

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 10 July 2024

DOCKET NUMBER: AR20230005454

ON BEHALF OF THE APPLICANT, COUNSEL REQUESTS REMOVAL OF:

- the Summary of Credible Adverse Information
- the General Court Martial Order
- the Record of Proceedings under Article 15, UCMJ
- the Article 15 Punishment Worksheet
- the Written Reprimand issued on 16 April 2010
- the Summarized Record of Trial (Court Martial)
- Criminal Investigation Division (CID) Report of Investigation and any other related derogatory information. associated with the CRC and DCII

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Legal brief, with exhibits 1-12

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. Of the initial charges against the applicant under Kansas state law for sale/cultivation of marijuana and wrongful possession of marijuana, the government only sought to pursue punishment for the wrongful possession of marijuana under Article 112a, UCMJ via judicial and then nonjudicial means. The only theory of possession in the applicant's case was constructive possession, which requires knowledge of the presence of contraband under an accused's control. Here, no evidence was ever presented against the applicant to show that she was in constructive possession of marijuana. Additionally, the applicant's husband has signed a statement admitting he hid his marijuana plants from the applicant, and the applicant's commander

at the time of this allegation-COL (ret.) A.E.C.-has provide a statement admitting that she would not have imposed nonjudicial punishment on the applicant if she had the knowledge then that she has now.

b. Moreover, it is both error and unjust that the applicant's Summary of Credible Adverse Information should read "Sale/ Cultivation of Marijuana" in addition to "Wrongful Possession of Marijuana" because no judicial or nonjudicial proceedings were ever brought against the applicant for "Sale/ Cultivation of Marijuana." That being the case, President Biden recently issued a proclamation granting a general pardon to persons convicted of mere possession of marijuana. Thus, pursuant to this general pardon, any finding against the applicant for possession of marijuana must not adversely affect her military career.

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

a. Exhibit 1: Summary of Credible Adverse Information, inquiry/investigation approval date 5 October 2010, reflect the substantiated findings of "wrongful possession of marijuana, sale/cultivation of marijuana. The disposition states, "the DA Form 4833 (Record of Proceedings Under Article 15, UCMJ), Commander's Report of Disciplinary or Administrative Action, indicated the officer received a written locally filed reprimand on 20 May 2010."

b. Exhibit 2: DD Form 491 (Summarized Record of Trial) reflects a General Court-Martial convened on 8 April 2010; however, the form is void of a Judge Advocate or Law Specialist signature.

c. Exhibit 3: CID Report of Investigation (ROI) – 1st Corrected Final/Joint - 0110-2009-CID055-69983-5L2E / 5L2C, dated 14 December 2009, states in the Investigative Summary, "Investigation determined applicant and her husband committed the offense of Sale/Cultivation of Marijuana when they began growing, suspected marijuana in their home. At approximately 1414, 5 October 2009, Det P executed a search warrant for the applicant's residence wherein he discovered five suspected marijuana plants growing in one of the downstairs bedroom closets. Upon inspection of the moving boxes in an upstairs room Det W discovered two suspected marijuana plants each planted in separate pots.

d. Exhibit 4: Memorandum for President of the FY22 COL AMEDD Promotion Board, dated 20 December 2021, addresses the nonjudicial punishment she received over 12 years ago and the basis for it, her husband's disability, her commitment to the Army's values, and a few of her many voluntary services. In closing, she states, "I am a highly competent medical professional, a sound officer with impeccable judgment and loyalty to the Army's mission, and inspirational leader of Soldiers. I am involved in community and remain a loyal to my vows as a spouse and responsibilities as a

mother. The records from 12 years ago do not tell the true story, and are no reflection of the officer appearing before this board today. I sincerely and humbly urge you to consider me for the next level of responsibility in our profession of arms.

e. Exhibit 5: A Proclamation on Granting Pardon for the Offense of Simple Possession of Marijuana (October 6, 2022).

f. Exhibit 6: Commander's Report of Disciplinary or Administrative Action, reflects in item 4 (Action Taken) "Administrative, Non-Adverse Referrals, Adverse Personnel Actions).

g. Exhibit 7: Officer Record Brief, dated 19 November 2021, provides a snapshot of the applicant's service data (i.e. overseas/deployment/combat duty, military and civilian education, awards and decorations, and duty assignments).

h. Exhibit 8: Admittance letter from Mr. R.A.G., the applicant's spouse, which shows he took full responsibility of engaging in the illegal activity of growing marijuana plants. Also stating he deliberately hid his activities from his wife [the applicant], taking actions to obscure the view of the box and to block access to the closet.

i. Exhibit 9: Letter of Support, dated 22 October 2022, written by COL (ret) A.C., former commander of Munson Army Health Center, Fort Leavenworth, Kansas, states:

"The Combined Arms Center commanding general initiated court martial proceedings against the applicant on the premise that she must have known about the marijuana plants. Court martial proceedings were terminated with the Charge and its Specifications withdrawn and dismissed without prejudice after Mr. G's diversion. As there was no evidence found or presented for (or against) the applicant, the Staff Judge Advocate's advice was to impose a local command Article 15 in lieu of a General Court Martial for possession of more than 30 grams of marijuana (Article 112a) which the commanding general accepted.

I decided to file the Article 15 in the restricted section of the Official Military Personnel File. My decision was formed by the nature of the offense, the need for good order and discipline, and the applicant's excellent military record. The applicant was a hard worker, an excellent officer, and committed to the success of an understaffed Warrior Transition Unit.

Mr. G has now provided a statement that he purposefully deceived the applicant to ensure she did not know about the marijuana plants. I know the Army Board for the Correction of Military Records corrects errors or injustice in military records. With the knowledge I have now, I would not have imposed an Article 15 on then CPT G, and as a

result, it is an injustice to this officer to maintain the Article 15 in her military records. I strongly support the correction of the applicant's record.”

j. Exhibit 10: Officer Evaluation Reports, between 26 June 2009 and 4 July 2022.

k. Exhibit 11: Character Reference Letters, dated between 7 and 14 June 2022.

l. Exhibit 12: Awards presented to her in recognition of her service, leadership, expertise and professionalism

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

a. She took the Oath of Office on 2 June 2001 as a Reserve Commissioned Officer.

b. The applicant is assigned to the William Beaumont Army Medical Center, El Paso, TX.

4. U.S. Army Criminal Investigation Command memorandum, dated 21 July 2023, Subject: Request for Sanitized Reports of Investigations (ROIs) and Military Police Reports, included a copy of the Final ROI pertaining to the applicant. The investigative summary states, “investigation determined the applicant and her husband Mr. G. committed the offense of Sale/Cultivation of Marijuana when they began growing suspected marijuana in their home. At approximately 1414, 5 October 2009, Detective executed a search warrant for the applicant's residence wherein he discovered five suspected marijuana plants growing in one of the downstairs bedroom closets. Upon inspection of the moving boxes in an upstairs room Detective discovered two suspected marijuana plants each planted in separate pots.”

5. The applicant was notified of the ex-parte correspondence received from the U.S. Army Criminal Investigation Command. She was afforded the opportunity to submit comments on the correspondence; however, as of the date of this writing, none have been received.

6. Army Regulation (AR) 600-37 (Unfavorable Information) sets forth policies and procedures to ensure the best interests of both the Army and Soldiers are served by authorizing unfavorable information to be placed in, transferred within, or removed from an individual's Army Military Human Resource Record (AMHRR).

7. Department of Defense Instruction (DoDI) 5505.07 (Titling and Indexing Subjects of Criminal Investigations in the Department of Defense) prescribes procedures to create a uniform process that allows people named in criminal investigative reports or indexed in the Defense Central Index of Investigations (DCII) a chance to obtain a review of such actions, as required by Reference (c).

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board through counsel 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 grant relief based on the applicant's spouse admitting guilt of growing the marijuana and her commander's letter recommending removal based on the evidence. However, upon further review through counsel of the applicant's petition and available military records, the Board determined the applicant, and her husband committed the offense of sale/cultivation of marijuana when they began growing suspected marijuana in their home."

2. Evidence shows the detective executed a search warrant for the applicant's residence wherein he discovered five suspected marijuana plants growing in one of the downstairs bedroom closets. Upon inspection of the moving boxes in an upstairs room Detective discovered two suspected marijuana plants each planted in separate pots. The applicant's commanding general initiated court martial proceedings against the applicant on the premise that she must have known about the marijuana plants. However, court martial proceedings were terminated with the charge and its Specifications withdrawn and dismissed without prejudice after the applicant's spouse's diversion. As there was no evidence found or presented for (or against) the applicant, the Staff Judge Advocate's advice was to impose a local command Article 15 in lieu of a General Court Martial for possession of more than 30 grams of marijuana (Article 112a) which the commanding general accepted.

3. The Board first considered whether probable cause did or did not when titled existed to believe the offence occurred or the person committed the offense. The applicant was titled for wrongful possession of marijuana, sale/cultivation of marijuana. The Board found there was probable cause to title the applicant based on the evidence. The Board found no error or injustice in the titling action. Furthermore, the Board considered whether probable cause does or does not now exist to believe the offense occurred or the person committed the offense. The CID report provides clear corroborating evidence of what transpired on the date in question. As a result of this incident, the command reprimanded the applicant with an Article 15 which was filed in the restricted section of the Official Military Personnel File. The Board noted the applicant's spouse admission, which shows he took full responsibility of engaging in the illegal activity of growing marijuana plants. Also stating he deliberately hid his activities from his wife [the applicant], taking actions to obscure the view of the box and to block access to the closet.

4. The Board determined although the applicant received an Article 15 as a captain, she has continued to serve and promoted through the ranks to colonel. The Board found the

overall merits of this are insufficient as a bases for correction of the records of the individual concerned. The Board agreed, there is insufficient evidence that supports the applicant, and her counsel contentions for removal of the Criminal Investigation Division (CID) Report of Investigation and any other related derogatory information. associated with the CRC and DCII. The Board found the applicant, nor her counsel provide sufficient evidence that demonstrates or shows that there was an injustice. Therefore, the Board denied relief.

5. Titling or indexing on CID reports does not denote any degree of guilt or innocence. If there is a reason to investigate, the subject of the investigation should be titled. This is a very low standard of proof, requiring only the merest scintilla of evidence far below the burdens of proof normally borne by the government in criminal cases (beyond a reasonable doubt), in adverse administrative decisions (preponderance of evidence), and in searches (probable cause).

6. The purpose of maintaining the Army Military Human Resource Record (AMHRR) is to protect the interests of both the U.S. Army and the Soldier. In this regard, the AMHRR serves to maintain an unbroken, historical record of a Soldier's service, conduct, duty performance, and evaluations, and any corrections to other parts of the AMHRR. Once placed in the AMHRR, the document becomes a permanent part of that file and will not be removed from or moved to another part of the AMHRR unless directed by an appropriate authority. The Board agreed, there does not appear to be any evidence the contested Article 15 was unjust or untrue or inappropriately filed in the applicant's AMHRR.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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| : | ■ | : | 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.

[REDACTED]

X Donna Bush

[REDACTED]
[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. Army Regulation 600-37 (Unfavorable Information) sets forth policies and procedures to ensure the best interests of both the Army and Soldiers are served by authorizing unfavorable information to be placed in, transferred within, or removed from an individual's Army Military Human Resource Record (AMHRR).

a. Paragraph 6-2e states, the Department of the Army Suitability Evaluation Board (DASEB) makes determinations upon appeal of unfavorable information filed in a Soldier's AMHRR. The DASEB may determine to revise, alter, or remove such unfavorable information if it is determined to be untrue or unjust, in whole or in part (see chap 7).

b. Paragraph 6-2f states, the DASEB makes determinations, upon appeal, on requests to transfer unfavorable information from the performance to the restricted portion of the AMHRR (see chap 7). The DASEB may recommend the transfer of those administrative memoranda of reprimand when such transfer would be in the best interest of the Army. Transfer of such memoranda is further subject to the stipulations stated in paragraph 6-1d, paragraph 6-1e, and chapter 7.

c. Paragraph 7 states, The DASEB is the initial appeal authority and makes recommendations for removal, alteration, or transfer of unfavorable information entered in the AMHRR. This chapter sets forth the policies and procedures whereby a person may seek removal of unfavorable information from his or her AMHRR, or transfer of unfavorable information from the performance file to the restricted file of his or her

AMHRR.

2. 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.

//NOTHING FOLLOWS//