

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 22 September 2023

DOCKET NUMBER: AR20230002517

APPLICANT REQUESTS: removal of the DA Form 2166-8 (Noncommissioned Officer (NCO) Evaluation Report (NCOER)) covering the period November 2001 through October 2002 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 under the Provisions of Title 10, U.S. Code, Section 1552)
- Counsel's Letter, 26 October 2022
- Memorandum in Support of Application Filed by (Applicant), Staff Sergeant, Army National Guard, undated
- List of Exhibits –
  - Exhibit 1 – DA Form 2166-8 covering the period November 2001 through October 2002
  - Exhibit 2 – DA Form 4187 (Personnel Action), 20 January 1989
  - Exhibit 3 – Army Achievement Medal Certificate, 19 May 1989
  - Exhibit 4 – Automotive Powertrain Course Diploma, 7 August 1990
  - Exhibit 5 –
    - Army Commendation Medal Certificate, 2 April 1991
    - Army Commendation Medal Certificate, 4 May 1991
  - Exhibit 6 – Army Achievement Medal Certificate, 3 July 1991
  - Exhibit 7 – DD Form 214 (Certificate of Release or Discharge from Active Duty) for the period ending 1 September 1991
  - Exhibit 8 – DD Form 4 (Enlistment/Reenlistment Document – Armed Forces of the United States), 26 February 1993
  - Exhibit 9 – U.S. Army Transportation Center Permanent Orders 197-006, 16 July 1993
  - Exhibit 10 – DA Form 1059 (Service School Academic Evaluation Report), 15 September 1993
  - Exhibit 11 – DA Form 1059, 13 August 1994

- Exhibit 12 – 1106th Aviation Classification Repair Activity Depot Orders 3-1, 30 January 1996
- Exhibit 13 – DA Form 2166-7 covering the period November 1995 through December 1996
- Exhibit 14 – National Guard Bureau Form 22-5-R (Approval and Acceptance by Service Representative for Interstate Transfer in the Army National Guard), 6 December 1996
- Exhibit 15 – State of California Office of the Adjutant General Orders 273-536, 27 December 1996
- Exhibit 16 – DA Form 2166-7 covering the period December 1996 through August 1997
- Exhibit 17 – DA Form 1059, 4 February 1998
- Exhibit 18 – DA Form 2166-7 covering the period December 1997 through November 1998
- Exhibit 19 – DA Form 1059, 12 March 1999
- Exhibit 20 – DA Form 2166-7 covering the period December 1998 through November 1999
- Exhibit 21 – State of Alaska Department of Military and Veterans Affairs Orders 005-006, 5 January 2000
- Exhibit 22 – DA Form 2166-7 covering the period November 1999 through October 2000
- Exhibit 23 – State of Alaska Department of Military and Veterans Affairs Permanent Orders 068-049, 9 March 2001
- Exhibit 24 – State of Alaska Department of Military and Veterans Affairs Permanent Orders 184-013, 3 July 2001
- Exhibit 25 – DA Form 2166-7 covering the period November 2000 through October 2001
- Exhibit 26 – State of Alaska Department of Military and Veterans Affairs Orders 091-015, 1 April 2002
- Exhibit 27 – National Guard Bureau Form 22 (Report of Separation and Record of Service), 27 March 2003
- Exhibit 28 – Standard Form 50-B (Notification of Personnel Action), 27 February 2003
- Exhibit 29 – Headquarters, State Area Command, Alaska Army National Guard, Memorandum (Notification of Eligibility for Retired Pay at Age 60 with 15 Years of Service), 21 April 2003
- Exhibit 30 – Declaration of (Applicant) under Title 28, U.S. Code, Section 1746, 18 October 2022

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant states he never received a copy of his NCOER covering the period November 2001 through October 2002. He was unaware of its existence until he was provided a copy of it by an investigator in April 2022.

3. Counsel states the applicant's supervisors in Company E, 1st Battalion, 207th Aviation Regiment, Fort Richardson, AK, signed an NCOER on 8 December 2002 that contained negative comments about the applicant's performance. Despite Army regulations to the contrary, the Alaska Army National Guard never provided him with a copy of the NCOER so he could rebut the baseless comments. He further states:

a. On 1 April 2002, the applicant received orders transferring him from Company E to Company F, 1st Battalion, 207th Aviation Regiment. There, he was to be trained as a flight engineer to work on the C-23 Sherpa cargo aircraft. Unfortunately, while taking the required flight physical, the applicant was diagnosed with Type I diabetes. That put him on a path toward a medical separation from the Alaska Army National Guard. Additionally, the stress of the diagnosis and the need for better medical care led the applicant to apply for 6 months of leave without pay from his State civilian technician position. He returned to California to be with his family and receive medical treatment.

b. Due to his diabetes, the applicant was medically separated from the Alaska Army National Guard on 27 March 2003. Additionally, because he was no longer a Guardsman, he was terminated from the State civilian Wage Grade (WG)-10 position. Because he had 15 years of service, he was placed in the Retired Reserve and will collect retired pay at age 60.

c. The letter awarding him retirement, a Standard Form 50 terminating him from his WG-10 position, and orders placing him in the Retired Reserve were the only documents the applicant received from the Alaska Army National Guard as his time there ended. He then went on with his life as a civilian.

d. As a civilian, the applicant worked for the Department of State and as a contractor for the U.S. Army. These positions required a security clearance, which he was granted without issue or comment from the Department of Defense and the Office of Personnel Management investigators. On 28 March 2022, he was hired by the U.S. Air Force as a WG-11 Powered Systems Mechanic. This position required a Secret clearance and a new investigation was undertaken. In April 2022, the applicant was

called to the investigator's office. There he was presented with a copy of the NCOER covering the period November 2001 through October 2002 that contained derogatory information about him. It was signed by the raters and reviewer on 8 December 2002. The applicant professed to the investigator that he had never seen that NCOER. Indeed, no other clearance investigator had mentioned it to him. This time, though, the investigator told him there would be a problem because of that NCOER.

e. The applicant's NCOER covering the period November 2001 through October 2002 is a transparent attempt at retaliation against the applicant. It was improperly processed, likely deliberately, and violates Army regulations and Federal law.

f. The applicant was never provided with a copy of the report. Army regulations provide that the rated NCO will be provided with a copy of the NCOER. Army Regulation 623-205 (NCO Evaluation Reporting System) provides a series of steps that must be undertaken that will ensure the rated NCO receives a copy and those steps were not followed.

g. The applicant was never provided counseling by anyone in the rating chain during that rating period. The process of rating an NCO begins with formal counseling. The applicant states in his sworn statement that he never received any form of counseling from his rater or anyone else in his rating chain.

h. The comments in the NCOER are not appropriate and do not represent a "realistic and objective evaluation." The rater must explain with specific bullet examples for "EXCELLENCE" or "NEEDS IMPROVEMENT" ratings. The comments on the applicant's NCOER failed to meet the standards set forth in the regulation.

i. The applicant's NCOER violated Federal law. Title 5, U.S. Code, section 552a(e)(5) (Records Maintained on Individuals), requires agencies to "maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." The law is clear. The Army is required to maintain accurate records. Subjective opinions, especially those that are linked to any fact like the one in the applicant's NCOER, are subject to review by the court. These remarks are "plainly irresponsible" and are unsubstantiated.

4. On 6 December 1996, the applicant voluntarily transferred interstate from the California Army National Guard to Headquarters and Headquarters Company, 1st Battalion, 207th Aviation Regiment, Alaska Army National Guard.

5. State of Alaska Department of Military and Veterans Affairs Orders 091-015, 1 April 2002, released the applicant from Company E, 1st Battalion, 207th Aviation Regiment,

and transferred him to Company F, 1st Battalion, 207th Aviation Regiment, effective 13 March 2002.

6. The applicant's annual NCOER covering the period November 2001 through October 2002 shows in:

a. Part II (Authentication), block c (Rated NCO – Signature), the entry "NCO UNAVAILABLE FOR SIGNATURE";

b. Part III (Duty Description), block f (Counseling Dates), counselings on 4 January 2002, 6 April 2002, and 1 June 2002;

c. Part IV (Army Values/Attributes/Skills/Actions), his rater checked "NO" for "DUTY," "HONOR," "INTEGRITY," and "PERSONAL COURAGE" and commented:

- "His honesty is sometimes called into question"
- "Will not perform duties if personal issues conflict with schedule"
- "Does not give a days [sic] work for a days [sic] pay"

d. Part IV (Values/NCO Responsibilities), block d (Leadership), his rater marked "NEEDS IMPROVEMENT (SOME)" and commented: "Does not set a good example for junior soldiers to follow";

e. Part IV, block f (Responsibility and Accountability), his rater marked "NEEDS IMPROVEMENT (SOME)" and commented: "Attempts to blame others for his shortcomings" and "Finds reasons not to do the right thing";

f. Part V (Overall Performance and Potential), his rater rated his overall potential as "MARGINAL." His senior rater commented: "Does not always meet obligations with regard to helping others (squad, section, platoon, company)" and "Should not let personal issues conflict with his duty." His senior rater rated his overall performance as "FAIR/4" and his overall potential as "FAIR/4."

7. The applicant provided several documents of merit from his service record, including:

a. The DA Form 4187, 20 January 1989, showing he was promoted to specialist/E-4 with a waiver for time in service. He also provided orders for his promotion to sergeant/E-5 and staff sergeant/E-6.

b. Two Army Achievement Medal Certificates, 19 May 1989 and 3 July 1991, and two Army Commendation Medal Certificates, 2 April 1991 and 4 May 1991, for meritorious service and achievement. He was also awarded the Aircraft Crewmen

Badge, Army Reserve Components Overseas Training Ribbon, and Alaska State Marksmanship Award (Machine Gun).

c. His diploma, showing he completed the Automotive Powertrain Course on 7 August 1990.

d. His DD Form 214 for the period ending 1 September 1991, showing he was honorably discharged and transferred to the U.S. Army Reserve Control Group (Reinforcement).

e. His DD Form 4, 26 February 1993, showing he enlisted in the Army National Guard.

f. His DA Forms 1059 for the following dates, showing he achieved course standards:

- 15 September 1993
- 13 August 1994
- 4 February 1998
- 12 March 1999

g. His NCOERs covering the following periods, showing his rater rated his overall potential as "FULLY CAPABLE" and his senior rater rated his overall performance as "SUCCESSFUL/2 or 3" and his overall potential as "SUPERIOR/2 or 3."

- November 1995 through December 1996
- December 1996 through August 1997
- December 1997 through November 1998
- December 1998 through November 1999
- November 1999 through October 2000
- November 2000 through October 2001

8. The Standard Form 50-B, 7 February 2003, shows the applicant was terminated from his State civilian WG-10 position due to loss of military membership.

9. On 27 March 2003, the applicant was honorably discharged from the Army National Guard due to being medically unfit for retention.

10. The Headquarters, State Area Command, Alaska Army National Guard, memorandum (Notification of Eligibility for Retired Pay at Age 60 with 15 Years of Service), 21 April 2003, notified the applicant of his early qualification to receive Non-Regular retired pay upon attaining age 60.

11. On 18 October 2022, the applicant declared he was never provided with a copy of his NCOER covering the period November 2001 through October 2002. He did not see a copy of the NCOER before it was signed by his rater, senior rater, and reviewer, or filed with the Personnel Service Battalion. The first time he saw the NCOER was when he was shown a redacted copy by an investigator in April 2022. He was never provided counseling by his rater, senior rater, or reviewer during the rating period. He was never told his performance was below standard at any time during the rating period.

**BOARD DISCUSSION:**

After reviewing the application, all supporting documents, and the evidence found within the applicant's military records, the Board found that relief was/warranted. The Board carefully considered the applicant's contentions, military record, and regulatory guidance. The Board agreed that based on the senior rater comments on the NCOER which the applicant is contesting, documentation available for review should include some evidence to support the bulleted comments. The Board noted that the documentation available does not reveal any counseling statements or other corrective actions as would be expected based given the comments and given his previous ratings. The Board further agreed they were not support by tangible evidence within his record and, therefore, at risk of misinterpretation by a selection board or personnel manager. Given his previous performance and lack of any evidence which would warrant his rater's comments, the Board found the evidence sufficiently compelling to warrant a recommendation for relief and removal of the contested NCOER is warranted.

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 partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by removal of the DA Form 2166-8 (Noncommissioned Officer Evaluation Report covering the period November 2001 through October 2002 from his Army Military Human Resource Record.

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



REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Army Regulation 623-205 (NCO Evaluation Reporting System), 15 May 2002 and in effect at the time, prescribed the enlisted evaluation function of the military personnel system.

a. Paragraph 3-9 (Part III, Duty Description) stated to enter the actual date of the counseling obtained from the DA Form 2166-8-1 (NCO Counseling Checklist/Record). The absences of counseling will not be used as the sole basis for an appeal. However, the lack of counseling may be used to help support other claims made in an appeal.

b. Paragraph 3-16 (Narrative Gimmicks Prohibited) stated a thorough evaluation of the NCO is required. The following technique will, therefore, not be used. Generic bullets to support a "NO" entry under values or a "Needs Improvement" entry under responsibilities. They frequently need to be interpreted by the selection board and personnel manager. If not correctly interpreted, the best interests of the Army and the rated NCO are not served.

c. Paragraph 6-6 (Evaluation Reports and Appeals) stated an evaluation report accepted for inclusion in the official record of an NCO is presumed to:

(1) be administratively correct,

(2) have been prepared by the proper rating officials, and

(3) represent the considered opinions and objective judgment of the rating officials at the time of preparation.

d. Paragraph 6-6f stated substantiating evidence must support an appeal. An appeal that alleges a report is incorrect, inaccurate, or unjust without usable supporting evidence will not be considered. The Commander, U.S. Army Enlisted Records and Evaluation Center; Chief, National Guard Bureau; or Commander, Army Personnel Command may make the determination regarding adequacy of evidence.

e. Paragraph 6-7 (Timeliness) stated because evaluation reports are used for personnel management decisions, it is important to the Army and the NCO that an erroneous report be corrected as soon as possible. As time passes, people forget and

documents and key personnel are less available. Consequently, preparation of a successful appeal becomes more difficult.

(1) Substantive appeals must be submitted within 5 years of the NCOER's completion date. Failure to submit an appeal within this time may be excused only if the appellant provides exceptional justification to warrant this exemption, for example, extended hospitalization.

(2) Administrative appeals will be considered regardless of the period of the report and a decision will be made based on the regulation in effect at the time the report was rendered. However, the likelihood of successfully appealing a report diminishes, as a rule, with the passage of time. Therefore, prompt submission is recommended.

f. Paragraph 6-10 (Burden of Proof and Type of Evidence) stated the burden of proof rests with the appellant. Accordingly, to justify deletion or amendment of an evaluation report, the appellant must produce evidence that establishes clearly and convincingly that:

(1) the presumption of regularity will not be applied to the evaluation report under consideration and

(2) action is warranted to correct a material error, inaccuracy, or injustice.

g. Clear and convincing evidence will be of a strong and compelling nature, not merely proof of the possibility of administrative error or factual inaccuracy. Simply put, if the adjudication authority is convinced that an appellant is correct in some or all of the assertions, the clear and convincing standard has been met with regard to those assertions.

h. For a claim of administrative error, appropriate evidence may include:

(1) the published rating scheme used by the organization during the period of the evaluation report being appealed;

(2) assignment, travel, or temporary duty orders;

(3) electronic battalion/brigade S-1 military personnel office or administrative human resources documents;

(4) leave records;

(5) organization manning documents;

(6) hospital admission, diagnosis, and discharge sheets;

(7) statements of military personnel officers or other persons with knowledge of the situation pertaining to the evaluation report in question;

(8) the results of a Commander's or Commandant's Inquiry, Inspector General, and/or Equal Opportunity investigation; and

(9) other relevant documents.

i. 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. 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 evaluation report was rendered. The results of a Commander's or Commandant's Inquiry or Army Regulation 15-6 (Procedures for Administrative Investigations and Boards of Officers) investigation may provide support for an appeal request.

j. Paragraph 6-12 (Guidelines for Appeals Based on Substantive Inaccuracy) stated a decision to appeal an evaluation report will not be made lightly. Before deciding whether or not to appeal, the prospective appellant will analyze the case dispassionately. The prospective appellant will note that:

(1) Pleas for relief citing past or subsequent performance or assumed future value to the Army are rarely successful.

(2) Limited support is provided by statements from people who observed the appellant's performance before or after the period in question (unless performing the same duty in the same unit under similar circumstances), letters of commendation or appreciation for specific but unrelated instances of outstanding performance, or citations for awards, inclusive of the same period.

k. Once the decision has been made to appeal an evaluation report, the appellant will state succinctly what is being appealed and the basis for the appeal. For example, the appellant will state:

(1) whether the entire evaluation report is contested or only a specific part or comment and

(2) the basis for the belief that the rating officials were not objective or had an erroneous perception of the performance. A personality conflict between the appellant and a rating official does not constitute grounds for a favorable appeal; it must be shown conclusively that the conflict resulted in an inaccurate or unjust evaluation.

I. Most appellants will never be completely satisfied with the evidence obtained. A point is reached, however, when the appellant will decide whether to submit with the available evidence or to forgo the appeal entirely. The following factors are to be considered:

(1) The evidence must support the allegation. The appellant needs to remember that the case will be reviewed by impartial board members who will be influenced only by the available evidence. Their decision will be based on their best judgment of the evidence provided.

(2) Correcting minor administrative errors or deleting one official's rating does not invalidate the evaluation report.

3. Army Regulation 600-37 (Unfavorable Information), 2 October 2020, sets forth policies and procedures to ensure the best interests of both the Army and Soldiers are served by authorizing unfavorable information to be placed in, transferred within, or removed from an individual's AMHRR. Paragraph 7-2a(3) (Appeals Involving Document with Regulatory Appeal Authority) states this regulation does not apply to documents that have their own regulatory appeal authority, such as evaluation reports or records of courts-martial.

4. Army Regulation 600-8-104 (Army Military Human Resource Records Management) prescribes policies governing the Army Military Human Resource Records Management Program. The AMHRR includes, but is not limited to, the Official Military Personnel File, finance-related documents, and non-service related documents deemed necessary to store by the Army. 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 other authorized agency.

//NOTHING FOLLOWS//