

IN THE CASE OF: [REDACTED]

BOARD DATE: 4 January 2024

DOCKET NUMBER: AR20230004556

APPLICANT REQUESTS: amendment of Law Enforcement Report (LER), [REDACTED]  
[REDACTED] to show:

- the offense of domestic violence (Article 128b, Uniform Code of Military Justice (UCMJ)) be unfounded
- the offense of sexual abuse of a child (Article 120b, UCMJ) be unfounded
- the offense of assault upon a child (Article 128, UCMJ) be unfounded
- removal of titling from the Defense Central Index of Investigations (DCII) and National Crime Information Center (NCIC)
- any other relief appropriate
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel Statement
- LER, [REDACTED]
- Department of Human Services (DHS) Child Welfare Assessment Summary
- Administrative Separation Board Proceedings
- H.R. 6395-226, Removal of Personally Identifying and Other Information of Certain Persons from Investigative Reports, the DCII, and Other Records of Databases
- UCMJ Excerpts for Article 120 (Sexual Assault), 128 (Assault), and 128b (Domestic Violence)
- Excerpts of DA Pamphlet 27-9, Military Judge's Benchbook, paragraph 3A-52B-1 (Domestic Violence) and paragraph 5-16 (Parental Discipline)
- Counsel Request to U.S. Army Criminal Investigation Command for Removal of Titling Action, 31 October 2022
- Criminal Investigation Division (CID), Crime Records Center Response, 29 November 2022
- Counsel Request to U.S. Army Criminal Investigation Command to Reopen the Request for Removal of Titling Action, 22 December 2022
- CID, Crime Records Center Response, 9 February 2023

FACTS:

1. The applicant, through counsel, states the applicant was titled as the subject for domestic violence, sexual abuse of a child, and assault upon a child. The LER indicates a military justice advisor opined that probable cause did exist to believe that the applicant committed the offenses against the applicant's daughter, age 14.

a. A member of DHS interviewed the applicant's daughter, and she claimed the applicant had spanked her 30 times but left no marking or bruising on her body. The DHS report reflects "inconclusive" for overall findings and the assessment was closed with a "Do Not Open a Case" recommendation.

b. The LER indicates the applicant was interviewed and stated he used his open hand to spank his daughter on her bare buttocks for disciplinary purposes.

c. The standards have changed (2021) and therefore the applicant's name must be removed from the titling block of the subject LER for the offenses described because no probable cause exists to conclude that he committed those offenses.

d. The applicant's command initiated administrative separation against him based on domestic violence, sexual abuse, and assault (the same allegations for which he is titled). It is appropriate that the administrative separation board concluded that he did not commit the alleged misconduct.

2. A review of the applicant's service records show:

a. He enlisted in the Regular Army on 21 April 2008.

b. He served in Afghanistan from 1 March 2009 through 26 February 2010 and again from 26 February 2011 through 21 December 2011. He attained the rank of staff sergeant on 1 April 2018.

c. LER [REDACTED] dated 29 September 2021 shows:

(1) On 15 September 2021, CID was notified by a member of the family advocacy program, Fort Carson, CO, that the applicant assaulted his 14-year-old daughter.

(2) The applicant's daughter was interviewed and stated that the applicant did in fact spank her 30 times but left no marking or bruising on her body.

(3) The applicant admitted to spanking his daughter 30 times but disclosed that no marking or bruising was left other than her skin being pink.

(4) On 22 September 2021, a military justice advisor opined that probable cause existed to believe the applicant committed the offenses of assault upon a child under the age of 16, domestic violence and sexual abuse of a child. No additional investigative efforts were required.

(5) On 27 September 2021, the applicant was interviewed again and denied receiving any sexual gratification from striking his children and stated he only uses spankings for discipline purposes only.

d. On 20 April 2022, the applicant's immediate commander initiated action to separate the applicant for commission of a serious offense (domestic violence, assault, and sexual abuse) and recommended an other than honorable characterization of service.

e. The applicant acknowledged receipt of the proposed separation on 20 April 2022.

f. On 26 April 2022, the applicant completed his election of rights. He requested consideration of his case by an administrative separation board and a personal appearance before an administrative separation board.

g. An administrative separation board was conducted on an unknown date and the findings and recommendations of that board are unavailable for review. However, the applicant provides a memorandum from his assigned defense counsel, which states after several hours of evidence presentation and deliberation on the matters, the board members, in a closed session, made the finding that the misconduct was not substantiated and recommended the applicant be retained in the U.S. Army.

h. On 15 July 2022, the Commanding General, 4th Infantry Division and Fort Carson, reprimanded the applicant, stating:

1. You are hereby reprimanded for committing an act of domestic violence. Between on or about 1 September 2021 and on or about 2 September 2021, you placed Ms. [REDACTED] your stepdaughter, and a child who had attained the age of 12 years but had not attained the age of 16 years, over your lap, pulled down her underwear, and spanked her 30 times on her bare buttocks with your hand.
2. You committed an act directly prejudicial to the good order and discipline of the armed forces. You egregiously failed to maintain the standards expected of a noncommissioned officer in the United States Army. Your conduct raises serious doubt about your potential for further service.
3. This reprimand is imposed under the provisions of AR 600-37 and is not punishment under Article 15, UCMJ. I am considering filing this reprimand in your

Army Military Human Resource Record. You may submit matters to convince me such filing is unwarranted. You may submit any matters you wish in rebuttal to the allegations or in extenuation or mitigation. You may also seek legal assistance from the Fort Carson Legal Assistance Office or from civilian counsel at no expense to the Government.

4. You will acknowledge this reprimand by signing and dating the prepared acknowledgment. Any matters you wish to submit for my consideration must be submitted, through your chain of command, to the Office of the Staff Judge Advocate within seven calendar days from the date you received this memorandum. If I do not receive a response from you within the seven-day period, I will assume that you have no matters to submit and will make my filing determination.

i. On 28 July 2022, the applicant responded to the General Officer Memorandum of Reprimand (GOMOR) and requested the GOMOR be filed locally. He stated, in part:

On or about 01-02 September 2021, I came home to discover that our oldest daughter, who was fourteen-years old at the time, was not caring for her younger siblings as she was expected to and had not yet completed her chores. This was not the first time that our daughter failed to fulfill her responsibilities. Prior to this incident, my wife and I attempted to use an admin app over her electronics and an allowance that would go directly to her debit card for completed chores. Since our daughter continued to disregard her responsibilities, during this incident, I felt that the proper punishment was to spank my daughter fourteen times on her buttocks. After this, I walked my daughter around the house to address the chores that were not completed, and during this conversation, I asked her about her grades.

Prior to this incident, my wife and I were aware that our daughter was failing one class. In response to her failing the class, my wife and I took away her privileges and told her that she needed to get her grade up to earn her privileges back. However, this did not seem to work, as my daughter informed me that she was now failing two classes. In response, I felt that it was appropriate to spank her another 14 times on her buttocks. The way the report was written is that I had spanked my daughter 30 consecutive times, however, this was incorrect as it was two separate instances of 14 times with about a 15 to 20 minute break in between.

I am sincerely sorry for my actions. I was personally spanked by my parents until I was roughly 15 years old, in which I would receive one spank for each year of my age, and at the time, felt that my actions were reasonable. However, I now realize that my actions were contrary to the Army values and were unacceptable

of a father and a Soldier in the United States Army. I strive to live by the Army values in every aspect of my life, and I have since learned that there are more productive ways to discipline our children.

j. On 6 October 2022, the GOMOR imposing authority, after considering all matters available, directed the GOMOR be filed in the applicant's Army Military Human Resource Record.

k. On 4 December 2022, the applicant was discharged under the provisions of Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations) for completion of required service.

3. On 31 October 2022, the applicant, through counsel, requested removal of his titling action through the U.S. Army Criminal Investigation Command.

4. On 29 November 2022, CID responded to the request for removal of the applicant's titling action indicating that the investigation was still active.

5. On 22 December 2022, the applicant, through counsel, requested to reopen the request for removal of the applicant's titling action.

6. On 8 February 2023, an attorney with CID conducted a legal review of the amendment record request by the applicant's counsel. The attorney found there is probable cause to believe the applicant committed the offenses for which he was titled.

a. Public Law 116-283 (William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021), section 545 (Removal of Personally Identifying and Other Information of Certain Persons from Investigative Reports, The DOD Central Index of Investigations, and Other Records and Databases), required the Secretary of Defense to establish and maintain a policy and process for a person to request their DOD law enforcement record be amended, corrected, expunged, or otherwise removed when it is determined probable cause did not or does not exist to believe that the individual committed the alleged criminal offense(s). To date, DOD has not published implementation guidance; however, in November 2022, the Secretary of the Army directed the Department of the Army Criminal Investigation Division to adopt the probable cause standard for review of amendment requests, as prescribed in Section 545 of Public Law 116-283.

b. The applicant was titled for violations of Article 128, Assault Consummated by a Battery Upon a Child under 16 Years; Article 128b, Domestic Violence, and Article 120b, Sexual Abuse of a Child, UCMJ when he spanked his dependent 14-year-old child approximately 30 times on her bare buttocks with his open hand. Based on his review of the LER, he found that there was probable cause to believe the applicant

violated Article 128, Article 128b, and Article 120b, UCMJ. Based on his review of the LER, he concurs with the trial counsel that there was probable cause to believe the applicant violated the offenses for which he was titled.

c. Consistent with the direction received from the Secretary of the Army, since probable cause existed to believe the applicant committed the offenses listed in the LER, his record should not be amended to remove his name from the title block for that offense and any corresponding entry into the DCII should remain.

7. On 9 February 2023, CID, after a review of the LER concluded that his amendment request was denied.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found relief is not warranted. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.

2. The Board found that probable cause did exist to believe the applicant committed the offenses listed in the LER in question and also found that probable cause continues to exist. Although the administrative separation process ultimately resulted in a recommendation that he be retained in the Army, he was later reprimanded for his actions and the GOMOR was placed in his Army Military Human Resource Record. The Board noted that the applicant admitted to spanking his daughter’s bare buttocks an excessive number of times. Moreover, in the applicant’s response to the GOMOR he received, he apologized for his actions and acknowledge his behavior was “unacceptable.” The applicant obviously was a witness to what happened and even he found his actions to be inappropriate. This and other evidence persuaded the Board that probable cause did exist to believe the applicant committed the offenses listed in the LER in question and that probable cause continues to exist. Based on a preponderance of the evidence, the Board determined that neither the decision to title him nor the findings of the investigation were in error or unjust.

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.

3/20/2024
X [REDACTED]
CHAIRPERSON [REDACTED]

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. Department of Defense (DOD) Instruction 5505.07 (Titling and Indexing by DOD Law Enforcement Activities), 8 August 2023, establishes policy, assigns responsibilities, and prescribes uniform standard procedures for titling persons, corporations, and other legal entities in DOD law enforcement activity (LEA) reports and indexing them in the Defense Central Index of Investigations (DCII).

a. Pursuant to Public Law 106-398, section 552, and Public Law 116-283, section 545, codified as a note in Title 10, U.S. Code, section 1552, establishes procedures for DOD personnel through which:

(1) covered persons titled in DOD LEA reports or indexed in the DCII may request a review of the titling or indexing decision; and

(2) covered persons titled in DOD LEA reports or indexed in the DCII may request their information be corrected in, expunged, or otherwise removed from DOD LEA reports, DCII, and related records systems, databases, or repositories maintained by, or on behalf of, DOD LEAs.

b. DOD LEAs will title subjects of criminal investigations in DOD LEA reports and index them in the DCII as soon as there is credible information that they committed a criminal offense. When there is an investigative operations security concern, indexing the subject in the DCII may be delayed until the conclusion of the investigation.

c. Titling and indexing are administrative procedures and will not imply any degree of guilt or innocence. Judicial or adverse administrative actions will not be taken based solely on the existence of a DOD LEA titling or indexing record.

d. Once the subject of a criminal investigation is indexed in the DCII, the information will remain in the DCII, even if they are found not guilty, unless the DOD LEA head or designated expungement official grants expungement in accordance with section 3.

e. Basis for Correction or Expungement. A covered person who was titled in a DOD LEA report or indexed in the DCII may submit a written request to the responsible DOD LEA head or designated expungement officials to review the inclusion of their information in the DOD LEA report; DCII; and other related records systems, databases, or repositories in accordance with Public Law 116-283, section 545.

f. Considerations.

(1) When reviewing a covered person's titling and indexing review request, the expungement official will consider the investigation information and direct that the covered person's information be corrected, expunged, or otherwise removed from the DOD LEA report, DCII, and any other record maintained in connection with the DOD LEA report when:

(a) probable cause did not or does not exist to believe that the offense for which the covered person was titled and indexed occurred, or insufficient evidence existed or exists to determine whether such offense occurred;

(b) probable cause did not or does not exist to believe that the covered person committed the offense for which they were titled and indexed, or insufficient evidence existed or exists to determine whether they committed such offense; and

(c) such other circumstances as the DOD LEA head or expungement official determines would be in the interest of justice, which may not be inconsistent with the circumstances and basis in paragraphs 3.2.a.(1) and (2).

(2) In accordance with Public Law 116-283, section 545, when determining whether such circumstances or basis applies to a covered person when correcting, expunging, or removing the information, the DOD LEA head or designated expungement official will also consider:

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



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

(c) the type, nature, and outcome of any adverse administrative, disciplinary, judicial, or other such action taken against the covered person for the offense.

2. 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.

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

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

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

//NOTHING FOLLOWS//