

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 5 December 2023

DOCKET NUMBER: AR20230003883

ON BEHALF OF THE APPLICANT, COUNSEL REQUESTS: removal of her name from the titling block of the U.S. Army Crime Records Center (CRC) and the Defense Central Index of Investigations (DCII)

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Legal brief, with exhibits 1-11
  - Exhibit 1: DD Form 214 (Certificate of Release or Discharge from Active Duty)
  - Exhibit 2: U.S. Army Criminal Investigation Command (USACID) Report of Investigation – Final
  - Exhibit 3: DA Form 4833 (Commander's Report of Disciplinary or Administrative Action)
  - Exhibit 4: DA Form 3508 (Application for Remission or Cancellation of Indebtedness)
  - Exhibit 5: Memorandum, Subject: Request Debt Cancellation
  - Exhibit 6: Privacy Act Request to Change Record
  - Exhibit 7: U.S. Army Criminal Investigation Command letter
  - Exhibit 8: JUMPS LES Online Inquiry System printout, period covered 1-31 May 2008
  - Exhibit 9: Columbia College Associate in Science Business Administration diploma
  - Exhibit 10: Applicant's resume
  - Exhibit 11: Applicant's letter to the Board

FACTS:

1. The applicant did not file within the three-year time frame provided in Title 10, United States 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. Counsel states:

a. The Applicant has been the victim of a material error of law regarding the titling of her larceny offense. The Criminal Investigation Department (CID) investigation did not provide legally sufficient evidence to find the Applicant guilty of any possible Uniform Code of Military Justice (UCMJ) violation. CID investigations utilize the legal standard of "probable cause", while administrative boards convened under Army Regulation 15-6 (Procedures for Administrative Investigations and Boards of Officers) utilize the legal standard of "preponderance of the evidence." The Model Rules of Professional Conduct, Rule 3.8a, "Special Responsibilities of a Prosecutor", states "The prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." The legal standard of "probable cause" is lower than the standard of "preponderance of the evidence" and is defined in Black's Law Dictionary as "A reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime." In this instance, the Commander's Report of Disciplinary or Adverse Action unambiguously states, "No action was taken because after viewing file with legal, it was believed that the evidence was too weak to prosecute." The applicant's commander and the legal advisor outright confirmed that this case lacked probable cause to establish the applicant committed larceny of Basic Allowance for Housing (BAH) funds. This clear and convincing evidence undoubtedly proves that the applicant was improperly titled and should have the adverse information removed from her military records.

b. Further, the applicant has been the victim of a material error of fact regarding the larceny titling. In order to be found guilty of larceny, the facts must show that "the taking, obtaining, or withholding by the accused was with the intent permanently to deprive or defraud another person of the use and benefit of the property or permanently to appropriate the property for the use of the accused or for any person other than the owner." The applicant did not intentionally submit erroneous BAH paperwork. Rather, the applicant relied on the Soldier that handled her in-processing paperwork to correctly change her location from Washington D.C. to Fort Stewart, Georgia. The applicant explained in her debt excusal request that when she arrived at Fort Stewart the division was deployed. Her sponsor walked her through in-processing with the rear detachment personnel. The applicant's erroneous BAH paperwork was completed for her and she signed off on the BAH paperwork without realizing that an error had been made. Although the applicant should have done her due diligence in ensuring that the paperwork was correct, this negligence does not rise to the level of culpability required to demonstrate that she possessed the requisite intent to commit larceny against the government. As such, the applicant's CID titling is a clear example of an error of fact.

c. The applicant's titling was the result of a material error of law and a material error of fact. Additionally, the applicant has had her reputation and character tarnished by this

unjust titling. She now seeks to restore her honor and remove this stain from her military records.

3. Counsel provides, as exhibits to the legal brief, the following:

a. Exhibit 1: DD Form 214, which shows the applicant was honorably retired on 31 August 2010, under the provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations), chapter 12, Sufficient Service for Retirement. She completed 21 years, 10 months, and 28 days of net active service this period.

b. Exhibit 2: CID Report of Investigation – Final, 24 August 2009, Investigative Summary reads, "...Investigation determined [applicant] committed the offense of Larceny of Government Funds, when she received unauthorized BAH entitlements. [Applicant] failed to ensure her BAH rate for the Washington DC area was changed to the FSGA rate for a term of 33 months. The approximate loss to the U.S. Government was \$32,821.00." Statutes: Article 121, UCMJ: Larceny of Government Property.

c. Exhibit 3: DA Form 4833 (Commander's Report of Disciplinary or Administrative Action), dated 17 August 2010, reflects the offense of "Larceny of Government Funds, 1 October 2005." In item 10 (Commander's Remarks), "no action was taken because after viewing file with legal, it was believed that the evidence was too weak to prosecute."

d. Exhibit 4: DA Form 3508 (Application for Remission or Cancellation of Indebtedness) submitted by the applicant on 14 May 2009 and verified by her commanding officer.

e. Exhibit 5: Memorandum, 16 May 2009, Subject: Request Debt Cancellation, submitted by the applicant's company commander, which reflects the request was based on the grounds of hardship and injustice.

f. Exhibit 6: Privacy Act Request to Change Record, 15 February 2017, submitted by the applicant requesting that the Military Police Report and CID Report, both dated 1 July 1992, be expunged.

g. Exhibit 7: U.S. Army Criminal Investigation Command letter, 2 March 2017, reflects the applicant's request to correct information from the U.S. Army Criminal Investigation Command (USAICDC) files and supplements their response of 22 February 2017. Further stating, the information the applicant provided did not constitute as new or relevant information needed to amend the report; therefore, her amendment request was denied.

h. Exhibit 8: JUMPS LES Online Inquiry System printout, period covered 1-31 May 2008, contains written notes by the applicant that dispute the allegations brought against her.

i. Exhibit 9: Columbia College Associate in Science Business Administration diploma, dated 17 December 2016.

j. Exhibit 10: Applicant's resume

k. Exhibit 11: Applicant's letter to the Board, which states:

"I am a woman of faith, a proud veteran of The United States Army, a homeowner, a single mother of two very obedient and studious children, a survivor of domestic abuse, a college graduate and current college student, an active citizen of the Richmond Hill, Georgia Community, a part-time employee of Liberty County, Georgia, an avid runner and lifelong learner. Since my separation from the Army in 2010, I did initially experience both financial and professional challenges due to the unfortunate circumstances leading up to my transition from military service. I separated prematurely never before having foreseen myself retiring so early.

During my transition from military service, I was also experiencing a very stressful divorce. However, although times were tough, I always knew I would have to make it work. In those times I relied on the tenacity instilled by the Army to never quit, and the ability also taught by the Army to stay focused on the mission. The mission at that time was for me and my children to be successful in spite of what challenges or unfortunate situations we had to overcome at that stage in our lives. Needless to say, my love for my children and my faith also kept pushing me forward. Hoping and praying that one day everything was going to work out and my name and family legacy would be exonerated. My faith in God played a significant major role in being strong and optimistic, but we all know nothing just happens. Some days even when you're not feeling like it, you still "gotta show up". So every day, in spite of embarrassing moments in the grocery line or utility companies, I just kept showing up to be the best mom, nurturer and provider for my family.

One day I decided I couldn't just settle. I made up in my mind that faith required action. If I was hoping to one day have my name exonerated, I needed to be prepared to act on moving forward when it actually happened. So, I went back to school. I got a degree, and then another. And took on the mindset that I was going to be a life-long learner. At that point began to instill that mindset into my children as well. I put my son through Georgia Southern where he graduated in three years, a major in Psych and minor in Internet Technology. He is currently

an Academic Advisor at his Alma Mater and pursuing a Master's in Public Administration.

My daughter an Honor Roll Student at Richmond Hill Middle School and received invitation to play Honor Band before the pandemic. I take pride in raising my children. I am committed to raising God-fearing, productive and self-sufficient citizens. I believe that is my responsibility as a veteran and person of upright character and integrity to do so. I strive to be the example for my children, friends, and family that nothing is over unless you decide to quit. So, keep striving to be and do your best no matter where you find yourself.

I am a very proud to have served in the United States Army and retired. I have nothing negative to say about any of my experiences prior to separation. I do know that I am a much stronger and wiser person than I would have ever known had I not experienced all that I did. I hold no grudges and place no blame. My goal is to take all that I've learned and apply that same strength and tenacity to completing my finance degree, taking a real estate exam, putting my daughter through college and going back west to take care of my elderly grandparents who raised me. Somewhere in there I hope to be able to train to run a marathon. I hope these few paragraphs in addition to all the other information that has been presented to you, not only gives you more in depth insight concerning who I am, but also aides in your decision process in coming to a favorable decision for me and my family.”

4. A review of the applicant's service record shows:

- a. She enlisted in the Regular Army on 3 October 1988. She held military occupational specialty 42A, HR Specialist
- b. She served through multiple reenlistments in a variety of assignments, and she attained the rank of sergeant first class (SFC)/E-7.
- c. She retired on 31 August 2010, under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), chapter 12, Sufficient Service for Retirement. She completed 21 years, 10 months, and 28 days of net active service this period.

5. The USACID Report of Investigation – Final, dated 24 August 2009, Investigative Summary states an investigation determined [Applicant] committed the offense of Larceny of Government Funds, when she received unauthorized BAH entitlements. [Applicant] failed to ensure her BAH rate for the Washington DC area was changed to the FSGA rate for a term of 33 months. The approximate loss to the U.S. Government was \$32,821.00.” Statutes: Article 121, UCMJ: Larceny of Government Property.

6. On 2 March 2017, a letter from the U.S. Army Crime Record Center (CRC), responded to the applicant's request to correct information from the USACID files and supplements their response of 22 February 2017. The CRC official stated:

a. The information she provided does not constitute as new or relevant information needed to amend the report; therefore, her amendment request is denied. The enclosed ROI [Number] and Military Police Report (MPR) [Number] responsive to his request, are part of a system of records exempt from the disclosure provisions of the Freedom of Information Act (FOIA). This denial, which is made on behalf of Major General [Name], Commander, USACIDC, the Initial Denial Authority for USACIDC records under the FOIA, may be appealed to the Secretary of the Army. .

b. If she decided to appeal at this time, her appeal must be submitted within 90 days of the date of this letter. In her appeal, she must state the basis for her disagreement with the denial and she should state the justification for its release. Her appeal is made through this Center and should be addressed to the Director, U.S. Army Crime Records Center, Quantico, Virginia 22134, for forwarding, as appropriate, to the Office of the Secretary of the Army, the appellate authority. Her appeal should address information denied in this response and cannot be used to make a new request for additional or new information. She was advised to read over the responsive record provided to her and review the amendment criteria below to modify or remove her name from their records.

(1) AMENDMENT CRITERIA: The ROI responsive to her request was completed after July 1992. At the time the ROI was completed, the legal standard for titling and indexing an individual as the subject of a criminal investigation was established by DOD Instruction 5505.7, paragraph 6-1, which provides: Organizations engaged in the conduct of criminal investigations shall place the names and identifying information pertaining to subjects of criminal investigations in title blocks of investigative reports. All names of individual subjects of criminal investigations by DOD organizations shall be listed in the [Defense Clearance and Investigations Index] DCII. Titling and indexing in the DCII shall be done as early in the investigation as it is determined that credible information exists that the subject committed a criminal offense.

(2) Credible information is information disclosed or obtained by an investigator that, considering the source and nature and 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, 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.

(3) 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, she 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 USACIDC ROI 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.

(4) Request to delete a person 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 Commanding General, USACIDC.

c. She may request amendment of the ROI; however, it is emphasized that the conclusion reflected in the investigative summary is an investigative determination that is independent of whether judicial, non-judicial or administrative action was taken against the subject, or the results of such action. Please be aware that "new and relevant" information they need to bring her request for a formal review must meet the attached criteria. Information about career goals, exemplary changes in life, and similar justifications are not part of the criteria, and these are not considered.

d. After reading the Amendment Criteria, if she determines she has new or relevant information to amend the report, she should submit a request for amendment to: Director, U.S. Army Crime Records Center, Attention: Freedom of Information/Privacy Act Division, 27130 Telegraph Road, Quantico, Virginia 22134. If she disagrees with this amendment denial, she may appeal to the Army Review Board Agency, Army Board for Correction of Military Records (ABCMR)

#### 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. The evidence shows CID agents determined there was probable cause to believe the applicant committed the offense of larceny of government property. The Board was not

persuaded by the applicant’s argument that the titling is unjust and unsupported by the facts of his case and the way the matter was resolved by the Army. The CID investigation determined there was probable cause to believe the applicant committed the offense in question and the offense was properly categorized as a founded offense. The decision to list a person's name in the title block of a police report is an investigative determination that is independent of whether or not subsequent judicial, nonjudicial or administrative action is taken against the individual. The applicant was properly titled.

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.

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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 190-45 (Law Enforcement Reporting) establishes policies and procedures for offense and serious-incident reporting within the Army; for reporting to the DOD and the Department of Justice, as appropriate; and for participating in the FBI NCIC, Department of Justice's Criminal Justice Information System, National Law Enforcement Telecommunications System, and State criminal justice systems.

a. Paragraph 3-6a (Amendment of Records) states an amendment of records is appropriate when such records are established as being inaccurate, irrelevant, untimely, or incomplete. Amendment procedures are not intended to permit challenging an event that occurred. Requests to amend reports will be granted only if the individual submits new, relevant, and material facts that are determined to warrant their inclusion in or revision of the police report. Requests to delete a person's name from the title block will be granted only if it is determined that there is no probable cause to believe the individual committed the offense for which he or she is listed as a subject. It is emphasized that the decision to list a person's name in the title block of a police report is an investigative determination that is independent of whether subsequent judicial, nonjudicial, or administrative action is taken against the individual.

b. Paragraph 4-3a states an incident will not be reported as a founded offense unless adequately substantiated by a police investigation. A person or entity will be reported as the subject of an offense in the LER when credible information exists that the person or entity has committed a criminal offense. The decision to title a person is an operational, rather than a legal, determination. The act of titling and indexing does not, in and of itself, connote any degree of guilt or innocence; rather, it ensures that information in a Report of Investigation (ROI) can be retrieved at some future time for law enforcement and security purposes. Judicial or adverse administrative actions will not be based solely on the listing of an individual or legal entity as a subject in the LER.

c. Paragraph 4-3d states that when investigative activity identifies a subject, all facts of the case must be considered. When a person, corporation, or other legal entity is entered in the "subject" block of the LER, their identity is recorded in Department of the Army automated systems and the DCII. Once entered into the DCII, the record can only be removed in cases of mistaken identity or if an error was made in applying the credible information standard at the time of listing the entity as a subject of the report. It is emphasized that the credible information error must occur at the time of listing the entity as the subject of the LER rather than subsequent investigation determining that the LER is unfounded. This policy is consistent with DOD reporting requirements. The Director, CRC, enters individuals from the LER into the DCII.

d. Paragraph 4-7 (DA Form 4833) states the DA Form 4833 is used with the LER to record actions taken against identified offenders and to report the disposition of offenses investigated by civilian law enforcement agencies.

2. Army Regulation 195-2 (Criminal Investigation Activities), dated 9 June 2014, prescribes policies and procedures pertaining to criminal investigation activities within the Department of the Army. It prescribes the authority for conducting criminal investigations, crime prevention surveys, protective service missions, force protection and antiterrorism efforts and the collection, retention, and dissemination of criminal information. It delineates responsibility and authority between installation law enforcement activities and CID. Chapter 4 contains guidance for investigative records, files, and reports.

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

b. Paragraph 4-4b (Amendment of CID Reports) provides that:

(1) 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.

(2) The burden of proof to substantiate the request rests with the individual.

(3) 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.

(4) 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.

(5) 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.

c. The Glossary defines creditable information as information disclosed to or obtained by an investigator that, considering the source and nature of the information and the totality of the circumstances, is sufficiently believable to indicate that criminal activity has occurred and would cause a reasonable investigator under similar

circumstances to pursue further the facts of the case to determine whether a criminal act occurred or may have occurred.

3. DOD Instruction 5505.7 (Titling and Indexing in Criminal Investigations) establishes policy, assigns responsibilities, and provides procedures for a uniform standard for titling and indexing subjects of criminal investigations by DOD.

a. DOD Components authorized to conduct criminal investigations 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. Titling and indexing are administrative procedures and will not imply any degree of guilt or innocence. 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.

b. If a subject's information requires expungement from or correction in the DCII, DOD Components will remove the information as soon as possible. Judicial or adverse administrative actions will not be taken based solely on the existence of a titling or indexing record in a criminal investigation.

c. 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. A subject who believes they were incorrectly indexed may appeal to the DOD Component head to obtain a review of the decision. DOD Components that conduct criminal investigations will make appropriate corrections or expungements to criminal investigative reports or the DCII as soon as possible.

4. DOD Instruction 5505.11 (Fingerprint Card and Final Disposition Report Submission Requirements) establishes policy, assigns responsibilities, and prescribes procedures for defense criminal investigative organizations and other DOD law enforcement organizations to report offender criminal history data to the Criminal Justice Information Services Division of the FBI for inclusion in the NCIC criminal history database. It is DOD policy that the defense criminal investigative organizations and other DOD law enforcement organizations submit the offender criminal history data for all members of the military service investigated for offenses, to include wrongful use of a controlled substance, to the Criminal Justice Information Services Division of the FBI, as prescribed in this instruction and based on a probable cause standard determined in conjunction with the servicing staff judge advocate or other legal advisor.

5. Public Law 116-283 (known and cited as the National Defense Authorization Act, Fiscal Year 2021, section 545 (Removal of Personally Identifying and Other Information

of Certain Persons from Investigation Reports, the DCII, and Other Records and Databases)), states 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, PII, and other information pertaining to the person shall be corrected in, or expunged or otherwise removed from a law enforcement or criminal investigative report of the DCII, an index item or entry in the DCII, and any other record maintained in connection with a report of the DCII, in any system of records, records database, record center, or repository maintained by or on behalf of the Department.

a. Basis for Correction or Expungement. The name, PII, and other information of a covered person shall be corrected in, or expunged or otherwise removed from, a report, item or entry, or record of the DCII, in the following circumstances:

(1) probable cause did not or does not exist to believe 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;

(2) probable cause did not or does not exist to believe 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; and

(3) 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 (1) and (2).

b. Considerations. While not dispositive as to the existence of a circumstance or basis set forth in subparagraph (1), the following shall be considered in the determination whether such circumstance or basis applies to a covered person for purposes of this section:

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

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

(3) the type, nature, and outcome of any action described in subparagraph (2) against the covered person.

//NOTHING FOLLOWS//