

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 29 September 2023

DOCKET NUMBER: AR20230003880

APPLICANT REQUESTS:

- a. amendment of any and all Law Enforcement Reports (LERs) and any residual and/or affiliated titling actions to show the offense of sexual assault (Article 120 (Rape and Sexual Assault Generally), Uniform Code of Military Justice (UCMJ)) was unfounded and noted as unfounded because no probable cause existed to believe he committed the offense;
- b. correction of the Defense Clearance and Investigations Index (DCII) and National Crime Information Center (NCIC) databases to reflect he is not titled for the above offense or any other offense related to the subject LER, 28 January 2020; and
- c. any other relief that is appropriate.

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 Supplemental Statement, 8 December 2022
- Tab A – LER – Serious Incident Report (SIR) (Category 3) Final, 28 January 2020
- Tab B – National Defense Authorization Act for Fiscal Year 2021 effective 1 January 2021
- Tab C – Article 120, UCMJ
- Tab D – 21st Theater Sustainment Command Memorandum (Separation under Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 10, Discharge in Lieu of Trial by Court-Martial, (Applicant)), 9 December 2020
- Tab E – Memorandum (Request for Removal of Titling Action in Case of (Applicant)), 17 November 2022
- Tab F – U.S. Army Criminal Investigation Command (CID) and U.S. Army Crime Records Center (CRC) Letter, 7 December 2022

- Memorandum (Response to Advisory Opinion in Case of (Applicant)),  
6 December 2022

FACTS:

1. The applicant defers to counsel.

2. Counsel states:

a. On or about 6 September 2019, Airman First Class (A1C) E\_\_\_\_ H\_\_\_\_, a female Air Force Airman, made a restricted report of sexual assault. She initially refused to disclose the name of the other party involved. The Air Force Office of Special Investigation contacted A1C H\_\_\_\_'s mother, who apparently identified the applicant as the alleged suspect.

b. A1C H\_\_\_\_ claims that on or about 29 August 2019, she went out with her friend, A1C G\_\_\_\_ S\_\_\_\_, and the applicant. A1C S\_\_\_\_ and the applicant were in a dating relationship at the time.

c. It is undisputed that A1C H\_\_\_\_ slept in the same bed as A1C S\_\_\_\_ and the applicant on the night in question. A1C H\_\_\_\_ claims that she awoke during the night to the applicant digitally penetrating her. She claims she told him to stop and that she was in the middle of her menstruation cycle at the time. She claims he tried again later, at which time she got up, got her wallet, and left the room. She did not say anything about the incident to A1C S\_\_\_\_ until 15 or 16 September 2019.

d. The applicant was subsequently titled for the offense of sexual assault.

e. In this case the exact theory of the alleged sexual assault is not particularly important because the applicant denies the incident altogether. On these facts, there is no probable cause to believe the applicant committed sexual assault. The LER is devoid of any legal analysis or justification for law enforcement's assertion that the applicant committed this offense beyond the simple assertion that there was probable cause.

f. The basis for the Government's assertion that the applicant committed this offense is based entirely on A1C H\_\_\_\_'s claims. Note that at the outset there is absolutely no corroboration of her claims whatsoever. In light of the lack of corroboration, the credibility of her claims is therefore of central importance. The totality of the evidence indicates that A1C H\_\_\_\_'s claims are completely incredible.

g. In this case there is absolutely no corroborating evidence to support A1C H\_\_\_\_'s claim. Not only is there no corroboration, the other witness in the case is her friend, A1C S\_\_\_\_, who claims the events did not unfold as A1C H\_\_\_\_ claims, that she did

not observe or hear anything out of the ordinary, and that A1C H\_\_\_\_\_ had significant motivation to fabricate her claim. Next, although the command initiated a court-martial action in this case, the command approved the applicant's Army Regulation 635-200, chapter 10, request, which resulted in his administrative discharge from the Army. This means the charge was never adjudicated in any way whatsoever. Consider this fact as additional evidence that probable cause did not and does not exist to believe the applicant committed the alleged offense.

3. The LER – SIR (Category 3) Final, 28 January 2020, shows the applicant as the subject for the offense of sexual assault (Article 120, UCMJ). It further shows:

a. A1C H\_\_\_\_\_ stated she was out drinking with the applicant and his girlfriend, A1C S\_\_\_\_\_. A1C H\_\_\_\_\_ stated she returned to the barracks with the applicant and A1C S\_\_\_\_\_ and they all went to sleep on the same bed. A1C H\_\_\_\_\_ stated she awoke to the applicant performing sexual acts on her without her consent.

b. A1C H\_\_\_\_\_ notified multiple individuals of the incident prior to notifying law enforcement. All individuals provided consistent accounts of the incident as described by A1C H\_\_\_\_\_.

c. On 31 December 2019, trial counsel opined probable cause existed to believe the applicant committed the offense of sexual assault. No additional investigative efforts were required. There was sufficient evidence to provide to command for consideration of action.

4. The 21st Theater Sustainment Command memorandum from the Commanding General (Separation under Army Regulation 635-200, Chapter 10, Discharge in Lieu of Trial by Court-Martial, (Applicant)), 9 December 2020, approved the applicant's request for discharge in lieu of trial by court-martial under the provisions of Army Regulation 635-200, chapter 10, with characterization of his service as under other than honorable conditions. The court-martial charges pending against the applicant were dismissed. He directed the applicant's reduction to the lowest enlisted grade.

5. The applicant's service records do not contain a DD Form 458 (Charge Sheet) or documentation to support his request for discharge in lieu of trial by court-martial.

6. The DA Form 4833 (Commander's Report of Disciplinary or Administrative Action), 14 January 2021, shows judicial action in the form of a summary court-martial was taken against the applicant by his commander for the offense of sexual assault. Item 5 (Nonjudicial Punishment/Court-Martial/Civilian Criminal Court Proceeding Outcome) shows the applicant pled guilty and the trial finding shows "settlement." The applicant would be discharged under the provisions of Army Regulation 635-200, chapter 10, effective 16 January 2021.

7. On 16 January 2021, the applicant was discharged in lieu of trial by court-martial in the rank/grade of private/E-1 under the provisions of Army Regulation 635-200, chapter 10. His service was characterized as under other than honorable conditions.

8. Counsel's memorandum (Request for Removal of Titling Action), 17 November 2022, requested amendment of the LER – SIR (Category 3) Final, 28 January 2020, by CID/CRC. The basis for this request is the same as his request to this Board.

9. The CID/CRC letter, 7 December 2022, denied counsel's request to amend the LER – SIR (Category 3) Final, 28 January 2020. The Chief, Freedom of Information Act/Public Affairs Division stated the information provided did not constitute as new or relevant information needed to amend the report.

#### BOARD DISCUSSION:

1. 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 thoroughly reviewed the applicant's statement, supporting evidence, and service record. By law and regulation, titling only requires credible information that an offense may have been committed. Regardless of the characterization of the offense as founded, unfounded, or insufficient evidence, the only way to administratively remove a titling action from CID records is to show either mistaken identity or a complete lack of credible evidence to dispute the initial titling determination.

The Board noted that a CID official determined that the LER revealed sufficient credible information to warrant the applicant being titled. However, in this case, the Board non-concurred with that determination. The Board found the LER insufficient to determine reasonable cause and, as the offense occurred in Germany, questioned the reliability of the victim's mother identifying the applicant. Further, as there was an eye-witness who claims the events did not unfold as stated and that she neither observed nor heard anything out of the ordinary, the Board determined that the burden of proof had been met through clear and convincing evidence to support his assertion. Therefore, the Board concluded that the DA Form 2627 Army Military Human Resource Record was untrue and unjust and removal of the document from his Official Military Personnel File and all affiliated documentation is warranted. The Board further determined correction of the Defense Clearance and Investigations Index (DCII) and National Crime Information Center (NCIC) databases to reflect he is not titled for the above offense or any other offense related to the subject LER, 28 January 2020

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 sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of Army records of the individual concerned be corrected by removing the following from his Army Military Human Record the Law Enforcement Report dated 28 January 2020 and any residual and/or affiliated titling actions from his records and all criminal databases to include his name from the title and/or subject block of the LER and any residual and/or affiliated titling actions.

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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 635-200 (Active Duty Enlisted Administrative Separations), 19 December 2016 and in effect at the time, set policies, standards, and procedures to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons.

a. Paragraph 1-13 provided that when a Soldier is to be discharged under other than honorable conditions, the separation authority will direct an immediate reduction to the lowest enlisted grade.

b. Chapter 10 (Discharge in Lieu of Trial by Court-Martial) provided that a Soldier who has committed an offense or offenses, the punishment for which under the UCMJ and the Manual for Courts-Martial, 2002, includes a bad conduct or dishonorable discharge, may submit a request for discharge in lieu of trial by court-martial. The discharge request may be submitted after court-martial charges are preferred against the Soldier or, where required, after referral, until final action by the court-martial convening authority. The Soldier's written request will include an acknowledgment that he/she understands the elements of the offense(s) charged and is guilty of the charge(s) or of a lesser included offense(s) therein contained which also authorizes the imposition of a punitive discharge. A discharge under other than honorable conditions normally is appropriate for a Soldier who is discharged in lieu of trial by court-martial. However, the separation authority may direct a general discharge if such is merited by the Soldier's overall record during the current enlistment.

2. Department of Defense (DOD) Instruction 5505.07, 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 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 that 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) and (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)
- 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).

//NOTHING FOLLOWS//