

IN THE CASE OF: [REDACTED]

BOARD DATE: 17 October 2024

DOCKET NUMBER: AR20240002679

APPLICANT REQUESTS: through counsel, honorable physical disability retirement vice general (under honorable conditions) administrative discharge in lieu of elimination or in lieu of trial by court-martial, as reflected on his DD Form 214 (Certificate of Release or Discharge from Active Duty)

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel's brief
- Headquarters, Regional Command (South), General Officer Memorandum of Reprimand (GOMOR), 8 June 2013
- DA Form 199 (Informal Physical Evaluation Board (PEB), 25 November 2014
- Deputy Assistant Secretary of the Army (Review Boards) memorandum, 7 July 2015
- Headquarters, Fort Stewart, Commanding General memorandum, 27 October 2015
- Deputy Assistant Secretary of the Army (Review Boards) memorandum 13 September 2016
- voided DD Form 214 covering the period ending 6 October 2016
- 21 pages of medical/mental health Progress Notes, [REDACTED] Correctional Institution, dated between 5 January 2017 – 17 January 2018
- Army Review Boards Agency (ARBA) memorandum, dated 5 August 2021
- ARBA memorandum, 24 September 2021
- Member Copies 1 and 4 and Service Copy 2 of reissued DD Form 214, issued on 24 September 2021
- Department of Veterans Affairs (VA) Rating Decision, 19 October 2023
- VA letter, dated 2 November 2023

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. Counsel states:

- a. The applicant requests that this Board set aside his separation for discharge in lieu of court-martial and instead discharge him through medical disability channels in accordance with the recommendation of the PEB. This is the applicant's first petition to this Board. He recently received a discharge upgrade through the Army Discharge Review Board (ADRB), under Docket AR20200002612, based on mitigating evidence provided for his post-traumatic stress disorder (PTSD) diagnosis. He requests a change in the narrative reason for separation and any other appropriate changes accompanying a disability retirement.
- b. The applicant graduated as an Aviation Officer from the United States Military Academy at West Point in 2009. While at West Point, he was injured during a cheerleading accident, where he injured his back and neck. After he graduated from West Point and flight training in Alabama, he was posted to Central America with a follow-on at Hunter Army Airfield in Savannah, GA. The applicant was deployed with the 3rd Combat Aviation Brigade to Tarin Kot, Afghanistan, from December 2012 to July 2013.
- c. During his deployment to Afghanistan, the applicant was stationed with a former West Point cadet, Captain (CPT) [REDACTED]. In May 2013, while in the S2 officer in charge (OIC) office, the applicant quoted a line from the movie Anchorman in jest to CPT [REDACTED] during their friendly banter. He said, "Shut your whore mouth." This was not meant to offend CPT [REDACTED] but she took it that way, having not been familiar with the movie. There was an investigation made into the incident, and though it was found that the applicant was not malicious, nor did he have a history of inappropriate sexual comments, he was still reprimanded by the Commanding General of the 3rd Infantry Division. On 8 June 2013, the applicant received a GOMOR for his comments. He regretted his actions and apologized immediately after saying the remarks, but he couldn't take back what he had said. The reprimand was filed in his official file. (See attached GOMOR.)
- d. While in Afghanistan, the applicant's job was to edit gun tape for the Apache kills. His job was essentially watching people die over and over daily. In his mind, he tried to think of it like a video game to avoid being affected by it. He didn't realize how much he actually was, however. After returning home, he began waking up in the middle of the night and reliving events in gruesome detail. He would have flashbacks and intrusive thoughts during the day and would completely zone out from wherever he was. He did not sleep well and often tried not to sleep at all to avoid his night terrors. It caused him to be moody and angry. He would explode at his wife, constantly getting into verbal disagreements.

e. Also, on his last night flight during his deployment, he injured his vertebrae. The applicant had difficulty wearing his helmet and interceptor body armor. When he returned from deployment, he started receiving interlaminar lumbar steroid injections. In February 2014, he was referred for a surgical consult, as he had an abnormal magnetic resonance imaging (MRI) and was not receiving relief from the injections. He was seen multiple times between February and July for pain, but was not recommended for surgery due to severe nerve involvement. He could not perform strenuous activities and was only able to do a desk job. He was referred to the Integrated Disability Evaluation System (IDES) for chronic pain secondary to cervical degenerative disc disease (DDD) and lumbar DDD with disc herniation.

f. Based on his GOMOR, a Board of Inquiry (BOI) was convened on 3 June 2014. The Board recommended that the applicant be eliminated based on misconduct, moral or professional dereliction, and derogatory information, with a general (under honorable conditions) characterization of service. (See results of first BOI)

g. On 15 July 2014, a Medical Evaluation Board (MEB) was convened and listed 21 conditions that the applicant had been diagnosed with. Of these 21, 4 were considered not to meet retention standards. (See attached MEB Narrative Summary (NARSUM).) On 25 November 2014, the Informal PEB met to evaluate the applicant's case. The IPEB recommended a combined rating of 60 percent and that he receive a permanent disability retirement. (See IPEB proceedings.) The conditions not meeting retention standards were chronic back pain with lumbosacral degenerative disc disease and thoracic strain (40 percent), chronic neck pain secondary to cervical degenerative disc disease (20 percent), lumbar intervertebral disc (IVDS) with right sciatic neuropathy with sensory symptoms (10 percent), and lumbar IVDS with left sciatic neuropathy with sensory symptoms.

h. PTSD was listed as a diagnosed condition on the IPEB ratings, but was found to meet retention standards. The applicant was unaware of how severe his PTSD was at the time and did his best to mitigate and downplay the symptoms. He didn't feel he "deserved" to have a PTSD diagnosis, as he didn't see a fallen one die personally or experience an improvised explosive device (IED) explosion. In his mind, all he did was see people die, and that shouldn't have been a big deal. He saw struggling with PTSD as a weakness and did not fully disclose the extent to which his mental health had deteriorated since his deployments.

i. In August 2014, the applicant was arrested by CID and handed over to Chatham County sheriffs and, over 3 weeks, was transported to the Wayne County officials in Ohio. He was charged with rape and two counts of gross sexual imposition of a minor based on events that happened when he was fourteen years old. As a child, the applicant was raped by a male family member and molested by a female member of his family. He did not understand the impact of this abuse until later in life, and it led to him

acting out the behaviors with another minor female. The applicant was distraught emotionally and spent 29 days in confinement before he finally reached his destination in Ohio and was able to post a bond. He returned home to his wife and discovered that she had sought a divorce attorney and had been assassinating his character to everyone she could speak to. The applicant found his wife had started talking to his best friend, the best man at their wedding. His wife and best friend had made plans to be involved sexually together, and she planned on divorcing him to be with the best friend. He was devastated.

j. Between August 2014 and March 2015, the applicant was in a downward spiral with little to no support. He had already been diagnosed with PTSD and was seeing a counselor. He started taking medication prescribed by his psychiatrist. The applicant maintained his innocence of the rape charge. He had a civilian attorney assisting him with the criminal charges, but was told that if he went to trial, he would likely be found guilty based on some emails he had exchanged with the victim's parents. The applicant was at his wits' end and felt he had no options. He was offered a plea deal, which he took, and in March 2015, he pleaded guilty to two counts of gross sexual imposition. He returned to his home to await sentencing and went even further down a self-destructive path.

k. To dull the constant pain and mental anguish he was feeling, the applicant began using cocaine. It was extremely out of character for him and a direct result of his attempts to self-medicate. He was alone and depressed and had no interaction with anyone who cared about him. His parents weren't close to him, and he wanted to die. He felt defeated, and while not explicitly trying to kill himself, he had lost his desire to live.

l. On 16 April 2015, the applicant was called in for a urinalysis, which he failed. His command did not attempt to help him, and new PEB proceedings were not convened to investigate his mental status. While all this was happening, an Ad Hoc Review Board was convened to review both issues. They recommended a new Board of Inquiry be conducted based on the allegation of illegal use of cocaine that arose after the initial Board of Inquiry, unless CPT [REDACTED] tendered his unconditional resignation in lieu of elimination.

m. On 27 October 2015, the applicant was notified again of his requirement to appear before a Show Cause Board. (See BOI second notification) The issues were the same as the first board, with the addition of the wrongful cocaine use. At this point, the applicant was serving part of his 6-year sentence in a state prison [REDACTED], and all correspondence had to be done via email or telephone. On 18 December 2015, the applicant tendered his unqualified resignation after consulting with CPT [REDACTED] his attorney. On 13 September 2016, the applicant's resignation was accepted, and he was discharged with an under other than honorable characterization of service. (See

attached approval of resignation.) He was not able to think clearly or comprehend how his mental illness had affected his choices. He could only think of avoiding any more legal proceedings, and he signed the paperwork requesting his resignation.

n. After his cocaine use and arrest for [REDACTED] charges, he continued to seek treatment for his PTSD in prison. He eventually was able to stop taking medication. While in prison, he came to understand that his drug abuse was a coping mechanism to escape the PTSD symptoms. (See attached mental health records from [REDACTED] Correctional Institute.)

o. Had circumstances been different, and the applicant fully understood the nature of his PTSD and mental illness, he would have requested a show cause board. He would have fought for medical disability instead of resignation. This Board will likely say that he knew what he was doing and is now faced with the consequences of that choice, but in reality, the applicant was not in the right frame of mind to make such a decision. He was in jail [REDACTED], had lost his wife and friends, was struggling with PTSD, and had no ability to think straight. Since his time in prison [REDACTED], he has continued to seek mental health treatment and has learned a great deal about how to manage his symptoms.

p. The applicant petitioned the ADRB for a discharge upgrade, and the Secretarial Reviewing Authority reviewed the ADRB's findings and conclusions and upgraded his characterization of service to general (under honorable conditions). (See attached decision of ADRB.) This upgrade allowed him to petition the VA for benefits, which he now receives. The applicant petitioned the VA for benefits in October 2016, but they were disallowed due to his character of discharge.

q. A memo from the Secretary of Defense, Chuck Hagel, was published on 3 September 2014. It deals specifically with Soldiers and situations like that in which CPT Ewing found himself. The memo says the following:

- Liberal consideration will be given to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD.
- Special consideration will be given to Department of Veterans Affairs (VA) determinations that document PTSD or PTSD-related conditions connected to military service.
- Evidence of misconduct, including any misconduct underlying a veteran's discharge, may be evidence of a mental health condition, including PTSD or traumatic brain injury (TBI).
- Mental health conditions, including PTSD and TBI, impact veterans in many intimate ways, are often undiagnosed or diagnosed years afterward, and are frequently unreported.

- Mental health conditions, including PTSD and TBI, inherently affect one's behaviors and choices, causing veterans to think and behave differently than might otherwise be expected.
 - r. The applicant receives VA disability for PTSD (see attached VA ratings), and it is clear that he suffered from some mental health conditions (PTSD, anxiety, depression, etc.) during his time on active duty that led to him committing misconduct that led to his separation. As this is now more fully understood, it is in the interest of justice that the applicant would receive the disability retirement that he was due to receive but for the use of cocaine self-medicate.
 - s. For the foregoing reasons, the applicant requests the ABCMR vacate the resignation in lieu of separation and instead award him a medical retirement based on the recommendations of the IPEB before his misconduct, the upgraded characterization of service by the ADRB, and the VA disability ratings. The applicant has paid for his mistakes and is thankfully receiving VA care for his injuries incurred on active duty. Allowing him to receive a permanent disability retirement will ensure he receives continued care for his medical conditions and aggravations from service.

3. The applicant was appointed as a second lieutenant (2LT) in the Regular Army on 23 May 2009.
4. The applicant deployed to Afghanistan on 14 December 2012.
5. A DA Form 1574 (Report of Proceedings by Investigating Officer/Board of Officers) shows an investigation commenced at Forward Operating Base (FOB) Tarin Kowl on 9 May 2013, and the investigating officer completed his findings and recommendations on 11 May 2013.
6. A Headquarters, 4-3 Aviation Regiment, Task Force Brawler memorandum, signed by the investigating officer on 11 May 2013, provided his findings and recommendations for a Commander's Inquiry into allegations of inappropriate comments and sexual harassment by the applicant.
 - a. The 4-page memorandum details the summary of specific facts and findings of the case and has been provided in full to the Board for review. In pertinent part, it shows it was found that the applicant used derogatory sexual language toward Captain (CPT) [REDACTED] by referring to her as a wh__e and after being reprimanded by her, continued to use inappropriate and offensive language of a sexual nature toward her. A third party witness corroborated the events.
 - b. The investigator's recommendations included disciplinary and/or administrative action against him, removing him from the work environment of CPT [REDACTED] and

receiving additional Sexual Harassment/Assault Response Prevention (SHARP) training.

7. A Headquarters, 3rd Infantry Division, GOMOR, signed by the Commanding General, 3rd Infantry Division and dated 8 June 2013, shows the applicant was reprimanded for violating the Army's Sexual Harassment and Equal Opportunity policies.

a. An Army Regulation 15 -6 (Procedures for Administrative Investigations and Boards of Officers) Investigation revealed the applicant made inappropriate and sexually explicit comments that offended other Soldiers who were around him. On 9 May 2013, he was conversing with a female CPT when he made an inappropriate comment to the effect of, "You shut your dirty wh__e mouth," to which she took offense. She then verbally expressed her concerns and displeasure in his comments, at which point he made several more inappropriate comments until she became visibly upset and left the room.

b. The applicant was advised this is an administrative action and not punishment under the Uniform Code of Military Justice (UCMJ) and the Commanding General was considering whether to file a copy of this reprimand in the applicant's Officer Military Personnel File (OMPF) and would consider any matter submitted in rebuttal before he made his decision.

8. On 23 June 2013, after carefully considering the facts and circumstances, including any rebuttal information, it was directed that the GOMOR be permanently filed in the applicant's Official Military Personnel File (OMPF).

9. The applicant returned from Afghanistan on 13 July 2013.

10. A DA Form 67-9 (Officer Evaluation Report) covering the period from 16 October 2012 through 9 May 2013, shows:

a. This was a referred report, with the reason for submission relief for cause.

b. The applicant was rated "No" in multiple Army Values and rated "Unsatisfactory Performance, Do Not Promote" by his Rater and Senior Rater and "Do Not Promote" "Below Center of Mass" by his Senior Rater.

c. Rater and Senior Rater comments include:

(1) He showed complete lack of judgment and professionalism when he used derogatory sexual language toward his female supervisor in the presence of a noncommissioned officer (NCO).

(2) During the course of this rating period, he struggled with intrapersonal skills with other personnel in leadership positions. In one instance his immaturity almost resulted in a physical altercation after a verbal confrontation with a company commander in front of a room full of Soldiers, NCOs, and officers.

(3) His lack of judgment, weak emotional maturity, and inability to improve behavior after senior leader counseling and mentoring reflect on an individual who lacks the skill set and character for continued service in the Army

(4). He has no potential for further service and should not be retained.

(5) He has absolutely no potential for continued service and it was not recommended the Army invest any professional education opportunities on this officer. Do not promote and do not retain. His Senior Rater indicated he directed the applicant's relief.

d. The OER was signed by multiple levels of Raters as authenticated in June 2013, and after supplemental review deemed complete and correct as written, signed by the Task Force Commander on 27 August 2013.

11. A Headquarters, 3rd Combat Aviation Brigade memorandum, dated 2 April 2014, shows the applicant's brigade commander requested of the 3rd Infantry Division Commanding General, the initiation of the applicant's elimination under the provisions of Army Regulation 600-8-24 (Officer Transfers and Discharges), paragraph 4-2b, misconduct and moral or professional dereliction. The background details the 9 May 2013, incident in which the applicant made derogatory comments of a sexual nature to a female CPT while deployed to Afghanistan. He failed to conduct himself in accordance with the standards and integrity of an officer of the U.S. Army; therefore, it was requested his elimination be initiated.

12. A Headquarters, 3rd Infantry Division memorandum, signed by the Commanding General and dated 14 April 2014, initiated the applicant's elimination and shows:

a. The applicant was required to show cause for retention on active duty under the provisions of Army Regulation 600-8-24, due to his misconduct, moral or professional dereliction, and derogatory information permanently filed in his Army Military Human Resources Record (AMHRR).

b. The specific reasons for the elimination action were the applicant's personal misconduct and conduct unbecoming an officer. On 9 May 2013, he made inappropriate comments of a sexual nature to a female officer in his unit while deployed in Afghanistan. An investigation conducted in accordance with Army Regulation 15-6 substantiated the allegation he made several demeaning and sexual comments to a female officer despite her warning that the comments were offensive to her. This misconduct resulted in his receipt of a GOMOR, dated 8 June 2013, which was filed permanently in his AMHRR.

c. He was advised of his right to counsel, prepare a written statement in his behalf, submit supporting documentation with his rebuttal showing he successfully overcame the reason for the show cause proceedings, submit a request for resignation in lieu of elimination, or apply for retirement in lieu of elimination if otherwise eligible.

d. He was advised the least favorable discharge he may receive is an under other than honorable conditions discharge. If he did not submit a resignation in lieu of elimination or request retirement in lieu of elimination, his case must be referred to a Board of Inquiry, in which case he may not waive a Board of Inquiry. The final decision on the type of discharge will be determined by Headquarters, Department of the Army (HQDA) for all officers.

13. On 17 April 2014, the applicant acknowledged receipt of initiation of elimination and indicated he would provide his rebuttal or resignation to the Office of the Staff Judge Advocate no later than 30 days from the date of his receipt of this notice of recommendation of elimination.

14. A physical profile is used to classify a Soldier's physical disabilities. PULHES is the acronym used in the Military Physical Profile Serial System to classify a Soldier's physical abilities in terms of six factors, as follows: "P" (Physical capacity or stamina), "U" (Upper extremities), "L" (Lower extremities), "H" (Hearing), "E" (Eyes), and "S" (Psychiatric) and is abbreviated as PULHES. Each factor has a numerical designation: 1 indicates a high level of fitness, 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a severity that performance of military duties must be drastically limited. Physical profile ratings can be either permanent (P) or temporary (T).

15. A DD Form 2808 (Report of Medical Examination) shows the applicant underwent medical examination on 8 May 2014, for the dual purpose of separation and medical board. He was given a PULHES of 133112, with a rating of 3 in factors U and L and a rating of 2 in factor S. His listed significant or disqualifying defects are listed as cervical degenerative disc disease (DDD) and lumbar DDD, with P3 ratings for MEB processing; "chapter" [administrative discharge] packet was initiated/completed and at the

Command's request. Item 74, which shows either qualified for service or not qualified for service is not completed.

16. A DA Form 3349 (Physical Profile) shows on 8 May 2014, the applicant was given a permanent PULHES of 133112, with a rating of 3 in factors U and L and a rating of 2 in factor S, for chronic pain secondary to cervical DDD and lumbar DDD with disc herniation non-surgical, and adjustment disorder. He was limited in most functional activities and Army Physical Fitness Test (APFT) events and an MEB was recommended.

17. On 16 May 2014, the applicant acknowledged a Board of Inquiry notification and provided a rebuttal, indicating he made an appalling decision when he made remarks to a fellow CPT that were demeaning and untrue. He tried to apologize, but understood why that was not enough. He further indicated he was going through an MEB for injuries he sustained in 2008 and would like to leave the military through medical channel rather than with an under other than honorable conditions discharge. He provided character letters from multiple individuals and requested they be taken into consideration when the Commanding General made his decision.

18. A memorandum, dated 19 May 2014, provided the results of the applicant's medical examination. It shows his PULHES was 133112, based on a physical conducted on 8 May 2014, and that he was not fully qualified for service and that the examining physician supported medical processing.

19. A DD Form 2807-1 (Report of Medical History), dated 19 May 2014, shows the applicant provided his medical history for the dual purpose of separation and medical board. He indicated he had numerous medical and orthopedic conditions listed on the form as well as trouble sleeping, anxiety, depression, and panic attacks.

20. A Headquarters, 3rd Infantry Division memorandum, signed by the Commanding General on 3 June 2014, appointed a Board of Inquiry under the provisions of Army Regulation 600-8-24, to consider whether the applicant should be retained or involuntarily separated from the Army.

21. A DA Form 3822 (Report of Mental Status Evaluation) shows the applicant underwent a command-directed behavioral health evaluation on 18 June 2014, which shows:

- a. He was found fit for full duty, including deployment.
- b. He was assessed as being able to understand and participate in administrative proceedings; could appreciate the difference between right and wrong; met medical retention requirements.

- c. His listed psychiatric condition was anxiety disorder, not otherwise specified.
- d. There were no recommended precautions.
- e. He had been screened for PTSD and mild traumatic brain injury (TBI) and both screenings were negative.
- f. The applicant denied any current or past suicidal or homicidal ideation, intent, plan or attempts. He had been engaged in behavioral health treatment since 22 April 2014 and was doing well in therapy. While he had had some trauma related symptoms, he was not yet at the medical retention determination point (MRDP) for his psychiatric symptoms and therefore met retention requirements of chapter 3, Army Regulation 40-501 and did not warrant disposition through medical channels or medical administrative actions. In other words, he did not meet criteria for MEB/PEB from a psychological standpoint.
- g. He presented for evaluation for a Board of Inquiry and was cleared from a psychological standpoint; therefore he was cleared for any administrative action the command deemed necessary.

22. A Trial Defense Service, Region Southeast memorandum to the members of the Board of Inquiry, dated 30 June 2014, provided information to the Board of Inquiry concerning dual processing of officer elimination under Army Regulation 600-8-24 and IDES. It shows:

- a. On occasion, an officer facing an administrative separation that could result in separation under other than honorable conditions will also be in the process of an MEB/PEB. Officers in this category who are believed to be unfit because of physical disability will be simultaneously processed for administrative separation in accordance with Army Regulation 600-8-24 and physical disability evaluation per Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).
- b. If the result of the physical disability evaluation is a finding of fitness, the U.S. Army Physical Disability Agency (USAPDA) will approve the findings for the Secretary of the Army and forward the proceedings to the Commander, U.S. Army Human Resources Command (AHRC) to be processed with the elimination action.
- c. If the result of the physical disability evaluation is a finding of unfitness, the Commander, AHRC will refer the entire file, including both courses of action, to the Office of the Secretary of the Army for necessary and the Secretary of the Army will decide the proper disposition of the case.

23. A second DA Form 1574 shows:

- a. A Board of Inquiry convened on 30 June 2014, as appointed by the Commanding General 3rd Infantry Division on 3 June 2014.
- b. After careful consideration of the evidence, the Board of Inquiry found:
 - the applicant did commit acts of personal misconduct on 9 May 2013, by making inappropriate comments of a sexual nature to a female officer in his unit
 - this allegation was supported by a preponderance of the evidence and did warrant separation
 - the applicant's actions can be considered conduct unbecoming an officer, which was supported by a preponderance of the evidence and did warrant separation
- c. The Board of Inquiry recommended the applicant's separation from the Army with a general, under honorable conditions characterization of service.

24. On 11 July 2014, the applicant signed a memorandum for record acknowledging receipt of the Board of Inquiry proceedings, findings, and recommendations.

25. An IDES Abbreviated NARSUM, dated 11 July 2014, which has been provided in full to the Board for review, shows in pertinent part:

- a. The applicant was referred to IDES for chronic pain secondary to cervical DDD and lumbar DDD. Both diagnoses were determined to fail retention standards
- b. The following conditions were considered and deemed to meet retention standards:
 - status post (s/p) arthroscopic superior labrum anterior and posterior (SLAP) repair, left shoulder
 - strain, right shoulder
 - bilateral hip strain
 - bilateral sciatic neuropathy
 - bilateral knee strain
 - bilateral ankle strain
 - migraine headache
 - bilateral hand strain
 - s/p fracture left second finger
 - gastroesophageal reflux disease (GERD)
 - chronic sinusitis

- temporomandibular joint (TMJ) disorder with joint sounds
- bruxism (teeth grinding)
- dry eye syndrome
- hypertension
- scars, surgical, left shoulder
- left sensorineural hearing loss
- tinnitus
- benign proximal vertigo
- erectile dysfunction
- recurrent herpes simplex virus (HSV) skin infection
- TBI without cognitive impairment
- PTSD

c. He was referred to the PEB for a compensable determination of fitness/unfitness and then to the VA for proper adjudication.

26. On 15 July 2014, the applicant submitted a memorandum for the Commander, 3rd Infantry Division and Fort Stewart, rebutting the Board of Inquiry results. It shows he requested the Commanding General allow him to separate from the Army through the MEB process. He was currently finishing up the MEB and on his way to the PEB evaluation, which could put him out of the Army in a few months if found unfit. He stated his chain of command recommended his departure through the MEB process.

27. A DA Form 3947 shows:

a. An MEB convened on 15 July 2014, where the applicant's following diagnoses were determined to not meet medical retention standards of Army Regulation 40-501, chapter 3:

- chronic back pain with lumbosacral DDD
- chronic neck pain secondary to cervical DDD
- lumbar intervertebral disc syndrome (IVDS) with left sciatic neuropathy with sensory symptoms
- right sciatic neuropathy with sensory symptoms

b. The following conditions were determined to meet retention standards:

- PTSD
- TBI without cognitive impairment
- GERD
- recurrent HSV skin infection
- hypertension

- left hand strain
- right hand strain
- s/p fracture second finger
- right shoulder strain
- s/p arthroscopic SLAP repair, left shoulder
- left hip strain
- right hip strain
- left knee strain
- right knee strain
- left ankle strain
- right ankle strain
- erectile dysfunction

c. The applicant signed the form on 7 August 2014, indicating he had been informed of the approved findings and recommendations of the Board and did not agree, submitted an appeal. The applicant's appeal is not in his available records for review.

d. On 17 August 2014, the appeal was considered and the report of the board was returned for reconsideration. The reconsideration is not in the applicant's available records for review.

28. A Trial Defense Service, Region Southeast memorandum, dated 18 July 2014, shows the applicant's Defense Counsel requested on his behalf that the Commanding General close the Board of Inquiry, which recommended his administrative elimination with a general discharge and allow him to separate from the Army through the IDES with an honorable discharge.

29. A Commander's Critical Information Requirements (CCIR) document in the applicant's records shows he was arrested in August 2014, for a warrant issued in the [REDACTED] with a charge of rape. He was released on bail in September 2014.

30. A memorandum from the Brigade Judge Advocate for the Commander, Fort Stewart, dated 6 November 2014, shows there is no legal objection to the elimination proceedings of the applicant in accordance with Army Regulation 600-8-24 and Army Regulation 15-6 for the misconduct, moral or professional misconduct, and derogatory information permanently filed in his AMHRR.

31. A DA Form 199 shows:

a. An Informal PEB convened on 25 November 2014, where the applicant was found physically unfit with a recommended rating of 60 percent and that his disposition be permanent disability retirement.

b. He was found unfit for the following disabilities:

- chronic back pain with lumbosacral DDD and thoracic strain (MEB Dx 1); 40 percent
- chronic neck pain secondary to cervical DDD (MEB Dx 2); 20 percent
- lumbar IVDS with right sciatic neuropathy with sensory symptoms (MEB Dx 4); 10 percent
- lumbar IVDS with left sciatic neuropathy with sensory symptoms (MEB Dx 3); 10 percent

c. He was found fit for the conditions MEB Dx 5-30 (which include PTSD and TBI). The MEB indicates these conditions meet retention standards, does not indicate that any of these conditions cause profile limitations of functional activities, and does not indicate that performance issues, if any, are due to these conditions.

d. The applicant signed the form on 12 December 2014, indicating he concurred with the findings and recommendations of the Informal PEB and waived a formal hearing of his case. He also indicated he did not request reconsideration of his VA ratings.

32. The second DA Form 1574, reflecting the Board of Inquiry which convened on 30 June 2014, shows in section VIII (Action by Appointing Authority), that the Commanding General signed the form and approved the findings and recommendations of the Board of Inquiry on 16 December 2014.

33. An AHRC memorandum for the Deputy Assistant Secretary of the Army (Review Boards), dated 24 February 2015, forwarded the applicant's enclosed elimination in accordance with Army Regulation 600-8-24.

a. Elimination action was initiated by the Commander, Headquarters, 3rd Infantry Division and Fort Stewart on 14 April 2014, in accordance with Army Regulation 600-8-24 for misconduct, moral or professional dereliction of duty.

b. On 25 November 2014, an Informal PEB found the applicant physically unfit and recommended permanent disability retirement with a rating of 60 percent

c. The General Officer Show Cause Authority approved the field Board of Inquiry findings and recommendations that the officer be separated with a general, under honorable conditions characterization of service.

34. A CCIR document shows in March 2015, the applicant accepted a plea bargain to remove the charge of rape and instead pleaded guilty to two counts of gross sexual imposition.

35. A memorandum from the Army Substance Abuse Program (ASAP), dated 6 May 2015, informed the applicant's immediate commander that the applicant tested positive for cocaine via urinalysis conducted on 16 April 2015.

36. A sentencing document from the Court of Common Pleas, Wayne County, Ohio, dated 7 May 2015, shows the court found on 24 March 2015, the applicant pleaded guilty to two counts of gross sexual imposition, a felony of the third degree. He was sentenced to 6 years in prison and was notified he would be the subject of 5 years mandatory post release control after his release from prison.

37. A memorandum from the Deputy Assistant Secretary of the Army (Review Boards), for the Commanding General, AHRC, dated 7 July 2015, shows:

a. On 3 June 2014, a Board of Inquiry recommended the applicant be involuntarily eliminated from the Army based on both misconduct and moral or professional dereliction, and derogatory information, with a general (under honorable conditions) characterization of service.

b. On 25 November 2014, an Informal PEB recommended he be placed on the Permanent Disability Retired List.

c. An Ad Hoc Review Board subsequently reviewed both of these issues.

d. The Deputy Assistant Secretary of the Army (Review Boards) (DASA (RB)) directed this case be returned to the General Officer Show Cause Authority. The DASA (RB) directed that a new Board of Inquiry be conducted based on the findings of the Board of Inquiry conducted on 3 June 2014 and the allegation of illegal use of cocaine that arose after that Board of Inquiry unless the applicant tenders an unconditional resignation in lieu of elimination.

38. An AHRC memorandum, dated 16 July 2015, shows the applicant was informed:

a. On 3 June 2014, a Board of Inquiry recommended he be involuntarily eliminated from the Army based on both misconduct and moral or professional dereliction, and derogatory information, with a general (under honorable conditions) characterization of service.

b. On 25 November 2014, an Informal PEB recommended his placement on the Permanent Disability Retired List.

c. An Ad Hoc Review Board subsequently reviewed both of these issues.

d. On 7 July 2015, the DASA (RB) directed this case be returned to the General Officer Show Cause Authority. The DASA (RB) directed that a new Board of Inquiry be conducted based on the findings of the Board of Inquiry conducted on 3 June 2014 and the allegation of illegal use of cocaine that arose after that Board of Inquiry unless he tenders an unconditional resignation in lieu of elimination.

39. A Headquarters, Fort Stewart memorandum, dated 27 October 2015, initiated the applicant's elimination and informed he was required to show cause for retention on active duty under the provisions of Army Regulation 600-8-24, due to his misconduct, moral or professional dereliction, and derogatory information permanently filed in his AMHRR.

a. The specific reasons for his elimination were:

(1) Personal misconduct when he made inappropriate comments of a sexual nature to a female officer on 9 May 2013, which were substantiated through an Army Regulation 15-6 investigation, resulting in receiving a GOMOR dated 8 June 2013, which was filed permanently in his AMHRR

(2) Personal misconduct involving the use of drugs when he wrongfully used cocaine, a schedule II controlled substances, between 13 April 2015 and 16 April 2015.

(3) Conduct unbecoming an officer, as indicated by the above-referenced GOMOR and misconduct.

b. He was advised of his right to counsel to prepare a rebuttal statement bearing on the question of his elimination. He was advised he could either submit a rebuttal to show how he overcame the reason for the show cause proceedings, submit his request for resignation in lieu of elimination, or apply for retirement in lieu of elimination if otherwise eligible.

40. In a memorandum to the Commander, 3rd Infantry Division and Fort Stewart, dated 18 December 2015, the applicant acknowledged receipt of notification that he was being considered for elimination and must show cause for his retention on active duty under the provisions of Army Regulation 600-8-24.

41. In a memorandum to the Commander, AHRC, dated 2 February 2016, the applicant acknowledged having received, read, and understood the officer elimination memorandum recommending his involuntary separation from active duty. He indicated he elected to submit a request for a Board of Inquiry and elected to submit a statement or document on his behalf.

42. In an undated memorandum through the Commanding General, Headquarters, Fort Stewart to the Commander AHRC, having been informed that he was being considered for elimination, did request resignation from the Army under the provisions of Army Regulation 600-8-24, chapter 4, in lieu of further elimination proceedings.

- a. He acknowledged having been advised prior to submitting this request for resignation, that he may consult with and be represented by legally qualified counsel. He indicated he was fully advised and counseled by a member of the Judge Advocate General's Corps at Fort Stewart, GA, on 7 April 2016 and he fully understood the implications of this voluntary action.
- b. He elected to waive any right he had either to appear before a board of officers with legally qualified counsel or to submit matters in explanation, rebuttal, or defense concerning the allegations in his case. He elected to waive any right he had to submit matters in explanation, rebuttal, or defense concerning the allegations in his case.
- c. If this resignation were accepted, he understood he would be furnished an honorable, general, or under other than honorable conditions discharge, as determined by Headquarters, Department of the Army.
- d. He understood his resignation was voluntary and that he was not entitled to separation pay.

43. A memorandum from Headquarters, 3rd Infantry Division and Fort Stewart for the Commander, AHRC, dated 26 April 2016, shows:

- a. On 27 October 2015, this command initiated an officer elimination action against the applicant based on misconduct, moral, or professional dereliction and derogatory information permanently filed in his AMHRR.
- b. After careful consideration of his case and the documents submitted on his behalf, he recommended approval of the applicant's request for resignation in lieu of elimination request, and if approved, that his service be characterized as under other than honorable conditions.

43. A memorandum from the DASA (RB), dated 13 September 2016, shows:

- a. The Department of the Army Ad Hoc Review Board reviewed the resignation in lieu of elimination tendered by the applicant.
- b. The DASA (RB) accepted his resignation and directed he would be discharged from the Army with an under other than honorable conditions characterization of service.

c. This elimination is based on both misconduct and moral or professional dereliction and derogatory information in accordance with Army Regulation 600-8-24, chapter 4.

44. The applicant's DD Form 214 shows he was discharged under other than honorable conditions on 6 October 2016, under the provisions of Army Regulation 600-8-24, chapter 3, in lieu of trial by court-martial, with separation code DFS. [Note this does not reflect the approved discharge in lieu of elimination under the provisions of Army Regulation 600-8-24, chapter 4, for misconduct, moral, or professional dereliction and derogatory information]. He was credited with 7 years, 4 months, and 14 days of net active service.

45. The applicant provided 21 pages of mental health Progress Notes from North Central Correctional Institution, dated between January 2017 and January 2018, which have been provided in full to the Board for review. They detail the applicant's mental health treatment plan and reflect his diagnoses of PTSD and attention deficit/hyperactivity disorder, combined presentation.

46. In November 2019, the applicant applied to the ADRB requesting an upgrade of his characterization of service from under other than honorable conditions to honorable, contending his misconduct was the direct result of PTSD.

47. The ADRB Case Report and Directive in Docket Number AR20200002612, has been provided in full to the Board for review and shows:

a. On 4 August 2021, the ADRB voted not to change the applicant's characterization of service because of the severity of the un-mitigated misconduct, repeated demeaning comments to females with sexual connotations. The ADRB noted administrative errors specific to the separation authority, narrative reason, associated separation code and reentry code, but cannot take action that was not requested nor make an applicant's situation worse; therefore the narrative reason and associated separation code and reentry code would remain unchanged.

b. While the ADRB found the separation was both proper and equitable, as the Secretarial Reviewing Authority, the DASA (RB) reviewed the findings, conclusions, and the board's recommendation. The DASA (RB) found sufficient evidence to upgrade the characterization of service to general (under honorable conditions).

48. An ARBA memorandum, dated 5 August 2021, informed the applicant of the DASA (RB) decision to upgrade the characterization of his service to general (under honorable conditions) and that his DD Form 214 would be corrected to reflect this finding.

49. On 24 September 2021, the applicant's original DD Form 214 was voided and he was reissued a DD Form 214, reflecting he was given a general discharge (under honorable conditions) on 6 October 2016. No other information on the form was amended.

50. A VA Rating Decision, dated 19 October 2023, shows the applicant was granted the following service-connected disability ratings effective 5 November 2019:

- lumbosacral DDD and thoracic strain, 40 percent
- maxillary sinusitis, 30 percent
- migraine headaches, 30 percent
- PTSD, 30 percent
- cervical spine DDD, 20 percent
- left shoulder residuals of arthroscopic SLAP repair, 20 percent
- right shoulder strain, 20 percent
- GERD, 10 percent
- left ankle strain with Achilles tendonitis, 10 percent
- left hip strain with impairment of the thigh, 10 percent
- left knee strain, 10 percent
- left sciatic neuropathy, 10 percent
- right ankle strain, 10 percent
- right hip strain with impairment of the thigh, 10 percent
- right knee strain, 10 percent
- right sciatic neuropathy, 10 percent
- TMJ disorder with joint sounds and bruxism, 10 percent
- tinnitus, 10 percent
- benign paroxysmal positional vertigo, 0 percent
- bilateral dry eye syndrome, 0 percent
- erectile dysfunction, 0 percent
- herpes zoster, 0 percent
- hypertension, 0 percent
- left ear hearing loss, 0 percent
- left hand strain, index finger, s/p fracture, 0 percent
- left hand strain, little finger, 0 percent
- left hand strain, long finger, 0 percent
- left hand strain, ring finger, 0 percent
- left hand strain, thumb, 0 percent
- left hip strain with limitation of flexion, 0 percent
- left shoulder scars, 0 percent
- right hand strain, index finger, 0 percent
- right hand strain, little finger, 0 percent

- right hand strain, long finger, 0 percent
- right hand strain, ring finger, 0 percent
- right hand strain, thumb, 0 percent
- right hip strain with limitation of flexion, 0 percent
- TBI, 0 percent

51. A VA letter, dated 2 November 2023, informs the applicant of and reiterates the findings of the above discussed VA Rating Decision, dated 19 October 2023.

52. The Army rates only conditions determined to be physically unfitting at the time of discharge, which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career. The VA does not have authority or responsibility for determining physical fitness for military service. The VA may compensate the individual for loss of civilian employability.

53. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration of an honorable physical disability retirement vice general (under honorable conditions) administrative discharge in lieu of elimination or in lieu of trial by court-martial, as reflected in his DD Form 214.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following:

- The applicant was appointed a Second Lieutenant (2LT) in the Regular Army on 23 May 2009.
- The applicant deployed to Afghanistan from 14 December 2012 to 13 July 2013. In May 2013 he was the subject of a 15-6 Investigation and was found to have made inappropriate and sexually explicit comments to a female CPT. He had a GOMOR permanently filed in his OMPF. His next OER reflected negative comments and had a recommendation for the applicant's relief from service. On 17 April 2014, the applicant acknowledged receipt of initiation of elimination. The applicant underwent a medical examination for the purpose of separation and medical board, and on 8 May 2014, the applicant was given a permanent PULHES of 133112. A Board of Inquiry convened on 30 June 2014 and recommended the applicant's separation from the Army with a general, under honorable conditions characterization of service. He appealed, and the report of the board was returned for reconsideration.
- The applicant was arrested in August 2014, for a warrant issued in the State of Ohio with a charge of rape. In March 2015, he accepted a plea bargain to two counts of gross sexual imposition. He served six years in prison.

- An Informal PEB convened on 25 November 2014, where the applicant was found physically unfit with a recommended rating of 60 percent for three physical health conditions. He was found to meet retention standards for PTSD and TBI, and he signed indicating he concurred with the findings.
- The applicant tested positive for cocaine via a urinalysis conducted on 16 April 2015.
- After multiple reviews, the applicant was discharged on 6 October 2016 under the provisions of Army Regulation 600-8-24, chapter 3, in lieu of trial by court-martial, with separation code DFS, and he was credited with 7 years, 4 months, and 14 days of net active service.

c. Review of Available Records: The Army Review Boards Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts he experienced PTSD as a result of his exposure to traumatic content while deployed, and he minimized his symptoms due to his belief that he did not deserve to have PTSD. He indicated he began using cocaine to self-medicate his PTSD symptoms. The applicant requests that his separation for discharge in lieu of court-martial be set aside in favor of a discharge through medical channels in accordance with the recommendation of the Physical Evaluation Board.

d. The application included mental health records from the North Central Correctional Institution and were dated from 5 January 2017 to 21 December 2017. In summary, documentation reflected monthly visits with a therapist and/or a prescriber, although the applicant was not taking any medications, and it noted mild symptoms of PTSD, adjustment to confinement, and behavioral management of mental health symptoms. The diagnoses were PTSD and ADHD. A VA Rating Decision letter dated 19 October 2023 showed the applicant is 30% service connected for PTSD and 0% service connected for TBI. A second letter dated 2 November 2023 showed the same ratings. A Report of Medical History dated 19 May 2014 showed that the applicant endorsed difficulty sleeping, depression or excessive worry, and loss of appetite due to anxiety. He reported having a diagnosis of "acute anxiety/depression" and taking medication for anxiety/depression and nightmares. A Report of Mental Status Evaluation dated 18 June 2014 showed a diagnosis of Anxiety Disorder, not otherwise specified (NOS) and that the applicant was considered fit for full duty, including deployment. It was indicated that he met retention standards, had capacity to understand administrative procedures, and could appreciate the difference between right and wrong. An IDES "Abbreviated" NARSUM dated 11 July 2014 was included in the application and showed that the applicant met retention standards for PTSD and TBI. There was sufficient evidence that the applicant was diagnosed with a psychiatric condition while on active service.

e. The Joint Legacy Viewer (JLV), which includes medical and mental health records from DoD and VA, was also reviewed and showed the applicant initiated mental health treatment on 22 April 2014, and he reported symptoms of depression and anxiety

associated with the sexual harassment charge and subsequent GOMOR, a CID investigation, and going through MEB process. He had a follow up visit the next day and reported difficulty adjusting to the death of his best friend in 2011, another friend's death shortly thereafter, and images he saw during deployment of people being "blown up." He was diagnosed with Anxiety Disorder NOS, and it was noted that he was taking a medication for mood and one for nightmares. He was evaluated for PTSD but did not meet full criteria; however, an evidence-based treatment (EMDR) for PTSD was started. He was seen on 29 May 2014 for an MEB and a chapter physical, and it was determined that he had not reached MRDP for Anxiety Disorder. He continued in psychotherapy, and he completed a command directed evaluation on 18 June 2014 where he was determined to meet retention standards. By the end of July 2014, documentation showed improvement in symptoms through psychotherapy, and he was able to discontinue the medication for sleep. The applicant reengaged mental health treatment in March 2015 due to stress associated with the allegation of sexual misconduct when he was 14 years old and the loss of his marriage. He engaged in supportive therapy to help manage the stressors in his life, and he completed psychological testing to determine a diagnosis of ADHD. He had a final mental health session on 29 April 2014, and his diagnosis was Adjustment Disorder with Mixed Emotional Features and ADHD.

f. The applicant initially engaged mental health treatment through the VA in November 2021, and he reported that his discharge had been upgraded so he was pursuing his VA benefits. In April 2022 he completed a psychiatric evaluation where he discussed his mental health history, including medication management for ADHD, and his desire to utilize VA for care. He was diagnosed with ADHD, PTSD, and Binge Eating Disorder, by history. He initiated psychotherapy and primarily discussed his history of childhood sexual trauma. He was evaluated by the TBI clinical team on 27 May 2022, and it was concluded, "Your current memory issues are not from your history of concussions. Your memory difficulties are most likely due to your history of ADHD, dyslexia, PTSD, poor sleep and other mental health issues." The applicant has continued to regularly engage in mental health treatment, including medication management, individual therapy, and couples counseling, and his most recent visit was in September 2024. His primary diagnoses are PTSD (related to childhood trauma) and ADHD, and he is prescribed a stimulant medication, an antidepressant, and a medication for nightmares.

g. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support that the applicant had a medically disabling mental health condition while on active service. The documentation during the applicant's time in service does not support that the applicant was psychiatrically unfit at the time of discharge for any boardable mental health condition as he did not have persistent or reoccurring symptoms requiring extended or recurrent

psychiatric hospitalization or persistent and reoccurring symptoms that interfered with duty performance or necessitated duty limitations (AR 40-501, para 3-33c).

h. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes. The applicant asserts he had a disabling mental health condition at the time of discharge. There was documentation of history of diagnoses of Anxiety Disorder NOS, Adjustment Disorder, and ADHD while on active service, and he is 30% service connected for PTSD through the VA. Additionally, the applicant's misconduct has been mitigated, and his characterization of discharge has been upgraded to under honorable conditions (general), taking into consideration the nexus between trauma exposure and substance use.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he was experiencing a mental health condition while on active service, and he has been found to be 30% disabled for service-connected PTSD.

(3) Does the condition or experience actually excuse or mitigate the discharge? No. The applicant initially engaged mental health treatment in April 2014, and documentation discussed situational stressors as the primary complaint. He was appropriately diagnosed with Anxiety Disorder NOS because he did not meet full criteria for PTSD, but he did endorse a deployment related trauma exposure. As he engaged in treatment, there is no indication of any duty limiting condition throughout the documentation, and it does not appear that he was profiled due to a behavioral health related condition. His symptoms improved with psychotherapy and medication, and he discontinued treatment. The PEB found that he met retention standards for PTSD and TBI.

i. However, the applicant contends he was experiencing a mental health condition or an experience that is mitigatable, and per Liberal Consideration his contention is sufficient for the board's consideration.

BOARD DISCUSSION:

The Board carefully considered the applicant's request, supporting documents, evidence in the records, a medical review, and published Department of Defense guidance for liberal consideration of requests for changes to discharges. The Board considered the counsel's statement, the applicant's statement, the applicant's record of service to include deployment, the frequency and nature of his misconduct, and the reason for his separation. The Board considered the applicant's PTSD claim and the review and conclusions of the ARBA Behavioral Health Advisor. The applicant provided

no evidence of post-service achievements or letters of reference in support of a clemency determination. The Board found insufficient evidence of in-service mitigating factors and concurred with the conclusion of the medical advising official regarding PTSD not being an unfitting condition prior to his discharge. Based on a preponderance of the evidence, the Board determined the character of service the applicant received after upgrade by the ADRB and his administrative discharge in lieu of disability retirement were not in error or unjust.

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.

4/1/2025

 X

CHAIRPERSON


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

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to

timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), sexual assault, or sexual harassment. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based, in whole or in part, on those conditions or experiences.

3. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NRs) regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds. This guidance does not mandate relief, but rather provides standards and principles to guide BCM/NRs in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

4. Army Regulation 600-8-24 (Officer Transfers and Discharges) serves as the authority for the transfer and discharge of Army officer personnel. It provides that elimination action may be or will be initiated for misconduct, moral or professional dereliction, acts of personal misconduct, conduct unbecoming an officer, and adverse information filed in the Official Military Personnel File (OMPF).

a. Paragraph 1-22, in effect at the time, provides the authorized types of characterization of service or description of separation.

- b. Paragraph 1-22a, states an officer will normally receive an honorable characterization of service when the quality of the officer's service has met the standards of acceptable conduct and performance of duty, or the final revocation of a security clearance under DODI 5200.02 and AR 380-67 for reasons that do not involve acts of misconduct for an officer.
- c. Paragraph 1-22b, states an officer will normally receive a general (under honorable conditions) characterization of service when the officer's military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge. A separation under general (under honorable conditions) normally appropriate when an officer: Submits an unqualified resignation; Separated based on misconduct; discharged for physical disability resulting from intentional misconduct or neglect; and, for final revocation of a security clearance.
- d. Paragraph 1-22c, states a discharge under other than honorable conditions is an administrative separation from the service. A discharge certificate will not be issued. An officer will normally receive an under other than honorable conditions when he or she: resigns for the good of the Service; is dropped from the rolls (DFR) of the Army in accordance with paragraph 5-9; (3) is involuntarily separated due to misconduct, moral or professional dereliction, or for the final revocation of a security clearance as a result of an act or acts of misconduct, including misconduct for which punishment was imposed; and, is discharged following conviction by civilian authorities.
- e. Chapter 4 outlines the policy and procedure for the elimination of officers from the active Army for substandard performance of duty.
- f. Paragraph 4-2b, prescribes for the elimination of an officer for misconduct, moral or professional dereliction, or in the interests of national security.
- g. Paragraph 4-2c, prescribes for the elimination of officer for derogatory information.
- h. Paragraph 4-3a states an officer referred to recommended for elimination under this chapter who does not meet medical retention standards will be process through both the provisions of this regulation and through the Disability Evaluation System (DES) process as described in paragraph 1-22.
- i. Paragraph 4-3b states when it is determined the officer's mental condition contributed to military inefficiency or unsuitability, the medical evaluation will include a psychiatric study of the officer. This study will indicate whether the officer was able to distinguish right from wrong and whether the officer has the mental capacity to understand board and judicial proceedings and participate in defense. When applicable, the report

will also indicate whether the incapacitating mental illness could have been the cause of the conduct under investigation.

j. Paragraph 4-24a states an officer identified for elimination may, at any time during or prior to the final action in the elimination case elect one of the following options: (1) Submit a resignation in lieu of elimination; (2) request a discharge in lieu of elimination; and, Apply for retirement in lieu of elimination if otherwise eligible.

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

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an Military Occupational Specialty (MOS) Medical Retention Board (MMRB); and/or they are command-referred for a fitness-for-duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and Physical Evaluation Board (PEB). The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

c. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of his or her office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in a

finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

6. Army Regulation 635-40 establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

a. Disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

b. Soldiers who sustain or aggravate physically-unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

c. The percentage assigned to a medical defect or condition is the disability rating. A rating is not assigned until the PEB determines the Soldier is physically unfit for duty. Ratings are assigned from the Department of Veterans Affairs (VA) Schedule for Rating Disabilities (VASRD). The fact that a Soldier has a condition listed in the VASRD does not equate to a finding of physical unfitness. An unfitting, or ratable condition, is one which renders the Soldier unable to perform the duties of their office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of their employment on active duty. There is no legal requirement in arriving at the rated degree of incapacity to rate a physical condition which is not in itself considered disqualifying for military service when a Soldier is found unfit because of another condition that is disqualifying. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

d. Paragraph 4-4 states a commissioned or warrant officer will not be referred for disability processing instead of elimination action (administrative separation) that could result in separation under other than honorable conditions. Officers in this category who are believed to be unfit because of physical disability will be processed simultaneously for administrative separation and physical disability evaluation.

c. Commanders exercising general court-martial authority will ensure that the foregoing actions processed together are properly identified and cross-referenced. The administrative separation will be forwarded to Commander, U.S. Army Human Resources Command (AHRC). The commander, USAHRC, will refer the entire file, including both courses of action, to the Office of the Secretary of the Army, for necessary review. The Secretary of the Army will decide the proper disposition of the case.

7. Title 10, U.S. Code, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent. Title 10, U.S. Code, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30 percent.

8. Title 38, U.S. Code, section 1110 (General – Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

9. Title 38, U.S. Code, section 1131 (Peacetime Disability Compensation – Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

10. Title 10, U.S. Code, section 1556 requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be

provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//