

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 January 2025

DOCKET NUMBER: AR20240002769

APPLICANT REQUESTS: reconsideration through counsel for –

- removal of the General Officer Memorandum of Reprimand (GOMOR), 30 June 2020, and all allied documents from his Army Military Human Resources Record (AMHRR)
- restoration of his rank to colonel (COL)
- restoration of his pension to pay grade O-6
- a personal appearance hearing before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel's brief
- Exhibit A - Applicant's statement
- Enclosure 1 – Original Army Board for Correction of Military Records (ABCMR) Petition with attachments (previously considered)
- Enclosure 2 - Charter for the Functional Area (FA) 50 Steering Committee
- Enclosure 3 - Memorandum for Record (MFR) - Subject: FA50 Assignment Guidance and Considerations with Annex A - Active Component Manning Categories to Fiscal Year (FY) 18-19 ACMG
- Enclosure 4- Office of the Deputy Chief of Staff (ODCS) G-8 (W6APAA) FY20 Table of Distribution Allowance (TDA) Effective Date 3 October 2018 (Approved) Military Manning Report
- Enclosure 5 - FA50 Council of Colonels Steering Committee slides
- Enclosure 6 - FA50 Talent Management Panel slides
- Enclosure 7 - Email communication - Letter of Support
- Enclosure 8 - Character Letter in Support of Applicant
- Enclosure 9 - Character Letter in Support of Applicant
- Enclosure 10 –
 - Criminal Investigation Division (CID) Crime Records Letter
 - CID Fort Myer Report of Investigation (ROI) - 2nd Corrected Final

- Enclosure 11 - Character Letter in Support of Applicant
- Enclosure 12 - Character Letter in Support of Applicant
- Exhibit B - Internal Review Team on Racial Disparities in the Investigative and Military Justice Systems

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 Number AR20220005247 on 18 October 2022.

2. The applicant defers to counsel.

3. Counsel states:

a. This request for reconsideration is made on the basis of new evidence, material errors within the applicant's records, and material injustice. All evidence and arguments presented in the original petition are incorporated herein by reference (Exhibit A, Enclosure 1).

b. After serving in the United States Army for over 25 years the applicant experienced an unjust investigation and Army Grade Determination Review Board (AGDRB). The result of these unjust proceedings has been to tarnish the reputation of an outstanding officer and has resulted in significant financial harm to his family. In an additional denial of his request for a records correction, the Honorable Board failed to properly consider the clear bias of the investigating officer as well as the ugly specter of racial disparity in the military justice system.

c. The applicant is asking this Board to consider new evidence and statements that were not reviewed or considered by the Board prior to its initial denial (Exhibit A, with 12 Enclosures). The applicant asks that these matters be considered now for reasons of fundamental fairness and equity given the years of dedicated service he has rendered and the professional embarrassment and personal harm the false allegations have caused (Exhibit A, with 12 Enclosures).

d. Among the most critical new information is a new statement from the close friend of the accuser in the investigation that led to the adverse action (Enclosure 12). In addition, new witness statements are available that provide sufficient evidence to overcome the presumption of administrative regularity. In addition to witness statements, the findings of the original CID investigation are now available (Enclosure 10). The finding of that investigation was that there was no probable cause to support the allegations of the accuser.

e. Finally, new evidence is available to support the concern that race, and ethnicity played a role in the adverse action and grade determination. Although, concerns that cultural misunderstanding and race played a role were raised in the original petition, systemic racism and racial disparity were not clearly raised. Based on new evidence, it is clear that there is racial disparity in the treatment of "black" and "Hispanic" males in the military justice system. Regardless of the causes, the reality is that disparate treatment exists. The Internal Review Team on Racial Disparities in the Investigative and Military Justice Systems is now available and provides critical new information for this Board (Exhibit B).

f. Based on the new evidence and statements that are now available it is clear that there was not sufficient evidence to support the findings of the investigation leading to the adverse action and that the investigation was fundamentally flawed. Now available evidence shows that CID conducted an investigation and that there was not probable cause to support the allegation of the accuser. The fact that there was not even the low level of probable cause provides critical insight into the entire investigation and decimates the credibility of the accuser. Based on this new evidence alone, relief should be granted. Several witness statements are now available that fully undermine the original finding of wrongdoing and demonstrate a flawed investigation. First, these statements show that the allegations were not credible and were not supported by the evidence. Second, the fact that critical eyewitnesses were not interviewed fully undermines the legal sufficiency of the investigation and the resulting adverse actions.

g. The first source of error in the applicant's records arises from the AGDRB application of its own legal standard in the applicant's case. Pursuant to Title 10, U.S. Code (USC), Section 1370 and Army Regulation (AR) 15-80, the AGDRB is responsible for determining the highest grade in which a former servicemember served satisfactorily since servicemembers will be retired at the highest such grade. In order to determine "satisfactory service," the AGDRB considers numerous factors. These factors include but are not limited to any contributing medical reasons; any compassionate circumstances; the length of otherwise satisfactory service in the grade in question, before and after the misconduct; performance level, as reflected in evaluation reports and other portions of the service record; the nature and severity of any misconduct and the punishment received; and the grade at which the misconduct occurred and/or was addressed by authorities. AR 15-80 paragraph 2-4 (Grade determination considerations).

h. It is true that AR 15-80 paragraph 2-5 states that "service in the highest grade [...] normally will be considered to have been unsatisfactory when: a. reversion to a lower grade was [...] (2) owing to misconduct." However, that paragraph does not state that a reduction in grade must occur when there has been misconduct within a grade: indeed, the occurrence of misconduct does not override all other factors listed in AR 15-80 paragraph 2-4. On the contrary, AR 15-80 paragraph 2-4 states that the AGDRB's grade

"determination will be based on the Soldier's overall service in the grade in question." AR 15-80 paragraph 2-4. When the applicant's overall service in the grade of COL, O-6, is properly and objectively considered, it is clear that the applicant's performance in that grade was satisfactory.

i. As the first factor that was given insufficient consideration by the AGDRB, AR 15-80 paragraph 2-4(b) lists "compassionate circumstances" as a relevant factor in determining whether performance in grade was satisfactory. In the applicant's case, there are several compassionate circumstances that mitigate the applicant's conduct. The applicant has taken responsibility for his conduct. He comes from a minority culture in which overt actions of familiarity can and apparently were misunderstood and misconstrued. In addition, the applicant has a wife and daughters who have sacrificed through his career along with the applicant and will suffer significant financial harm as the result of loss of rank. Instead of properly considering this factor the AGDRB appears to have focused simply on the misconduct, at the expense of giving proper consideration to mitigating circumstances.

j. Next, AR 15-80 paragraph 2-4(c) lists the "length of otherwise satisfactory service in the grade in question, before and after the misconduct" as a factor that should be included in the analysis of satisfactory performance. This factor weighs in the applicant's favor and was given insufficient consideration by the AGDRB. As mentioned in above, the applicant was permitted to continue in special positions of leadership and trust by his leadership. Finally, the AGDRB also failed to give proper consideration to the factor listed in AR 15-80 paragraph 2-4(e): "performance level, as reflected in evaluation reports and other portions of the service record that reflect performance. In reviewing these matters, the AGDRB will consider whether reporting officials were aware of the performance giving rise to the grade determination." First, the applicant received two awards after his promotion to COL. He received the Defense Meritorious Service Medal. He also received the NATO Service Medal. These two awards clearly demonstrate that the applicant's performance as a COL was outstanding. In addition, his Officer Evaluation Reports (OERs) include important statements regarding the applicant's outstanding performance and show favorable ratings.

k. Despite his long and demonstrated history of professionalism and fair treatment, his cultural colloquialisms were permitted to be used against by those with an agenda to seek retribution against him. While this may not appear to be blatant racism or discrimination on the surface, when viewed through a cultural lens it is clear that race and culture played a critical part. Not only did cultural differences cause an assumption of improper intent, the basic standards of evidence and legal sufficiency have been ignored throughout the processing of this case. As a result, in light of the applicant's outstanding service record, the AGDRB's reduction of the applicant's grade in retirement violates basic notions of justice. Sadly, this corresponds with the pattern of racial disparity that is present throughout the military today.

l. The Applicant respectfully requests that his performance as a COL, which took over 25 years to attain, not be defined by this single and unfortunate allegation. After years of immaculate service to the Army and his nation, the applicant requests that the GOMOR filed in his Official Military Personnel File (OMPF) be expunged and that his rank and pension be restored to the grade of COL.

m. In light of the above-referenced material error and injustice, it is respectfully requested that this Honorable Board grant the applicant a records correction. The AGDRB erred by applying the appropriate legal standard in the applicant's case, as it focused almost exclusively on the applicant's misconduct. Indeed, there are numerous factors to be evaluated in assessing satisfactory performance in grade, and several other factors weigh heavily toward the conclusion that the applicant should have been allowed to retire as a COL/O-6. These favorable yet insufficiently considered factors and the other exemplary aspects of the applicant's performance as a COL all merited retirement as COL. New evidence is now available that undermines the original investigation, and all follow-on adverse actions. Finally, the requested correction is also made in the interest of justice, as the reduction of the applicant's rank in retirement improperly disregards the discriminatory factors at play and the totality of the applicant's service record, which contains over 25 years of honorable and distinguished service. Numerous character references also corroborate that the applicant was an outstanding officer, who worked hard to overcome the cultural issue that played a role in perceived misconduct. As a result, the only just outcome for the applicant is to retire at his highest-held rank: Colonel.

4. Counsel's brief and supporting documents to the Board can be reviewed in their entirety within the tabbed and labeled supporting documents.

5. A review of the applicant's official records show the following:

a. Having prior Reserve Officers' Training Corps Cadet service, DA Form 71 (Oath of Office – Military Personnel) shows he was appointed as a Reserve commissioned officer and executed his oath of office on 18 August 1995.

b. On 19 September 2017, Headquarters, U.S. Army Human Resources Command published Order Number 262-002, which promoted the applicant to rank/grade of COL/O-6, effective on with a date of rank of 1 October 2017.

c. The applicant was issued Military Protective Orders (MPO) for the following dates. The MPOs show Ms. [REDACTED] as the protected person. The basis for the MPOs is an allegation of abusive contact made against the applicant by Ms. [REDACTED]. The MPOs specifically state: "[Applicant] is to remain at a minimum distance of 50 feet from [Ms. [REDACTED]] in the workplace and no less than 500 feet outside of the workplace." The DA Forms 2873 (Military Protective Order) are properly signed by

the applicant and his commander.

- 5 August 2019 until 5 September 2019
- 5 September 2019 until 5 October 2019
- 3 October 2019 until 8 November 2019
- 7 November 2019 until 6 December 2019
- 5 December 2019 until 10 January 2020
- 10 January 2020 until 14 February 2020

d. On 20 March 2020, Ms. [REDACTED] the alleged victim, rendered a sworn statement in connection with the Investigating Officer (IO) investigation. In the DA Form 2823 (Sworn Statement) and its attachment, Ms. [REDACTED] states:

(1) As soon as she began her employment at the Pentagon on 4 March 2019, it was apparent that the applicant took a special interest in her. The first time she met the applicant, he leered at her and gazed up and down her body. Routinely thereafter, on a daily basis, the applicant would visit her workstation uninvited. The applicant constantly invaded her personal space; stared at her chest; gazed up and down her body; told her she "looked beautiful"; used inappropriate and unprofessional language, such as "hey girl" or "hey beautiful"; whispered in her ear about the way she looked; gazed at her in meetings; and offered her unwanted and unsolicited rides home from work. When the applicant would look at her, his eyes would trace her entire body from her head to her legs. At all times during her employment at the Pentagon, she was offended by the applicant's unwanted comments and conduct. She felt very uncomfortable and unsafe in the applicant's presence. She had no romantic or personal interest in the applicant and did not encourage, participate in, or consent to any of his conduct. She identifies as gay and is not attracted to men.

(2) There were at least 20 incidents between 4 and 29 March 2019 in which the applicant made sexual comments about her appearance and clothing. During this time, the applicant also inappropriately touched her by purposefully brushing against her and invading her personal space. The applicant also insisted that she should call him by his first name instead of referring to him by his rank and last name. She never did this and always referred to him by his rank and last name.

(3) The applicant's sexually harassing behavior often occurred in front of supervisory and senior Pentagon employees, including but not limited to Lieutenant Colonel (LTC) [REDACTED] COL [REDACTED] Ms. [REDACTED] and Mr. [REDACTED]. The Government therefore noticed this conduct but failed to take any remedial measures to protect her. Other employees of her directorate noticed the applicant's harassment and warned her about the applicant's prior harassment of other women. For example, in or around mid-April 2019, LTC [REDACTED] told her to be careful around the applicant and that people noticed that he treated her differently. Ms. [REDACTED] and other supervisory employees in

the directorate knew about her status as a sexual assault survivor since she disclosed that information to Ms. ██████ during her security clearance proceedings. However, upon beginning her employment at ██████ in March, Ms. ██████ directed her to speak to anyone above her grade or rank, causing her to feel that she was precluded from complaining about or reporting the applicant's sexual harassment.

(4) There were at least 21 incidents in April 2019 in which the applicant harassed her. He would flirt with her and offer favors. The applicant would say things like: "my friend, will you do this for me and I will buy you a Starbucks?" Furthermore, in April 2019, as she began to attend more organizational meetings, the applicant would leer at her as well as continue to pursue her by offering her rides home from work. There were at least 23 incidents in May 2019, in which the applicant called her "beautiful." His eyes would gaze over her entire body when he would enter her office space. The applicant's repeated compliments of her appearance were offensive, unwanted, and never reciprocated.

(5) In June 2019, there were again at least 20 incidents in which the applicant repeatedly complimented her on her appearance. On 17 June 2019, the applicant directed her to meet him in his office in the afternoon. When she reported to the applicant's office, he instructed her to shut the door and they began discussing work-related tasks. She was seated in a chair across from the applicant's desk and he was seated at his desk. When she got up to leave, he walked over to her and proceeded to embrace her with his right hand. She did not ask the applicant to approach her nor did the applicant request permission to hug or embrace her in any way. At the same time, the applicant placed his left hand up her dress and groped the right side of her buttocks and pulled up on her dress, attempting to move it above her waist and groin area. She was so shocked by this conduct that she momentarily froze out of extreme fear for what he might do next. Then she escaped his grasp, opened the door, and quickly returned to her work area. She felt extremely violated, humiliated, and unsafe by the applicant's gender-based violence toward her.

(6) Given her history of previous sexual assault, the impact of the applicant's actions was particularly devastating and traumatic. The applicant groped her and attempted to expose her groin area. The applicant, who is a trained military officer and a much larger and stronger individual than she, could have raped her in his office at the Pentagon. To make matters worse, given Ms. ██████ instruction against speaking to her ranking officials, she initially felt powerless and that she could not even report the incident.

(7) On 19 June 2019 in retaliation for rejecting his advances, the applicant called her direct line and told her that she "needed to be very, very careful" and "to watch her back with ██████ because she was out to get me." She believes the applicant was attempting to further intimidate her from reporting the assault. She also believes the

applicant's phone call was an obvious, if implicit, admission of guilt and further harassment. Were the applicant to have believed, for example, that he unintentionally touched her inappropriately, he would have no reason to try to intimidate her and prevent her from reporting the incident. The applicant never once said to her in the time following his assault, either in his office or at any time thereafter, that what he did was accidental or unintentional. Instead, the applicant continued to sexually pursue and harass her.

(8) The applicant's phone call was deeply upsetting, and though she had been trying to maintain her mental and emotional wherewithal since the assault, she felt she had reached a breaking point. When she hung up the phone, she immediately reported the applicant's sexual assault and harassment to Mr. [REDACTED] who was then her first-line supervisor. When she reported the applicant's assault and attempt to intimidate her, Mr. [REDACTED] who was seated, put his head down and said he did not know what to do. He said this was "new territory" for him, but that he believed her and that he was very sorry this happened to her. On 20 June 2019, Mr. [REDACTED] provided her with the contact information for the Sexual Harassment/Assault Response and Prevention (SHARP) Office.

(9) She immediately contacted Ms. [REDACTED] from the SHARP Office and reported the harassment and assault. However, Ms. [REDACTED] failed to act on her report or even respond to her follow-up inquiries. In fact, the Government took no action to investigate her claims against the applicant in the month and half following her initial complaints to Mr. [REDACTED] and the SHARP Office. As a result, the applicant continued to sexually harass and assault her throughout the entire month of July 2019. There were at least 10 incidents in July 2019 where the applicant purposefully brushed against her, paid her excessive attention, continued to repeatedly offer her rides home from work, asked her to get coffee with him, and asked her to lunch. She tried to avoid being near the applicant as best she could and never set foot in the applicant's office again after the 17 June 2019 assault incident. However, even after her report of his unlawful conduct, Mr. [REDACTED] continued to require her to work with the applicant, including interacting with him and attending meetings with him. The applicant continued to harass her and repeatedly tried to drive her home from work. She feared that if the applicant knew her home location, he might follow her home and rape her. The Government did nothing to ensure her safety during this time.

(10) On 16 July 2019, nearly a month after she reported the initial assault, the applicant came to her workstation and physically and verbally harassed and assaulted her while she was seated at her desk. Specifically, he approached her from behind and pressed the right side of his body against the left side of her body. The applicant then leaned in and whispered into her ear "how good" she looked that day. With the back of his right hand, he fondled her left hand. She was terrified and froze in place. Major (MAJ) [REDACTED] who worked the same open space as she at that time, witnessed the

applicant's predatory behavior. Fortunately, MAJ [REDACTED] intervened and broke up the situation.

(11) The applicant's daily harassment continued unabated, even after she reported his harassment, until she made an additional report to the Army's Equal Employment Opportunity (EEO) Office on 18 July 2019, specifically with Ms. [REDACTED]. At that time, Ms. [REDACTED] provided her with additional contacts at the SHARP Office and she immediately contacted Sergeant First Class [REDACTED] a Sexual Assault Response Coordinator, and Ms. [REDACTED] the Garrison SHARP Victim Advocate. On or about this date, the Army also opened a CID matter. She believes that it was only in or around this time that the applicant was made aware of the EEO and CID matters.

(12) She met with CID investigators on 2 August 2019, and they asked her if she wanted to impose an MPO against the applicant. She responded in the affirmative. On 2 August 2019, the Army issued the MPO against the applicant which required him to stay at least 50 feet away from her in the workplace and at least 500 feet away from her outside of the workplace. To her knowledge, the applicant either failed or refused to sign and agree to the MPO until 12 August 2019. In addition, the applicant also delayed signing the MPOs that were subsequent renewals. It is a lawfully binding order against the applicant; however, he indisputably violated it four times on 19 November 2019, 2 December 2019, 19 December 2019, and 3 January 2020.

(13) LTC [REDACTED] Ms. [REDACTED] Mr. [REDACTED] COL [REDACTED] Ms. [REDACTED] and MAJ [REDACTED] witnessed the applicant's behavior and harassment.

(14) The applicant's violations of the MPO and the Army's general responsibility for failing to enforce the same are part of a larger pattern of misconduct and non-feasance that have befallen her since she began her employment at the Pentagon. The applicant should have faced criminal consequences and other severe discipline, including discharge, for sexually assaulting her in his office. Unless something dramatically changes, he will escape any real form of discipline for severely traumatizing her and disgracing the Army.

(15) First, despite the criminal nature of the applicant's harassment and assault, he has not faced, and likely will never face, any criminal consequences for assaulting her. The applicant has been allowed to remain in the workplace with no apparent consequences whatsoever, other than being subjected to the MPO, which he and other Army personnel have repeatedly ignored – with further impunity. The justification that she has received for the lack of criminal action against the applicant is that this is a case of "he said, she said" and that there are "no" witnesses who can speak to the assault. This justification is false and patently misguided. There are numerous witnesses, about whom Government investigators are aware, who can speak to the applicant's predatory

nature and harassment of her. That provides additional corroborative evidence to her testimony that the applicant groped her. That means that this is not a "he said, she said" scenario. Further, the Government's apparent position that if only the attacker and the survivor are present during a sexual attack, then the attacker cannot be prosecuted or held criminally accountable is facially untenable. Most obviously because, among other reasons, categorically precluding prosecution under these circumstances would render the majority of sexual assaults non-prosecutable.

(16) The applicant violated the MPO on 19 November 2019, 2 December 2019, 19 December 2019, and 3 January 2020. On each occasion, the applicant disregarded the MPO's proximity directive and came well within 50 feet of her workstation. Specifically, the applicant entered the waiting area adjoining her desk and sat just across from her on a couch in that space. She duly reported each of these violations to Captain [REDACTED] the EEO Office, and others. The Government was aware of each of these violations; however, it failed to take any remedial measures and the applicant's conduct continued. It was not until January 2020, after she became represented by counsel, that the Government took any steps to investigate the applicant's MPO violations.

(17) The notion suggested that she assented to the applicant's violations of the MPO is wrong and legally irrelevant. Neither the Army, nor any reasonable employer, should place the burden of avoiding one's sexual attacker on the employee. Indeed, the plain language of the MPO itself contemplates no exceptions whatsoever, stating in relevant part: "the service member shall remain at all times and places" at "a minimum distance of 50 feet from [Applicant] in the work place[.]" Moreover, the applicant's violations of the MPO, and/or the supervisors' decisions to permit or communicate to the applicant that it was acceptable to violate the MPO, were intentional, in that the applicant and others acted with the express knowledge that the applicant would break the MPO's 50-foot proximity requirement.

e. A series of email messages from 9 December 2019 through 15 May 2020 reflect the applicant's and COL [REDACTED] discussions regarding the applicant's retirement packet as well as the MPOs.

f. The U.S. Army Military District of Washington (MDW) memorandum (Appointment as Investigating Officer (IO)), dated 27 April 2020, states COL [REDACTED] was appointed as the IO pursuant to Army Regulation 15-6 to conduct an administrative investigation into certain allegations against the applicant. His scope of inquiry and specific instructions directed him to conduct an administrative investigation into the facts and circumstances concerning allegations that the applicant sexually harassed Ms. [REDACTED] and violated an MPO imposed against him.

g. On 29 April 2020, COL ██████ rendered a sworn state in connection with the IO's investigation. In the DA Form 2823 and its attachment, he states:

(1) He is the executive officer for the Deputy Chief of Staff, G-8. He supervises the G-8 executive office. He supervises Ms. ██████

(2) He has no idea if the applicant sexually harassed Ms. ██████ by hugging her, touching her lower back close to her right buttock, and trying to pull up her dress. He did not work anywhere near these two employees and did not frequent this office area for business or personal reasons. He was not in a position to witness/hear or see the allegation that the applicant made sexually-charged comments or displayed sexually-charged behavior as outlined in her claim. He has very little exposure to the applicant at work and none off duty, so he did not hear him make any inappropriate remarks or remarks that are sexual in nature.

(3) Since he does not work in the office area with the applicant and Ms. ██████ he cannot comment on the allegations that the applicant sexually harassed Ms. ██████ by invading her personal space, staring at her chest, gazing up down her body, gazing at her during meetings, offered her rides home, whispering in her ear, commenting on her physical appearance, and using language such as "hey girl" and "hey beautiful" on multiple occasions between March and July 2019. He was never in a position to hear any interactions between the applicant and Ms. ██████ He did not work around either of them.

(4) He rarely had any interactions with the applicant. If he did, it was either to schedule an appointment or a question about the contents of a briefing. He had no social engagement with him. He never witnessed the applicant make comments or jokes or exhibit any behavior toward Ms. ██████ that could be deemed inappropriate or sexual in nature.

(5) On 19 November 2019, he was not present in the office. He does not know if the applicant discriminated or harassed the applicant, thus violating his MPO. He was not aware that the applicant needed to come to the office to see the general. The applicant probably assumed that COL ██████ knew and that he would de-conflict his presence with Ms. ██████ but this did not happen. He was not there to witness any interaction with Ms. ██████

(6) On 2 December 2019, he does not believe the applicant discriminated or harassed Ms. ██████ The general required a meeting with the applicant on that day. Prior to meeting, the applicant asked COL ██████ for guidance on how to proceed and accomplish the mission. He informed Ms. ██████ that the applicant needed to come to the office to see the general. He gave her the option to either leave the office for duration of the 30-minute meeting or to remain at her desk while he supervised the

office area to ensure Ms. [REDACTED] was not harmed or felt threatened. Ms. [REDACTED] chose to remain at her desk and work. When the applicant arrived, COL [REDACTED] stepped away from his desk and stood in the foyer/office area to make his presence seen and felt. The applicant remained in the area, and he heard no comments from him that were inappropriate or observed him staring in any negative manner at Ms. [REDACTED]. When the general was ready for the meeting to begin, COL [REDACTED] escorted the applicant and his staff in to begin the meeting. Afterward, he escorted him out and away from the office.

(7) During the 2 December 2019 meeting, COL [REDACTED] did not hear or observe the applicant make verbal comments or visual connections of any nature to Ms. [REDACTED]. However, he states he was not looking at the applicant every second he was in the area. He was continuously moving, answering phones, making copies, notes, etc., while in the office. He could have missed something.

(8) On 19 December 2019, he does not recall the applicant being in the office area. The applicant did not contact him regarding any business he had with the general. As he reviews the calendar for that day, none of the meetings involved the applicant or his organization. This day was their Organizational Holiday Party. He did not attend the hallway party area so he can only comment on the office area where he worked that day. He does not recall seeing the applicant that day.

(9) On 3 January 2020, the general required a meeting with the applicant prior to meeting with the Chief of Staff of the Army. The meeting was scheduled for 20 December 2019. Ms. [REDACTED] made the entry on the calendar. This was during the holiday period. COL [REDACTED] does not have a record of informing Ms. [REDACTED] that the applicant needed to see the general and asking her which option she would like to choose. Further, COL [REDACTED] does not recall if the applicant actually came to the meeting.

(10) He believes something happened. He just does not know what.

h. On 30 April 2020, LTC [REDACTED] rendered a sworn statement in connection with the IO's investigation. In the DA Form 2823 and its attachment, he states he was Ms. [REDACTED] co-worker. He further states:

(1) From his understanding, Ms. [REDACTED] was told several times by Mr. [REDACTED] that Ms. [REDACTED] was not her employee and Ms. [REDACTED] was not to directly supervise Ms. [REDACTED]. It is important to note, Ms. [REDACTED] job was as an executive assistant to Mr. [REDACTED]. If Ms. [REDACTED] ordered Ms. [REDACTED] to not communicate directly with anyone who outranked her, it would be an unreasonable request.

(2) He was not a witness to the alleged sexual harassment that occurred between the applicant and Ms. [REDACTED]. Ms. [REDACTED] approached him on or about 24 June 2019 and told him of the incident. He does not know if anyone else witnessed the event. Ms. [REDACTED] asked him what she should do. He indicated to her that she had three options: to confront the applicant directly, tell her chain of command (Mr. [REDACTED]), or file a sexual assault claim. Ms. [REDACTED] stated she would think it over.

(3) He did not witness the event that occurred between the applicant and Ms. [REDACTED] on 17 June 2019. He can say that he would not be surprised if this occurred based on his prior observations of the applicant interacting with Ms. [REDACTED].

(4) He and Ms. [REDACTED] were both executive assistants. They sat directly opposite of each other. He was in a separate office and if he rolled his chair to the left, he could see and talk to Ms. [REDACTED] face-to-face. If Ms. [REDACTED] was seated, he could only see the top of her head behind two monitors. He and Ms. [REDACTED] shared responsibilities in each other's absences. They would even cover each other to use the restroom. They were able to answer each other's phones and access each other's calendars, which included their bosses' calendars. Ms. [REDACTED] did not work directly for him. He outranked her and she would come to him for advice and counseling. They interacted on a frequent basis.

(5) Each day, sometimes several times a day, the applicant would come to their office and interact with both he and Ms. [REDACTED]. The applicant would "check in" and see if there was anything their bosses, who were also his bosses, needed, and/or to say hello. These "check ins" were not atypical of the other types of interactions the COLs in the organization would have. The purpose of the applicant's visits, while more frequent than others, were not necessarily out of the ordinary.

(6) The applicant definitely gave Ms. [REDACTED] more attention than was appropriate for a married man to give to a young woman. He never directly witnessed anything inappropriate by the applicant. The applicant would interact with Ms. [REDACTED] in a way that made him feel that he was letting Ms. [REDACTED] know he liked her. He would lean on her desk, talk softly, and smile while looking at her. The applicant is very personal, so from time to time, him talking to others like this would not be of a general concern. But this happened every day. He warned Ms. [REDACTED] that she needed to be careful of the applicant, not to ever be in a room by herself with him, and to avoid the appearance of taking interest in him.

(7) Ms. [REDACTED] would engage the applicant in conversation but would often complain after the fact about how much of her time was wasted just chitchatting with him. The applicant outranked Ms. [REDACTED]. As an executive assistant, it would

have been difficult for her to "break away" from the conversation. He heard the applicant compliment her on her appearance and indicated on multiple occasions that she "looked nice in that dress." The topics of conversations the applicant and Ms. [REDACTED] had involved what she did after hours, her personal life, and, at times, past relationships she had been in.

(8) In his opinion, he felt Ms. [REDACTED] may have shared more of herself than what was considered typical, but he thinks she also tended to do that in general overall. The applicant's remarks, when taken as a singular remark, did not appear to be inappropriate. Taken as a collective whole, the applicant's consistent interactions with Ms. [REDACTED] indicated he was interested in her personally and was attracted to her. At times he could be flirtatious with her in how he talked to her. He witnessed the applicant look at Ms. [REDACTED] buttocks from time to time when she would not have noticed. It was not in a manner that was overly sexual or in a manner that he felt it was appropriate to call him out on. It led him to believe that the applicant was attracted to Ms. [REDACTED] and enjoyed stopping by and chatting with her. He never witnessed the applicant staring at her chest, gazing her up and down, gazing at her during meetings, offering her rides home, or whispering in her ear. He may have heard the applicant use language like "hey girl," but he does not remember the applicant using "hey beautiful." From time to time, the applicant would comment on Ms. [REDACTED] physical appearance by stating "you look nice in that dress." He believes that comment was sexually charged.

(9) He believes the applicant is savvy enough to place his hand on Ms. [REDACTED] [REDACTED] backside in a manner that was ambiguously socially acceptable. Witnesses may or may not have viewed it as inappropriate. The fact that Ms. [REDACTED] felt it was inappropriate leads him to believe that it was indeed inappropriate. This is the only time he is aware that the applicant gave Ms. [REDACTED] direct physical contact.

i. On 8 May 2020, the applicant rendered a sworn statement in connection with the IO's investigation. In the DA Form 2823, the applicant states:

(1) His relationship with Ms. [REDACTED] had always been professional in nature. He has never made any attempt to surpass those boundaries. Ms. [REDACTED] was the executive assistance to Mr. [REDACTED]. As one of the division chiefs for Mr. [REDACTED] he visited the executive office daily. In this capacity, he maintained communication with the executive office via Ms. [REDACTED] on a daily basis. There was no reason for him to visit the executive office unless there was official business to coordinate or have office calls with his supervisor. Most of their conversations were work related and took place in the executive office in plain view of other members of the office unless Ms. [REDACTED] came to his division area and in certain occasions to his office.

(2) In reference to Ms. [REDACTED] allegations of sexual harassment, he has never stared/gazed her body up and down or offered her rides home. At no time has he addressed her or any of his co-workers as "hey girl" or "hey beautiful." Also, he did not make any sexual comments of any kind to Ms. [REDACTED]. Ms. [REDACTED] always referred to him by his rank and last name. At no time did he ask her to call him by his first name. In addition, he did not ask Ms. [REDACTED] for favors or request any preferential treatment from her or implied any quid pro quo. At no point, has he made any such request, made any inappropriate jokes, made any comments, or exhibited any inappropriate or unprofessional behavior toward Ms. [REDACTED]. He did not ask Ms. [REDACTED] to go to lunch nor invite her to go get coffee at Starbucks. He did not purposefully or accidentally brush up against Ms. [REDACTED] or press his body against her while seated. In reference to the allegation of commenting on her physical appearance, his recollection is a little hazy, but he did acknowledge her new haircut once; however, not in a flirtatious or inappropriate manner.

(3) He was never made aware of Ms. [REDACTED] feelings or thoughts that he sexually harassed her from March-July 2019. Ms. [REDACTED] did not mention feeling overwhelmed or uncomfortable with his behavior or conversations. He was made aware of general accusations made against him with no specific details by Ms. [REDACTED] on or about 24 July 2019 via phone while attending his retirement workshop at Fort Belvoir, Virginia. No further details were provided at that time. He became aware on 2 August 2019 that CID was investigating Ms. [REDACTED] complaint, but he did not know the details of her allegations at that time. It was not until he spoke with Ms. [REDACTED] an EEO Specialist, on or about 4 September 2019 that he learned Ms. [REDACTED] was pursuing an EEO lawsuit against the Army, alleging that he touched her lower back to pull up her dress. Additionally, during July 2019, his interaction with Ms. [REDACTED] was limited, as he was participating in pre-retirement briefings and classes from 22-26 July 2019 at Fort Belvoir. After this training, he went on leave. On 12 August 2019, he returned to work and COL [REDACTED] called him to the executive office and asked him to sign paperwork for his suspension of favorable personnel actions (flag) and the initial MPO, pending an investigation of the allegations. COL [REDACTED] said he did not have any further details. The only information he established was provided by the documentation and it was for allegations of abusive sexual contact as written in the MPO.

(4) On or around 19 November 2019, he coordinated with COL [REDACTED] via email to let COL [REDACTED] know he was required to be in the executive office. COL [REDACTED] would need to make some special arrangement in the executive office if the applicant needed to be there. COL [REDACTED] informed him that he would make arrangements for Ms. [REDACTED] not to be there. Due to a conflict with the calendar, the meeting was re-scheduled for a later time. Coordination was made by someone other than COL [REDACTED] in which case, Ms. [REDACTED] did not receive the second notification. As a result, he ended up in the executive office waiting area within approximately

30-40 feet from Ms. [REDACTED] desk. However, he did not address or initiate any interaction with her. After a few minutes, they were called into their meeting. At the conclusion of the meeting, they left the office and Ms. [REDACTED] was not around.

(5) On or around 2 December 2019, he arranged for an early morning meeting where he was told by COL [REDACTED] that Ms. [REDACTED] would not be there. Due to several delays and other calendar conflicts, the meeting ran late and Ms. [REDACTED] arrived at the office while he was still there. He immediately left the surrounding area after been made aware that she walked into the office.

(6) On 19 December 2019, there was no meeting requiring him be in close proximity of the executive office or Ms. [REDACTED]. He left the Pentagon shortly after opening remarks since he had other family matters to attend that day. On 3 January 2020, he was not in the office that day as he was taking another retirement class. Mr. [REDACTED] and Ms. [REDACTED] were his representatives during that briefing.

(7) In conclusion, Ms. [REDACTED] has made similar complaints against him to two or three different law enforcement agencies (CID, EEO, now an Army Regulation (AR) 15-6 investigation). These allegations appear to have changed and expanded with time. These actions or behaviors never took place. In his 25-year military career, he has never been accused of sexual harassment or any other allegation because it is not within his character. His behavior may be intense at times, but professional. He fully believes these allegations made by Ms. [REDACTED] are complete fabrications and manipulation of facts to present an untrue picture. These allegations are intended to damage his image and defames his character in order to gain her own career advantage and manipulate the situation and leadership to move her to another office away from the environment and improve her career opportunities.

j. Between on or about 30 April 2020 and 8 May 2020, the following personnel rendered sworn statements pursuant to the IO's investigation. Their DA Forms 2823 reflect that they have no knowledge of any inappropriate behavior by the applicant toward Ms. [REDACTED]. They observed normal, professional, or friendly conversations between the applicant and Ms. [REDACTED]. Two people stated the applicant told Ms. [REDACTED] either "you look very nice today" or "you look beautiful today." Further, they were unaware of any violations of the MPOs. One person stated he could not rule out that they were within 50 feet of Ms. [REDACTED] if they were in the G-8 suite.

- Ms. [REDACTED]
- Mr [REDACTED]
- Ms. [REDACTED]
- MAJ [REDACTED]
- Mr. [REDACTED]
- Ms. [REDACTED]

- Ms. [REDACTED]
- Mr. [REDACTED]
- LTC [REDACTED]
- MAJ [REDACTED]

k. The Office of the Deputy Chief of Staff, G-1, Memorandum (Findings and Recommendations for AR 15-6 Investigation into Allegations Concerning Allegations of Sexual Harassment and MPO Violations by (Applicant)), dated 12 May 2020 (erroneously dated 12 May 2019), reflects the IO's findings and recommendations based on his investigation of allegations that the applicant sexually harassed Ms. [REDACTED] and violated an MPO imposed against him.

(1) The allegation that the applicant sexually harassed Ms. [REDACTED] in violation of AR 600-20 (Army Command Policy) is substantiated. There was a preponderance of evidence from three witnesses supporting Ms. [REDACTED] claim of sexual harassment.

(2) The allegations that the applicant violated MPOs was substantiated. The applicant specifically violated the MPO's "50-foot proximity order" on four specific instances.

(3) For the offense of sexual harassment, the IO recommended that the command take actions as deemed appropriate. Related to the violations of the MPOs, the IO recommended that the command take actions as appropriate and/or review procedures to ensure better enforcement and mitigation to avoid any further inadvertent violations.

l. The Office of the Deputy Chief of Staff, G-8, Memorandum from the applicant (Adverse Information Rebuttal – (Applicant)), dated 3 June 2020, requests acceptance of his sincere apologies and allowance to retire with no additional adverse action taken against him. He stated:

(1) He sincerely apologizes to Ms. [REDACTED] to his chain of command, and other co-workers. He never intended to offend Ms. [REDACTED] or make her uncomfortable. He carefully read Ms. [REDACTED] testimony and, while his memory of their interactions was different, he understood that she was upset and has gone through a great deal by pursuing the different complaints against him. He acknowledged he should have been more careful in how he interacted with co-workers and he will avoid ever being in this situation in the future.

(2) He respectfully requested allowance to retire upon conclusion of the investigation.

m. The U.S. Army Trial Defense Service (TDS) Memorandum from the applicant's defense counsel (Adverse Information Rebuttal – (Applicant)), dated 4 June 2020, respectfully requested disapproval of the findings and recommendations detailed in the AR 15-6 investigation and allowing the applicant to immediately retire upon conclusion of the investigation.

(1) For the finding of sexual harassment, the standard for sexual harassment as defined in AR 600-20 requires a showing that the conduct created an intimidating, hostile, or offensive work environment. The applicant's alleged comments, even if said, did not meet the definition.

(2) For the finding of violating the MPOs, any violation was inadvertent as stated by the IO's conclusion.

(3) The IO failed to make a credibility determination regarding the complainant. The IO failed to account for the over-exaggerations that were readily refuted by multiple other sworn statements within the investigation. Additionally, the IO failed to account for the fact that the allegations made to CID were unfounded, which impacts the credibility of Ms. [REDACTED] complaint regarding those allegations. Not to mention the fact that Ms. [REDACTED] filed multiple complaints across various investigative agencies, likely to fish for the desired result.

(4) The IO made certain recommendations, one of which was to "take actions deemed appropriate." Considering the amount of time this investigation has taken, TDS requested that even if the IO's findings were approved, the action "deemed appropriate" would be to remove the applicant's flag so his retirement packet may be processed.

n. The U.S. Army MDW Memorandum from the administrative law attorney (Legal Review, AR 15-6 Investigation, (Applicant)), dated 8 June 2020, states he reviewed the administrative investigation and had no legal objections to the IO's findings and recommendations. The IO's findings are supported by a greater weight of evidence than supports a contrary conclusion.

(1) The investigation complies with the requirements of AR 15-6 and the memorandum of appointment. The evidence is sufficient to support the conclusion that the applicant created "an intimidating, hostile, or offensive working environment" by making sexualized comments about the physical appearance of a colleague while at the workplace.

(2) There are no substantial errors. The evidence does not raise material unanswered questions. The recommendations are consistent with the findings.

o. The U.S. Army MDW Memorandum (GOMOR) from the Commanding General dated 30 June 2020, reprimanded the applicant for engaging in sexual harassment in violation of AR 600-20. On multiple occasions, the applicant commented on the appearance of a Department of the Army civilian employee and interacted in a manner that caused others to question his professionalism. He was further reprimanded for violating an MPO when he failed to maintain a minimum distance of 50 feet from the civilian employee within his office at the Pentagon.

p. The Office of the Deputy Chief of Staff, G-8, memorandum from the applicant (GOMOR Rebuttal – (Applicant)) dated 7 July 2020, acknowledged the disappointment expressed in the GOMOR and sincerely apologized to Ms. [REDACTED] his chain of command, and other co-workers. He never intended to offend Ms. [REDACTED] or to make her uncomfortable. In hindsight, he learned how his actions may be perceived as inappropriate and will be more cognizant in the future. He further stated:

(1) He has never received a negative counseling statement, punishment, or adverse action throughout his entire career. He consistently maintained exceptional duty performance in positions of escalating importance and responsibility. Even during the very difficult times of multiple investigations, his local chain of command maintained their trust and confidence in him, as he was not removed from his position as a division chief.

(2) Having gone through the investigative process since August 2019, he requested rescission of the GOMOR or, in the alternative, locally filing the GOMOR. He submitted a retirement packet and was convinced that retirement was the most suitable course of action in this case.

q. The U.S. Army TDS memorandum from counsel for the applicant (GOMOR Rebuttal – (Applicant)) dated 7 July 2020, requested rescission of the GOMOR or, in the alternative, locally filing the GOMOR and allowing the applicant to retire. Counsel further stated a GOMOR, whether locally or permanently filed, serves no purpose because the applicant intends to immediately complete the retirement process as soon as his flag is lifted. GOMORs are typically valuable tools because they serve to prevent an individual from obtaining a leadership position or from advancing to the next grade. Neither are applicable to the applicant.

r. The U.S. Army MDW memorandum from the Commanding General (GOMOR Filing Determination for (Applicant)), undated, states that after carefully reviewing the facts, circumstances, and rebuttal matters, he directed permanently filing the GOMOR in the applicant's AMHRR.

s. The Office of the Deputy Chief of Staff, G-8, memorandum from the applicant (Application for AGDRB – (Applicant)) dated 5 October 2020, requests retirement in the

rank/grade of COL/O-6.

t. The Army Review Boards Agency (ARBA), Deputy Assistant Secretary of the Army (DASA) (Review Boards) memorandum – Subject: Officer Grade Determination Case (Applicant), dated 2 February 2021, states the AGDRB reviewed the applicant's request for voluntary retirement and the request for grade determination submitted by the Chief, Colonels Management Office. If the applicant's retirement is approved, the DASA (Review Boards) directed his placement on the Retired List in the rank/grade of LTC/O-5. The DASA (Review Boards) determined the applicant's service in the rank/grade of COL/O-6 was not satisfactory.

u. On 31 May 2021, the applicant was honorably retired by reason of sufficient service for retirement. DD Form 214 shows in:

- Item 4a (Grade, Rate or Rank) – COL
- Item 12c (Net Active Service This Period) – 25 years, 8 months, and 26 days
- Item 12i (Effective Date of Pay Grade) – 1 October 2017
- Item 18 (Remarks) – Service in Kuwait 15 April 2003 – 3 July 2003; Iraq 15 September 2008 – 16 January 2009; and Afghanistan 26 February 2018 – 27 August 2018

v. The CID ROI (2nd Corrected Final) dated 9 May 2022, shows the applicant listed as the subject/suspect of the offense of Abusive Sexual Contact (Adult), Uniform Code of Military Justice – Article 120. It also shows under the offense "Protective Order Issued – Military" was listed. The victim's name is redacted and the CID ROI shows:

(1) Date/Time Reported: 1500 hours, 25 July 2019.

(2) The CID office was notified by the SHARP Coordinator, Joint Base Myer-Henderson Hall, Virginia, that the victim stated she was inappropriately touched by an unidentified male in the Pentagon.

(3) The victim stated she works at the Pentagon with the applicant. She often interacts with the applicant, and he almost immediately started making unwanted comments about her appearance. On 17 June 2019, the victim went to the applicant's office for a meeting and at the conclusion of the meeting, the applicant got up from his desk, hugged her, and used his hand to grab her buttocks. The victim stated the hug was unwanted, as well as the touch. The victim stated the applicant continued to make unwanted comments regarding her appearance after the incident, as well as invade her personal space while in the workplace.

(4) The applicant was advised of his legal rights, which he waived and stated on one occasion the victim initiated a hug, but he never inappropriately touched the victim.

(5) Legal Coordination: This is not a prosecutorial decision. For the purposes of fingerprint card submission, CODIS sample submission, and DIBRS indexing, on 25 March 2020, [REDACTED] Trial Counsel, Office of Staff Judge Advocate Military District of Washington, Fort McNair, Washington, DC, opined no probable cause exists to believe that the applicant committed the offense of Abusive Sexual Contact. For additional details concerning the no probable cause opinion coordinate with the supporting trial counsel. No additional investigative efforts are required. "There is sufficient evidence to provide to command for consideration of action."

w. The ARBA memorandum (Request for Redacted CID/Military Police Report for (Applicant)) dated 22 June 2022, shows the ARBA Case Management Division requested a redacted copy of any CID ROIs and military police reports pertaining to the applicant.

x. The CID memorandum (Request for Sanitized ROI and/or Law Enforcement Report) dated 25 August 2022, provided the sanitized LER pertaining to the applicant to the ARBA Case Management Division in response to its request.

y. The ARBA Case Management Division letter to the applicant dated 25 August 2022, provided him with a copy of the sanitized CID LER and offered him the opportunity to submit comments or rebuttal. His application was placed on hold for 15 days pending comments. No response was received prior to his case appearing before the Board.

z. On 18 October 2022, the Board voted unanimously to deny the applicant and counsel's request to remove the GOMOR dated 30 June 2020, and all allied documents from his AMHRR; restoration of his rank to COL, restoration of his pension to pay grade O-6, and a personal appearance hearing before the Board. The Board stated:

(1) In an AR 15-6, an IO found that the allegations that the applicant sexually harassed Ms. AJ in violation of AR 600-20 and violated MPOs were both substantiated. The IO recommended that the command take actions as deemed appropriate. As a result, the Commanding General reprimanded the applicant for misconduct. A CID final report further shows the applicant is listed as the subject/suspect of abusive sexual contact.

(2) Because the applicant submitted his retirement, the AGDRB reviewed his case and determined that his service as a COL was not satisfactory. The AGDRB determines the highest grade in which a Soldier served satisfactorily. A "satisfactory" determination of service at a particular grade has pay implications in the case of retiring officers above the grade of warrant officer who have been the subject of adverse information since their last promotion.

(3) Based on the length of service in the grade in question, before and after the misconduct; the applicant's performance level and grade at which the misconduct was committed; the grade at which the misconduct was addressed by the proper authorities, and the nature and severity of any misconduct, the Board determined the applicant's service at the grade of colonel was not satisfactory, and therefore his retirement in the grade of LTC/O-5 is not in error or unjust.

6. In support of the applicant's reconsideration counsel provides, in part:

a. A statement from the applicant dated 3 September 2023, wherein, he states in part, he is requesting the ABCMR reconsider its decision on 18 October 2022, based on the introduction of new evidence, statements, and arguments that were not reviewed previously before the Board's decision. He requests to appear in front of the ABCMR in person. A personal appearance in front of the panel members would greatly benefit this case and enable him to present new arguments, evidence, and circumstances that are better articulated in person. He believes full relief should be granted, due to the questionable procedures and conclusions made by the IO without supporting evidence. However, this is not about money, but it is about salvaging his honor and reputation and taking back his family name. He would be satisfied with a partial relief in the form of upgrading his name on the retirement list to the rank of COL/O-6 so his dependent record, identification card, and other records reflect his last rank, which he worked all his life to earn. No backpay or any financial adjustment is requested. In conclusion, today, he is asking ABCMR to consider new evidence and statements from actual eyewitnesses never interviewed by the IO.

b. Enclosure 1 - Original ABCMR Petition with attachments that were previously reviewed and considered by the Board.

c. Multiple character letters in support of the applicant, which attest to the applicant's professionalism, work performance, leadership skills, and trustworthiness. The letters also show that several officers and civilian employees opined on the allegations against the applicant and the AR 15-6 investigation. The officers and government civilian employees were dismayed and did not support the findings and recommendation(s) of the AR 15-6 investigation. The officers and civilians also provided their observations pertaining to the G-8 staff and work environment, and the interactions and conduct between the applicant and Ms. [REDACTED]

d. Exhibit B - Internal Review Team (IRT) on Racial Disparities in the Investigative and Military Justice Systems report dated 31 August 2022, which found and recommended, in part:

(1) Significant racial disparities exist across the investigative and military justice systems. This key finding is fully supported by prior reports and studies, current data, and the qualitative insights gained during the IRT's discovery and analysis.

(2) The greatest disparities exist along the continuum where there is significant discretion and limited oversight or procedural protections. Early in its research, the IRT focused on the commanding officer as the key discretionary actor in the investigative and military justice systems. Commanding officers issue nonjudicial punishment, approve administrative discharges, and as to those with convening authority, convene courts-martial. However, a Service member's history does not begin with nonjudicial punishment or a court-martial. The IRT's research, as well as analysis by the IRT, GAO, CNA, and others, clearly indicate that racial disparities appear far earlier, in more routine and seemingly unremarkable contexts, and certainly prior to the initiation of a formal investigation or nonjudicial punishment.

(3) The IRT's recommended enhancements in training and education must be regarded as a Department of Defense priority, both to maintain operational readiness today and compete for the talent necessary to prevail in future competition and conflict. The IRT also recommended and outlined 12 courses of action.

7. Counsel and the applicant's new evidence, exhibits, and enclosures can be reviewed in their entirety within the labeled and tabbed supporting documents.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, the Board determined partial relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the available documentation, the Board made the following findings and recommendations related to the requested relief:

- Removal of GOMOR: DENY. Based upon the findings outlined in the AR 15-6 investigation stating the allegations that the applicant sexually harassed a civilian employee and the legal opine finding the investigation legal sufficient, the Board concluded there was insufficient evidence of an error or injustice warranting the removal of the GOMOR.
- Restoration of his rank to COL: GRANT, based upon the overall military record of the applicant the number honorable years of serviced completed as a COL prior to the misconduct related to his reduction, and the legal opine showing there was no probable cause to believe the applicant committed the offense of abusive sexual contact.

- Change retirement grade to COL: GRANT, based upon the overall military record of the applicant the number honorable years of serviced completed as a COL prior to the misconduct related to his reduction, and the legal opine showing there was no probable cause to believe the applicant committed the offense of abusive sexual contact.

BOARD VOTE:

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

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by restoring the applicant's rank to COL/06 and changing his rank for retirement pay benefits to COL/06.

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to removal of the General Officer Memorandum of Reprimand.

X	
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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. AR 15-185 (Army Board for Correction of Military Records) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. In pertinent part, the regulation states that the ABCMR begins its consideration of each case with the presumption of administrative regularity. It will decide cases based on the evidence of record and it is not an investigative body. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. Paragraph 2-11 states that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

2. AR 600-20 (Army Command Policy) prescribes the policies and responsibilities of command, which include the Army Ready and Resilient Campaign Plan, military discipline and conduct, the Army Military Equal Opportunity Program, the Army Harassment Prevention and Response Program, and the Army SHARP Program.

a. Chapter 7 provides that commanders are responsible for the success of the SHARP Program, including prevention, annual training activities, compliance with required response actions when acts of sexual harassment or sexual assault are reported, and victim support. Commanders are responsible for creating climates that encourage individuals to intervene to correct misconduct and behavior that could lead to sexual harassment and sexual assault at the earliest opportunity and to trust their chain of command to take appropriate action when reports of sexual harassment and sexual assault are made.

b. Paragraph 7-4 (Program Eligibility) states the SHARP Program provides assistance to Department of the Army civilians and their family members 18 years of age and older when they are stationed or performing duties outside the continental United States and eligible for treatment in the military treatment facility at military installations or facilities outside the continental United States. However, SHARP professionals can assist all Department of the Army civilians with identifying appropriate civilian sexual assault resources.

3. AR 600-37 (Unfavorable Information) sets forth policies and procedures to authorize placement of unfavorable information about Army members in individual official personnel files; ensured that unfavorable information that is unsubstantiated, irrelevant, untimely, or incomplete is not filed in individual official personnel files; and ensured that the best interests of both the Army and the Soldier are served by authorizing unfavorable information to be placed in and, when appropriate, removed from official personnel files.

a. Chapter 3 (Unfavorable Information in Official Personnel Files) states an administrative memorandum of reprimand may be issued by an individual's commander, by superiors in the chain of command, and by any general officer or officer exercising general court-martial jurisdiction over the Soldier. The memorandum must be referred to the recipient and the referral must include and list applicable portions of investigations, reports, or other documents that serve as a basis for the reprimand. Statements or other evidence furnished by the recipient must be reviewed and considered before a filing determination is made.

b. Paragraph 3-5 (Filing of Nonpunitive Administrative Memoranda of Reprimand, Admonition, or Censure) states nonpunitive administrative letters of reprimand, admonition, or censure in official personnel files, such as a memorandum of reprimand, may be filed in a Soldier's AMHRR only upon the order of a general officer-level authority and is to be filed in the performance folder. The direction for filing is to be contained in an endorsement or addendum to the memorandum. If the reprimand is to be filed in the AMHRR, the recipient's submissions are to be attached. Once filed in the AMHRR, the reprimand and associated documents are permanent unless removed in accordance with chapter 7 (Appeals).

c. Paragraph 7-2 (Policies and Standards) states once an official document has been properly filed in the AMHRR, it is presumed to be administratively correct and to have been filed pursuant to an objective decision by competent authority. Thereafter, the burden of proof rests with the individual concerned to provide evidence of a clear and convincing nature that the document is untrue or unjust, in whole or in part, thereby warranting its alteration or removal from the AMHRR.

4. AR 600-8-104 (Army Military Human Resource Records Management), 7 April 2014, prescribes policies governing the Army Military Human Resource Records Management Program. The AMHRR includes, but is not limited to, the Official Military Personnel File, finance-related documents, and non-service-related documents deemed necessary to store by the Army. Paragraph 3-6 (Authority for Filing or Removing Documents in the AMHRR Folders) provides that once a document is properly filed in the AMHRR, the document will not be removed from the record unless directed by the ABCMR or other authorized agency.

5. AR 15-80 (Army Grade Determination Review Board) establishes policies, procedures, and responsibilities of the AGDRB and other organizations delegated authority to make grade determinations on behalf of the Secretary of the Army.

a. Paragraph 2-1 (AGDRB establishment) states, the AGDRB operates within the Office of the Secretary of the Army under the supervision of and as a component board of the ARBA. The AGDRB consists of military officers senior in rank to and in at least a

grade equal to the highest grade held by the individual whose grade is being considered. Additionally, at least one member of the AGDRB will be at least one grade higher than the highest grade held by the individual whose grade is being considered.

b. Paragraph 2-2 (AGDRB) states, the AGDRB considers individual cases that are referred to it in accordance with this regulation. It directs or recommends the final grade determination that affects an individual's separation or retired pay. The AGDRB decides cases on the evidence of record. It is not an investigative body. AGDRB discussions and individual votes of members are privileged and confidential and will be disclosed only to those individuals in the decision-making process with a need to know.

c. Paragraph 2-4 (Grade determination considerations) states, a grade determination is an administrative decision to determine appropriate retirement grade, retirement pay, or other separation pay. Although a lower grade determination may affect an individual adversely, such determinations under this regulation are not punitive. The AGDRB will consider each case on its own merits. Generally, determination will be based on the Soldier's overall service in the grade in question, either on active duty or other service qualifying the Soldier for retirement, receipt of retired pay, or separation for physical disability. Circumstances pertinent to whether such service is found satisfactory include, "but are not limited to", the following:

(1) Medical reasons, which may have been a contributing or decisive factor in a reduction in grade, misconduct, or substandard performance.

(2) Compassionate circumstances.

(3) Length of otherwise satisfactory service in the grade in question, before and after the misconduct. Additionally, the AGDRB cannot waive statutory Time-In-Grade (TIG) requirements for retirement at the current grade. For instance, TIG requirements can be negated by operation of law in disability cases under provisions of Title 10, USC, Section 1372.

(4) Performance level, as reflected in evaluation reports and other portions of the service record that reflect performance. In reviewing these matters, the AGDRB will consider whether reporting officials were aware of the performance giving rise to the grade determination.

(5) Nature and severity of misconduct, if any. Although the punishment an individual has received may be one factor in determining the seriousness of misconduct, the amount of punishment will not be considered in determining whether the individual has been "punished enough." Grade determinations are not considered punitive, and the standard for grade determinations is "highest grade satisfactorily served," not whether the individual has been sufficiently punished.

(6) The grade at which the misconduct was committed.

(7) The grade at which the misconduct was addressed by proper authorities.

d. Paragraph 2-5 (Unsatisfactory service) states, service in the highest grade or an intermediate grade normally will be considered to have been unsatisfactory when:

(1) Reversion to a lower grade was —

- Expressly for prejudice or cause
- Owing to misconduct
- Caused by nonjudicial punishment pursuant to Uniform Code of Military Justice, Article 15
- The result of the sentence of a court-martial

(2) There is sufficient unfavorable information to establish that the Soldier's service in the grade in question was unsatisfactory. One specific act of misconduct "may" or may not form the basis for a determination that the overall service in that grade was unsatisfactory, regardless of the period of time served in grade. Retirement in lieu of or as the result of elimination action will not, by itself, preclude retirement in the highest grade; however, the underlying misconduct and/or substandard performance can result in a determination that service in grade was unsatisfactory.

e. Paragraph 2-6 (Service in lower grade) states, if service in the highest grade held was unsatisfactory, the Soldier can be deemed to have served satisfactorily in the next lower grade actually held, unless paragraph 2-5 applies with regard to that next lower grade.

f. Paragraph 2-10 (Reviews) states if a Soldier, retiree, or other former Soldier believes an error or injustice has occurred with respect to their grade determination by the AGDRB, the individual can apply to the ABCMR.

6. Title 10, U.S. Code (USC), Section 1370 - Regular commissioned officers, states:

a. Unless entitled to a different retired grade under some other provision of law, a commissioned officer (other than a commissioned warrant officer) of the Army who retires under any provision of law other than chapter 61 or 1223 of this title shall be retired in the highest permanent grade in which such officer is determined to have served on active duty satisfactorily. The determination of satisfactory service of an officer in a grade under paragraph shall be made by the Secretary of the military department concerned if the officer is serving in a grade at or below the grade of major general or rear admiral.

b. If the Secretary of a military department or the Secretary of Defense, as applicable, determines that an officer committed misconduct in a lower grade than the retirement grade otherwise provided for the officer by this section such Secretary may deem the officer to have not served satisfactorily in any grade equal to or higher than such lower grade for purposes of determining the retirement grade of the officer under this section; and the grade next lower to such lower grade shall be the retired grade of the officer under this section.

//NOTHING FOLLOWS//