

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 8 August 2023

DOCKET NUMBER: [REDACTED]

APPLICANT REQUESTS: amendment of Military Police Report (MPR) [ending with CID838] to change investigative report from founded to unfounded, substantiated to unsubstantiated, and potential removal of titling completely with the Army Crime Records Center. He also requests a personal appearance before the Board.

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

- Online DD Form 149 (Application for Correction of Military Record)
- Personal Statement
- Response from the Criminal Records Center to Applicant, 4 October 2022
- DA Form 4833 (Commander's Report of Disciplinary or Administrative Action), 2 July 2015
- U.S. Army Criminal Investigation Command, Report of Investigation (ROI)/ [Ending with CID838], and allied documents
- Promotion Board Review Results, 22 March 2018
- Summary of Credible Adverse Information

FACTS:

1. The applicant states the Military Police Report [ending with CID838] is in error in appropriately applying regulation.

a. The summary of the investigative report is currently listed as a 'founded' and 'substantiated' investigation charging him with assault x 2. CID Regulation 195-1 defines 'unfounded' as "a determination that a criminal offense did not occur" and 'insufficient evidence' as "the inability to determine whether or not an offense occurred or the inability to establish probable cause that an individual did or did not commit the offense." Additionally, 'substantiated' refers to a "probable cause to believe an offense occurred as alleged." Within MP Report [ending with CID838] there is insufficient evidence to support founding that he committed assault. Moreover, there is no credible evidence within the investigative report to substantiate that he committed the criminal offense of assault. He was subsequently found not guilty on all specifications at a General Officer article 15 hearing. Additionally, there is an injustice and inequity within the founding and substantiation of this report which continues to serve to his detriment as it is reviewed

prior to every selection board and security determination and provides a distinct unfair disadvantage amongst my peers. This is in light of the fact that the outcome was determined to be "Not guilty on all specifications." Additionally, a summary of this "adverse credible information" has now been added to his official military personnel file (OMPF) - where no other documentation regarding the event exists.

b. The cause of the error is difficult to determine exactly but may relate to the confusing framework / concept of 'Titling', 'Founding', and 'Substantiating' investigations. Additionally, the level of instruction trial counsel and CID agents receive regarding these concepts is uncertain and the error may be related to a knowledge gap. Lastly, misattribution of witness statements and the chaos of the investigative statements, along with the disparity of injuries between parties, may have led investigators to assume he must have committed assault although there is no credible evidence to suggest he did anything but defend himself. Additionally, he believes these records are unjust, as discussed above, as they continue to serve to his detriment. This information is now reviewed prior to every selection board and security determination and provides a distinct unfair disadvantage amongst his peers. He has had to contend with this issue at the time it occurred, at a promotion review board when he was a scroll withhold for promotion to lieutenant colonel (LTC), and as a document added to his below zone O-6 promotion selection board. He will continue to have to contend and battle with this as he continues forward in my Army career.

2. In a personal statement, the applicant reiterates his request, cites relevant regulation, and makes the following argument:

a. There are no eyewitness accounts to the actual altercation within the report of investigation, only witness statements pertaining to the altercation aftermath and photographic evidence of injuries. Moreover, the individuals he is accused of assaulting never identified him, or anyone, as their assailant.

b. Although there are no eyewitness accounts of the actual altercation and the closed-circuit television recording is too grainy to visualize most of the altercation, the recording does confirm the interested parties involved himself, Major (MAJ) Her___, Chief Warrant Officer Two (CW2) Dom___ and Sergeant First Class (SFC) Rod___. The video also confirms both his spontaneous statement that CW2 Dom___ initiated the altercation and SFC Rod___'s statement that CW2 Dom___ initiated the altercation.

c. Numerous sworn witness statements, which encompass the time immediately after the altercation, indicate he was not the aggressor or even involved in the altercation, but rather that the individual in the red/orange jacket was. As full disclosure – he was involved in the event, defended himself as needed, and removed himself from the situation and awaited the arrival of the military police.

d. Based upon the evidence, there is insufficient evidence to found he committed assault. Additionally, there is no credible evidence to substantiate he committed assault. He was the “victim” of assault and defended himself.

e. After the investigation was concluded, he was subsequently found “not guilty on all specifications” at a General Officer Article 15, UCMJ proceeding attended by himself, his chain of command, as well as the assailant and his chain of command. He was found from all facts, to include all sworn testimony and a review of video excerpts of the incident, to have acted without question in self-defense. This incident was also formally re-reviewed at a Promotion Review Board (PRB) at the time of his selection for LTC in 2017. The review returned favorably by the PRB in 2017 and resulted in a retain decision on the LTC promotion selection list by the Secretary of the Army. An adverse information summary was added to his below zone COL promotion selection board in 2021 and was also recently uploaded to his official OMPF and will most likely be included in every selection board and security determination he has going forward which provides a distinct unfair disadvantage amongst his peers.

f. He contends there is no credible information to found or substantiate that he committed assault in line with CID regulation 195-1. He was involved in an altercation and defended himself judiciously and as is allowed by law. He believes he was misidentified as the aggressor in this case based upon post altercation witness statements which investigators misattributed to him.

g. He contends that the indexing of this report of investigation ‘as is’ is an injustice and inequity. He has a deep appreciation for his career, the Army, the Army Values, and the Army Warrior Ethos. He desires to continue serving as a career officer and continue to progress in his career taking on more demanding positions.

3. Review of the applicant’s service records shows:

a. He was appointed as a commissioned officer in June 2002 and entered active duty on 20 March 2006. He served in a variety of stateside or overseas assignments, including Korea from July 2014 to July 2015.

b. He was promoted to MAJ in May 2012 and to LTC in May 2018.

c. MPR [ending with CID838), dated 18 March 2015, shows the Provost Marshal's Office, 2nd Infantry Division, Cam Casey, Korea notified the CID office a fight took place off post involving two Majors, a Chief Warrant Officer, and a Sergeant First Class.

(1) On 7 February 2015, a fist fight had taken place off post in front of Olive Bar, Dongducheon, Korea. The investigator then related a SFC Rod___ and CW2 Dom___ were drinking at a bar off post when the two were approached by [Applicant] and MAJ

Her____. The investigator then related both [Applicant] and MAJ Her____ attempted to coerce the two individuals to head back on post with them due to their levels of intoxication. CW2 Dom____ threw a punch at [Applicant] and [Applicant] proceeded to assault CW2 Dom____ while SFC Rod____ and MAJ Her____ had minor involvement in the altercation.

(2) The CID investigation established then-[Applicant] struck two service members (SM) several times. The officer and another major, while at an off post establishment, approached the service members and asked them to leave because they were intoxicated, and it was getting close to curfew. The four left the establishment together where they got into an argument which led to a physical altercation. SM1 punched the [Applicant] in the face, who responded by hitting SM1 back several times. SM2 and the other major intervened and pulled the officer off SM1 after SM1 fell to the ground. SM1 sustained serious injuries on the face, to include broken teeth and a fractured jaw and nose. SM1 underwent facial reconstructive surgery. The applicant sustained injuries on his ring finger.

(3) CID/MPs escorted/detained applicant, advised him of assault and conduct unbecoming charges (he invoked his right to a lawyer), fingerprinted and photographed. He was released to his unit.

d. On 2 July 2015, A DA Form 4833 (Commander's Report of Disciplinary or Administrative Action), reflecting two counts of assault consummated by battery, was initiated, and referred to the applicant's commander for action. Action taken: Nonjudicial Punishment by a General Officer, please not guilty, finding not guilty.

4. On 4 October 2022, CID Crime Records Center (CRC) responded to the applicant's 31 August 2022, request to remove the charge of assault from the files of the Department of the Army Criminal Investigation Division (DACID). A CRC official stated the information he provided does not constitute as new or relevant information needed to amend the report; therefore, your amendment request is denied. The official added that a check of NCIC reflects that the applicant is listed as the subject in the above referenced LER. They have updated your NCIC entry with the FBI to reflect "Found Not Guilty on all Specifications" Consistent with DOD Instruction 5505.11, retention of this criminal history data in the NCIC does conform to DOD policy. His name will remain in the NCIC. The CID official further explained to the applicant that:

a. Credible information is information disclosed or obtained by an investigator that, considering the source and nature of the information and the totality of the circumstances, is sufficiently believable to lead a trained investigator to presume that the fact or facts in question are true.

b. Titling an individual or entity is an operational rather than a legal decision. The acts of titling and indexing are administrative procedures and shall not connote any degree of guilt or innocence. The listing of a subject's name and other identifying information in the DCII indicates only that a report of investigation concerning that person or entity has been created. Judicial or adverse administrative actions shall not be taken against individuals or entities based solely on that fact that they have been titled or indexed due to a criminal investigation.

c. Once a person is properly titled and indexed in the DCII, that person's name will only be removed in the case of mistaken identity, i.e., the wrong person's name was placed in the report of investigation as a subject or entered into the DCII or if it is later determined a mistake was made at the time the titling and/or indexing occurred in that credible information indicating that the subject committed a crime did not exist (DODI 5505.7, paragraphs 6.6.1 and 6.6.2.). However, he has the right to challenge the investigative findings of the report of investigation pursuant to Army Regulation 195-2, paragraph 4-4b, which provides, in part: Requests to amend...DACID LER will be granted only if the individual submits new relevant and material facts that are determined to warrant revision of the report. The burden of proof to substantiate the request rests with the individual. Requests to delete a person's name from the title block will be granted if it is determined that credible information did not exist to believe that the individual committed the offense for which titled as a subject...Within these parameters, the decision to make any changes in the report rests within the sole discretion of the Director, DACID.

BOARD DISCUSSION:

1. The Board determined 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.
2. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The evidence shows the applicant was involved in a fight with other Soldiers in Korea. A CID investigation determined there was credible information that, considering the source and nature of the information and the totality of the circumstances, is sufficiently believable to lead a trained investigator to presume that the fact or facts in question are true. As a result, the applicant was titled. Titling an individual or entity is an operational rather than a legal decision. The acts of titling and indexing are administrative procedures and do not indicate any degree of guilt or innocence. Requests to delete a person's name from the title block will be granted if it is determined that credible information did not exist to believe that the individual committed the offense for which titled as a subject. The Board agreed that although there was probable cause, the chain of command/commander

found the applicant not guilty of the cited violations. As such, the Board was persuaded by the preponderance of the evidence and the applicant's contention that the charges were unfounded. Based on the preponderance of the evidence available for review, the Board determined the evidence presented insufficient to warrant a recommendation for relief.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is 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 amending the Military Police Report (MPR) [ending with CID838] to change investigative report from founded to unfounded and/or substantiated to unsubstantiated.

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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. Army Regulation 195-2 (Criminal Investigation Activities), effective 9 July 2014, prescribed policies and procedures pertaining to criminal investigations, crime prevention surveys, protective service missions, force protection and antiterrorism

efforts and the collection, retention, and dissemination of criminal information. Chapter 4 provided guidance for investigative records, files, and reports.

a. Paragraph 4-4 prescribed guidance for individual requests for access to or amendment of CID Reports of Investigation (ROIs). Requests to amend CID ROIs will be considered only under the provisions of this regulation.

b. Paragraph 4-4b stated requests to amend or unfound offenses in CID ROIs will be granted only if the individual submits new, relevant, and material facts that are determined to warrant revision of the report. The burden of proof to substantiate the request rests with the individual. Requests to delete a person's name from the title block will be granted if it is determined that credible information did not exist to believe the individual committed the offense for which titled as a subject at the time the investigation was initiated, or the wrong person's name has been entered as a result of mistaken identity. The decision to list a person's name in the title block of a CID ROI is an investigative determination that is independent of judicial, nonjudicial, or administrative action taken against the individual or the results of such action. Within these parameters, the decision to make any changes in the report rests within the sole discretion of the Commanding General, CID. The decision will constitute final action on behalf of the Secretary of the Army with respect to requests for amendment under this regulation.

2. Department of Defense (DOD) Instruction 5505.07 (Titling and Indexing Subjects of Criminal Investigations in the DOD), 28 February 2018, establishes policy, assigns responsibilities, and provides procedures for a uniform standard for titling and indexing subjects of criminal investigations by the DOD.

a. Paragraph 1.2a states DOD components authorized to conduct criminal investigations, as outlined in DOD Instruction 5505.16 (Investigations by DOD Components), will title and index subjects of criminal investigations as soon as the investigation determines there is credible information that the subject committed a criminal offense. Indexing in the Defense Central Investigations Index (DCII) may be delayed until the conclusion of the investigation due to operational security.

b. Paragraph 1.2b states victims and incidentals associated with criminal investigations can be titled and indexed.

c. Paragraph 1.2c states titling and indexing are administrative procedures and will not imply any degree of guilt or innocence.

d. Paragraph 1.2d states once the subject of a criminal investigation is indexed in the DCII, the information will remain in the DCII, even if the subject is found not guilty of

the offense under investigation, unless there is mistaken identity, or it is later determined no credible information existed at the time of titling and indexing.

e. Paragraph 1.2e states if a subject's information requires expungement from or correction in the DCII, DOD components will remove the information as soon as possible.

f. Paragraph 1.2f states judicial or adverse administrative actions will not be taken based solely on the existence of a titling or indexing record in a criminal investigation.

g. Paragraph 3.1 states a subject is titled in a criminal investigative report to ensure accuracy and efficiency of the report. A subject's information is indexed in the DCII to ensure this information is retrievable for law enforcement or security purposes in the future.

h. Paragraph 3.2 states a subject who believes he/she was incorrectly indexed, as outlined in paragraph 1.2.d., may appeal to the DOD component head to obtain a review of the decision.

i. Paragraph 3.3 states when reviewing the appropriateness of a titling or indexing decision, the reviewing official will only consider the investigative information at the time of the decision to determine if the decision was made in accordance with paragraph 1.2.a.

j. Paragraph 3.4 states DOD components that conduct criminal investigations will make appropriate corrections or expungements to criminal investigative reports or the DCII as soon as possible.

3. The National Defense Authorization Act for Fiscal Year 2021, effective 1 January 2021, authorized appropriations for Fiscal Year 2021 for military activities of the DOD, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes. Section 545 stated:

a. Policy and Process Required. Not later than 1 October 2021, the Secretary of Defense shall establish and maintain a policy and process through which any covered person may request that the person's name, personally identifying information, and other information pertaining to the person shall, in accordance with subsection c, be corrected in, or expunged or otherwise removed from, the following:

(1) a law enforcement or criminal investigative report of the DOD or any component of the military department;

(2) an index item or entry in the DCII; and

(3) any other record maintained in connection with a report described in paragraph (1), or an index item or entry described in paragraph (2), in any system of records, records database, records center, or repository maintained by or on behalf of the military department.

b. Covered Persons. For purposes of this section, a covered person is any person whose name was placed or reported, or is maintained:

(1) in the subject or title block of a law enforcement or criminal investigative report of the DOD (or any component of the military department);

(2) as an item or entry in the DCII; or

(3) in any other record maintained in connection with a report described in paragraph (1), or an index item or entry described in paragraph (2), in any system of records, records database, records center, or repository maintained by or on behalf of the military department.

c. Elements. The policy and process required by subsection (a) shall include the following elements:

(1) Basis for correction or expungement. That the name, personally identifying information, and other information of a covered person shall be corrected in, or expunged or otherwise removed from, a report, item or entry, or record described in paragraphs (1) through (3) of subsection (a) in the following circumstances:

(a) probable cause did not or does not exist to believe that the offense for which the person's name was placed or reported, or is maintained, in such report, item or entry, or record occurred, or insufficient evidence existed or exists to determine whether or not such offense occurred;

(b) probable cause did not or does not exist to believe that the person actually committed the offense for which the person's name was so placed or reported, or is so maintained, or insufficient evidence existed or exists to determine whether or not the person actually committed such offense; or

(c) such other circumstances, or on such other bases, as the Secretary may specify in establishing the policy and process, which circumstances and bases may not be inconsistent with the circumstances and bases provided by subparagraphs (a) & (b).

(2) Considerations. While not dispositive as to the existence of a circumstance or basis set forth in paragraph (1), the following shall be considered in the determination

whether such circumstance or basis applies to a covered person for purposes of this section:

(a) the extent or lack of corroborating evidence against the covered person concerned with respect to the offense at issue;

(b) whether adverse administrative, disciplinary, judicial, or other such action was initiated against the covered person for the offense at issue; and

(c) the type, nature, and outcome of any action described in subparagraph (b) against the covered person.

(3) Procedures. The policy and process required by subsection (a) shall include procedures as follows:

(a) procedures under which a covered person may appeal a determination of the applicable component of the DOD denying, whether in whole or in part, a request for purposes of subsection (a);

(b) procedures under which the applicable component of the military department will correct, expunge, or remove; take other appropriate action on, or assist a covered person in so doing, any record maintained by a person, organization, or entity outside of the military department to which such component provided, submitted, or transmitted information about the covered person, which information has or will be corrected in, or expunged or removed from, military department records pursuant to this section;

(c) the timeline pursuant to which the military department, or a component of the military department, as applicable, will respond to each of the following: a request pursuant to subsection (a); an appeal under the procedures required by subparagraph (a); and/or a request for assistance under the procedures required by subparagraph (b)

(d) mechanisms through which the military department will keep a covered person apprised of the progress of the military department on a covered person's request or appeal as described in subparagraph (c).

4. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent

evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//