2015 and derive from confusion with pay entitlements following his reinstatement to active duty and errors by the ABCMR when it reached its decision on 6 December 2012 that voided his unlawful administrative discharge on 14 April 2009 and ordered his reinstatement to active duty.

b. In 2012, he petitioned the ABCMR to void his discharge due to injustices he faced based on his medical conditions not being addressed and retaliations he suffered. He submitted evidence he was framed for charges that formed the basis of his 2009 discharge and the only instances in his career where he was subjected to negative counseling or nonjudicial punishment can be traced to his traumatic brain injury (TBI) and therefore should be deleted from his record.

c. He petitioned the ABCMR to issue a decision dispelling any false allegations about his character and request to review whether any awards should be issued but were not due to the false allegation or the medical conditions, whether any performance reports should be corrected and whether academic reports and letters should be added to his record to guide a promotion board in deciding whether he should have been promoted to higher ranks.

d. In December 2012, the ABCMR issued a decision voiding the discharge. In its rationale, the Board avoided weighing in the framing and fabrication of evidence issues. The Board denied he had any medical conditions and his claim to evaluate awards, decorations, and promotions.

e. The Army did not have a process through which it reinstates personnel whose discharges were voided. Therefore, it was handled by the recruiting command and had to resolve issues prior to shipping.

f. In November 2013, he was referred to a medical evaluation board (MEB) and in March 2014 referred to a physical evaluation board (PEB). He was notified the PEB found him unfit for duty and recommended medical retirement with 80 percent Army rating and 100 percent total and permanent through the Department of Veterans Affairs (VA).

g. In 2018, the applicant reiterated to the ABCMR the need to clear his name from false allegations made against him in order for him to not be perceived as the pervert and liar portrayed by the decision published in the investigation.

h. (First Claim) The process allowed for the applicant's records to be reviewed by a Standby Advisory Board (STAB) for the years 2011 through 2013 for promotion to sergeant first class (SFC) and if selected would be eligible for consideration for a selection for promotion to master sergeant (MSG). He was only reviewed by the 2014 SFC board and was not selected due among other things to all the errors in his personnel file and missing evaluations.

i. (Second Claim) Congress only authorized back pay interest for service members who were wrongfully convicted by a court-martial and for civilian employees who were wrongfully terminated and not service members who were wrongfully discharged.

j. (Third Claim) The applicant petitioned the ABCMR for reimbursement of health benefits, Morale, Welfare, and Recreation (MRW) programs, and savings related to access to the commissary.

k. (Fourth Claim) His untreated medical conditions caused him to receive nonjudicial punishment which included a fine. He requested that as part of the exoneration, he be refunded.

3. The applicant on 20 May 2024 states:

a. The application for relief will attempt to (i) remove from the record any misunderstanding regarding any mention of the medical conditions the applicant was suffering from prior to his discharge; (ii) restate all the due process violations that led to his discharge; (iii) emphasize the importance of exonerating the applicant from false allegations of misconduct; (iv) convince the Board they are the only ones capable of providing the promotion relief sought; and (v) that the ABCMR provide the awards sought by the applicant since it would have been futile to apply through a member of the Senate and is now past the 6-year period to do so.

b. The applicant never alleged there are medical errors to correct or that changes are warranted to his records based on a medical condition having been the cause of the

misconduct allegations or other issues. His position has always been the charges of misconduct levied against him were fabricated and supported by planted evidence.

c. The applicant requests the Board support his claim to exonerated him and expunge his record from any false allegations of misconduct, promote him to the rank of SFC effective no later than adjournment date of the fiscal year 2012 SFC promotion board, and promote him to MSG effective the last day of duty before retirement. He further requests the award of two customary decorations related to change of station and retirement.

4. A review of the applicant's service record shows:

a. On 1 August 2001, he enlisted in the Regular Army. He held military occupational specialty 35M (Human Intelligence).

b. He served in:

- Iraq from 14 February 2003 to 6 February 2004
- Iraq from 5 December 2004 to 8 February 2005
- Iraq from 8 December 2007 to 15 March 2009

c. The applicant received a NCOER from October 2004 to September 2005. It shows, in pertinent part:

- Principal Duty Title: Administrative Clerk
- Duty Military Occupational Specialty Code: 11B2P (Infantryman)
- Daily Duties: administrative clerk and radio operator to a 750-man infantry battalion task force
- Army Values: "Yes" to all; fearless paratrooper, exemplary candor, always tells it is like it is
- Competence: Excellence; earned 46 college credits; worked outside his MOS to learn personnel security; displayed excellent knowledge and technical skills
- Physical Fitness & Military Bearing: Success; profile does not interfere with performance of duty; worked strenuous hours during the deployment Operation Iraqi Freedom II; calm under pressure
- Leadership: Needs Improvement; missed movement on one occasion while deployed in support of Operation Iraqi Freedom II; worked closely with Soldiers to ensure that all personnel security packets were completed; ensured the construction of numerous terrain models for operations in Iraq
- Training: Success; recertified 3/3 on French and Arabic and 2+/2+ on Italian; conducted language training for the battalion units which enhanced combat patrols; shows deep concern for mission accomplishment

- Responsibility & Accountability: Success; ensured section equipment was mission capable; continues to have problems with time management skills in most endeavors; requires supervision on most tasks
- Rater Potential: Fully Capable; promote as allocations become available; lacks time management skills during duty hours, has the ability to overcome deficiencies; will thrive in administrative positions
- Senior Rater Performance: "3" Successful
- Senior Rater Potential: "3" Superior

d. The applicant received a NCOER from October 2005 to December 2006. It shows, in pertinent part:

- Principal Duty Title: Administrative Clerk
- Duty Military Occupational Specialty Code: 11B1P
- Daily Duties: administrative clerk and radio operator to a 750-man infantry battalion task force
- Army Values: "Yes" to all; consistently defends what he believes is right; sound judgement questionable without supervision
- Competence: Success; continually enrolls in online college courses in pursuit of his degree; battalion expert on all issues regarding clearances; does not utilize his chain of command
- Physical Fitness & Military Bearing: Success; scored 245 on last Army Physical Fitness Test (APFT); profile interferes with his MOS as an 11B2P
- Leadership: Needs Improvement; Soldier is concerned about himself before unit, mission or task; constantly found engaged in areas outside of his appointed place of duty; lacks effective time management skills
- Training: Success; completed 10 credit hours of correspondence course within the intelligence MOS
- Responsibility & Accountability: Success; responsible for the maintenance of the shop weapons and own night equipment; does not hold himself accountable for his actions
- Rater Potential: Fully Capable; retain in current grade; further leadership development needed; excels in administrative duties as demonstrated by his performance in personnel security issues; lacks the ability to prioritize mission related and personal issues during duty hours
- Senior Rater Performance: "3" Successful
- Senior Rater Potential: "3" Superior

e. The applicant received a NCOER from January 2006 to March 2006. It shows, in pertinent part:

- Principal Duty Title: Administrative Clerk

- Duty Military Occupational Specialty Code: 11B1P
- Daily Duties: administrative clerk and radio operator to a 750-man infantry battalion task force
- Army Values: “Yes” to all; consistently defends what he believes is right; sound judgement questionable without supervision
- Competence: Success; battalion expert on all issues regarding security clearances; continually enrolls in online courses in pursuit of his degree
- Physical Fitness & Military Bearing: Success; participates regularly in the company and section physical fitness program; maintains standards of appearance
- Leadership: Success; used his expertise to guide new lieutenant and paratrooper on security clearance process; is willing to go the extra mile to help a paratrooper obtain his security clearance
- Training: Success; completed three week equal opportunity leaders course; trained new section personnel on obtaining security clearance process for paratroopers
- Responsibility & Accountability: Success; responsible for the maintenance of the shop weapons and own the night equipment; always safety conscious
- Rater Potential: Fully Capable; retain in current grade; further leadership development needed; excels in administrative positions as demonstrated by his performance in personnel security issues; as potential to be a successful 97E upon reclassification
- Senior Rater Performance: “3” Successful
- Senior Rater Potential: “3” Superior

f. The applicant received a NCOER from 1 April 2006 to 31 March 2007. It shows, in pertinent part:

- Principal Duty Title: HUMINT Collection Sergeant
- Duty Military Occupational Specialty Code: 97E30
- Daily Duties: HUMINT collection sergeant; responsible for morale, training, welfare, and discipline of nine Soldiers
- Army Values: “Yes” to all; provides quality and timely professional development, advice, and guidance; committed to unit’s Soldiers and mission; does not tolerate abusive or demeaning behavior
- Competence: Excellence; earned the highest rating in the Army on both listening and reading comprehension on the DLAB
- Physical Fitness & Military Bearing: Success; excellent mental and physical abilities; displayed strong stamina; motivated, enthusiastic NCO; led by example during squad fitness training; assisted squad in averaging 270 of APFT score

- Leadership: Success; actively coordinated weapons qualification and cross training opportunities with adjacent units for his Soldiers; motivated his Soldiers to perform to the best of their abilities as individuals and as a squad; motivated, guided, and directed Soldiers to accomplish the mission to standard during difficult missions
- Training: Success; completed three week equal opportunity leaders course; trained new section personnel on obtaining security clearance process for paratroopers
- Responsibility & Accountability: Success; responsible for the maintenance of the shop weapons and own the night equipment; always safety conscious
- Rater Potential: Fully Capable; retain in current grade; further leadership development needed; excels in administrative positions as demonstrated by his performance in personnel security issues; has potential to be a successful 97E upon reclassification
- Senior Rater Performance: "3" Successful
- Senior Rater Potential: "3" Superior

g. The applicant received a NCOER from 1 April 2007 to 31 October 2007. It shows, in pertinent part:

- Principal Duty Title: HUMINT Collection Sergeant
- Duty Military Occupational Specialty Code: 35M30
- Daily Duties: responsible for the morale, training, welfare, and discipline of his Soldiers; supervises counterintelligence force protection source operations, tactical screening operations, tactical questioning, and HUMINT support to combat operations
- Army Values: "Yes" to all; accepts responsibility for own actions; committed to mission accomplishment
- Competence: Success; reprimanded by chain of command for lapse of judgement during an incident; fully competent in his MOS, very skilled in writing reports that are essential to the accomplishment of the HUMINT collection mission
- Physical Fitness & Military Bearing: Needs Improvement; counseling by squadron command sergeant major for circumventing chain of command for personal gain; assisted squad in averaging 270 on APFT score
- Leadership: Success; demonstrated an aggressive leadership style which occasionally hindered section cohesion in a training environment; lacked the ability to motivate troops in a tactical training environment
- Training: Success; developed team work and training that would enhance his Soldiers performance in MOS related skills; failed to strive for maximum team performance or to train his squad on weaknesses while at NTC
- Responsibility & Accountability: Success; maintained 100% accountability of \$300,000 worth of equipment; effectively deployed his squad to NTC;

- scheduled his squad for HUMINT support and training missions during training
- Rater Potential: Fully Capable; promote with peers; send to ANCOG with peers; needs to put the Army, mission, and Soldiers before his own personal affairs; always willing to learn
- Senior Rater Performance: "3" Successful
- Senior Rater Potential: "3" Superior

h. On 19 December 2007, the Headquarters Multi National Division – Baghdad commanding general issued General Order Number 1 (Prohibited Activities for Multi-National Division – Baghdad (MND-B) Personnel). The order was applicable to all U.S. military personnel serving with the Armed Forces of the United States while assigned to MND-B. Included amongst the prohibited activities outlined was the introduction, purchase, possession, transfer, sale, creation, or display of any pornographic or sexually explicit visual depiction to include, but not limited to, photograph, videotape, CD/DVD, movie, drawing, book, magazine, or similar representation. This was a punitive order, punishable under the UCMJ.

i. On 10 April 2008, while deployed to Camp Taji, Iraq, the applicant was apprehended by military police after it was reported he left a naked pictures on the upstairs computer [in a public area].

(1) He was transported to the military police station where he was advised of his rights and notified him of his violation of Article 92 of the UCMJ for failure to obey a lawful order/General Order Number 1 for pornography, Article 120 of the UCMJ for indecent exposure, and Article 134 of the UCMJ for bringing discredit. The applicant declined to answer questions and requested legal representation.

(2) Also on 10 April 2008, written authorization was given to the military police to search the applicant's living quarters. They conducted an examination and annotated items discovered on a DA Form 4137 (Evidence/Property Custody Document).

(3) On 21 April 2008, the military police investigator/evidence custodian rendered a report of the property examination seized from the applicant. The following items seized (laptop, USB drive, and cell phone) contained approximately:

- 26 digital adult pornographic pictures
- 1,392 web history adult pornographic photographs
- four digital adult pornographic photographs of an unknown male individual which could not be identified
- 108 adult pornographic videos
- three digital pornographic photographs of an unknown nude male whose full face was not present



j. On 10 May 2008, by memorandum, subject: Request for Redress under the Provisions of Article 138, UCMJ, submitted by the applicant to his commanding officer, the applicant states his constitutional rights were violated for unfair treatment. He states the command conspired against him in order to reduce him in rank, cause him financial grievance, public humiliation, and to hinder his career progression to negatively affect future transition to civilian employment. He requested medical attention, an apology, and return of his personal property.

k. On 19 May 2008, by memorandum, subject: Response to Request for Redress, the applicant's commanding officer responded to the applicant's request:

(1) The applicant alleges the command denied him access to adequate health care, however, the command has taken every effort to support his medical concerns. He has been seen by a medical professional over 15 times at sick call. He was seen by the physical therapist over the course of 40 visits. He was evaluated by the battalion surgeon and two physical therapists. He obtained a second opinion from a physical independent from the unit. The battalion surgeon discussed his case with the physician from a separate battalion during a sick call visit.

(2) The command followed every recommendation by the battalion surgeon to include initially restricted his wear and ultimately prohibiting the wear of gear, weapon carrying, or exertional activity outside those directed by his providers. No members of the command influenced the battalion surgeon in his management of health care. The command remained engaged in monitoring the applicant's progress as nonoperative interventions were pursued as recommended by the battalion surgeon.

(3) The commanding officer would not post a formal apology on the secure net portal. He disputes that such a posting would restore the applicant's reputation as a professional NCO in the unit.

(4) His personal property was seized as a result of a law enforcement search of his room. There was probable cause to believe the applicant had committed a crime under the UCMJ. The probable cause was the basis for a search warrant of his room, which resulted in the finding of his personal property currently under investigation. The property will likely not be returned because it is evidence in an ongoing investigation.

l. On 29 May 2008, the applicant submitted a complaint of wrongs under Article 138 of the UCMJ to the Commander, MND-B. In his complaint, he contends he was wronged by his commanding officer by refusing the applicant's request for medical attention for his current injuries, that his personal property was seized as part of an ongoing investigation be returned, and that he be issued a formal apology.

m. On 27 July 2008, an investigating officer was appointed to conduct an informal investigation concerning the redress complaint of wrongdoing against the applicant's commanding officer. The applicant alleged that he did not receive a proper redress concerning his request on 10 May 2008.

n. On 9 August 2008, in evaluation for separation under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), the applicant was evaluated by a clinical psychologist. The DA Form 3822-R (Report of Mental Status Evaluation) indicates the applicant did not suffer from any significant pre-existing or current mental health disorders. He was psychiatrically cleared for any administrative action deemed appropriate by the command.

o. On 17 August 2008, by memorandum, subject: Army Regulation 15-6 (Procedures for Administrative Investigations and Boards of Officers) Investigation Findings and Recommendations from the investigating officer found the actions by the applicant's commanding officer provided redress. The investigating officer recommended the applicant be separated at the earliest convenience. The applicant, due to the nature of his beliefs of non-support from the physicians, would not be able to re-assimilate back into a normal working routine in any unit within the Army. He further recommended a bar to reenlistment be imposed and any reenlistment bonus paid to the applicant be recovered.

p. On 8 September 2008, the applicant's immediate commander notified the applicant he was initiating action to separate him for a pattern of misconduct. The reasons for his proposed action were: violating General Order Number 1 by possessing over 1500 pornographic photographs and/or videos on his personal computer, hard drive, and cellular phone; indecently exposing himself by transferring a naked picture of himself from his cellular phone to a public computer in the internet café, and making a false official statement to a superior commissioned officer that he was referred for additional medical treatment. The commander was recommending the applicant receive an under honorable conditions (General) characterization of service; however, the separation authority may direct that his characterization be characterized as honorable, under honorable conditions (General), or other than honorable conditions. The applicant acknowledged receipt on the same date.

q. On 15 September 2008, the applicant consulted with legal counsel and was advised of the basis for the proposed action to separate him under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 14, paragraph 12b and the rights available to him. He understood he was entitled to have his case considered by an administrative separation board because he was being recommended for a discharge under other than honorable conditions and he had over 6 years of service.

(1) He requested an opportunity to rehabilitate before a separation action was initiated. He disputed the majority of allegations in support of the action, but even if the allegations were all true, he still submits that he has great rehabilitative potential. He was given many excellent evaluations and counselings from his supervisors. He has been recognized many times with commendations and awards for his service.

(2) He would like to continue to serve in the Army, but if he was to be separated, he requested that he be allowed to complete a medical examination. He believes the language separation will not be delayed for completion of physical does not apply to a Chapter 14 separation. Further, he is a Purple Heart recipient on permanent profile. He was medically reclassified from 11B to 35M because of his combat injuries. When he detailed his condition to his superior commissioned officer, he recommended the applicant be returned to home station for evaluation for a MEB. This is important because by regulation if his medical condition warrants, he should be considered for handling through the medical examination process.

(3) However, if the above requests are not approved, he requests his case be referred to an administrative separation board and requested a personal appearance before the board, representation by military counsel, and understood that his willful failure to appear before the board by absenting himself would constitute a waiver of his rights to a personal appearance. He requested statements included in the separation notification not be presented to the Board which refer to his alleged mishandling of the unit's transition in Iraq. The unit transition occurred in late December 2007 and early January of 2008, during his previous enlistment.

r. On 25 October 2008, an administrative separation board proceeding convened on the applicant. The applicant was present and represented by military counsel. The board found after hearing all evidence presented in front of the board, in view of the findings, the board recommended the applicant be separated from the Army prior to the expiration of his current term of service under the provisions of Army Regulation 635-200, Chapter 14-12b for a pattern of misconduct. The board recommended his discharge be characterized as under honorable conditions (General).

s. On 31 October 2008, the applicant's appointed counsel, by memorandum, subject: Request to Disapprove Administrative Separation under 14-12b (Applicant), states:

(1) An administrative separation board recommended the applicant be separated for patterns of misconduct with a characterization of service under honorable conditions (General). The applicant requests suspension of the approval of the separation action for 12 months and transfer to another unit. Irrelevant and inappropriate matters were presented to the board, which were highly prejudicial to his case. The applicant's alleged misconduct should warrant imposition of Article 15 proceedings not an

administrative separation. In the alternative, if separation is decided, the applicant should be given a full physical as required.

(2) Prior the board, the applicant was notified by his company commander that his separation was for patterns of misconduct based on adult pornography, indecent exposure, and making a false official statement. However, the intermediate commander presented testimony to the board regarding uncharged misconduct and alleged poor work performance. This testimony was given without any prior notice that he wished these matters to be considered.

(3) The testimony clearly indicated he considered more than the three charges listed in the notice provided to the applicant in making his decision to support the separation action.

(4) The intermediate commander stated during the board rehabilitative efforts would not be successful in the applicant's case. However, there is no documentation to support this assertion. The applicant only received one counseling during the period of alleged misconduct.

(5) A medical examination as required prior to separation was improperly interpreted and the regulation is clear that a 14-12 chapter requires a physical.

t. Orders 365-0018, published by the United States Army Garrison-Hawaii on 30 December 2008 assigned the applicant to the U.S. Army Transition Center effective 20 January 2009.

u. On 14 April 2009, the applicant was discharged under the provisions of Army Regulation 635-200, paragraph 14-12b with an under honorable conditions (General) characterization of service. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 7 years, 8 months, and 14 days of active service. It also shows in:

(1) Item 4a (Grade, Rate or Rank): staff sergeant (SSG)

(2) Item 4b (Pay Grade): E-6

(3) Item 11 (Primary Specialty): 35M30 (HUMINT Collector), 2 years and 7 months; 11B3P (Infantryman), 4 years and 9 months

(4) Item 12f (Foreign Service): 1 year, 5 months, and 18 days

(5) Item 12h (Effective Date of Pay Grade): 1 April 2007

(6) Item 13 (Decorations Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized):

- Bronze Star Medal (2nd Award)
- Purple Heart
- Army Achievement Medal
- USA/USAF Presidential Unit Citation
- Valorous Unit Award
- Army Good Conduct Medal (2nd Award)
- National Defense Service Medal
- Global War on Terrorism Expeditionary Medal
- Global War on Terrorism Service Medal
- Iraq Campaign Medal with campaign star
- NCO Professional Development Ribbon (2nd Award)
- Army Service Ribbon
- Overseas Service Ribbon (2nd Award)
- Combat Infantryman Badge
- Parachutist Badge
- Expert Marksmanship Qualification Badge with Hand Grenade Bar
- Expert Marksmanship Qualification Badge with Rifle Bar

(7) Item 14 (Military Education): in pertinent part, basic NCO course (BNCOC), 8 weeks, 2007

5. The applicant petitioned the Army Discharge Review Board (ADRB) for an upgrade of his characterization of service from under honorable conditions (General) to honorable. On 27 September 2010, the ADRB determined the applicant was properly and equitably discharged and denied his request.

6. The applicant petitioned the ABCMR for reinstatement in the Regular Army with back pay, a medical evaluation upon reinstatement, repayment of dual allowances for basic allowance for housing (BAH) and cost of living allowance (COLA), payment of non-cash compensation for health insurance, post exchange and commissary benefits, qualify of life programs, and tuition assistance to include endorsement to graduate school, and correction of his military records, including performance evaluations, awards, expunction of records, security clearance, and promotions. In AR20120006588 on 6 December 2012, the Board determined partial relief was warranted. There was no evidence the general court-martial convening authority approved the applicant's separation. As a result, the Board determined the applicant was technically denied due process and is therefore entitled to reinstatement in the Regular Army with associated back pay and allowances. However, the Board found his contention the Army negligently failed to provide proper medical care which caused a cascade of

unwarranted consequences lacked merit and there was no basis for a medical evaluation. The applicant's claim for entitlement to payment of non-cash compensation should be resolved upon his reinstatement; therefore, no further action is required.

7. Based on the decision in AR20120006588 on 6 December 2012, the applicant enlisted in the Regular Army on 1 October 2013.

8. On 20 November 2014, an informal PEB convened and found the applicant unfit and recommended a rating of 80 percent and his disposition be permanent disability retirement.

a. The medical conditions determined to be unfitting included:

- residuals of TBI with central and peripheral vestibular dysfunction; 50 percent
- right shoulder degenerative joint disease, chronic pain; 20 percent
- cervical degenerative disc disease and degenerative joint disease; 20 percent
- thoracolumbar degenerative disc disease and degenerative joint disease; 20 percent
- right knee degenerative joint disease, status post surgery; 10 percent

b. On 25 November 2014, the applicant concurred and waived a formal hearing of his case. He did not request reconsideration of his VA ratings. He authenticated the form with his signature.

c. On 10 December 2014, the U.S. Army Physical Disability Agency representative authenticated the proceedings.

9. On 12 April 2015, the applicant was honorably retired from active duty for disability, permanent (Enhanced). His DD Form 214 shows he completed 13 years, 8 months, and 12 days of active service. It also shows in:

(1) Item 4a (Grade, Rate or Rank): SSG

(2) Item 4b (Pay Grade): E-6

(3) Item 11 (Primary Specialty): 35M30 (HUMINT Collector), 8 years and 7 months; 11B3P (Infantryman), 4 years and 9 months

(4) Item 12f (Foreign Service): 2 years, 5 months, and 5 days

(5) Item 12h (Effective Date of Pay Grade): 1 April 2007

(6) Item 13 (Decorations Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized):

- Iraq Campaign Medal with three campaign stars
- Bronze Star Medal (2nd Award)
- Purple Heart
- Army Achievement Medal
- Meritorious Unit Commendation
- USA/USAF Presidential Unit Citation
- Valorous Unit Award
- Army Good Conduct Medal (3rd Award)
- National Defense Service Medal
- Global War on Terrorism Expeditionary Medal
- Global War on Terrorism Service Medal
- NCO Professional Development Ribbon
- Army Service Ribbon
- Overseas Service Ribbon (3rd Award)
- Combat Infantryman Badge
- Parachutist Badge
- Expert Marksmanship Qualification Badge with Hand Grenade Bar
- Expert Marksmanship Qualification Badge with Machinegun Bar
- Expert Marksmanship Qualification Badge with Pistol Bar
- Expert Marksmanship Qualification Badge with Rifle Bar

(7) Item 14 (Military Education): in pertinent part, basic NCO course (BNCOC), 8 weeks, 2007

10. The applicant petitioned the ABCMR for his foreign language proficiency bonus and granted a waiver of any lapse in recertification. In AR20180007124 on 11 May 2020, the Board determined partial relief was warranted. The Board found for several periods of time, he met the criteria for proficiency payments and determined a correction was required. The Board granted relief for proficiency pay for French from 9 October 2013 to 12 April 2015, proficiency pay for Arabic from 12 April 2005 to 13 April 2009 and from 2 to 16 October 2013, and waived the recertification lapse. The Board denied any relief in excess of the above.

11. The applicant petitioned the ABCMR for a misdiagnosis of medical conditions, to set aside his nonjudicial punishment imposed in 2005 and 2007 and deleting any reference in his evaluation reports, to approve awards or decorations or recommend previous commands and unit of assignments to assist in the matter, to promote him to SFC or place his records before a STAB for fiscal years 2010 to 2014, if selected for promotion to SFC in fiscal year 2012 or earlier to promote him to MSG for retirement

purposes or place his record before a STAB for fiscal years 2014 and 2015, provide a statement covering non-rated evaluation periods and education placed in his records, and apply the appropriate NCO education system waivers.

a. In AR20200004203 on 11 September 2020, the Board determined partial relief was appropriate. The Board granted relief to refer his record to a STAB for any SFC/E-7 boards for which he would have been eligible and if selected, retroactively promotion and pay accordingly. If selected for retroactive promotion to E-7, his record should be placed before a STAB for any E-8 boards he would have been eligible based on his date of rank for E-7. If selected for promotion to E-8, he should be retroactively promoted and paid accordingly. Any military education requirements for promotion should be waived.

b. Additionally, the Board granted relief to add to his record a statement of nonrated time for any periods of active duty service as a NCO for which he did not receive an NCOER.

c. The Board denied any relief in excess of the above.

12. Based on the decision in AR20200004203:

a. On 11 September 2020, a memorandum for record, dated 3 November 2021, subject: Nonrated Statement was placed in the applicant's AMHRR for the period 1 November 2007 to 3 November 2021.

b. On 27 January 2022, HRC, by memorandum, notified the applicant the U.S. Army Senior Enlisted Review Board (USASERB) (formerly known as Standby Advisory Board (STAB)) convened on 6 January 2022 and considered the applicant for promotion to SFC/E-7 under the Fiscal Year 2010 through Fiscal Year 2013 SFC Promotion Selection criteria. The board members recommended and the Director of Military Personnel Management approved the board's recommendation of his non-selection for promotion.

13. The applicant petitioned the ABCMR for entitlement to BAH and COLA from 1 October 2013 to 12 April 2015, entitlement to family separation housing (FSH) from 1 October 2013 until he reported to Fort Belvoir, VA, entitlement to family separation allowance (FSA) from the day he reported to Fort Belvoir, VA until he departed on terminal leave, foreign language proficiency bonus for Arabic from 1 October 2013 through 12 April 2015, foreign language proficiency bonus for Arabic and French for the duration of his performance as a 35M, reimbursement for travel related expenses associated with his do it yourself move, entitlement to dislocation allowance, entitlement to clothing allowances for 2013 and 2014, and payment of travel related expenses



associated with his attendance at medical appointments in GA. In AR20210011094 on 17 May 2022, the Board determined partial relief was warranted.

a. The Board granted relief for:

- entitlements based on his dependent's location, specifically BAH, COLA, FSH, and FSA for the period 1 October 2013 through 12 April 2015
- reimbursement of his rental contract invoice and paid storage receipts
- language proficiency for Arabic as a second language at the payment list "A" rate and waiving recertification as necessary
- issuing him a PCS order with authorized travel of his spouse and son with entitlement to DLA and authorized shipment of his privately owned vehicle
- voiding his 1 October 2013 enlistment
- issuing PCS orders from Brooklyn, NY to Fort Jackson, SC with entitlement to DLA without dependent rate

b. The Board denied any relief in excess of the above.

14. As it relates to the requested relief for non-cash compensation, specifically commissary and exchange benefits, indirect compensation for employer-provided health benefits, educational assistance, and MWR services, this request is outside the purview of the ABCMR. The ABCMR directs or recommends changes in military records to correct an error or injustice. The ABCMR begins its consideration of each case with a presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

15. As it relates to the requested relief for removal of the DA Form 2627 from the applicant's AMHRR, a comprehensive review of the applicant's AMHRR revealed no DA Forms 2627 or other derogatory information pertaining to the applicant.

16. Based on the foregoing, the Board will consider:

- if the applicant's NCOERs require amendment, specifically striking negative bullets pertaining to performance adversely affected by undiagnosed medical conditions
- removing the applicant's NCOER for the period 1 April 2007 to 31 October 2007
- adding NCOERs for the last two rating periods prior to discharge
- awarding the applicant a PCS award
- awarding the applicant a retirement award
- full exoneration and consideration for promotion

BOARD DISCUSSION:

1. After reviewing the application and all supporting documents, the Board found that relief was not warranted.
2. The Board reviewed the applicant's contentions, his complaint, his amended complaint, the Court's remand order, and the evidence of record. The Board found the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief.
3. The Board first considered the applicant's request to amend any noncommissioned officer evaluation reports between 2005 and 2007. The Board noted five reports were filed in the applicant's Army Military Human Resource Record (AMHRR) for the periods October 2004 through September 2005, October 2005 through December 2005, January 2006 through March 2006, 1 April 2006 through 31 March 2007, and 1 April 2007 through 31 October 2007. The Board additionally noted the Statement of Nonrated Time added to his AMHRR from Docket Number AR20200004203 for the period 1 November 2007 through 3 November 2021. The Board determined the evaluation reports to be balanced, including several successful ratings and comments by his rating officials and his overall performance to be captured; albeit well-rounded comments, including difficulty with time management skills. The Board specifically noted the applicant's contention of his untreated medical condition; however, found the applicant's positive comments on his evaluation reports outweighed the few needed improvement comments and his continuous ability to pass the Army Physical Fitness Test a testament of his abilities. The Board determined that the applicant did not demonstrate by a preponderance of evidence that procedural error occurred prejudicial to the applicant and by a preponderance of evidence that the contents of the evaluation reports are substantially incorrect and support removal, amendment or addition.
4. The Board next turned to consideration of removal of the noncommissioned officer evaluation report for the rated period 1 April 2007 through 31 October 2007. The Board noted the applicant's contention the report was "riddle with errors." However, determined the overall report provides an objective and comprehensive evaluation of the applicant's performance and potential. The Board determined that the applicant did not demonstrate by a preponderance of evidence that procedural error occurred prejudicial to the applicant and by a preponderance of evidence that the contents of the evaluation report is substantially incorrect and supports removal.
5. The Board next considered the addition of noncommissioned officer evaluation reports for the last two rating periods prior to his administrative discharge [subsequently vacated in AR20120006588] in April 2009. The Board noted the applicant's contention the missing evaluations were a contributing factor to his later non-selection by a Standby Advisory Board (STAB) as a result of the decision in AR20200004203. The

Board determined that appropriate relief was given to this request by the applicant in AR20200004203 by issuing a Statement of Nonrated Time from 1 November 2007 through 3 November 2021 as an evaluation report was not rendered by the applicant's chain of command during that period and was declared nonrated. The Board concluded issuance of the Statement of Nonrated Time was in accordance with the regulation and no additional relief was warranted.

6. The Board next turned to consideration of the applicant's request for a permanent change of station award. The Board noted the applicant's contention his untreated medical conditions impacted him receiving his PCS award. However, the Board determined the PCS award to be based on an entire period of service and not an entitlement. The Board noted his heroic act and award of the Purple Heart and his award of the Bronze Star Medal. The Board concluded it is the chain of command's discretion to determine if the overall Soldier performance warrants a PCS award and based on the facts and circumstances of the applicant's service, the chain of command, at the time, decided not to submit him for a PCS award. The Board found no error or injustice in the applicant not receiving a PCS award and denied relief.

7. The Board next considered the applicant's request for a retirement award. The Board noted the applicant's contention of the Army's "false allegations" against him and that his untreated medical conditions impacted him receiving his retirement award. However, the Board determined a retirement award is based on overall service and is not an entitlement. The Board noted his heroic act and award of the Purple Heart and his award of the Bronze Star Medal. The Board also considered applicant's actions in April 2008 involving prohibited activities on a public government computer and on his laptop, USB drive, and cell phone. The Board concluded it is the chain of command's discretion to determine if the overall Soldier service warrants a retirement award and based on the facts and circumstances of the applicant's service, the chain of command, at the time, decided not to submit him for a retirement award. The Board found no error or injustice in the applicant not receiving a retirement award and denied relief.

8. Finally, the Board considered the applicant's request for full exoneration and consideration for promotion. The evidence of record shows the applicant was promoted to staff sergeant (SSG)/E-6 on 1 August 2005. In Docket Number AR20200004203, the Board determined the applicant's records should be referred to a STAB for any sergeant first class (SFC)/E-7 boards for which he would have been eligible for consideration. If he is selected for promotion to SFC/E-7 by a STAB, he should be retroactively promoted and be paid accordingly. Also, if selected for retroactive promotion SFC/E-7, his record should be placed before a STAB for any master sergeant (MSG)/E-8 consideration boards he would have been eligible for based on his date of rank for SFC/E-7. Additionally, the Board in that case waived any military education requirements for promotion. Based on the foregoing, a U.S. Army Senior Enlisted Review Board (USASERB) (Formerly STAB) convened on 6 January 2022 to consider

the application for promotion to SFC/E-7 under the Fiscal Year 2010 through Fiscal Year 2013 SFC/E-7 promotion selection criteria. The applicant was non-selected for promotion. The Board determined that appropriate relief was given to this request for the applicant. The Board considered the applicant's request for full exoneration and did not find the existence an error or injustice warranting change to his Army records.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

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

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

REFERENCES:

1. Army Regulation 623-3 (Evaluation Reporting System) prescribes the policy for completing evaluation reports and associated support forms that are the basis for the Army's Evaluation Reporting System.

a. Paragraph 3-34c (Continuous Evaluation Report History) states generally, Soldiers will have a continuous rating history of sequential evaluation reports documenting both rated and nonrated time. The periods covered on evaluation reports will not overlap. Nonrated time encompasses periods of time when a rated Soldier cannot be evaluated. These periods include a wide variety of circumstances when a Soldier is not performing duty in an assigned position under a valid rating chain. Qualifying periods of nonrated time are documented on evaluation report form DA Form 2166-8 using nonrated codes and they become part of a Soldier's rating history. Gaps in a Soldier's evaluation report history may occur for various reasons. A majority of these gaps are acceptable, while others are unacceptable. Acceptable gaps between evaluation reports include periods when a Soldier was in a non-ratable status when no evaluation report was warranted, such as a break in service.

b. Paragraph 3-34d (Nonrated Time) states if a Soldier has nonrated time that has not been accounted for on an evaluation report, a rating official, the battalion or brigade S1, or the administrative office may submit a request for an administrative correction to the "From" date on the evaluation to include nonrated time in the period covered.

c. Paragraph 3-37 (Modifications to Previously Submitted Evaluation Reports) states an evaluation accepted by Headquarters, Department of the Army and included in the official record of a rated Soldier is presumed to be administratively correct and represent the considered opinions and objective judgement of the rating officials at the time of preparation. Requests for modifications to evaluation reports already posted to a Soldier's Army Military Human Resource Record (AMHRR) require use of the redress program.

d. Paragraph 4-11 (Burden of Proof and Type of Evidence) states the burden of proof rests with the appellant. Accordingly, to justify deletion or amendment of an evaluation report, the appellant will produce evidence that establishes clearly and convincingly that the presumption of regularity will not be applied to the evaluation report under consideration or action is warranted to correct a material error, inaccuracy, or injustice.

(1) Clear and convincing evidence will be of a strong and compelling nature, not merely proof of the possibility of administrative error or factual inaccuracy. If the adjudication authority is convinced that an appellant is correct in some or all of the

assertions, the clear and convincing standard has been met with regard to those assertions.

(2) For a claim of inaccuracy or injustice of a substantive type, evidence will include statements from third parties, rating officials, or other documents from official sources.

2. Army Regulation 600-8-19 (Enlisted Promotions and Reductions) prescribes policies and procedures governing the promotion and reduction of Army enlisted personnel.

a. Paragraph 1-34 (Noncommissioned Officer Professional Development System Requirement for Promotion) states Soldiers must complete the following professional military education courses:

- completion of Distance Learning Course (DLC) 3 is an eligibility requirement for promotion consideration to SFC
- graduation of Senior Leaders Course (SLC) is a promotion pin-on requirement to SFC
- completion of DLC 4 is an eligibility requirement for promotion consideration to MSG
- completion of the Master Leaders Course (MLC) is a promotion pin-on requirement to MSG

b. Paragraph 6-48 (Standby Advisory Board) states reconsideration normally will be granted when one or more of the following conditions existed in the Soldier's official records at the time they were reviewed by a promotion selection board.

- an adverse NCOER reviewed by a board was subsequently declared invalid in whole or in part and a determination was made that there was a material error
- an adverse document belonging to another Soldier was filed in the non-selectee's records and was seen by the board
- a record of nonjudicial punishment, designated for temporary filing in the Soldier's record or set aside and not removed from the Soldier's record, was seen by the board
- court-martial orders were filed in the Soldier's record when the findings were "not guilty and the Soldier was fully acquitted"
- a document was filed in the records reviewed by the board that erroneously identified the Soldier as absent without leave while on active duty, as a deserter, or while in an inactive duty training status, an unsatisfactory participant
- a record of 30 or more college semester hours was properly entered into official channels but was not seen by the board

- an award of a State or Federal Commendation Medal or higher award presented within 2 months before the date of the board was not recorded on official records, was not seen by the board in hard copy, or was not presented to the board when provided in the Soldier's memorandum to the president to warrant standby consideration
- an annual or change of rater NCOER that was processed through HQDA to the custodian of records but returned for administrative reasons may warrant standby consideration

3. Army Regulation 600-8-22 (Military Awards) prescribes policy, criteria, and procedures for individual and unit military awards and foreign decorations and badges.

a. Paragraph 1-17 (Character of Service) states no military decorations, including a medal, badge, or bar, or an associated emblem or insignia, will be awarded or presented to any individual or a representative of that individual if the individual's entire service subsequent to the time of the distinguished act, achievement, or service has not been honorable. The determination of "honorable" will be based on such honest and faithful service according to the standards of conduct, courage, and duty required by law and customs of the service of a servicemember of the grade to whom the standard is applied.

b. Paragraph 1-18 (Period of Award) states for meritorious service awards, the cited period is limited to the period of service during which the individual served under the recommending command, except in the case of retirement awards. Meritorious service is characterized by distinguished service and performance above that normally expected, over a sustained period.

c. Paragraph 1-23 (Recognition Upon Retirement) states meritorious service awards may be awarded upon retirement (to include medical retirements). The recommending command may take into consideration periods of service longer than that served in the terminal assignment. An extended period will only be considered in those cases where the length or nature of the individual's terminal assignment would not qualify them for an appropriate award. It is neither necessary nor desirable to consider an extended period of service when length and character of service in the terminal assignment would qualify the Soldier for an appropriate award. Award recommendations submitted for meritorious service based upon retirement will be submitted so that they may be processed and completed prior to the requested presentation date.

//NOTHING FOLLOWS//