

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 11 October 2024

DOCKET NUMBER: AR20230005245

APPLICANT REQUESTS:

- In effect, correction of his service records to show a flagging action, pertaining to alleged fraternization, was closed favorably
- Permission to appear personally before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Exhibit A – Applicant's Statement
- Exhibit B – DA Form 4856 (Developmental Counseling Form)
- Exhibit C – Marriage Certificate
- Exhibit D – DA Form 4856
- Exhibit E – Active Guard/Reserve (AGR) Personnel Announcement
- Exhibit F – IPPS-A (Integrated Personnel and Pay System – Army) Flag Information with request to remove applicant's flag
- Exhibit G – Email Correspondence
- Exhibit H – DA Form 4856
- Exhibit I – Memorandum for Record (MFR)
- Exhibit J – Maine Army National Guard (MEARNG) Inspector General (IG) Letter

FACTS:

1. The applicant states, in effect, in or around December 2019, he began a relationship with a specialist (SPC)/E-4 in his unit (SPC B__ M. H__); at the time, she was assigned to the Armament Platoon, and the applicant was the Readiness Noncommissioned Officer (NCO).

a. In January 2020, as their relationship developed, the applicant asked his first sergeant (1SG) whether there were any objections to the relationship, and if he should end contact with SPC H__; the 1SG said he would consult the commander, who was absent at the time. By way of context, the applicant notes that, back in 2011, the MEARNG placed him in an AGR position, and his command allowed him to have a

relationship with an SPC (SPC K__ S__); he and that SPC openly dated for 10 months before the relationship ended.

b. During the unit's February IDT (Inactive Duty for Training), the applicant, the 1SG, and the company commander discussed the applicant's relationship with SPC H__. The commander reviewed the known prohibited relationships (i.e., relationships between rater/rated Soldier; with a member of one's chain of command; recruiter/recruit; and instructor/student), but none of those circumstances applied. As a result, the commander declared he had no issue with the applicant's relationship.

c. In or around March 2020, the MEARNNG selected the applicant for a Master Sergeant (MSG)/E-8 position as the G-4 (Logistics) Senior Property Book NCO (Exhibit E); he was to start his new position in June 2020. In April 2020, after Major (MAJ) S__ S__, from the applicant's battalion level command, contacted the applicant's company commander, the applicant spoke with MAJ S__ S__ about his (applicant's) relationship with SPC B__ M. H__. MAJ S__ S__ advised the applicant that the battalion was "looking into the situation and thought it went against (the) regulation." The applicant asked what he could do to "fix" the situation, and MAJ S__ S__ said he did not know.

d. The applicant heard nothing more until 11 May 2020, when the Group Command Sergeant Major (CSM) counseled him; (a copy of the counseling is at Exhibit B). The CSM told the applicant that, according to Army Regulation (AR) 600-20 (Army Command Policy), paragraph 4-14 (Relationships Between Soldiers of Different Grade), a senior NCO cannot date a junior enlisted Soldier. Additionally, he stated the applicant would be flagged, pending the completion of a commander's investigation.

(1) The applicant notes, however, that what the CSM said was not entirely true; the regulation did allow for certain relationships. The applicant contends the regulation permitted his relationship because, at the time, he was full-time AGR and SPC B__ M. H__ was "M-Day" (Mobilization Day; refers to a Reserve Component member who can be called to active duty at a moment's notice).

(2) (Paragraph 4-14c (2) (c), AR 600-20, states, "Personal relationships between members of the National Guard or Army Reserve, when the relationship primarily exists due to civilian acquaintanceships, unless the individuals are on active duty (other than annual training (AT)), on Full-Time National Guard Duty (FTNGD) (other than AT) or serving as a dual status military technician").

(3) The CSM's counseling indicated that the remedy for the applicant's situation was marriage.

e. On 13 May 2020, the Group's Deputy Administrative Officer (AO), MAJ A__ C__, issued the applicant a counseling form (Exhibit D). MAJ C__ stated, effective 1 June 2020, the command would no longer be placing the applicant in the G-4 as the Senior Property Book NCO; instead, he would transfer to Group headquarters as the Headquarters and Headquarters Detachment supply sergeant. On 28 May 2020, he and SPC B__ M. H__ married (Exhibit C). Sometime afterward, the applicant asked his military defense counsel how the unit had closed his flagging action; the counsel said someone had told him no further action would be pursued. Counsel was not sure whether the flag had been closed favorably or unfavorably.

(1) The applicant checked AR 600-8-2 (Suspension of Favorable Personnel Actions (Flag)) and paragraph 1-10 (Standards of Service) (taken from the current version, effective May 2021) and found that it states, "flags will be initiated within 3 working days and closed within 3 working days after determination that the Soldier no longer has circumstances requiring a flag" (Exhibit F).

(2) Additionally, paragraph 2-6 (Notification) states, "Soldiers will be provided a copy (DA Form 268 (Report to Suspend Favorable Personnel Actions (Flag)) when flag is initiated and when closed." The applicant maintains he never received a signed copy of the closed DA Form 268.

f. In January 2022, after the Enlisted Promotion System (EPS) list was published and some of his subordinates questioned the results, the applicant did some research. He found that, in cases where EPS selected a Soldier for promotion, but the promotion was denied due to a flagging action, the Soldier could be authorized placement in the next available position at the higher rank and have his/her date of rank backdated if the flagging action was later closed favorably. Subsequently, the applicant learned the command had favorably closed his flagging action.

g. Based on the foregoing information, the applicant asked the Group S-1 to find out if the applicant's situation met the aforementioned criteria; the Group S-1 contacted the G-1 at MEARNG headquarters and was told the G-1 had to discuss the matter (Exhibit G). During an IDT, after multiple attempts to obtain a status, a paralegal told the applicant that the MEARNG was planning on reversing the favorable closing of the applicant's flag (now 18 months after the fact).

h. On 30 March 2022, the Group Operations Sergeant Major (SGM) counseled the applicant (Exhibit H) and stated the applicant's case status would change from favorable to unfavorable; the SGM added that the favorable closure had been a mistake. The applicant contacted the MEARNG IG to see if they could help; the IG responded saying the applicant had violated AR 600-20 (Exhibit J). Given the fact that the applicant notified his chain of command of the relationship and that his relationship did not compromise the integrity of supervisory authority, the applicant disagreed with the IG's

assessment. To further bolster his argument, the applicant cites a relationship that occurred in another MEARNG unit, and he points out that there, the couple's leadership never counseled them.

i. The applicant believes the Board should grant his request for following reasons:

- A precedent was set when he dated SPC K__ S__ in 2011, and there have been other dual status technicians and AGRs who dated Soldiers within the MEARNG
- The regulation requires commanders to conduct training on the fraternization rules in AR 600-20; in his 26 years of MEARNG service, no training was ever performed until a year after the command completed its investigation of the applicant
- AR 600-37 (Unfavorable Information), paragraph 3-7 (Referral of Information) requires the ARNG (full time) to share unfavorable information with a recipient within 7 days; neither applicant nor his counsel ever received notice as to how the command closed his case
- AR 600-8-2, Table 2-2 (Report Codes) states for an unfavorable finding, the investigation must substantiate the allegations and punishment must be complete; the investigation report stated the allegations were "substituted due to the fact I had access to (a) JAG (Judge Advocate General)..."
- The investigation report additionally indicated, "my Commander did consult JAG and was told to 'proceed with caution', not that it was prohibited"
- The applicant contends he did everything he believed was right throughout the process: he addressed the issue with his commander; he spoke with the battalion AO who said it might be against regulations but offered no recourse; after the Group CSM's counseling, he and SPC H__ got married

2. The applicant provides a February 2023 MFR from MSG S__ N. M__, Senior Human Resources NCO; MSG M__ affirms the command initiated the applicant's flag, on 1 April 2020, and removed it, on 17 July 2020. He initially removed the flag based on a JAG office phone call, in which JAG told him the applicant's investigation had been closed and the flag had to be removed; because JAG offered no further guidance, MSG M__ closed the flag favorably.

3. The applicant's service records show the following:

a. After completing 12 years of MEARNG service and a brief break in service, the applicant reenlisted into the MEARNG; at his reentry, he held the rank/grade of sergeant (SGT)/E-5. Through extensions, the applicant continued his MEARNG service and, effective 1 March 2015, the MEARNG promoted him to sergeant first class (SFC)/E-7.

b. Effective 30 September 2015, the MEARNG ordered the applicant to active duty in an AGR status; his duty position was Senior Supply Sergeant, and his term was to expire, on 29 September 2021. On 9 October 2018, the MEARNG issued orders directing the applicant to serve as an AGR Readiness NCO, for the term of 1 October 2018 to 29 September 2021.

c. Effective 1 June 2020, MEARNG orders reassigned the applicant in an AGR status to serve as a Logistics/Supply Sergeant at "Headquarters and Headquarters"; the AGR end date remained 29 September 2021. The applicant's online service record includes a copy of his marriage certificate, showing that, on 28 May 2020, he and Ms. B__ M. H__ married.

d. Effective 15 February 2021, MEARNG AGR orders assigned the applicant as Senior Supply Sergeant; the orders indicated the termination of the applicant's AGR status was 29 September 2021. On 24 June 2021, MEARNG orders extended the AGR termination date to 29 September 2027. The applicant continues his service in the MEARNG.

4. On 17 June 2024, the National Guard Bureau (NGB) provided an advisory opinion; the NGB recommended the Board deny the applicant's request.

a. The NGB reviewed what occurred in the applicant's case. On 11 May 2020, and MEARNG official advised the applicant he had to terminate the relationship permanently or marry. Further, the official stated, "when evidence of fraternization between an NCO and a junior enlisted Soldier prior to their marriage exists, their marriage does not preclude appropriate command action based on the prior fraternization." The applicant concurred with the counseling. The applicant also agreed with the counseling he received, on 13 May 2020, wherein he was told he would not be assigned to the G-4 Senior Property Book NCO position for promotion to MSG/E-8.

b. On 17 July 2020, the investigation into allegations of fraternization against the applicant concluded, and the applicant's flag was lifted. On 30 March 2022, SGM V__ advised the applicant that the favorable closing of the flag had been erroneous. Both the MEARNG Human Resources Office and the Judge Advocate General confirmed that the investigation's final summary showed the allegations were substantiated. MSG S__ N. M__'s MFR further clarifies that the lack of JAG guidance caused the applicant's flag to be mistakenly closed as favorable.

c. The National Guard Supplement 1 to AR 600-8-2 provides specific guidance and describes the procedures to initiate, transfer, and remove a flag for Army National Guard Soldiers. According to this regulation, in paragraphs 4-4 (Procedural Standards), subparagraphs a and g, "the unit commander or designee will counsel Soldiers upon initiation of a flag before the conclusion of the first period of training or other duty

following the date the flag was initiated. Failure to counsel within prescribed times does not invalidate a flag. Additionally, although the MEARNG G1 did not immediately realize the clerical error which resulted in the incorrect reporting of [applicant's] flag removal, it does not prohibit the flagging authority from correcting the mistake upon discovery. This office recommends denial of the [applicant's] request to change the flag removal code from unfavorable to favorable."

5. On 19 June 2024, the Army Review Boards Agency forwarded the applicant a copy of the advisory opinion for review and the opportunity to submit a statement or additional evidence on his own behalf. On 2 July 2024, the applicant offered the following rebuttal:

a. The applicant argued that adopting the NGB's position would lead to a "fundamentally unfair and unjust result."

(1) "When I was first confronted about the relationship, I was counseled and did state I was not aware that the relationship was inappropriate. AR 600-20, 4-14f states, 'Commanders should seek to prevent inappropriate or unprofessional relationships through proper training and personal leadership.' Up to that point, of my career, the MEARNG has never provided training on inappropriate relationships. Only after this situation was training then conducted the next year by the MEARNG. As stated in the counseling, I was aware that instructor/student, recruiter/recruitee (sic), rater or chain of command were prohibited, which were not the case in this situation. Those situations are what I've been taught/learned as inappropriate relationships throughout my career."

(2) The applicant continued by reiterating events, to include his conversation with MAJ S__ S__, the counseling from the Group CSM, and the date of his marriage. The applicant added, "We are still married and have a two-year-old son. I believe it should have been resolved and closed when I met the actions stated in (the CSM's counseling) 'Plan of Action,' by getting married."

(3) The applicant contended:

- The state failed to provide the required training
- His command did not initiate his flag immediately, as the regulation requires, and he never received a copy of the DA Form 268
- His counseling statement told him to end the relationship or get married; he got married
- The regulation requires the command to review flags on a quarterly basis; his command failed to do so
- Table 2-2, AR 600-8-2 states, for an unfavorable finding, an investigation must substantiate the allegations ("I didn't accept my commander's decision,

and (was told) I should have consulted JAG personally"), and indicate punishment completed (the applicant was not punished)

(4) The applicant points out, "I was not provided a copy of the investigation and only after repeated attempts were made, I was allowed to read the closing summary MFR provided by the IO (MAJ H___). I was not allowed a copy but was told I could go to JAG and read it in their office. It was an unsigned copy dated June 19th. The reasoning behind the unfavorable finding was.....that I had access to JAG and did not contact them. I had consulted my commander, who contacted JAG in the beginning, and was still given the approval for the relationship. I feel that I should be able to trust my commander's decisions without going to JAG for approval. I feel I did my due diligence in trying to do what's right."

b. The applicant concludes by voicing suspicions as to why his flagging issue resurfaced after a long time. The applicant he believes that flagging him gave the leadership the leverage they needed to move the G-4 Senior Property Book NCO position to another unit. That way, they could place a different SFC in the position; "when that failed, it was used to allow SSG (Staff Sergeant) L___ to get promoted...after that occurred, my flag (was) lifted...."

6. AR 15-185 (Army Board for Correction of Military Records (ABCMR)), currently in effect, states an applicant is not entitled to a hearing before the Board; however, the request for a hearing may be authorized by a panel of the Board or by the Director of ABCMR.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. One potential outcome was to deny relief based on the advising official recommendation for denial based the applicant being counseled for an inappropriate relationship with a junior Soldier. However, upon review of the applicant's petition, available military records and the National Guard Bureau-Special Actions Branch advisory opinion, the Board considered the advising official recommendation for denial. The Board determined the applicant went to his leadership prior to having a relationship with the Soldier and was provided guidance that it was no issue.

2. The Board notwithstanding the advising official recommendation for denial, found the applicant's leadership did not properly counsel him with the correct guidance, he was told by his leadership in order to correct what had been stated as acceptable and no

counseling, was to get married. The applicant married the Soldier, and they are still married with a small child. The Board agreed his leadership was not clear in their guidance and flagging the applicant, then lifting the flag, to come back later, stating they lifted the flag in error is unjust. The Board determined the applicant's command did not take responsibility for their unclear guidance and caused confusion. The Board understand the Army Command Policy regulatory guidance, however, the applicant's chain of command failed in their leadership in guiding the applicant. As such, the Board granted relief for correction of the applicant's service records to show a flagging action, pertaining to alleged fraternization, was closed favorably.

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

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 relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected to show in the applicant's service records his flagging action, pertaining to alleged fraternization, was closed favorably.

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 (AR) 600-20 (Army Command Policy), in effect at the time, implements Department of Defense policies and applied to Regular Army and Reserve Component Soldiers. Paragraph 4-14 (Relationships Between Soldiers of Different Grades) outlined the following rules:

a. Soldiers of different grades had to be cognizant that their interactions did not create an actual or clearly predictable perception of undue familiarity between an officer and an enlisted Soldier, or between an NCO and a junior-enlisted Soldier. All relationships between Soldiers of different grade were prohibited if they:

- Compromised, or appeared to compromise, the integrity of supervisory authority or the chain of command
- Caused actual or perceived partiality or unfairness
- Involved, or appeared to involve, the improper use of grade or position for personal gain
- Were, or were perceived to be, exploitative or coercive in nature
- Created an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission

b. Certain types of personal relationships between officers and enlisted Soldiers, or NCOs and junior enlisted Soldiers, were prohibited. Prohibited relationships included the following:

(1) Ongoing business relationships between officers and enlisted personnel, or NCOs and junior enlisted Soldiers.

(2) Dating, shared living accommodations other than those directed by operational requirements, and intimate or sexual relationships between officers and enlisted personnel, or NCOs and junior enlisted Soldiers. This prohibition did not apply to the following:

- When evidence of fraternization between an NCO and a junior enlisted Soldier prior to their marriage existed, their marriage did not preclude appropriate command action based on the prior fraternization; commanders could respond with counseling, reprimand, or other adverse action
- Situations where a relationship complied with this policy but moved into noncompliance due to a change in status (i.e., two junior enlisted dating where one becomes a commissioned officer); the couple had to terminate the relationship permanently or marry within one year of the change in status
- Personal relationships between members of the National Guard, when the relationship primarily existed due to civilian acquaintanceships, unless the individuals were on active duty (other than annual training (AT)), on Full-Time National Guard Duty (FTNGD) (other than AT)
- Personal relationships between members of the Regular Army and members of the National Guard when the relationship primarily exists due to civilian association and the RC member is not on AD (other than AT), on FTNGD (other than AT)
- Prohibited relationships involving dual status military technicians
- Soldiers and leaders share responsibility for ensuring that these personal relationships do not interfere with good order and discipline

c. These prohibitions were not intended to preclude unit based normal team building or activity based on interaction which occurred in the context of community based, religious, or fraternal associations; youth or adult sports leagues or teams; membership in organizations; religious activities including chapel, church, synagogue, mosque, or religious education; Family gatherings; unit-based social functions; or athletic events.

d. Commanders were to seek to prevent inappropriate or unprofessional relationships through proper training and personal leadership.

2. AR 15-185 (Army Board for Correction of Military Records (ABCMR)), currently in effect, states an applicant is not entitled to a hearing before the Board; however, the

request for a hearing may be authorized by a panel of the Board or by the Director of ABCMR.

//NOTHING FOLLOWS//