

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 8 November 2024

DOCKET NUMBER: AR20240003174

APPLICANT REQUESTS: reconsideration of his previous requests for:

- an upgrade of his under honorable conditions (General) discharge
- correction of the narrative reason for his separation and corresponding separation program designator (SPD) code
- correction of his reentry eligibility (RE) code
- reinstatement of his rank/grade to sergeant (SGT)/E-5 effective 9 May 2013
- reinstatement to active duty effective 22 May 2013 with all back pay and allowances to which he is entitled
- a video/telephonic appearance before the Board

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Self-authored statement (17 pages)
- Exhibit 1 - 164th Military Police (MP) Company memorandum, Subject: Ordering [the applicant] be confined to Building 792's Conference Room, dated 30 August 2012
- Exhibit 2 – Statement from Ms. JH
- Exhibit 2 continued – Court Documents
- Exhibit 3 – Statement from AM
- Exhibit 4 – Statement from CT-L
- Exhibit 5 – Statement from Captain (CPT P)
- Exhibit 6 – Statement from Sergeant First Class (SFC) W
- Exhibit 7 – Statement from Staff Sergeant (SSG) Retired (R) M
- Exhibit 8 – Statement from SSG C
- Exhibit 9 – Statement from MY
- Exhibit 10 – Bachelor of Science degree diploma
- Exhibit 11 – Associate in Arts degree diploma
- Exhibit 12 – Court Document, 22 October 2010
- Exhibit 13 – Court Documents, 12 March 2012
- Department of Veterans Affairs (VA) Rating Decision, 27 December 2022
- VA Rating Decision, 2 November 2023

- VA Rating Decision, 6 November 2023
- Documents previously considered in Army Board for Correction of Military Records (ABCMR) Docket Number AR20230006814 on 14 November 2023

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 Dockets Number AR201900146663 and AR20230006814, on 18 December 2020 and 14 November 2023, respectively.

2. The applicant provides a self-authored statement which is available in its entirety for the Board's consideration. He states, in part, since his last ABCMR hearing there has been some new, substantial, and relevant evidence uncovered that needs to be considered. This new information goes into great detail pertaining to how the characterization of his service, narrative reason for separation, separation code, rank/grade, and reentry code were all improper, inequitable, and unjust due to error.

a. He believes the new evidence shows his command team and their legal team did not abide by the rule of law, Army regulations or the Uniform Code of Military Justice (UCMJ) as there was vital information that was falsified and/or provided to him or his legal representatives that would have dismissed his charges. Had this not occurred, it would have prevented any type of discharge from being initiated, he would not have requested separation under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations) Chapter 10, he would not have been reduced in rank, he would have been allowed to stay in the Army, and he would have received the proper diagnosis and treatment for his medical condition stemming from being a victim of domestic violence.

b. The evidence will also show how he was issued pretrial punishments, restrictions, and arrests by his senior leaders that violated Article 10 of the UCMJ and his 6th Amendment Constitutional right to a speedy trial. His charges and trial were not read and started within the 120-day time frame. Additionally, his pretrial punishments, restrictions, and arrests presented on his DD Form 458 (Charge Sheet) in blocks 8 (Nature of Restraint of Accused) or 9 (Date(s) Imposed), thereby hiding it from his legal defense team who would have prevented charges from moving forward as they would have been dismissed due to the 120-day rule.

c. Finally, the evidence will show how his command team handled the situation unprofessionally and how they were going to do whatever was necessary to get him out of the Army, even if it required falsifying or providing misleading evidence.

d. The applicant cites numerous Rules of Court-Martial (R.C.M.) that he contends were violated by his command team and their legal team by ordering him to pretrial confinement, imposing unreasonable restrictions upon him, treating him like a prisoner, and then concealing these facts from him and his legal defense team.

e. The applicant indicates on his DD Form 149, that post-traumatic stress disorder (PTSD), Traumatic Brain Injury (TBI), and other mental health issues are related to his request.

f. The applicant provides the following exhibits, which are available in their entirety for the Board's consideration as new and substantial evidence in support of his requests:

(1) Exhibit 1 - 164th Military Police (MP) Company memorandum, Subject: Ordering [the applicant] be confined to Building 792's Conference Room, dated 30 August 2012, shows CPT P ordered him to be confined in a conference room and to only be allowed a blanket, sheet, pillow, towel, hygiene items, religious literature, military clothing, and a cot. He had to be supervised at all times and obtain meals through his supervising personnel. These orders treated him more like a prisoner than a Soldier. Having to shower while being supervised was humiliating, unprofessional, and a form of hazing/bullying as he was not even charged or found guilty of a crime. This made a mockery of him and continuously ate away at his mental health. R.C.M. 304 specifies the type of pretrial restraint pending a court-martial: conditions on liberty, restriction (restriction in lieu of arrest), arrest, and confinement should be listed in Block 8 of DD Form 458. The confinement that was implemented by CPT P was never placed within Block 8 or Block 9 of his DD Form 458. Rather this memorandum explained the applicant's restrictions were sitting inside his evidence packet that was never turned over to his legal representatives as it sat inside Major (MAJ) S's office. This caused his case to be handled in a different manner than it would have been if his evidence packet was turned over to his legal defense representatives. This was a clear violation of his Constitutional rights to due process as well as a Brady violation as his command team knowingly withheld information they knew would have prevented him from being discharged from the Army.

(2) Exhibit 2 – A statement from Ms. JH, the woman referred to in Adultery Specification 1 on the applicant's DD Form 458, and State of Alaska court documents show how Ms. JH retracted some of her previous statements and the case against the applicant was resolved with all petitions being denied for any type of domestic violence protective order being issued against him from Ms. JH through the Alaska court system.

(3) Exhibit 3 – A statement from Ms. AM, the woman referred to in Adultery Specification 2 on the applicant's DD Form 458, show Ms. AM addressed in great detail on how their interaction came to be by giving numerous detailed statements. Within this

statement, Ms. AM provided a detailed explanation of how the applicant's chain of command did whatever they needed to do in order to accomplish having him put out of the Army by even forcing her to write a statement against him that she refused to sign as she was in fear of getting in trouble herself. Ms. AM stated numerous times that he and she never had an intimate relationship and rather let rumors get the best of the situation as she was scared to correct the rumors.

(4) Exhibit 4 – A statement from Mrs. CT-L, the applicant's former spouse, explained what type of person he was and how he tried to do the right thing by getting a divorce. She stated he is an outstanding father and person who deserves a second chance at being a Soldier.

(5) Exhibit 5 – CPT P, the applicant's former company commander, rendered a statement wherein he provided very favorable comments about the applicant's duty performance, leadership abilities. He stated the applicant was a model Soldier and leader to be emulated, until he made the bad decision to drive under the influence of alcohol and was processed out of the Army. He is a firm believer in second chances and convinced that no one is perfect all of the time. Since his discharge, the applicant has continued his education and become a valuable member of society through his volunteer efforts.

(6) Exhibit 6 – SFC W, the applicant's former squad leader, rendered a statement wherein he provided very favorable comments about the applicant's drive, technical proficiency, duty performance, and leadership abilities. He also described some of the difficulties the applicant had in his marriage, to include how his former spouse physically abused him and then deliberately delayed their divorce process so she could continue to receive financial assistance from the Army.

(7) Exhibit 7 –SSG (R) M, the applicant's former platoon sergeant, rendered a statement wherein he provided very favorable comments about the applicant's ability to work under pressure, mentoring of young Soldiers, and decision making abilities. He acknowledged the applicant's misconduct, believes he learned from the situation, and thinks he should have a chance to return to active duty service in the Army.

(8) Exhibit 8 –SSG C, the applicant's former squad leader, rendered a statement wherein he opined the applicant was a professional and outstanding noncommissioned officer (NCO). SSG C also expressed his dismay and disappointment in how the chain of command handled the applicant's situation by repeatedly making an example of him in front of the rest of the unit by telling the Soldiers not to be like him by having extramarital affairs or having unprotected sex. They continued to mention his name as an example even after he was discharged from the Army.

(9) Exhibit 9 – One of the applicant's supervisors at a job he held after departing the Army, Ms. MY, rendered a statement wherein she provided favorable comments about the applicant's decision making ability, sound judgement, dependability, trustworthiness, and professionalism.

(10) Exhibit 10 – A diploma shows he was conferred a Bachelor of Science degree in Criminal Justice on 28 July 2019.

(11) Exhibit 11 – A diploma shows he was conferred an Associate in Arts degree on 27 April 2019.

(12) Exhibit 12 – A County Court, El Paso County, Colorado document shows the Domestic Violence case of The People of the State of Colorado versus [the applicant's former spouse] was closed on 22 October 2010. This document does not identify a victim by name, but shows she was arrested on 14 July 2010 and charged with the following three offenses: Assault 3-Know/Reckless Cause Injury; Harassment Follow Person in Public Place; and Harassment-Strike/Shove/Kick.

(13) Exhibit 13 – A County Court, El Paso County, Colorado document shows the Domestic Violence case of The People of the State of Colorado versus [the applicant's former spouse] was closed on 12 March 2012. This document does not identify a victim by name, but shows she was arrested on 7 December 2011 and charged with the following three offenses: Assault 3-Know/Reckless Cause Injury; Harassment-Strike/Shove/Kick; and I Child Abuse-Knowingly/Reckless-No Injury.

(14) A VA Rating Decision, dated 27 December 2022, shows the applicant was granted a combined rating evaluation of 70 percent (%) effective 26 August 2022.

(15) A VA Rating Decision, dated 2 November 2023, shows the applicant was awarded service connection for bilateral foot condition (diagnosed as plantar fasciitis with metatarsalgia), hearing loss, and lumbar spine condition (diagnosed as lumbar strain) effective 12 April 2023.

(16) A VA Rating Decision, dated 6 November 2023, shows the applicant was granted a combined rating evaluation of 100% effective 30 May 2023.

(17) Documents previously considered in ABCMR Docket Number AR20230006814 on 14 November 2023

3. On 14 September 2006, the applicant enlisted in the Regular Army in the rank/grade of private (PV2)/E-2, for 5 years. Upon completion of training, he was assigned to a unit at Fort Wainwright, AK.

4. On 26 March 2010, he was assigned to a unit at Fort Carson, CO. He served in Iraq during the period 20 February 2011 through 3 December 2011. On 1 June 2011, he was promoted to the rank/grade of sergeant/E-5, the highest rank he held.

5. On 2 October 2011, the applicant reenlisted for a period of 4 years under the Overseas Reenlist Option for assignment to Alaska and for a Selective Reenlistment Bonus, with a lump sum payment authorized. He agreed to complete this period of service and acknowledged he had been advised and understood that if he did not complete the full period of service or if he did not remain technically qualified in his military occupational specialty, he would not get any more installments of the bonus, and he would have to pay back as much of the bonus as he already received for the unexpired part of the period of obligated service.

6. An Anchorage Police Department (APD) Report, dated 9 July 2012, shows Ms. JH confirmed she had been dating the applicant. She knew he was married but was in the process of getting a divorce. When she informed him she was pregnant, he got upset and asked her to get an abortion because he was still married, and it would jeopardize his military career. He repeatedly asked her to get an abortion and she continued to refuse. One day he made a comment regarding pushing her down the stairs. Later, she discovered a white substance in her drink after the applicant placed it in the refrigerator. Suspecting the applicant had placed a substance in her drink that would make her abort the pregnancy, she took swabs of the substance as well as the empty can to the APD.

7. An APD, dated 1 August 2012, shows Ms. JH stated she went to the gas station and upon opening the door to her gas tank, she discovered sugar spilled along the opening. She believed the applicant was "doing things to her and her vehicle to make her life miserable," because she refused to have an abortion. Ms. JH requested a Domestic Violence Protective Order because the applicant "acted like he was going to kick" her belly and asked her if she wanted to have a date at the top of the staircase after learning she had a positive pregnancy test. For two weeks he was very persistent about her getting an abortion.

8. A State of Alaska, Department of Public Safety, Scientific Crime Detection Laboratory Report, dated 15 August 2012, shows a controlled substance analysis revealed the samples provided by Ms. JH tested positive for Naproxen, a substance associated with increases in spontaneous abortions.

9. A DA Form 4856 (Developmental Counseling Form) shows the applicant was counseled by his platoon sergeant on 29 August 2012, regarding having an inappropriate relationship, adultery, and dereliction of duty. It was noted the applicant had admitted to an APD investigator that he had a relationship with a person other than his spouse and that he had a sexual relationship with a person other than his spouse.

As a result, he was required to write a 2000 word response by indorsement on military adultery and advised he would be recommended for further disciplinary action.

10. A 164th MP Company memorandum, Subject: Ordering [the applicant] be confined to Building 792's Conference Room, dated 30 August 2012, shows CPT P determined the applicant's presence at any location outside that building would likely result in his continued misconduct. As a result, he ordered the applicant to be confined in the conference room and to only be allowed a blanket, sheet, pillow, towel, hygiene items, religious literature, military clothing, and a cot. He was to be supervised at all times and obtain meals through his supervising personnel.

11. On 2 September 2012, Ms. JH was granted a 20-day domestic violence protective order against the applicant based upon him making a kicking motion as if to kick her stomach when she told him she was pregnant, and him joking about making a date for "the top of the stairs." This conduct coupled with on-going pressure regarding termination of her pregnancy had placed her in fear that he would follow through with his jests.

12. A 164th MP Company memorandum, Subject: Memorandum of Concern, dated 6 September 2012, was issued to the applicant by CPT P in response to a series of incidents involving his conduct over the past few weeks. The APD had informed CPT P of an open investigation in which it was determined the applicant was engaging in an extra-marital affair with Ms. JH. His actions were in violation of Article 134. The memorandum was imposed as an administrative measure and not as punishment under the UCMJ.

13. A 164th MP Company memorandum, Subject: Orders Based on Misconduct, dated 10 September 2012, shows CPT P decided the applicant required increased accountability and ordered him to perform the following tasks for a period of 45 days or until he successfully demonstrated to his leadership and CPT P his ability to perform his assigned duties. Failure to abide by the order would result in UCMJ action up to and including reduction in rank, pay, and separation from the Army. He was ordered to:

- remain in military uniform at all times unless conducting personal hygiene
- sign in with the battalion charge of quarters (CQ) every two hours from 0600 hours to 2200 hours daily except when at his place of duty
- sign out at the battalion CQ if he intended to leave the company area for more than 15 minutes
- be restricted to the unit area and the dining facility
- read the 2,000 word RBI on adultery to the battalion during Safety Stand Down
- teach a class on adultery to the battalion

- stand guard on Mondays, Tuesdays, Wednesdays, Thursdays, and Fridays at the building 791 CQ and check identification of everyone entering and exiting the building from 1700 to 0230 hours
- stand guard on Saturdays and Sundays at the building 791 CQ and check identification of everyone entering and exiting the building from 0800 to 0230 hours

14. A DA Form 2823 (Sworn Statement) from PV2 AM, dated 19 October 2012, wherein she stated she and the applicant had been involved in an intimate relationship, which she further defined as sex, and it continued until she found out he was married. They were intimate one time before August after a party and did not start again until after the end of August.

15. A 164th MP Company memorandum, Subject: Orders Based on Misconduct, dated 25 October 2012, shows CPT P stated the applicant was still issued a No Civilian Clothing Order. He was to:

- be confined to his barracks room unless he was going to the post dining facility or to work
- print the Article 134 (Adultery) statute from the Manual for Courts-Martial and display it on the outside of his barracks room door and the outside of his office door in the company area.
- stand guard Fridays at the Visitors Center (Main Gate) on Fort Richardson (Joint Base Elmendorf-Richardson) handing out the Article 134 statute from 1700 to 0300 hours
- stand guard Saturdays and Sundays at the Visitors Center (Main Gate) on Fort Richardson (Joint Base Elmendorf-Richardson) handing out the Article 134 statute from 0800 to 0230 hours
- have no contact with PV2 AM and Ms. JH

16. A 164th MP Company memorandum, Subject: Memorandum of Concern, dated 3 December 2012, was issued to the applicant by CPT P in response to completion of an Army Regulation 15-6 Investigation against him. The Investigating Officer (IO) determined the applicant engaged in an extramarital affair with Ms. JH. The IO determined that even after consuming alcohol at a local establishment, the applicant's actions afterwards placed him in a situation that violated Article 134, UCMJ. The IO also determined the applicant was not engaged in an extramarital affair with PV2 AM and that none of the items in question were purchased by her for the applicant. The IO recommended that the applicant receive a Letter of Reprimand as punishments had already been applied. CPT P advised the applicant that as commander, he would approve the recommendations of the IO. This Memorandum of Concern was imposed as an administrative measure and not as a punishment under the UCMJ. It would remain in the applicant's local unit file for one year or until he permanently departed the



general court-martial jurisdiction, whichever came first. The applicant was afforded an opportunity to make a statement on his own behalf. A copy of the Army Regulation 15-6 investigation is not filed in the applicant's available record for review.

17. A 164th MP Company memorandum, Subject: Orders for [the applicant] from MAJ S, dated 10 December 2012, shows MAJ S issued the following orders governing around the applicant's Adultery misconduct. The applicant was ordered to:

- stay within the confines of his barracks room until he was advised of his charges pertaining to his Adultery specification or other legal proceedings
- not leave his room to attend religious services
- order his meals the Staff Duty or his Chain of Command
- only leave his room to when reporting for work duties
- sign in with the Staff Duty every hour from 0500 hours to 2300 hours, to include non-duty days
- leave his barracks room door unlocked and have no visitors

18. A 164th MP Company memorandum, Subject: Orders for [the applicant] from MAJ S\_\_, dated 10 December 2012, shows MAJ S issued the following additional orders governing around the applicant's Adultery misconduct. Failure to abide by the order would result in UCMJ action up to and including reduction in rank, pay, and separation from the Army. He was ordered to:

- leave his cellular device with Battalion Staff Duty on all duty and non-duty days
- report to the Battalion Staff Duty and use his phone at the desk if he needed to use it
- be monitored anytime he used his telephone
- be escorted from his barracks room to his assigned work areas
- be monitored by an escort while performing his work duties
- to conduct police call and snow removal around the unit area

19. A U.S. Army Alaska Incident Report and District Court for the State of Alaska, Third Judicial District at Palmer court document show the applicant was cited for driving under the influence (DUI) with a preliminary breath test of .138 on 3 March 2013 following a routine stop by an Alaska State Trooper for speeding and failure to signal.

20. A DA Form 268 (Report to Suspend Favorable Personnel Actions (FLAG)) shows an administrative flag was initiated on 7 March 2013 to prevent applicant from receiving favorable personnel actions while pending adverse action.

21. The applicant's DA Form 2166-8 (NCO Evaluation Report) rendered for the period from 1 June 2012 through 1 April 2013 shows the applicant was relieved for cause. His

rater and senior rater provided less than favorable comments and ratings regarding his performance and potential as a result of his DUI.

22. A 164th MP Company memorandum, Subject: Memorandum of Concern, dated 19 April 2013, was issued to the applicant by CPT P\_\_ in response to his DA Form 3822 (Report of Mental Status Evaluation). On 19 April 2013, the examining medical authority advised CPT P that the applicant had numerous potential medical conditions which required additional evaluation, to include, in part, PTSD and TBI. As a result, the applicant was not cleared for administrative separation action at the time.

a. CPT P advised the applicant that on the DA Form 3822, the examiner addressed his cognitive impairments. Having cognitive impairments could possibly interfere with signing and/or reading/understanding future legal documents. His cognitive impairments were being evaluated by Behavioral Health.

b. In his capacity as the company commander, CPT P stated he would advise the court-martial convening authority of the applicant's DA Form 3822 and his future recommendation of letter of reprimand so the applicant's continuation of medical board proceedings could proceed forth instead of chapter actions.

c. This memorandum of concern was imposed as an administrative measure and not as a punishment under the UCMJ. This memorandum would remain in the applicant's local unit file for one year or until he permanently departed the general court-martial jurisdiction, whichever came first.

d. The applicant was afforded an opportunity to make a statement on his own behalf. A copy of the DA Form 3822 is not filed in the available record for review.

23. A 164th MP Company Memorandum for Record, Subject: Report of Mental Status Evaluation of [the applicant], dated 26 April 2013, was rendered by CPT P to document that Colonel R, MAJ S, and Legal:

- were advised of the memorandum of concern governing the applicant's DA Form 3822, dated 19 April 2013
- were advised of the applicant's cognitive impairments described in the DA Form 3822, dated 19 April 2013
- were advised of CPT P's recommendations that the applicant should be issued a letter of reprimand so medical board proceedings could proceed forth instead of chapter actions

24. On 1 May 2013, court-martial charges were preferred against the applicant for two specifications of adultery. The brigade commander recommended a special court-martial with the authority to adjudge a bad conduct discharge and forwarded the

charges to the convening authority. The applicant was charged with the following specifications in violation of Article 134, of the UCMJ:

- Specification 1 - the applicant, a married man, had wrongful sexual intercourse with Ms. JH, a woman not his wife, between 14 June 2012 and 21 June 2012
- Specification 2 - the applicant, a married man, had wrongful sexual intercourse with a private/E-1 (PV1) AM, a woman not his wife, between 1 July 2012 and 1 October 2012

25. On 2 May 2013, the applicant was issued a General Officer Memorandum of Reprimand (GOMOR) for DUI. The Commanding General, Headquarters, U.S. Army Alaska, stated:

a. He was reprimanded for a DUI arrest that occurred on 3 March 2013. After a State Trooper observed his vehicle speeding and failing to signal, the applicant was detained and failed a series of standardized field sobriety tests. He provided a breath sample resulting in a breath alcohol content of .131%.

b. His lack of judgment as an NCO was a great disappointment to all those who depend on him. His actions endangered not only his life, but the lives of others. The effects of DUI are not only dangerous and illegal, but also disastrous to families, military communities, and society. His arrest for drunk driving was an embarrassment to his fellow NCOs, his unit, and himself.

c. The GOMOR was imposed as an administrative measure and not as punishment under the UCMJ. Before directing filing the memorandum in the applicant's official military file, anything submitted in rebuttal would be considered before making a final decision.

d. On 3 May 2013, he acknowledged receipt of the GOMOR. He elected to not submit any matters in extenuation, mitigation, or rebuttal.

e. The Commanding General, Headquarters, U.S. Army Alaska, ultimately directed permanently filing the GOMOR in the applicant's Official Military Personnel File.

26. On 6 May 2013, the applicant consulted with defense counsel and voluntarily requested discharge in lieu of trial by court-martial under the provisions of Army Regulation 635-200, Chapter 10. He stated he did not desire further rehabilitation and had no desire to perform further military service. He acknowledged he understood: charges were preferred against him for two specifications of adultery in violation of Article 134, of the UCMJ; he might be discharged under conditions other than honorable and would be reduced to the lowest enlisted grade; a discharge under other than honorable conditions would deprive him of many or all Army benefits as a veteran; he

might expect to encounter substantial prejudice in civilian life as a result; and while he may apply to either the Army Discharge Review Board (ADRB) or the ABCMR for upgrading, that did not imply his discharge would be upgraded.

27. On 8 May 2013, the applicant's brigade commander recommended approval of his request for discharge with the issuance of an under other than honorable (UOTHC) characterization of service.

28. On 9 May 2013, the separation authority approved the applicant's request for discharge in lieu of trial by court-martial and directed his reduction to the lowest enlisted grade and an under other than honorable conditions discharge.

29. Orders and the applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) show he was discharged in the rank of PV1 on 22 May 2013 under the provisions of Army Regulation 635-200, Chapter 10. The narrative reason for his separation was in lieu of trial by court-martial. He was assigned separation code "KFS" and RE code "4." He was credited with 6 years, 8 months, and 9 days of net active service. He had continuous honorable service from 14 September 2006 to 3 March 2013. He completed his first full term of service. His service was characterized as under other than honorable conditions.

30. A 164th Military Police Company, Joint Base Elmendorf-Richardson, AK, Memorandum for Record, Subject: Evidence Packet of [the applicant], dated 22 May 2013, was rendered by CPT P to document the applicant's evidence packet contained documents that the applicant was unaware of that pertained to his adultery specifications. The evidence packet contained video/audio recordings, witness statements, evidence obtained through the Army Regulation 15-6 Investigation, numerous memorandums, APD reports/video recordings and other items beneficial to the applicant. The numerous memoranda inside the evidence packet that were signed by the applicant during the year-long investigation were originals. A copy of these memoranda were never presented to the applicant for his personal records so that the information obtained during the investigation would be protected.

a. The applicant's evidence packet consisted of documents that were obtained during the year-long investigation that would have exonerated him from any charges pertaining to adultery. The evidence packet would have prevented him from being administratively chaptered out of the Army and allowed him to continue with medical board proceedings.

b. The applicant's evidence packet was turned over to MAJ Shaw at 793d Military Police Battalion on 22 April 2013. After reviewing the evidence, MAJ Shaw was advised to turn over the evidence packet to COL R at 2nd Engineer Brigade and Legal.

c. The applicant's evidence packet was never turned over to COL R or Legal after MAJ S's review. The evidence packet was still located inside MAJ S's office on 21 May 2013.

d. COL R, MAJ S, and Legal were advised on the applicant's legal packet and its contents on 26 April 2013. COL R and Legal never received the actual evidence packet or its contents from MAJ S that would have exonerated the applicant from adultery charges.

31. The applicant petitioned the ADRB for relief. On 12 November 2014, the applicant was informed that after careful review of his application and all other available evidence, the ADRB determined that he was properly and equitably discharged and denied his request.

32. The applicant petitioned the ADRB for relief a second time. In a personal appearance hearing conducted at Arlington, VA, on 16 November 2015, the ADRB denied his request.

33. The applicant petitioned the ADRB for relief a third time. This time, the applicant presented new evidence in the form of the memorandum previously discussed in paragraph 30 above wherein CPT P explained there were facts and documents contained in the applicant's evidence packet that would have exonerated him from his adultery specifications, that were not considered by the separation authority because they were withheld by MAJ S. This evidence included the statements provided by the two women who were the subjects of his charges. In a personal appearance hearing conducted at Arlington, VA, on 19 July 2018, the ADRB determined the characterization of service was too harsh based on the applicant's length and quality of service, to include combat service; post-service accomplishments; the circumstances surrounding the discharge, to include in-service diagnosis of TBI; and was inequitable as a result. Accordingly, the board granted partial relief in the form of an upgrade to his service characterization from UOTHC to general, under honorable conditions. The board determined the narrative reason, SPD code, and RE code were equitable and determined not to change them. The case was assigned ADRB Docket Number AR20160019586.

34. On 10 September 2018, the applicant's original DD Form 214 depicting a discharge UOTHC was voided; and he was reissued a new DD Form 214, for the period ending 22 May 2013 reflecting his character of service as under honorable conditions (general).

35. The applicant petitioned the ADRB for an upgrade of his recently upgraded general discharge to an honorable discharge, and changes to the narrative reason for his separation, SPD code, and RE code. In a personal appearance hearing conducted at

Arlington, VA, on 6 May 2019, the ADRB determined the applicant's separation was both proper and equitable, and denied his requests. Per the board's Medical Officer, a voting member, the board determined the applicant does not have a behavioral health diagnosis that is mitigating for the misconduct which led to his separation from the Army. The case was assigned ADRB Docket Number AR20180013083.

36. The applicant petitioned the ABCMR for correction of his DD Form 214 to show award of the Army Meritorious Unit Commendation (MUC), an upgrade of his general discharge, his narrative reason for separation to an unspecified reason instead of in lieu of trial by court-martial, his SPD code to an unspecified code instead of KFS, and his RE code to an unspecified code instead of RE-4. He also requested restoration of his rank/grade of SGT/E-5 effective 9 May 2013 with back pay and allowances, and reinstatement to active duty effective 22 May 2013 with back pay and allowances. He further requested referral to a medical evaluation board (MEB) for medical retirement and correction of his records to show he was medically retired. Finally, he requested a personal appearance hearing before the Board.

a. On 2 July 2021, the applicant was informed the ABCMR determined to grant partial relief in the form of correcting his DD Form 214 to show award of the MUC, and that the remainder of his request was denied.

b. A DD Form 215 (Correction to DD Form 214), dated 7 September 2021, shows the applicant's DD Form 214, for the period ending 22 May 2013 was corrected by adding the MUC to Item 13 (Decorations, Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized).

c. This case was assigned ABCMR Docket Number AR20190014663 and boarded on 18 December 2020.

37. The applicant petitioned the ADRB for an upgrade of his general discharge to an honorable discharge; a change of his narrative reason for separation, SPD code, and RE code; restoration of his rank/pay grade to SGT/E-5; correction of his DD Form 214 to show he had no time lost; and to return to military service.

a. The ADRB determined that partial relief was warranted in the form of an upgrade of the applicant's RE code to RE-3, to allow him to apply for a waiver for continued military service.

b. The ADRB voted not to change the applicant's characterization of service because, despite giving liberal consideration, his Adjustment Disorder and TBI did not outweigh the unmitigated adultery offense, and the discharge was both proper and equitable. The ADRB voted not to change the applicant's reason for discharge of the

accompanying SPD code under the same pretexts, as the reason the applicant was discharged was both proper and equitable.

c. As a result of these decisions, the applicant's DD Form 214 as revised by the aforementioned DD Form 214 was revoked and the applicant was reissued a DD Form 214 reflecting award of the MUC and RE code RE-3 on 7 July 2022.

d. This case was assigned ADRB Docket Number 20210002990 and boarded on 28 June 2022.

38. The applicant petitioned the ADRB for an upgrade of his general discharge to an honorable discharge and changes of his narrative reason for separation, SPD code, and RE code. On 1 December 2022, the applicant was informed that after careful review of his application, military records, and all other available evidence, the ADRB had determined he was properly and equitably discharged and denied his requests.

39. The applicant petitioned the ABCMR for reconsideration of his previously denied requests. On 17 November 2023, the applicant was informed his request for reconsideration of ABCMR Docket Number AR20190014663 was reconsidered on 14 November 2023, and denied.

40. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition. By regulation, an applicant is not entitled to a hearing before the Board.

#### 41. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting reconsideration of his previous request for: 1) an upgrade of his general, under honorable conditions discharge; 2) corresponding changes to his DD214; and 3) reinstatement of his rank and back pay. He contends he experienced a traumatic brain injury (TBI), domestic violence, and mental health conditions including PTSD, and these experiences and mental health conditions are related to his requests. 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: 1) The applicant enlisted in the Regular Army on 14 September 2006; 2) On 1 May 2013, court-martial charges were preferred against the applicant for two specifications of adultery; 3) The applicant was discharged on 22 May 2013, Chapter 10, in lieu of trial by court-martial, with a characterization of service of UOTH; 4) The applicant has applied multiple times to the ADRB and ABCMR with various requests. On 10 September 2018, the applicant's original DD Form 214 depicting a discharge UOTH was voided; and he was reissued a new DD Form 214, for the period ending 22 May 2013 reflecting his character of service as under honorable conditions (general).

b. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's available military service and medical records. The military electronic medical record (AHLTA), the VA's Joint Legacy Viewer (JLV) and hardcopy information provided by the applicant were also examined.

c. The applicant asserts he experienced a TBI, domestic violence, and mental health conditions including PTSD; and these experiences and mental health conditions are related to his requests. There is sufficient evidence the applicant was engaged with the Family Advocacy Program starting in October 2010 for family/marital problems. He was identified as an abused adult, and he was predominately seen for behavioral health treatment within this program. The applicant was also diagnosed later an adjustment disorder with depressed mood, alcohol abuse, and a history of mild TBI on 14 May 2013 as the result of a neuropsychological evaluation.

d. A review of JLV provided sufficient evidence the applicant has been diagnosed with service-connected PTSD (SC 50%) and traumatic brain disease (SC10%). He has been engaged in treatment for these conditions.

e. Based on the available information, it is the opinion of the Agency Medical Advisor that there is insufficient evidence to support the applicant had a condition or experience that mitigates his misconduct.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the misconduct? Yes, the applicant asserts he experienced mental health conditions and experience while on active service that mitigates his misconduct. The applicant was identified as experiencing domestic abuse, a history of mild TBI, and an adjustment disorder while on active service. Also later, the applicant was diagnosed with service-connected PTSD and traumatic brain disease by the VA.

(2) Did the condition exist or experience occur during military service? Yes, the applicant asserts he experienced mental health conditions and experience while on active service that mitigates his misconduct. The applicant was identified as experiencing domestic abuse, a history of mild TBI, and an adjustment disorder while on active service. Also later, the applicant was diagnosed with service-connected PTSD and traumatic brain disease by the VA.

(3) Does the condition experience actually excuse or mitigate the misconduct? No, there is sufficient evidence beyond self-report the applicant experiencing domestic abuse, a history of mild TBI, an adjustment disorder, and PTSD while on active service. However, there is no nexus between these experiences and mental health conditions and the applicant's misconduct of adultery in that: 1) this type of misconduct is not a



part of the natural history or sequelae of the applicant's mental health conditions and experiences; 2) The applicant's mental health conditions and experiences do not affect one's ability to distinguish right from wrong and act in accordance with the right. However, the applicant contends he was experiencing mental health conditions and an experience that mitigated his misconduct, and per Liberal Consideration his contention is sufficient for the board's consideration.

#### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was charged with an offense punishable under the Uniform Code of Military Justice with a punitive discharge. After being charged, he consulted with counsel and voluntarily requested discharge in lieu of trial by court-martial. The Board found no error or injustice in the separation proceedings and designated characterization of service. The Board noted the applicant's contention of post-traumatic stress disorder and TBI; however, reviewed and concurred with the medical advisor's review finding no evidence of a behavioral health condition. Based on a preponderance of the evidence, the Board concluded that the characterization of service, narrative reason for separation and corresponding SPD code and RE code the applicant received upon separation was not in error or unjust.
2. The Board determined the evidence of record does not support reinstatement of his rank/grade to sergeant (SGT)/E-5 and denied that portion of his request.
3. The Board also determined the evidence of record does not support reinstatement to active duty and denied that portion of his request.
4. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

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

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

REFERENCES:

1. Title 10, U.S. Code (USC), Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.
2. Title 37, USC, Section 204, provides entitlement to service members for the basic pay of the pay grade to which assigned in accordance with their years of service. The total amount of pay and allowances provided by law or regulation for a member of a Regular Component of a Uniformed Service of corresponding grade and length of service for that period. The Secretary concerned may extend such period in any case if the Secretary determines it is in the interests of fairness and equity to do so.
3. Army Regulation 15-6 (Procedures for Investigating Officers and Boards of Officers), in effect at the time, established procedures for investigations and boards of officers not specifically authorized by any other directive. An administrative fact-finding procedure may be designated to inquire into the conduct or performance of a particular individual. The primary function is to ascertain facts and to report them to the appointing authority.
4. Army Regulation 27-26 (Rules of Professional Conduct for Lawyers), in effect at the time, provided comprehensive rules governing the ethical conduct of Army lawyers, military and civilian. Rule 3.8(d) stated trial counsel will make timely disclosure to the defense of all evidence or information known to the lawyer that tends to negate the guilt of the accused or mitigates the offense and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the lawyer, except when the lawyer is relieved of this responsibility by a protective order or regulation.
5. Army Regulation 600-8-19 (Enlisted Promotions and Reductions) prescribes the enlisted promotions and reductions function of the military personnel system. Paragraph 10-1 (Reductions), states when the separation authority determines that a Soldier is to be discharged from the Service under other than honorable conditions, he/she will be reduced to the lowest enlisted grade. Board action is not required for this reduction. The commander having separation authority will, when directing a discharge under other than honorable conditions or when directed by higher authority, direct the Soldier to be reduced to PV1/E-1. If discharge is approved under other than honorable conditions but is suspended, the Soldier will not be reduced under this provision.
6. Army Regulation 601-210 (Active and Reserve Components Enlistment Program), in effect at the time, governs eligibility criteria, policies, and procedures for enlistment and processing of persons into the Regular Army, the Army Reserve and the Army National

Guard. RE codes are used for administrative purposes only and are not to be considered derogatory in nature. They are codes used for identification of an enlistment processing procedure. Table 3-1 lists the following:

- a. RE-1 applies to persons completing their term of active service who are considered qualified to reenter the U.S. Army. They are qualified for enlistment if all other criteria is met.
- b. RE-3 applies to persons who are not considered fully qualified for reentry or continuous service at time of separation, but disqualification is waivable. They are ineligible unless a waiver is granted.
- c. RE-4 applies to persons separated from last period of service with a nonwaivable disqualification. Persons are ineligible for enlistment.

7. Army Regulation 601-280 (Army Retention Program) prescribes criteria for the Army Retention Program and sets forth policies, command responsibilities for immediate reenlistment or extension of enlistment of Soldiers currently serving in the Active Army. A Soldier who voluntarily or because of misconduct fails to complete obligated service for which an enlistment bonus or selective reenlistment bonus was paid will refund a percent of the bonus equal to the percent of obligated service not performed. The servicing finance and accounting office will perform recoupment of the portion of the bonus before the Soldier's discharge.

8. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes), in effect at the time, provides SPD codes are three-character alphabetic combinations that identify reasons for, and types of, separation from active duty. The narrative reason for the separation will be entered in Block 28 of the DD Form 214 exactly as listed in tables 2-2 or 2-3 of the regulation. Table 2-3 identified separation code KFS with the narrative reason for separation listed as "In Lieu of Trial by Court-Martial," under the provisions of Army Regulation 635-200, chapter 10.

9. Army Regulation 635-8 (Separations Processing and Documents) states the DD Form 214 is a summary of the Soldier's most recent period of continuous active duty. It provides a brief, clear-cut record of all current active, prior active, and prior inactive duty service at the time of release from active duty, retirement, or discharge. The information entered thereon reflects the conditions as they existed at the time of separation. Block 28 (Narrative Reason) is based on regulatory or other authority and can be checked against the cross reference in AR 635-5-1.

10. Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), in effect at the time, set forth the basic authority for the separation of enlisted personnel.

a. Chapter 10 stated a member who committed an offense or offenses for which the authorized punishment included a punitive discharge could, at any time after the charges have been preferred, submit a request for discharge for the good of the service in lieu of trial by court-martial. Although an honorable or general discharge was authorized, a discharge under other than honorable conditions was normally considered appropriate. At the time of the applicant's separation the regulation provided for the issuance of an UOTHC discharge.

b. An honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

c. A general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

d. When a Soldier was to be discharged UOTHC, the separation authority would direct an immediate reduction to the lowest enlisted grade.

e. Paragraph 10-6 provides that a medical examination is not required but may be requested by the Soldier under AR 40-501, chapter 8.

f. Chapter 14 established policy and prescribes procedures for separating personnel for misconduct because of minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, and absence without leave. A discharge under other than honorable conditions is normally appropriate for a Soldier discharged under this chapter. However, the separation authority may direct a general discharge if such is merited by the Soldier's overall record.

11. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) to carefully consider the revised PTSD criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged UOTHC and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

12. 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 DRBs

and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD; Traumatic Brain Injury; 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 to those conditions or experiences. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

13. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and 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 type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards 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.

b. 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.

//NOTHING FOLLOWS//