Army Review Boards and Military Personnel Law Practice and Procedure

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Introduction

The Army Review Boards Agency, commonly referred to as ARBA, contains fifteen boards that render decisions concerning military personnel issues. As the focus of this discussion is military personnel law, I will not discuss the Army Clemency and Parole Board, which I cover in a military justice course. In addition, because discussion of the issues involved in processing physical disability cases would exceed the time we have today, I will not discuss ARBA's physical disability appeal boards. We will also not be discussing selection boards for promotion, schooling, or command, which fall under the Headquarters, Department of the Army (HQDA), Office of the Deputy Chief of Staff, Personnel/G-1's (ODCSPER/G-1) responsibility, and are, therefore, not part of ARBA.

The Army Review Boards Agency acts for the Secretary of the Army when it decides a case. Regardless of whether our boards are acting in an executive role in making a personnel decision or a quasi-judicial role by reviewing the personnel decisions made by others, we view our mission as being service-oriented. Our mission is to serve Soldiers, Veterans, and their Family Members in a courteous and timely manner. In deciding cases, we follow principles of justice, equity, and compassion with a view toward balancing what is in the best interests of the Army, the public, and the individual under consideration. We operate with transparency, considering only evidence that applicants have had an opportunity to review and comment on. The boards that review personnel decisions made by others issue written rationale explaining the boards' analyses.

Military personnel law is a complex and challenging area in which to practice because myriad and often obscure statutory and regulatory provisions dictate the practices and procedures. For instance, statutory provisions governing officer cases often vary greatly from regulatory provisions governing enlisted cases. The ARBA Legal Office, consisting of four attorneys and one paralegal, assists the Agency and its very capable, experienced staff and board members in the adjudication of cases. Realizing the complexity of military personnel law practice, our legal office does not limit its activities to those responsibilities within the Agency. We also conduct an active outreach program. This presentation is part of that program. We encourage phone calls and emails from the field. We will gladly give you information on the relevant law and the procedures for appeals to the boards. However, we will not advise you on the strategies to use in pursuing or defending your client's case, as we have to maintain our neutrality. Before contacting us with your questions, we ask that you read the relevant regulations and statutes to the extent you can, so you can ask more probing questions and have a basic understanding of the issues we will discuss.

Army Board for Correction of Military Records

ARBA reviews over 18,000 cases annually. By far our busiest board is the Army Board for Correction of Military Records (ABCMR), which routinely processes over 14,000 cases a year. Congress established the boards for correction of military records (BCMRs) after World War II to reduce the burden on Congress to correct military records through private bills. The ABCMR members, by statute, are civilian employees assigned in the National Capital Region. The members serve on the ABCMR as an additional duty. Title 10 U.S.C. § 1552 authorizes the BCMRs to correct errors or remove injustices from any military record of their respective service.[1]

When the statute and ABCMR's governing regulation, Army Regulation (AR) 15-185, refer to "errors," they are referring to factual or legal errors that can disadvantage an individual.[2] A factual error could be the entry of an incorrect home of record or basic entry pay date. An example of a legal error would be the Army not affording a respondent the right to a separation board guaranteed by regulation. If the ABCMR finds an error, it can correct the applicant's military record to remove the error and/or to cure the harm that flowed from the error. For instance, an applicant improperly discharged could be given a change of reason for the discharge, an upgrade of characterization, and back pay and allowances.

The greater authority of the board comes in removing injustices. This is the utilization of the "tain't fair" rule. In examining a case, the ABCMR will first look to see if there are any factual or legal errors in the records. If the ABCMR determines there are no factual or legal errors to correct or correcting them does not entirely cure the injustice, it applies the "tain't fair" rule in equity. The Army's action, although factually and legally correct, may have led to an unfair result. If the ABCMR believes the result was unfair, it can change or "correct" the records to lead to a different result.

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[1] 10 U.S.C. § 1552 (2006).

[2] U.S. DEP'T OF ARMY, REG. 15-185, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (31 Mar. 2006).

An example from the Korean Conflict illustrates the Board's equity authority. When the Korean Conflict broke out, the United States did not have sufficient forces in South Korea, so the Army rushed in forces from occupied Japan. One of the deploying units took its orderly, a Japanese national, with them. The orderly was not an Army employee. The officers had hired him to tend to their uniforms and clean their bachelor officer quarters. Shortly after the unit deployed, the North Koreans and Chinese overran its position and detained the Soldiers and Japanese orderly in a prison camp. The Koreans and Chinese bore animosity toward the Japanese because of the Japanese occupation of their countries during World War II. To protect their Japanese orderly from potential mistreatment, the officers in the unit passed him off as a Japanese-American Soldier in the POW camp, and he served out the remainder of the conflict in the camp by all appearances as an American Soldier. The orderly proved quite useful as he served as a translator and liaison between the Americans and their captors. In gratitude for his services after the end of hostilities, the Americans sponsored his immigration to the United States. He joined the Army, served well, retired, and became an American citizen. At a reunion many years later, the other Veterans discovered he had not received service credit for the time he spent in the POW camp.

Someone suggested he seek relief from the ABCMR. He applied seeking service credit toward retirement for his time as a POW. Factually and legally, he was not an Army Soldier during his stay in the POW camp. However, the Board felt that because of his outstanding service in support of the American POWs and his performance of duties as if he had been an American Soldier, it was only fair he should receive the service credit. The ABCMR changed his records to reflect his years of military service, including the time he spent as a POW. That is an example of the authority of the ABCMR. It can create new "realities" or rewrite history to bring about the goal it wants to achieve.

Despite the ABCMR's extraordinary authority in equity, there are legal limitations on what the ABCMR can do. First, the Board must find a service record it can change or create that will lead to the desired result. Second, the ABCMR can only correct an Army record; it cannot correct a Veterans' Administration (VA) record. If an applicant is unhappy with a VA benefits determination, the most the ABCMR can do is change the Army's records to put the Veteran in a better light with the VA. However, it cannot change the VA's records or its determinations. Third, the ABCMR cannot overturn a court-martial conviction in a case tried or reviewed under the Uniform Code of Military Justice.

Applicants need to understand how the ABCMR operates. The ABCMR does not investigate cases. The burden of proof is on the applicant to show by a preponderance of the evidence that there has been an error or injustice. Therefore, it is important that applicants provide any evidence and records they have to support their positions. The ABCMR will review a Soldier's or Veteran's official military personnel file (OMPF) and may ask an outside agency for an advisory opinion on an application. If the Board acquires an advisory opinion, it will provide that to the applicant with an opportunity to respond to the advisory report before the Board considers the case.

Applicants need to file in a timely manner. Applicants should file within three years after commission or discovery of the error or injustice to satisfy the Board's three-year statute of limitations. However, the ABCMR can waive the statue of limitations for good cause. This means the Board will review all cases ripe for consideration, and waive the statute of limitations if the Board finds error or injustice. In other words, the ABCMR will only invoke the three-year statute of limitations in those cases where it denies the case on the merits.

The most common requests for correction involve awards, separations, promotions, disabilities, evaluation reports, pay, allowances, clemency on court-martial sentences, Article 15s, and memorandums of reprimand. Before adjudicating a case, however, the ABCMR will normally require applicants to exhaust other avenues of appeal. For example, an applicant should appeal an adverse evaluation report through the appeal process provided for in the evaluation regulation before applying to the ABCMR. Requiring exhaustion of other remedies reduces the number of cases that applicants bring before the ABCMR and helps build an administrative record for the Board to review.

Just as it is important for an applicant to present an application supported by evidence, it is also critical for the Government to document a personnel action so that it can withstand scrutiny upon review. For instance, a general officer memorandum of reprimand should adequately describe the misconduct it addresses and should include supporting evidence filed in the OMPF for future reference. Make sure the personnel clerk files a complete copy of a chapter discharge packet in a Soldier's OMPF. If an adverse personnel action is worth pursuing, it is worth taking the extra time to ensure it will withstand scrutiny on appeal.

How do we process cases at ARBA? When a case arrives at ARBA, we assign it to an analyst for the particular board. Some boards have their own dedicated analysts, as does the ABCMR; other boards share a pool of analysts. The analyst researches the case and drafts a recommended decision. Based on a number of factors, the ARBA Legal Office and/or Medical Office might review the recommended decision before it goes to a board for consideration. At a minimum, the analyst's supervisors will review the recommended decision before a board considers it.

The board members review the case and recommended decision. The recommended decision in no way binds the members, and the members can make any changes to the rationale or the decision to reflect the majority of the

members' decision. Some board decisions are the final agency decision on behalf of the Secretary of the Army. Some board decisions are recommendations to our Agency Director—the Deputy Assistant Secretary of the Army (Review Boards) (DASA(RB))—who makes the final decision. For the ABCMR, if the staff recommendation, any advisory opinion, and all of the Board members agree, the Board's action normally is the final Agency decision. If there is a disagreement among any of those individuals, the DASA(RB) makes the final decision for the Secretary of the Army.

Congress exercises an important oversight function for the BCMRs. As the BCMRs exercise Congress's authority as delegated by 10 U.S.C. § 1552, Congress requires that the Boards properly exercise that function.[3] To help ensure the independence of the BCMRs in the exercise of their quasi-judicial function, Congress mandated the Boards have independent legal and medical advisors through enactment of 10 U.S.C. § 1555.[4] To ensure the processes for reviewing requests for correction by any of ARBA's boards are transparent, Congress mandated, through 10 U.S.C. § 1556, that the Boards disclose virtually all communications with anyone outside the Agency to the applicant if that communication pertains directly to the applicant's case or has a material effect on the applicant's case.[5] To ensure the BCMRs timely process requests for correction and the services properly resource the BCMRs, Congress enacted 10 U.S.C. § 1557 mandating that no case take more than eighteen months to process and that, as of fiscal year 2011, the BCMRs must complete ninety percent of all cases within ten months of receipt.[6] As we examine the work of ARBA's other boards, bear in mind affected Soldiers, Veterans, or their representatives can appeal unfavorable decisions of these other boards to the ABCMR.

Army Discharge Review Board

Let's turn to a discussion of ARBA's second busiest board, the Army Discharge Review Board (ADRB) governed by AR 15-180.[7] Congress, through enactment of 10 U.S.C. § 1553, created the DRBs to ensure Veterans' discharges were being properly and fairly characterized.[8] Congress recognized reasons for separation and characterizations of service could have long-term consequences for the availability of Veterans' benefits and future employability. The ADRB differs from the ABCMR in several regards. As its name implies, the ADRB's sole function is to review discharges. Unlike the ABCMR, which requires an application to invoke its jurisdiction, the ADRB can review discharges or classes of discharges upon its own motion or at the request of the Army. For instance, if the law, policy, or substantive procedures for a particular type of discharge changed for the benefit of Soldiers, the Army could task the ADRB to review prior discharges to see if the ADRB should upgrade any under the new standards. Whereas the ABCMR has a waiveable three-year statute of limitations for applicant filing, the ADRB has a fifteen-year nonwaiveable statute of limitations. Additionally, although the ABCMR's members by statute must be civilian employees, the ADRB's members traditionally have been military. The ADRB members are active duty officers assigned to ARBA whose full-time duty is to serve as members of ARBA boards. There is no right of personal appearance before the ABCMR, but there is a statutory right to appear (at no expense to the Government) before the ADRB. In fact, an applicant gets two chances at the ADRB. First, the applicant can request a review based solely on the records. If unsuccessful there, the applicant is entitled to a personal appearance, which is a de novo review. As to the final major difference between the two boards, the ABCMR can upgrade a discharge given by a general court-martial, whereas the ADRB's statute expressly prohibits it from doing so.

Aside from these differences, the ADRB operates very much like the ABCMR. It reviews discharge actions first for factual and legal errors, and then it examines the discharge based on equity. If the ADRB finds the separation authority approved a discharge on one ground with a certain characterization but the transition point improperly recorded those determinations on a Veteran's discharge (DD Form 214)[9]—that is, the transition point committed a factual error—the ADRB can correct the DD 214 to reflect the separation authority's true action. Correction of a factual error is the only circumstance where the ADRB can leave the Veteran worse off than before the Board considered the case. For instance, if the separation authority approved a discharge based on chapter 14, AR 635-200, with an under other than honorable (UOTH) characterization of service, but the transition point incorrectly recorded a chapter 13 with general, under honorable conditions (GD) characterization, the ADRB can correct the DD Form 214 to reflect the correct reason and characterization.[10]

If the ADRB finds the separation authority committed legal error—for instance, the command considered limited use evidence but imposed an other than honorable discharge characterization—the ADRB must upgrade the

[3] 10 U.S.C. § 1552.

[4] *Id.* § 1555.

[5] *Id.* § 1556.

[6] *Id.* § 1557.

[7] U.S. DEP'T OF ARMY, REG. 15-180, ARMY DISCHARGE REVIEW BOARD (20 Mar. 1998) [hereinafter AR 15-180].

[8] 10 U.S.C. § 1553.

[9] U.S. Dep't of Defense, DD Form 214, Certificate of Release or Discharge from Active Duty (1 Aug. 2009).

[10] *See* U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS ch. 14 (6 June 2005) (RAR, 27 Apr. 2010) [hereinafter AR 635-200].

characterization to an honorable discharge (HD) as required by AR 600-85.[11] After reviewing a case for factual and legal error, the ADRB will examine the case based on equity. Issues of equity normally focus on the characterization of service—whether the characterization was too harsh. If the apparent norm for a private first class with two positive urinalyses for marijuana (and no other misconduct) is a GD and the applicant received an UOTH characterization, the ADRB can upgrade it to a GD. Similarly, if the going rate for two positive urinalyses fourteen years ago was an UOTH characterization, which the applicant received then, but the going rate today is a GD, as a matter of equity the ADRB can upgrade the discharge under "current standards."

Like the ABCMR, the ADRB does not investigate cases. It relies primarily on the Veteran's OMPF and matters the Veteran submits. The Veteran carries the burden of proof in demonstrating by a preponderance of the evidence the discharge was improper or inequitable. However, if the discharge packet contained in the Veteran's OMPF is irregular on its face, the command runs a substantial risk the ADRB will upgrade the discharge as to reason and/or characterization. Common issues the ADRB sees include limited use evidence with a characterization below HD; no separation board when the Soldier exercised the right to request a board; administrative board procedure requiring the general court-martial convening authority take action, but the special court-martial convening authority approved the separation; and separation with less than an HD issued after the Soldier's apparent expiration of term of service (ETS).

Involuntary Officer Separations

Separation authority for most types of involuntary enlisted separations resides in the field with summary, special, or general court-martial convening authorities. However, separation authority for most involuntary officer separations remains at HQDA. Next, let's review the ARBA boards that handle several types of involuntary officer separations. The ARBA Legal Office is responsible for the processing of these boards.

The Department of the Army Active Duty Board (DAADB), discussed in chapter 2, AR 600-8-24,[12] reviews cases of Other Than Regular Army (that is, Reserve) officers serving on active duty whose chains of command have recommended them for release from active duty based on misconduct or substandard performance. The respondent does not appear before a board in the field. The DAADB reviews the officer's OMPF, matters submitted by the officer's chain of command, and the officer's rebuttal. The DAADB can only release an officer from active duty with an appropriate characterization of service, as it does not sever an officer's reserve status.

However, an officer's release from active duty (REFRAD) by the DAADB will not preclude the Army from subsequently pursuing an involuntary separation on the same grounds under other procedures. Ideally, commands should use the DAADB in those cases where a Reserve officer experiences issues that are interfering with successful performance on active duty, but the officer has potential for future mobilization because the issues are temporary. One example would be an officer who cannot develop an adequate family care plan but should be able to do so in the future. In summary, the DAADB is not a quick and easy substitute for the more formal procedures required to eliminate an officer.

Speaking of more formal officer elimination procedures brings us to the next ARBA board—the Army Board of Review for Eliminations. The Board of Review (BOR) reviews officers recommended for elimination by a Board of Inquiry (BOI) in the field, often referred to as the Show Cause Board. The BOR was a statutory requirement, but now, only AR 600-8-24 requires it. To understand the BOR, we need to review the conduct of BOIs.

The Army initiates a show cause proceeding involving an officer through one of two primary means. First, if the local command believes an officer should be separated (for substandard performance of duty, misconduct, moral or professional dereliction, in the interest of national security, or other derogatory information), a general officer in command with a judge advocate or legal advisor available can require the officer to "show cause" why he or she should be retained in the service. This general officer is the General Officer Show Cause Authority (GOSCA). Although the BOI that may result is often called the show cause board, which implies the officer carries the burden of proof, the Army has the burden of proof by a preponderance of the evidence to demonstrate why the officer should be eliminated.

Human Resources Command (HRC) is the second mechanism for initiating a show cause proceeding. When an HRC board non-selects an officer, it also has the option of recommending that the Commanding General (CG), HRC, issue a show cause order to the officer. If the CG, HRC, agrees, he or she sends the required notice to the officer and directs the local command to conduct a BOI, if one is required.

The BOI remains a statutory requirement for the involuntary elimination of probationary officers for which the Army is seeking an UOTH characterization of service and for all nonprobationary officers. The officer (respondent) cannot waive the BOI, although the officer can waive appearance before the BOI. However, the officer can

[11] U.S. DEP'T OF ARMY, REG. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM para. 10-12 (2 Feb. 2009) (RAR, 2 Dec. 2009).

[12] U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2006) (RAR, 27 Apr. 2010) [hereinafter AR 600-8-24].

avoid the BOI process by either convincing the GOSCA to rescind the action or by submitting a retirement in lieu of elimination, resignation in lieu of elimination (RILE), or request for discharge in lieu of elimination (DILE). If the Army accepts the officer's retirement, resignation, or request for discharge, that becomes the basis for separation rather than the involuntary separation initiated by the GOSCA, thus avoiding the statutory requirement for a BOI. We will discuss how we process retirements, RILEs, and DILEs later when we talk about the Ad Hoc and Army Grade Determination Review Boards.

The BOI is probably the most labor intensive and time-consuming means of eliminating an officer administratively. As a practitioner representing either the command or the respondent, you should treat it with the same level of attention as you would a court-martial. As much of the procedure is statutorily based, there is little room for error or deviation. For instance, if the respondent is not a Regular Army officer, at least one member of the BOI must be a Reserve officer on active duty. The respondent cannot waive this statutory requirement. Furthermore, there are several pitfalls to avoid. The bases for separation must be clearly set forth in a proper notification letter with factual specificity, much like a court-martial specification. A BOI's findings must likewise be factually specific, rather than conclusory. Ideally, the BOI's findings should mirror the bases set forth in the notification letter or specifically describe how they differ based on the evidence presented at the BOI.

As a practical matter, you will be involved in many more enlisted separation boards than you will officer separation boards. The key to success is remembering the requirements and procedures differ greatly between the two. Be sure to read chapter 4, AR 600-8-24, closely, and follow its dictates scrupulously.[13] Do not assume because you are familiar with enlisted separation boards under the provisions of AR 635-200, that you can carry that knowledge automatically over to a BOI. Remember that not only the BOI must be convinced that the officer should be eliminated, but the BOR and separation authority must be convinced as well. Therefore, the adequacy of the record compiled by the command, including the record of the BOI, is crucial to a successful separation.

If the BOI votes to retain an officer, that ends the separation action. If the BOI recommends separation (which will include a recommendation for an appropriate characterization), the case goes through HRC to ARBA for conduct of the BOR. The BOR composition mirrors that of the BOI. At least one member must be a colonel and the other two must be lieutenant colonels or above, but all must be senior to the respondent. If the respondent is not a Regular Army officer, at least one member must be a Reserve officer. The BOR limits its review to the respondent's OMPF, the record of the BOI, any rebuttal from the respondent to the BOI, and the GOSCA's recommendation. The BOR can recommend no action less favorable than that recommended by the BOI. If the BOR votes to retain, that terminates the separation action. If the BOR votes to separate the officer, the BOR recommends a characterization. The DASA(RB) decides whether the officer should be separated, unless the officer is in sanctuary (between eighteen and twenty years of active federal service), in which case the Assistant Secretary of the Army (Manpower and Reserve Affairs) (ASA(M&RA)) decides whether the officer should be separated. The DASA(RB) and ASA(M&RA) can approve no action less favorable than that recommended by the BOR.

Not all officer involuntary separations process under BOI/BOR procedures. That brings us to a discussion of the next ARBA board—the Ad Hoc Board. The Ad Hoc Board is a special board created by ARBA to review cases and advise the DASA(RB) where no statutory or regulatory board is required. As a strictly advisory board of ARBA's creation, respondents have no right to an Ad Hoc Board review, and the Board's recommendations in no way bind the DASA(RB)'s decision authority. When considering a case the Ad Hoc Board will recommend whether an officer should be eliminated, and if so, how that officer's service should be characterized.

The Ad Hoc Board typically reviews three categories of cases. First are officer resignations for the good of the service in lieu of general court-martial (RFGOS)—the officer equivalent of the enlisted chapter 10, AR 635-200 separation.[14] When an officer submits a RFGOS, the command must expeditiously forward it for a decision. The convening authority can proceed to trial but cannot take initial action on the results of trial until after the DASA(RB) decides whether to accept the RFGOS. Approval of the RFGOS will require the convening authority to dismiss the charges and set aside the court-martial, if it has been held. The accused and convening authority cannot deal away any of the Secretary's options concerning the RFGOS. At most, the parties can include the convening authority's agreement to recommend approval of the RFGOS in a pretrial agreement.

The second type of case referred to the Ad Hoc Board involves resignations in lieu of elimination (RILE) or requests for discharge in lieu of elimination (DILE). There is no longer a difference between the two, and an officer facing elimination can apply for either. Similar to these are requests for retirement in lieu of elimination. However, the Ad Hoc Board does not review requests to retire in lieu of elimination because the DASA(RB) will approve all legitimate retirements in lieu of elimination. Pursuant to 10

[13] *Id.* ch. 4.

[14] AR 635-200, *supra* note 10, ch. 10.

U.S.C. §§ 1186[15] and 14,905,[16] an approved elimination on a retirement eligible officer will be converted to retirement by operation of law; therefore, there is no reason to deny a retirement in lieu of elimination. We will discuss retirements in lieu of elimination more when we talk about the Army Grade Determination Review Board. Note there is no retirement in lieu of court-martial. The convening authority must dispose of court-martial charges before an officer is eligible to retire.

In the first two categories of cases heard by the Ad Hoc Board, the officer can submit a conditional RFGOS, RILE, or DILE. Essentially, the officer offers to resign in lieu of court-martial or elimination in return for a guarantee that the characterization will be no worse than a GD or HD. If the DASA(RB) denies the conditional request, the command will most likely proceed with the underlying court-martial or elimination action unless the officer submits an unconditional request. While the DASA(RB) would routinely accept unconditional RILEs and DILEs, the DASA(RB) will deny RFGOSs when court-martial dispositions are more appropriate.

The third type of case the Ad Hoc Board reviews are probationary officer cases where the command is seeking no worse than a GD characterization. Before we discuss the process of review further, let's define who probationary officers are. Congress raised the maximum allowable length of the probationary period from five to six years a couple of years ago. The Department of Defense recently amended its instruction to allow for an increased probationary period from five to six years. The Army has not yet implemented the enlarged probationary period. For the time being a commissioned officer above the warrant grades with less than five years commissioned service will be a probationary officer.

The probationary period for warrant officers is different. Warrant officers who have less than three years of service since original appointment in their present component are probationary officers. By way of explanation, when the Army appoints a warrant officer as a WO1, the warrant officer is appointed in the Reserves (not the Regular Army) and is not commissioned. If a WO1 remains at that grade for three years, those three years will be as a probationary officer. After promotion to CW2, the Army commissions warrant officers in the Regular Army, which starts a new three-year probationary period from the date of commissioning. Be aware that the CW2's date of commissioning in the Regular Army does not necessarily coincide with the date of promotion to CW2.

The consequences of being a probationary or nonprobationary officer are based in statute. Title 10 establishes that nonprobationary officers must be afforded a BOI before they can be involuntarily separated. A probationary officer who is facing no worse than a GD characterization is not entitled to a BOI. However, a probationary officer facing the possibility of an UOTH characterization is entitled to a BOI and is processed the same as a nonprobationary officer. As I mentioned earlier, a respondent entitled to a BOI cannot waive the BOI without submitting a RILE or DILE, as it is a required step in the officer involuntary separation process.

The basis for separation helps determine whether a probationary officer will face the possibility of an OTH, and therefore, be entitled to a BOI. Unlike an enlisted Soldier who can receive either an HD or GD when separated under chapter 13, AR 635-200, for unsatisfactory performance,[17] an officer separated for substandard performance of duty under AR 600-8-24 can only receive an HD.[18] A command would normally treat a probationary officer facing possible separation solely for substandard performance as a probationary officer. However, the command must treat any probationary officer at initiation who will become a nonprobationary officer before the final decision on separation as a nonprobationary officer.

The command's desired outcome also helps determine whether the probationary officer will have the right to a BOI. If the GOSCA proposes separation based wholly or in part on misconduct or moral or professional dereliction, the officer could receive an HD, GD, or UOTH characterization. If the GOSCA believes an HD or GD would be an appropriate characterization, the command can use the probationary officer notification memorandum found in AR 600-8-24, effectively limiting the final characterization to no worse than a GD.[19]

We often see probationary officers processed as probationary officers submit RILEs and DILEs. Although the submissions clearly indicate the respondents do not want to contest the separation, they are unnecessary. A RILE or DILE waives the requirement to conduct a BOI, and a conditional RILE or DILE seeks to leverage that waiver for a more favorable characterization of service. A probationary officer processed as a probationary officer does not have a right to a BOI; therefore, the probationary officer has nothing to waive.

Army Grade Determination Review Board

The next ARBA board we will discuss is the Army Grade Determination Review Board (AGDRB) governed by

[15] 10 U.S.C. § 1186 (2006).

[16] *Id.* § 14,905.

[17] AR 635-200, *supra* note 10, para. 13-10.

[18] AR 600-8-24, *supra* note 12, paras.1-22*a* & 4-17(d).

[19] *Id.* fig.4-3 (Sample format for initiation of elimination).

AR 15-80.[20] The mission of the AGDRB is to determine the highest grade in which a Soldier served satisfactorily. A "satisfactory" determination of service at a particular grade has pay implications in three types of cases: disability separations, thirty-year enlisted and warrant officer cases, and officer retirements above warrant officer.

A Soldier separating for a physical disability receives severance or retired pay based on the highest of (1) the pay grade at time of separation, (2) the highest grade satisfactorily served, or (3) the grade to which the Soldier had been approved for promotion. If the Soldier is not serving in his or her highest grade or on an approved promotion list to what would have been the highest grade, the Physical Disability Agency forwards the disability case to the AGDRB for a determination of whether the Soldier served satisfactorily at a higher grade.

An enlisted Soldier retires (in non-disability cases) in the grade held the day before placement on the retired list. If that retired grade is not the highest grade in which the retiree served, the retiree can petition the AGDRB for possible advancement to the highest or intermediate grade. If the AGDRB grants advancement of grade on the retired list, it becomes effective when the retiree's time on the active duty list plus time on the retired list equals thirty years. Soldiers who retired as warrant officers can also take advantage of this provision. Under the provisions of AR 15-80, if the reduction in grade resulted from misconduct or poor performance, the presumption is that service in the highest grade and any intermediate grade through which reduced is unsatisfactory; therefore, the retiree should not be advanced.[21] Burden is on the applicant to prove otherwise.

An officer above the rank of warrant officer retires in the highest grade satisfactorily served, not necessarily the grade held the day before placement on the retired list. When an officer applies for retirement, HRC reviews the officer's file to see if there is any adverse information generated since the officer's last promotion. If there is, AR 15-80 requires HRC to refer the officer's case to the AGDRB.[22] Even if there is no adverse information in the OMPF, the officer's command or branch can refer the officer for a grade determination if there is adverse information reflecting conduct since the last promotion that is not required to be filed in the OMPF. We notify the officer what information the AGDRB will consider and provide the officer an opportunity to submit matters. The officer does not have a right to appear before the AGDRB. Note that a warrant officer UP 10 USC § 1371 retires in the warrant officer grade held the day before placement on the retired list, unless the warrant officer previously satisfactorily served in a higher warrant officer grade. Therefore, warrant officers are not potentially subject to the "adverse" grade determination at retirement that more senior commissioned officers might face.

The AGDRB consists of three officers, all of whom must be senior by date of rank and at least one must be senior by grade to the individual under consideration. The AGDRB by majority vote determines the highest grade satisfactorily served for enlisted cases and all 30-year cases. The DASA(RB) makes the determination for officers below the grade of brigadier general, except for warrant officers involved in 30-year cases. The Secretary of the Army personally makes the determination for brigadier and major generals. The Secretary of Defense personally makes negative grade determinations involving generals above major general.

Former Army Special Review Boards

The term "Special Review Boards" referred to four boards that were formerly part of HQDA, ODCSPER/G-1. During a reorganization of HQDA a couple years ago, the four boards moved to ARBA because they were more similar in function to ARBA's boards than they were to ODCSPER/G-1's selection boards. The Army Review Boards Agency no longer uses the term "Special Review Boards" as these boards have become part of the Military Review Boards, which is the term used to describe ARBA's boards except for the ABCMR and the Army Clemency and Parole Board. The members of the four former Special Review Boards are the same ARBA military members that populate ARBA's other boards except as noted in the following discussion.

The Department of the Army Suitability Evaluation Board (DASEB), governed by AR 600-37,[23] primarily hears appeals from E-6s and above to transfer adverse information from the OMPF performance section to the restricted section or to entirely remove adverse information from the OMPF. Documents in the OMPF that have their own appeal processes, such as court-martial orders or evaluation reports, fall outside DASEB's jurisdiction. Applicants do not have a right to appear personally before the DASEB. The DASEB can collect information to corroborate or refute an applicant's claim, but must provide the applicant an opportunity to review and comment on such information before the DASEB decides the case. The DASEB includes an enlisted member when considering cases involving enlisted personnel. The DASEB does not entertain cases from retirees or other separated Veterans.

Documents susceptible to transfer are limited to Article 15s and memorandums of reprimand, admonition, or

[20] AR 15-180, *supra* note 7.

[21] *Id.* para 2-5.

[22] *Id.* para. 4-1.

[23] U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION (19 Dec. 1986).

censure. For a transfer, the applicant must prove by substantial evidence that the document has served its intended purpose and transfer would be in the best interest of the Army. Although not required, a memorandum of support from the imposing commander can help meet that burden of proof. However, the imposing authority cannot initiate a request for transfer on the basis the document has served its intended purpose.

A successful appeal for removal of adverse information from the OMPF or its alteration requires the applicant show by clear and convincing evidence that the document is untrue or unjust in whole or in part. However, AR 600-37 expressly excludes Article 15s from DASEB's removal authority.[24] After exhaustion of the normal Article 15 appeal process, the ABCMR, rather than the DASEB, has authority to alter, overturn, or remove an Article 15 from the OMPF.[25] The imposing authority of a memorandum of reprimand, admonition, or censure, if later investigation determines it was untrue or unjust in whole or in part, can initiate a DASEB application to have the document revised or removed.[26]

The DASEB, in addition to removing adverse information from an OMPF, can approve the filing of adverse information in the OMPF. In those cases where Army regulations do not authorize filing of adverse information in the OMPF, Army officials can ask the DASEB to authorize filing of information deemed relevant to personnel decisions involving the Soldier. Before considering such action, the DASEB will notify the subject of the adverse information of the proposed action and provide the Soldier an opportunity to review the information and comment on the proposed filing.

The Officer Special Review Board (OSRB) and Enlisted Special Review Board (ESRB), governed by AR 623-3,[27] hear appeals of officer and noncommissioned officer evaluation reports. The ESRB membership includes a senior noncommissioned officer senior to the applicant. Applicants must submit appeals to the Boards within three years of the receipt of the evaluation, unless they can present exceptional justification for delay.

The applicant carries the burden of proof to show by clear and convincing evidence that a material error, inaccuracy, or injustice in the evaluation report warrants a correction. Upon finding that a correction is warranted, the Boards can amend the evaluation or remove it from the OMPF. If the applicant has been non-selected for promotion and the selection board considered the defective evaluation, the Boards can authorize a special selection board to relook the applicant's corrected file. Applicants do not have the right to appear personally before either Board.

The final board we are going to discuss is the Department of the Army Conscientious Objector Review Board (DACORB). As a percentage, this Board generates more litigation against the Army than any of ARBA's other boards. Army attorney involvement is pivotal throughout the processing of conscientious objector (CO) cases. Upon receipt of a CO application, the special court-martial convening authority must appoint an investigating officer who will require legal advice during the conduct of the investigation. In recognition of the sensitivity and complexity of these cases, AR 600-43 requires that the servicing staff judge advocate review the case for legal and factual sufficiency, ensure the applicant's rights have been protected, and recommend appropriate disposition of the case to the general court-martial convening authority (GCMCA).[28] Finally, the DACORB membership, in addition to three colonels from ARBA and one military chaplain from the Office of the Chief of Chaplains, contains an attorney from ARBA's Legal Office.

In accordance with AR 600-43, a purported CO can claim one of two possible statuses: 1-A-0 (CO requests assignment to noncombatant duties) or 1-0 (CO who objects to participation of any kind in war in any form and requests discharge).[29] The applicant must state which status applies, and an applicant's failure to qualify for 1-0, if requested, will not qualify the applicant for 1-A-0, as the two claims of status are mutually exclusive.[30] The applicant's GCMCA can approve 1-A-0 status or recommend denial.[31] The DACORB can approve or deny 1-A-0 status when the GCMCA recommends denial.[32] The DACORB decides all applications for 1-0 status.[33]

In closing, if you would like any further information on ARBA's boards, I recommend you consult our webpage (http://arba.army.pentagon.mil), call us, or email our legal office.

[24] *Id.* para. 7-2(c)(1).

[25] *Id.*; *see also* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 3-43 (16 Nov. 2005).

[26] AR 600-37, *supra* note 23, para. 7-2(f).

[27] U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM (10 Aug. 2007).

[28] U.S. DEP'T OF ARMY, REG. 600-43, CONSCIENTIOUS OBJECTION (21 Aug. 2006).

[29] *Id.* para. 1-5(c).

[30] *Id.* para. 1-5(d).

[31] *Id.* para. 2-8.

[32] *Id.*

[33] *Id.*