

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 2 January 2024

DOCKET NUMBER: AR20230000778

APPLICANT REQUESTS: removal of a DA Form 2627 (Record of Proceedings Under Article 15, Uniform Code of Military Justice (UCMJ)), dated 3 August 2020, from the restricted section of 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)
- North Carolina Divorce Statute and Effects of Absolute Divorce
- Extract of Army Regulation 608-99, Family Support, Child Custody, and Parentage
- Separation Agreement

FACTS:

1. The applicant states there is currently a DA Form 2627 in his Restricted file. He received a field grade article 15 in August 2020, and he believes the Army Regulation and state law support that this was wrongfully given to him. He is requesting that this Article 15 be removed from his restricted file completely.

a. He and his former spouse had a written separation agreement that went uncontested in court. According to Army Regulation 608-99, a written formal agreement is as follows. Written financial support agreement. If a signed written financial support agreement exists, the amount of financial support specified in the agreement controls (see para B-2). A written financial support agreement is any written document (such as a separation agreement or property settlement agreement, a letter, email, or a series of letters or emails) evidencing an intent to create a binding financial support agreement. Ordinarily, informal forms of written communication (for example, text messages and social media posts) do not demonstrate an intent to create a binding agreement. According to the Army Regulation, the financial agreement that his former spouse and he agreed and signed is all the financial support the Army requires him to afford them unless his former spouse contested this agreement in some manner, which they did not.

b. According to North Carolina State Law N.C. Gen. Stat. § 50, legal separation begins immediately once the couple agrees upon separation and is living apart. In the

State of North Carolina, a separation agreement can be as little as an oral agreement (which his former spouse and he had) up to a court ordered separation agreement (which they did not receive as the agreement they made was never contested in court or in any way). Lastly, he received this Article 15 seven months after the divorce had been finalized. According to North Carolina State Law and Army Regulation, due to the status of his Absolute Divorce all support to his former spouse was to stop. There was no court ordered alimony or support of any kind nor does the army require any support of any kind following a court ordered absolute divorce that was completely uncontested. For these reasons, he believes he was well in line with Army Regulation and North Carolina State Law regarding the financial compensation he did or did not afford his former spouse. He understands the Army's need to regulate financial compensation for spouses, and he has complete respect for the process which is why he made every effort possible to ensure he was operating in accordance with all Army Regulations.

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

a. He enlisted in the Regular Army on 3 September 2014 and reenlisted on 8 April 2019. He held military occupational specialty 35N, Signal Intelligence Analyst.

b. He served in a variety of assignments, including Germany and Korea, and he attained the rank of staff sergeant (SSG)/E-6.

c. On 19 February 2020, an investigating officer (IO) was appointed pursuant to Army Regulation (AR) 15-6 (Procedures for Administrative Investigations and Boards of Officers) to conduct an investigation after an initial Commander's Inquiry occurred to determine if the applicant committed Basic Allowance for Housing (BAH) Fraud.

(1) Findings:

(a) Was [Applicant] ever sent to Cameroon, Africa and was he on assignment to Africa when he proxy-married Mrs. Br___? No, based on his Overseas Tour Credit Listing, [Applicant] was never sent to Cameroon, Africa on deployment and he was not on assignment to Africa when he proxy-married Mrs. Br___. Based off his flight itinerary and DTS travel records, he had not traveled to Cameroon, Africa at the time of his proxy marriage. The applicant's deployment history determined that the only two locations that he deployed to based off his Overseas Tour Credit Listing was South Korea on 17 June 2015 and Germany on 21 December 2017. The applicant does not have any records of deployment or travel through Cameroon, Africa.

(b) Has [Applicant] been to Africa and not reported this country to S2 in compliance with his clearance? No. after interviewing the Brigade S2, there were no records of [Applicant] ever traveling to Africa and there were no records of deployment or TDY (temporary duty) travel during the time of his proxy marriage on 20 June 2017.

(c) Specifically, what documents were falsified and what documents were used to defraud funds against the U.S. Government? [Applicant's] Power of Attorney: California Marriage License stated he was stationed overseas in Cameroon, Africa and serving in a conflict of war on 20 June 2017. This document was falsified due to zero deployment history or factual evidence of an assignment there. The Power of Attorney: California Marriage License and License and Certificate of Marriage was also used to defraud funds from the US government because it allowed [Applicant] to collect California BAH while stationed in North Carolina.

(2) Summary: Based on the above narrative, [Applicant] has zero records of deploying or traveling to Cameroon, Africa during the timeframe of his 20 June 2017 proxy marriage or at any time. The applicant falsified an official government document, the Power of Attorney: California Marriage License. The document declared that he was stationed in a conflict of war and was unable to be present for his marriage. The Power of Attorney: California Marriage License and License and Certificate of Marriage was also used to defraud funds from the US government because it allowed [Applicant] to collect California BAH while stationed in North Carolina.

(3) Recommendations. In view of the above findings, the IO recommended an Article 15 at the Field-Grade Officer Level.

d. On 12 July 2020, the applicant's battalion commander notified the applicant that he was considering whether he should be punished under Article 15 of the UCMJ for the following misconduct:

(1) Article 121: In that he, did, at or near Fort Bragg, NC, between on or about 1 August 2018 and on or about 31 December 2018, steal BAH of a value of \$7,146, property of the United States Government.

(2) Article 121: In that he, did, at or near Fort Bragg, NC, between on or about 1 January 2019 and on or about 30 April 2019, steal BAH of a value of \$4,848, property of the United States Government.

(3) Article 121: In that he, did, at or near Fort Bragg, NC, between on or about 1 May 2019 and on or about 31 December 2019, steal BAH of a value of \$2,880, property of the United States Government.

(4) Article 92: In that he did, at or near Fort Bragg, NC, on or about 1 January 2018, fail to obey a lawful general regulation which was his duty to obey, to wit: paragraph 2-1(a) of Army Regulation 608-99, dated 29 October 2003, by wrongfully failing to provide financial support to Ms. K__ Br__, his wife.

(5) Article 134: In that he did. at or near Fort Bragg, NC, on or about 6 July 2017, wrongfully and unlawfully in an Authorization to Start, Stop, or Change Basic Allowance for Quarters and/or Variable Housing Allowance (DA Form 5960), make under oath or affirmation a false statement in substance as follows: "I certify that I provide. or am will [sic] to provide adequate support for the above named dependents", which statement you did not then believe to be true. and that said conduct was to the prejudice of good order and discipline in the armed forces and of was of a nature to bring discredit upon the armed forces.

e. The applicant consulted with counsel. He declined trial by a court-martial and opted for a closed hearing wherein he requested a person to speak on his behalf and that he would present matters in his own defense.

f. On 3 August 2020, the imposing commander found him guilty of some of the charges (Article 92: wrongfully failing to provide financial support to Ms. K__ Br___, his wife, and Article 134: wrongfully and unlawfully in DA Form 5960 making under oath or affirmation a false statement in substance that he provides adequate support for the above named dependents). His punishment consisted of:

- Reduction to Sergeant (E-5), suspended, to be automatically remitted if not vacated on or before 3 February 2021
- Forfeiture of \$1,445.00 pay, suspended, to be automatically remitted if not vacated on or before 03 February 2021

g. The imposing commander ordered the Article 15 filed in the restricted section of the applicant's official military personnel file (OMPF).

h. The applicant elected not to appeal.

i. The applicant signed a Declination of Continued Service Statement, and he was honorably discharged from active duty on 7 April 2023. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 8 years, 7 months, and 5 days of active service.

j. the contested Article 15 is filed in the restricted section of the applicant's official military personnel file.

3. The applicant provides:

a. Separation agreement wherein he and his spouse agreed that he would pay all divorce legal fees on the grounds that this his spouse Ky__ does not contest the divorce, that he would provide Ky__ with monthly financial compensation in the amount of Zero Dollars, that the couple have no shared assets and will not be share or split any

assets financial, physical, or anything of the sort; that neither he or she will contest an absolute divorce, and that neither will receive any form of spousal support following an absolute divorce being granted by the North Carolina Court.

b. Extract of AR 608-99, that reads in paragraph 2-3(b), Written financial support agreement. If a signed written financial support agreement exists, the amount of financial support specified in the agreement controls. A written financial support agreement is any written document (such as a separation agreement or property settlement agreement, a letter, email, or a series of letters or emails) evidencing an intent to create a binding financial support agreement. Ordinarily, informal forms of written communication (for example, text messages and social media posts) do not demonstrate an intent to create a binding agreement.

c. Section § 50-6 of NC Divorce Statute: Divorce after separation of one year on application of either party. Marriages may be dissolved, and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for one year, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months. A divorce under this section shall not be barred to either party by any defense or plea based upon any provision of G.S. 50-7, a plea of res judicata, or a plea of recrimination. Notwithstanding the provisions of G.S. 50-11, or of the common law, a divorce under this section shall not affect the rights of a dependent spouse with respect to alimony which have been asserted in the action or any other pending action. Whether there has been a resumption of marital relations during the period of separation shall be determined pursuant to G.S. 52-10.2. Isolated incidents of sexual intercourse between the parties shall not toll the statutory period required for divorce predicated on separation of one year.

d. Section § 50-11 of NC Divorce Statute: Effects of absolute divorce.

(1) (a) After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine except as hereinafter set out, and either party may marry again without restriction arising from the dissolved marriage.

(2) (b) No judgment of divorce shall cause any child in "esse" or begotten of the body of the wife during coverture to be treated as a child born out of wedlock.\

(3) (c) A divorce obtained pursuant to G.S. 50-5.1 or G.S. 50-6 shall not affect the rights of either spouse with respect to any action for alimony or postseparation support pending at the time the judgment for divorce is granted. Furthermore, a judgment of absolute divorce shall not impair or destroy the right of a spouse to receive alimony or postseparation support or affect any other rights provided for such spouse

under any judgment or decree of a court rendered before or at the time of the judgment of absolute divorce.

(4) (d) A divorce obtained outside the State in an action in which jurisdiction over the person of the dependent spouse was not obtained shall not impair or destroy the right of the dependent spouse to alimony as provided by the laws of this State.

(5) (e) An absolute divorce obtained within this State shall destroy the right of a spouse to equitable distribution under G.S. 50-20 unless the right is asserted prior to judgment of absolute divorce; except, the defendant may bring an action or file a motion in the cause for equitable distribution within six months from the date of the judgment in such a case if service of process upon the defendant was by publication pursuant to G.S. 1A-1, Rule 4 and the defendant failed to appear in the action for divorce.

(6) (f) An absolute divorce by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property shall not destroy the right of a spouse to equitable distribution under G.S. 50-20 if an action or motion in the cause is filed within six months after the judgment of divorce is entered. The validity of such divorce may be attacked in the action for equitable distribution.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered.

a. The evidence shows an AR 15-6 found evidence to substantiate that the applicant falsified an official government document, declaring that he was stationed in a conflict of war and was unable to be present for his marriage, and then using the document to defraud funds from the government because it allowed him to collect CA BAH while stationed in NC. Based on the substantiated finding, the applicant was informed of and received NJP. The imposing commander found him guilty, punished him, and directed filing the DA Form 2627 in the restricted folder of his OMPF.

c. The ABCMR does not normally reexamine issues of guilt or innocence under Article 15 of the UCMJ. This is the imposing commander's function, and it will not be upset by the ABCMR unless the commander's determination is clearly unsupported by the evidence. The applicant was provided a defense attorney, was given the right to demand trial by court-martial, and was afforded the opportunity to appeal the Article 15 through the proper channels. He chose not to appeal. His NJP proceedings were conducted in accordance with law and regulation and his NJP is properly filed in his OMPF as directed by the imposing commander. The applicant has not demonstrated the NJP action was unjust or untrue, that this NJP should be removed, or that a removal would be in the best interest of the Army.

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 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.



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 15-185 (Army Board for Correction of Military Records) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. The ABCMR considers individual applications that are properly brought before it. The ABCMR will decide cases on the evidence of record; it is not an investigative body. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. The ABCMR members will direct or recommend changes in military records to correct the error or injustice, if persuaded that material error or injustice exists and that sufficient evidence exists in the record.

2. Army Regulation 27-10 (Military Justice) prescribes the policies and procedures pertaining to the administration of military justice and implements the Manual for Courts-Martial. It provides that a commander should fully use nonpunitive administrative measures to further the efficiency of the command before resorting to NJP under the UCMJ. Use of NJP is proper in all cases involving minor offenses in which nonpunitive measures are considered inadequate or inappropriate. NJP may be imposed to correct, educate, and reform offenders who the imposing commander determines cannot benefit from less stringent measures; to preserve a Soldier's record of service from unnecessary stigma by record of court-martial conviction; and to further military efficiency by disposing of minor offenses in a manner requiring less time and personnel than trial by court-martial.

a. Paragraph 3-6a addresses filing of NJP and provides that a commander's decision whether to file a DA Form 2627 in the performance folder of a Soldier's OMPF is as important as the decision relating to the imposition of the NJP itself. In making a filing determination, the imposing commander must carefully weigh the interests of the Soldier's career against those of the Army to produce and advance only the most qualified personnel for positions of leadership, trust, and responsibility. In this regard, the imposing commander should consider the Soldier's age, grade, total service (with particular attention to the Soldier's recent performance and past misconduct), and whether the Soldier has more than one DA Form 2627 directed for filing in the restricted folder. However, the interests of the Army are compelling when the DA Form 2627 reflects unmitigated moral turpitude or lack of integrity, patterns of misconduct, or evidence of serious character deficiency or substantial breach of military discipline. In such cases, the DA Form 2627 should be filed in the performance folder.

c. Paragraph 3-28 (Setting Aside and Restoration) states: This is an action whereby the punishment or any part or amount, whether executed or unexecuted, is set aside and any rights, privileges, or property affected by the portion of the punishment set aside are restored. NJP is "wholly set aside" when the commander who imposed the punishment, a successor-in-command, or a superior authority sets aside all punishment imposed upon an individual under Article 15. The basis for any set aside action is a determination that, under all the circumstances of the case, the punishment has resulted in a clear injustice. "Clear injustice" means there exists an un-waived legal or factual error that clearly and affirmatively injured the substantial rights of the Soldier. An example of clear injustice would be the discovery of new evidence unquestionably exculpating the Soldier. Clear injustice does not include the fact that the Soldier's performance of service has been exemplary after the punishment or that the punishment may have a future adverse effect on the retention or promotion potential of the Soldier.

c. Paragraph 3-37b (2) states for Soldiers in the ranks of SGT and above, the original will be sent to the appropriate custodian for filing in the OPMF. The decision to

file the original DA Form 2627 in the performance folder or restricted folder of the OMPF will be made by the imposing commander at the time punishment is imposed. The filing decision of the imposing commander is subject to review by superior authority. However, the superior authority cannot direct filing a DA Form 2627 in the performance folder that the imposing commander directed filing in the restricted folder.

d. Paragraph 3-43 contains guidance for transfer or removal of DA Forms 2627 from the OMPF. Applications for removal of a DA Form 2627 from the OMPF based on an error or injustice will be made to the ABCMR. There must be clear and compelling evidence to support removal of a properly completed, facially valid DA Form 2627 from a Soldier's record by the ABCMR.

3. Army Regulation 600-37 (Unfavorable Information) prescribes the policies and procedures regarding unfavorable information considered for inclusion in official personnel files.

a. Once an official document has been properly filed in the OMPF, it is presumed to be administratively correct and to have been filed pursuant to an objective decision by competent authority. Thereafter, the burden of proof rests with the individual concerned to provide evidence of a clear and convincing nature that the document is untrue or unjust, in whole or in part, thereby warranting its alteration or removal from the OMPF. Appeals that merely allege an injustice or error without supporting evidence are not acceptable and will not be considered.

b. Only those documents listed in Table 2-1 and Table 2-2 are authorized for filing in the OMPF. Depending on the purpose, documents will be filed in the OMPF in one of three folders: performance, service, or restricted. Table 2-1 (Composition of the OMPF) shows the DA Form 2627 is filed in either the performance or restricted folder of the OMPF as directed in item 5 of the DA Form 2627.

4. Army Regulation 600-8-104 (Army Military Human Resource Records Management) prescribes Army policy for the creation, utilization, administration, maintenance, and disposition of the AMHRR. Paragraph 3-6 provides that once a document is properly filed in the AMHRR, the document will not be removed from the record unless directed by the ABCMR or another authorized agency.

//NOTHING FOLLOWS//