

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 7 July 2023

DOCKET NUMBER: AR20220008193

APPLICANT REQUESTS: removal of the DA Form 2166-9-2 (NCO Evaluation Report) for the rating period 14 November 2018 through 26 August 2019 from his Army Military Human Resource Record (AMHRR).

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

- DD Form 149 (Application for Correction of Military Record)
- Statement in support of appeal, 2 September 2020
- Contested NCOER Relief for Cause,
- Personal Affidavit, 2 September 2020
- Enlisted Aide handbook, 25 June 2015
- Texts related to "unauthorized dinner"
- Statement from Colonel W\_\_\_, 30 August 2020
- Statement from Captain G\_\_\_, 17 July 2020
- Department of the Army Inspector General (DAIG) Letter (Unsubstantiated Finding)
- DAIG Report of Investigation

FACTS:

1. The applicant states he has been placed in a non-promotable status because he is pending QMP (Qualitative Management Program) proceedings to take place on 20 October 2020 based solely on the evaluation in question. The basis of this appeal is substantive inaccuracy throughout the rendered report. During a quarterly counseling, he made his rater aware that in accordance with the Army Enlisted Aide Handbook, Vol. II, dated 25 June 15, due diligence was not being exercised to ensure the line of authority remained clear and solely between he and myself. In reprisal to his claim, he locally reassigned him to a duty position inconsistent with his grade and MOS for five months, tried to personally influence the HRC reassignment process for his next permanent change of station (PCS), and subsequently rendered a relief for cause NCOER for the rating period. He has included his timelines and details pertaining to these actions. Based on the evidence in the attached and in the enclosures, he believes removal of the entire report in question is warranted.

2. Review of the applicant's service records shows:

a. The applicant enlisted in the Regular Army on 2 August 2005, and he holds military occupational specialty 35F, Intelligence Analyst. He served through multiple extensions or reenlistments, in a variety of stateside or overseas assignments, and he was promoted to sergeant first class (SFC)/E-8 in April 2018.

b. Around November 2018, he was assigned as an Enlisted Aide to the Commanding General (CG), U.S. Army Training Center (ATC), Fort Jackson, SC.

c. In August 2019, he was relieved from his duties. He received the contested Relief for Cause NCO Evaluation Report, covering 9 months of rated time during the rating period 14 November 2018 through 26 August 2019. The CG, ATC was his rater and senior rater. The contested NCO Evaluation Report states:

(1) Character: "Did Not Meet Standard" and the comments "

- supports the Army SHARP and EO programs
- questionable integrity displayed and lacked a sense of duty
- unable to consistently demonstrate empathy

(2) Performance – Leads: "Did Not Meet Standard" and the comments "

- exhibited an inability to adapt to assigned duties, integrate, and earn trust within a small team
- failed to communicate effectively and consistently within an experienced command group team

(3) Performance – Develops: "Did Not Meet Standard" and the comments "

- failed to integrate and foster a sense of esprit de corps
- failed to sustain adequate self-preparation/time management for daily duties

(4) Performance – Achieves: "Did Not Meet Standard" and the comments "

- maintained the readiness of the Commanding General's equipment and uniforms valued at over \$20,000
- inconsistently maintained the upkeep and maintenance of the CG's quarters to required standards and expectations
- facilitated 2 General Officer and SECARMY visits by preparing meals

(5) Overall Potential: "Not Qualified" and the comments "

- NCO Refuses to sign. [Applicant] failed to execute his duties as an enlisted aide with any level of consistency or to standard.
- I relieved him due to a lack of effort or desire to improve and inconsistent display of Army attributes and competencies.
- Do not promote or send to further schooling.

d. The rater/senior rater signed the contested NCOER on 28 April 2020. An officer conducted a supplementary review on 5 May 2020. The applicant did not sign.

e. On 2 September 2020, he appealed the contested NCOER through the U.S. Army Human Resources Command to the Army Special Review Board (ASRB), based on substantive inaccuracy. He contended that

- he has been placed in a non-promotable status because he is pending QMP based solely on the contested NCOER
- during a quarterly counseling he made his rater aware that due diligence was not being exercised to ensure the line of authority remained clear and solely between the rater and himself
- in reprisal to his claim, the rater locally reassigned him for five months, tried to influence the HRC reassignment process for his next PCS and subsequently rendered the RFC NCOER.

f. There is no evidence the applicant requested a Commander's Inquiry.

g. On 2 September 2020, he appealed the contested NCOER through the U.S. Army Human Resources Command to the Army Special Review Board (ASRB), based on substantive inaccuracy. He contended that

h. On 2 March 2021, the ASRB unanimously voted to deny relief after that board determined there is insufficient evidence supporting the removal of the contested NCOER. The following was noted:

(1) The third party statements were noted; however, the Board did not determine the evidence was adequate to justify removal of the contested NCOER. The appellant did not digitally authenticate the report verifying the accuracy of the administrative data. The governing authority requires rated NCOs sign evaluations as confirmation of the administrative data and to preclude an appeal by the rated NCO based on inaccurate administrative data.

(2) The appellant's concerns were adequate reason for him to request a Commander's Inquiry (CI) or file an EO or IG complaint. It is unknown if the appellant escalated his concerns because the results of an investigation were not provided to the

Board. Without the results of a formal investigation the Board cannot add weight to the appellant's contentions.

(3) There are checks and balances in the rating system and rules in place to prohibit unjust ratings. Rating officials have a responsibility to balance their obligations to the rated individual with their obligations to the Army. Further, the governing regulation states any verified derogatory information may be entered on an evaluation report. Therefore, the decision of what ratings or comments to annotate on the NCOER is the rater's discretion.

(4) The governing authority does not provision the ASRB to remove unfavorable information based on an alleged injustice resulting from QMP selection, non-selection for promotion, a mandatory retirement date, schooling, previous evaluations, or prior job performance. The appellant bears the burden of overcoming this presumption through the presentation of clear and convincing evidence to support her contention that the NCOER contains a material error, substantive inaccuracy, or is unjust.

(5) The appellant has not provided sufficient evidence to show the NCOER was not processed in accordance with applicable laws and regulations. Further, he has not provided sufficient evidence to show the ratings on the contested report were in error or they were not the considered opinions and objective judgments of the rating officials at the time the report was rendered. Given the above, the appellant has not provided sufficient evidence showing that the contested report was inaccurate, unjust, or otherwise flawed.

### 3. The applicant provides:

a. Personal affidavit dated 20 September 2020, in which he provides a background, addresses the contested NCO Evaluation Report processing, addresses the parts of the contested NCOER that reflect not meeting the standard. He essentially states he regrets being placed into the hostile environment where his performance would fully meet expectations and the mission of the Army, but never satisfy a supervisor who permitted his wife to direct and manage his performance. The evaluation was a direct response, retaliation, and reprisal against him for standing up for the Enlisted Aide Guide. The evaluation in its entirety fails to fairly document his performance, and the best interests of the Army are fulfilled by deleting the entire document from his records. His past performance, and the included letters of support from other Army leaders, proves that his future potential is unlimited. The evaluation is inaccurate and unjust. His performance is not reflected, and the derogatory information is motivated only by his willingness to stand up for Army Values. It is not right to take revenge on a Soldier who performed his duty. It is not right to destroy a Soldier's career only because he objected to being caught between a supervisor and his wife. He did his best to complete the

mission. Only because he confronted his boss concerning the inappropriate nature of his expectations did he become subjected to retaliation.

b. Excerpt from the Army Enlisted Aide Handbook dated 25 June 2015, together with texts and emails related to running errands. Both authors indicated the applicant's job was incredibly stressful and that he did not get along well with his rater's spouse.

c. Statements from COL W (Deputy Commander and former Chief of Staff) and the former aide-de-camp. Both spoke favorably about the applicant and his performance during the contested rating period.

d. DAIG Report of Investigation and a letter from the DAIG, with the following findings

(1) ALLEGATION / FINDING # 1: The allegation that [name] issued the complainant a relief for cause NCOER in reprisal for making a protected communication (PC) to the DODIG, in violation of the DOD Directive (DODD) 7050.06, (Military Whistleblower Protection), was not substantiated.

(2) ALLEGATION/ FINDING# 2: The allegation that [Name] misused his enlisted aide (EA) in violation of Army Regulation (AR) 614-200 (Enlisted Assignments and Utilization Management), was not substantiated.

#### BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The Board carefully considered the applicant's contentions, the military record, and regulatory guidance. One possible outcome was to deny relief. However, the majority of Board members weighed in favor of the applicant based on the memorandum provided on his behalf by a Colonel who had personal knowledge of the applicant and the difficulty of his assignment. Of note, was that the Colonel upon noticing a change in the applicant's demeanor, engaged in periodic welfare checks. Based on the preponderance of the evidence available for review the Board determined the evidence presented sufficient to warrant a recommendation for relief.

BOARD VOTE:

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

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by removing the DA Form 2166-9-2 (NCO Evaluation Report) for the rating period 14 November 2018 through 26 August 2019 from his Army Military Human Resource Record (AMHRR).

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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:

Army Regulation 623-3 prescribes the policy for completing DA Form 67-9 (NCOER); associated DA Form 67-9-1 (NCOER Support Form), and DA Form 67-9-1a (NCOER Developmental Support Form), that are the basis for the Army's Evaluation Reporting System (ERS). Procedures, tasks, and steps pertaining to the completion of each evaluation report and support forms are contained in DA Pamphlet 623-3.

a. Paragraph 1-11 states, when it is brought to the attention of a commander or commandant that a report rendered by a subordinate or a subordinate command may be illegal, unjust, or otherwise in violation of this regulation, that commander or commandant will conduct an inquiry into the matter. The commander's or Commandant's Inquiry (CI) will be confined to matters related to the clarity of the evaluation report, the facts contained in the report, the compliance of the evaluation with policy and procedures established by HQDA, and the conduct of the rated Soldier and members of the rating chain. The official does not have the authority to direct that an evaluation report be changed; command influence may not be used to alter the honest evaluation of a rated Soldier by a rating official.

b. Paragraph 4-11b states clear and convincing evidence will be of a strong and compelling nature, not merely proof of the possibility of administrative error or factual inaccuracy. If the adjudication authority is convinced that an appellant is correct in some or all the assertions, the clear and convincing standard has been met regarding those assertions.

c. Paragraph 4-11d states for a claim of inaccuracy or injustice of a substantive type, evidence will include statements from third parties, rating officials, or other documents from official sources (see DA Pam 623-3). Third parties are persons other than the rated officer or rating officials who have knowledge of the appellant's performance during the rating period. Such statements are afforded more weight if they are from persons who served in positions allowing them a good opportunity to observe firsthand the appellant's performance as well as interactions with rating officials. Statements from rating officials are also acceptable if they relate to allegations of factual errors, erroneous perceptions, or claims of bias. To the extent practicable, such statements will include specific details of events or circumstances leading to inaccuracies, misrepresentations, or injustice at the time the report was rendered. The results of a CDR's or Commandant's Inquiry may provide support for an appeal request.

//NOTHING FOLLOWS//