

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 January 2024

DOCKET NUMBER: AR20230005391

APPLICANT REQUESTS: through counsel, removal of his name from the title block of the U.S. Army Criminal Investigation Command (CID) Law Enforcement Report (LER), 9 February 2017.

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 Brief in Support of Application for Correction of Records, undated, with exhibits –
 - Exhibit 1 – DD Form 214 (Certificate of Release or Discharge from Active Duty) for the period ending 31 August 2010
 - Exhibit 2 – Installation Management Command, Korea Region, Orders 169-0001, 18 June 2010
 - Exhibits 3 through 6 – LERs, 22 August 2016, 16 September 2016, 25 October 2016, and 31 January 2017
 - Exhibit 7 – DA Form 4833 (Commander's Report of Disciplinary or Administrative Action), 5 February 2018
 - Exhibits 8 and 9 – two DA Forms 67-9 (Officer Evaluation Report (OER)) covering the periods 1 July 2000 through 30 June 2001 and 1 July 2001 through 15 November 2001
 - Exhibit 10 – Letter of Recommendation for (Applicant), 28 June 2022

FACTS:

1. The applicant defers to counsel.
2. Counsel states the applicant is a retired lieutenant colonel (LTC) who enlisted in the Army on 29 October 1988. He later commissioned, received numerous awards, and completed a number of military educational courses (see exhibit 1). He honorably retired on 31 August 2010 after 22 years, 11 months, and 22 days of service (see exhibit 2). He is appealing the CID decision denying the applicant's request to remove his name as the subject of the enclosed LER.

a. In August 2016, 6 years after the applicant's retirement, the Fort Myer CID initiated an investigation against the applicant after being notified by the Walter Reed National Medical Center Sexual Assault Response (SARC) that an individual had come forward and reported being sexually assaulted by the applicant (see exhibit 3). According to the alleged victim, the assault occurred while she was stationed in Korea in 2001 (see exhibit 3). CID investigated between 22 August 2016 and 15 December 2016 (see exhibit 4). The alleged victim and the commander of the 702d Main Support Battalion (MSB) at the time of the alleged sexual assault were interviewed for the investigation (see exhibit 4). CID also sought to interview the applicant, but he exercised his Article 31 rights and declined to speak with CID (see exhibit 5).

b. On 31 January 2017, the Fort McNair Chief of Military Justice returned his opinion of probable cause and transferred the matter to the commander of the 702d MSB, 2d Infantry Division, for further action on 9 February 2017 (see exhibit 6). More than a year later on 25 February 2018, the commander issued a decision and completed the DA Form 4833, declining to prosecute or take any other action because the statute of limitations for the alleged offense had elapsed (see exhibit 7).

c. The applicant applied to Army CID to amend his military records in 2022 and received the decision denying his request on 26 April 2022 (see exhibit 8).

d. Counsel argues:

(1) There was material error when the applicant was investigated primarily on the alleged victim's statement. While not uncommon for a rape or sexual assault victim to delay making a report, especially when the perpetrator is in a position of authority. Such a lengthy delay raises substantial doubts about the alleged victim's motive and recollection. The alleged victim's statement is also questionable with counterintuitive behavior and inconsistencies. He questions why the alleged victim go to the applicant's office on official business to discuss an issue with a former Soldier and arrive so intoxicated that she needed to lie down (see exhibit 3). Likewise, if the applicant wanted to take advantage of the alleged victim, he questions the applicant would take her to get something to eat to sober up (see exhibit 3). Finally, the alleged victim claims to have almost no recollection of the alleged sexual assault, likely a result of the gap in time and intoxication or unconsciousness. What she does recall is indicative of consent (see exhibit 3). She did not say "stop," she said "slow down" (see exhibit 3).

(2) The statements provided by the former commanders of the 702d MSB and Division Support Command (DISCOM) confirm the alleged victim and the applicant were both in Korea and part of the 702d MSB during the time of the alleged offense. However, these statements have significant credibility issues that raise doubts as to whether the applicant was even in the right time and place to have potentially committed the alleged assault, as these commanders' statements were vague. The comments

made during the investigation did not match the OER comments listed below (see exhibit 4).

(3) There is a material injustice as a result of the applicant remaining titled on the LER when he was never convicted of the alleged crimes. "Titling is not a 'law enforcement record' insofar as a Defense Central Index of Investigations (DCII) entry is not the equivalent of an 'arrest,' nor does titling imply any degree of guilt or innocence. Rather, it is an administrative function used to ensure that information regarding military members or civilian employees of DOD [Department of Defense] are available for review in future DOD administrative and criminal investigations."

(4) The applicant was investigated for sexual assault and rape and was not convicted for either offense (see exhibit 7). Despite the outcome of the investigation, the applicant's name on the CID LER remains and will show him as being a "rapist" when a background check is performed. As stated above, the purpose of the DCII is for administrative reasons but nonetheless leaves a mark on the serviceman being investigated by CID, even when the member was not prosecuted for the allegations. The applicant had an exceptional Army career, retiring honorably after serving his country for over 22 years (see exhibits 1 and 2). Being titled will continue to stigmatize, prejudice, and label him as a rapist after an otherwise impeccable career serving his country and an investigation based on zero credibility, despite never being reprimanded during his service in the Army or being in legal jeopardy because of these false allegations. The continued existence of this LER presents an unacceptable risk of harm to his professional and personal life.

3. Following prior enlisted service in the Regular Army, the applicant was appointed as a Reserve commissioned officer in the U.S. Army Reserve Field Artillery Branch in the rank/grade of second lieutenant/O-1 effective 28 May 1988 with concurrent orders to active duty.

4. The applicant's annual OER covering the period 1 July 2000 through 30 June 2001 (a 10-month period) addressed his duty performance as the Headquarters and Headquarters Company, 2d Infantry Division, Chief of Staff, Division Materiel Officer. His rater is shown as Colonel (COL) C____ M. S____, Assistant Chief of Staff, G-4, and his senior rater is shown as COL R____ J. R____, Jr., Chief of Staff. His rater rated his overall performance as "OUTSTANDING PERFORMANCE, MUST PROMOTE" and his senior rater rated his overall potential as "BEST QUALIFIED." The senior rater commented:

[Applicant] ranks in top 2 of 33 Majors that I senior rate. He is a dedicated, hardworking logistics expert who makes things happen. He has aggressively and positively impacted logistic readiness of this forward deployed division. EOH [equipment on hand] ratings are at the highest possible. Critical needs have been

identified to theater and DA [Department of the Army] and are being supported. He has contributed directly to making our DFACs [dining facilities] "the best restaurant in town." Potential: Selected for CGSC [Command and General Staff College]. Select below zone for LTC. Must for battalion command. GO [general officer] potential.

5. The applicant's change of rater OER covering the period 1 July 2001 through 15 November 2001 (a 5-month period) addressed his duty performance as the Headquarters and Headquarters Detachment, 702d MSB, 2d Infantry Division, Battalion Support Officer/Executive Officer. His rater is shown as LTC C____ M. C____, Battalion Commander, and his senior rater is shown as COL S____ M. A____, DISCOM Commander. His rater rated his overall performance as "OUTSTANDING PERFORMANCE, MUST PROMOTE" and his senior rater rated his overall potential as "BEST QUALIFIED." The senior rater commented:

Absolutely superior performance! [Applicant] was the perfect officer to put in charge of the largest battalion in the DISCOM and the Division – he is already making headlines as a truly superb Executive Officer. A team player, extremely dedicated and hardworking, he is battalion commander material. He is a thorough, precise, disciplined leader who easily works with his staff along with those within the DISCOM staff. He can execute the toughest of missions in the blistering OPTEMPO [operating tempo] of the 2ID [2d Infantry Division]. The Main Support Battalion is in good hands with [Applicant] at the helm and I see nothing but success for him in the future. A must promote to LTC followed by selection for battalion command. Exceptional potential. On track for Battalion Command.

6. The applicant was promoted to LTC effective 1 October 2005.

7. On 21 April 2010, the applicant retired with 21 years, 10 months, and 2 days of net active service. His DD Form 214 shows he was awarded or authorized the:

- Meritorious Service Medal (4th Award)
- Army Commendation Medal (3rd Award)
- Army Achievement Medal (4th Award)
- National Defense Service Medal (2nd Award)
- Global War on Terrorism Expeditionary Medal
- Global War on Terrorism Service Medal
- Korea Defense Service Medal
- Army Service Ribbon
- Overseas Service Ribbon (5th Award)
- Armed Forces Reserve Medal
- Parachutist Badge

8. The applicant had been retired for 6 years when he became the subject of a 2017 CID LER for two specifications of violating Article 120 (Rape and Sexual Assault Generally) of the Uniform Code of Military Justice. The investigation noted the applicant was accused of committing rape and sexual assault between on or about 29 July 2001 and 2 August 2001.

9. The Joint Base Myer-Henderson Hall CID Office memorandum (LER – Serious Incident Report (SIR) (Category 3)/Final), 9 February 2017, names the applicant as the subject/suspect for the offenses of rape and sexual assault between on or about 29 July 2001 and 2 August 2001.

a. The report summary states:

(1) This office was notified by (Redacted), Sexual Assault Response Coordinator, Walter Reed National Military Medical Center, that Captain (CPT) (Redacted) reported she was sexually assaulted while stationed in Korea in 2001.

(2) CPT (Redacted) stated the applicant called her to his office about an issue with one of her former Soldiers the night before she left Korea. CPT (Redacted) reported she was (redacted) that evening from going out to celebrate her departure and when she arrived at the applicant's office she laid down on the floor. CPT (Redacted) stated she provided the applicant information he requested and accompanied him to a nearby restaurant. After returning to the barracks, the applicant and CPT (Redacted) went to his room where he gave her an alcoholic beverage and the next thing CPT (Redacted) remembered was the applicant on top of her having sexual intercourse with her. She stated the next morning the applicant told her they had to keep what they had done a secret and no one could ever know.

(3) The applicant was advised of his legal rights, which he invoked, and requested legal counsel.

b. On 31 January 2017, the Chief, Military Justice, Office of the Staff Judge Advocate, Fort McNair, reviewed the investigation and case file and opined there was probable cause to believe the applicant committed the offense of rape.

10. The DA Form 4833, 17 February 2017, lists the applicant as the offender for the offenses of rape and sexual assault. The report shows the commander's decision date as 17 February 2017 and a final decision date of 5 February 2018. Block 3 (Referral Information) is marked "No" for the offenses of rape and sexual assault and Action Taken, and the reason given as "Statute of Limitations." Block 10a (Commander's Remarks) states: "No prosecution as Statue [Statute] of Limitations had occurred."

11. The CID letter, 26 April 2022, referenced as a supplemental response to 25 April 2022, notified the applicant that his request to correct information from the files of the CID/Crime Records Center was denied. He was instructed that he may appeal to the Army Board for Correction of Military Records if he disagreed with this denial.

12. The letter of recommendation from the applicant's former supervisor, 28 June 2022, notes he fervently recommends consideration for employment with the utmost confidence. He notes the applicant's exceptional intelligence, calm and well-mannered disposition, hard work ethic, natural leadership, and commitment to excellence consistently achieved exceptional outcomes. The applicant demonstrated the ability to analyze complex problems and translate them into actionable results with positive impacts. He possesses a masterful understanding of logistics and reputation for working well with others under challenging conditions. The applicant was one of the best employees he worked with in over 35 years.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the applicant's military records, the Board found that relief was warranted. The Board carefully considered Counsel's contentions, the applicant's military records, and regulatory guidance. The applicant was titled as a subject for the offense of rape and upon review of the investigation, the Chief of Military Justice of the Office of the Staff Judge Advocate opined that there was probable cause to believe that the applicant committed the offense for rape. The Law Enforcement Record dated 22 August 2016 identifies two service members as witnesses. Upon review of the witness statements, the Board determined that their statements were not credible and based on vague recollections and assumption. The Board determined that the greater weight of the evidence reflects that probable cause did not exist to believe the applicant committed the offenses. The Board agreed the applicant was improperly titled and should be removed from the U.S. Army Criminal Investigation Command (CID) Report of Investigation (ROI) (Final), 9 February 2017, and all associated documents to remove the applicant's name from the "title" and/or "subject" blocks and any residual and/or affiliated titling actions. After due consideration of the case, the Board determined the evidence presented insufficient to warrant a recommendation for relief.

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 that the evidence presented was 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 by removing the applicant's name from the title and subject blocks of U.S. Army Criminal Investigation Command (CID) Law Enforcement Report (LER) – Final, 9 February 2017 and removing his name from all federal crime databases, to include the Department of Defense Central Index of Investigation and Department of Justice and other federal agency criminal databases.

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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. Article 120 of the Uniform Code of Military Justice specifically addresses rape, sexual assault, and other sexual misconduct within the military. These crimes involve non-consensual sexual acts where the accused knowingly commits the act without the victim's consent. If convicted, penalties may include forfeiture of pay, dishonorable discharge, and imprisonment. It is essential to recognize the gravity of these charges and the lasting impact Article 120 violations can have on both the accused and the victim. For several decades, the Uniform Code of Military Justice held that a 5-year statute of limitations applied to all military offenses not punishable by death, including rape charges. This meant the alleged victim had to come forward within 5 years of the incident. Once that time frame expired, the victim could no longer press charges. This changed in 2019 when *United States v. Moore* eliminated the statute of limitations for Article 120 violations. When the Supreme Court rejected the statute of limitations for military rape, it removed the time limit for prosecuting Article 120 violations under the Uniform Code of Military Justice. This aligns with the view that rape can have a long-lasting impact on the victim and reflects a societal shift towards supporting survivors of sexual violence. Removing the statute of limitations has extensive implications, not only for the accused but also for the entire military justice system. Service members can now be held accountable for sexual offenses without any time constraints. This change reflects the military's efforts to combat sexual misconduct and promote a culture of respect and integrity in the Armed Forces. The absence of time constraints means that old cases, once considered closed due to the statute of limitations, could now be reopened. This creates new avenues for justice but also brings challenges to those accused of crimes that occurred many years ago.

2. Army Regulation 190-45 (Law Enforcement Reporting) prescribes policies, procedures, and responsibilities for the preparation, reporting, use, retention, and disposition of Department of the Army forms and documents related to law enforcement activities. It implements federal reporting requirements on serious incidents, crimes, and misdemeanor crimes.

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 actually 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 4-7 (DA Form 4833) states this form 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.

3. Army Regulation 195-2 (Criminal Investigation Activities) establishes policies for criminal investigation activities, including the utilization, control, and investigative responsibilities of all personnel assigned to CID elements.

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

(1) Requests to amend or unfound offenses in CID reports of investigation 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 report of investigation 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.

b. 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.

4. DOD Instruction 5505.7 (Titling and Indexing of Subjects of Criminal Investigations in the DOD) 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.

5. DOD Instruction 5505.11 (Fingerprint Card and Final Disposition Report Submission Requirements), 21 July 2014, 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 Federal Bureau of Investigation for inclusion in the National Crime Information Center 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 Federal Bureau of Investigation, 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.

6. The National Defense Authorization Act, Fiscal Year 2021, section 545 (Removal of Personally Identifying and Other Information of Certain Persons from Investigation Reports, the Department of Defense Central Index of Investigations, 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, personally identifying information, 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, 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 of the DCII, in the following circumstances:

(1) 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;

(2) 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; 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//