

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 March 2024

DOCKET NUMBER: AR20230005649

APPLICANT REQUESTS: through counsel:

- removal of the general officer memorandum of reprimand (GOMOR), 31 January 2022, from his Army Military Human Resource Record (AMHRR)
- reinstatement to active duty in the rank of major (MAJ) with back pay and allowances
- consideration for promotion to lieutenant colonel (LTC) by a special selection board (SSB)
- any other relief the Board considers just and equitable
- a personal appearance hearing before the Board

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 Petition, 12 April 2023, with attachments –
 - Tab A –
 - Headquarters, U.S. Army Maneuver Center of Excellence, Fort Benning (GOMOR), 31 January 2022
 - Applicant's Memorandum (Acknowledgement of Receipt of Reprimand), 4 February 2022
 - Western Hemisphere Institute for Security Cooperation, Fort Benning, Memorandum (Request to Initiate Administrative Action Regarding (Applicant)), 20 January 2022
 - Unit Urinalyses Testing Data
 - U.S. Southern Command Memorandum (Notification of Selection for Military Random Urinalysis Testing), 20 July 2021
 - DA Form 4856 (Developmental Counseling Form), 1 September 2021
 - Forensic Toxicology Drug Testing Laboratory, Fort Meade, Memorandum (Overview of Urine Drug Testing), 9 September 2021

- U.S. Army Criminal Investigation Command (CID) Lakeland CID Office Memorandum (Law Enforcement Report (LER) – Initial-Final), 1 October 2021
- DA Form 268 (Report to Suspend Favorable Personnel Actions (Flag)), 31 August 2021

- Tab B – Counsel's GOMOR Rebuttal, 11 February 2022
- Tab C – Headquarters, U.S. Army Maneuver Center of Excellence, Memorandum (Filing Determination on Reprimand), 14 March 2022
- Tab D –

- Headquarters, U.S. Army Maneuver Center of Excellence, Memorandum (Elimination Action – (Applicant)), 14 December 2022
- DA Form 1574 (Report of Proceedings by Board of Officers), 14 December 2022

- Tab E –

- Counsel's Petition for the Department of the Army Suitability and Evaluation Board (DASEB), 14 December 2022
- DASEB Docket Number AR20230003191, 28 March 2023
- Army Review Boards Agency Memorandum (Resolution of Unfavorable Information for – (Applicant)), 4 April 2023, with Letter

- Tab F – DA Form 268, 30 August 2021
- Tab G –

- Military Personnel Message Number 21-187 (Fiscal Year 2022 (FY22) Active Component, LTC, Operations, Operations Support, Force Sustainment, and Information Dominance, Promotion Selection Board (PSB) Zones of Consideration), 2 June 2021
- Military Personnel Message Number 22-321 (Fiscal Year 2023 (FY23) Active Component, LTC, Operations, Operations Support, Force Sustainment, and Information Dominance, PSB Zones of Consideration), 17 June 2022

- Tab H – Applicant's Declaration, 15 March 2023
- Tab I – Email Correspondence between Counsel and U.S. Army Human Resources Command (HRC) (Reply: (Applicant)), 23 January 2023

d. The applicant was flagged on 30 August 2021 (see Tab F). As noted above, the BOI convened on 7 December 2022 and the length of time it took the command to resolve this case was outrageous. During the time the applicant was flagged, two promotion boards convened for which he should have been considered for promotion to LTC (see Tab G). As outlined in the applicant's declaration at Tab H, his branch manager told him that he was not considered by either promotion board due to being flagged and his pending BOI (see Tab H).

e. As reflected in the email traffic provided at Tab I, the applicant sought relief through counsel to resolve this issue with his branch manager. They were ignored by the branch manager and referred to that office's advising judge advocate, who refused to answer whether the applicant had been considered by the above-referenced promotion boards (see Tab I). They were directed to submit a FOIA request, which was submitted on 25 January 2023 (see Tab J). The responsive documents provided at Tab K do not indicate whether the applicant was considered by either promotion board. Thus, they believed the only reasonable conclusion was that he was not considered for promotion by either the FY22 or FY23 promotion board.

f. On 13 March 2023, the applicant requested promotion consideration by an SSB based on HRC's failure to consider him for promotion to LTC (see Tab L).

g. On 6 April 2023, the applicant was notified of his MRD due to non-selection for promotion (see Tab M). According to this notice, the Department of the Army FY23, LTC, Operations, Operations Support, Force Sustainment, and Information Dominance, PSB considered the applicant for promotion, but he was not selected (see Tab M). As a result, the applicant was separated from the Regular Army (see Tab M).

h. Counsel reiterates the facts presented throughout his 12-page petition. He highlights the reasons the GOMOR should be removed, the administrative errors, and the material unfairness. He concludes that due to the listed reasons, the principles of justice, fairness, and equity require the requested relief.

3. The applicant was commissioned as a Regular Army officer in the Armor Branch effective 27 May 2006. He ascended through the ranks until being promoted to MAJ/O-4 effective 1 February 2017.

4. On 20 July 2021, the applicant submitted a urine sample as part of a random unit urinalysis. The sample he provided tested positive for THC-9.

5. On 30 August 2021, the applicant's commander initiated a DA Form 268 against him for drug abuse. The form does not provide any other remarks.

6. The Commanding General, Headquarters, U.S. Army Maneuver Center of Excellence, reprimanded the applicant in writing on 31 January 2022, wherein he stated:

On 20 July 2021, you tested positive for Tetrahydrocannabinol (THC) on a unit urinalysis at your former duty station.

You are reprimanded for your misconduct. Your behavior fell far below the standards expected of a commissioned officer in the U.S. Army. Testing positive for THC during a urinalysis has seriously compromised your standing as an officer. Your actions will not be tolerated and causes me to question your judgment and potential to lead Soldiers.

This is an administrative memorandum of reprimand imposed under the provisions of AR [Army Regulation] 600-37 [Unfavorable Information] and not as punishment under Uniform Code of Military Justice. You are advised that in accordance with AR [Army Regulation] 600-37, paragraph 3-5b, I am considering whether to direct this reprimand be filed permanently in your Army Military Human Resource Record. Prior to making my filing decision, I will consider any rebuttal matters you submit in extenuation, mitigation, or rebuttal. Enclosed you will find a copy of the evidence which forms the basis for this reprimand. You will immediately acknowledge receipt of this reprimand in writing. You will forward any matters you wish me to consider through your chain of command within seven calendar days, using the format prescribed in AR [Army Regulation] 600-37, paragraph 3-7.

7. On 4 February 2022, the applicant was presented the GOMOR and refused to acknowledge its receipt with his signature.

8. On 11 February 2022, counsel submitted a rebuttal to the GOMOR, citing the following reasons:

We respectfully request that you rescind the GOMOR issued to [Applicant] in its entirety for reasons set forth below.

In a GOMOR dated 31 January 2022, you reprimanded [Applicant]. In the GOMOR you wrote "[o]n 20 July 2021, you tested positive for Tetrahydrocannabinol (THC) on a unit urinalysis at your former duty station." A copy of the evidence that was provided to [Applicant] is also enclosed at TAB A.

[Applicant] denies that he has ever knowingly or intentionally ingested THC or any other controlled substance. The GOMOR does not contain an allegation

that [Applicant's] alleged use of THC was wrongful. The GOMOR simply asserts that THC was identified in [Applicant's] urine. TAB A. The presence of THC in his system, without more, is insufficient to conclude [Applicant] committed misconduct.

While we recognize that this is an administrative action and not a Court-Martial, the Manual for Courts-Martial (M.C.M.) is instructive and of particular importance in this case. The Manual for Courts-Martial (M.C.M.) provides that the elements of the crime of wrongful use of a controlled substance under Article 112a, UCMJ, are:

- a. That the accused used a controlled substance; and
- b. That the use by the accused was wrongful. See M.C.M. IV-66 at TAB B.

The M.C.M also explains that "[k]nowledge of the presence of the controlled substance is a required component of use." See M.C.M IV-67 at TAB B. In other words, if the accused did not know he was using a controlled substance, he cannot be found guilty of this offense.

In this case, the urine sample collected from [Applicant] screened positive for THC9 in a concentration of 30 ng/ml [nanograms per milliliter]. TAB A. Although the results indicate that this substance was present in his body, the data from the urinalysis does not address the issue of how the substance actually entered his body.

If this were an administrative hearing, we would call a toxicologist from the drug screening laboratory. Any legitimate toxicologist would tell you that a positive drug test does not explain how the drug in question was introduced into the accused's body. Therefore, the fact that [Applicant's] urine sample tested positive for THC is not inconsistent with the possibility that he accidentally and/or unknowingly ingested this substance.

[Applicant] declines to provide a statement at this time on advice of counsel. However, he denies that he has ever knowingly or intentionally ingested THC.

Unfortunately, there are myriad ways that this substance could have entered [Applicant's] system without his knowledge. The government has not provided any evidence that proves that [Applicant] knowingly and intentionally ingested THC nor has he been provided a forum in which to defend himself against this allegation.

Accordingly, the issuance of an GOMOR at this time is premature and based on an incomplete record. [Applicant] looks forward to the opportunity to clear his name of this alleged wrongdoing in the appropriate forum.

Finally, [Applicant's] service record strongly indicates that he would never act in the way alleged in the GOMOR. Over the course of his lengthy career [Applicant] has no other instance of misconduct. A review of [Applicant's] letters of support and OERs [officer evaluation reports], and ORB [Officer Record Brief] reflects that he is a superior performer with unlimited potential. See TABS C and D. His sustained excellence and his lack of prior acts of misconduct are affirmative evidence of his good character as a Soldier and as a person. [Applicant] also has the support of Servicemembers of various ranks. These individuals have authored statements in support of [Applicant], which are enclosed at TAB D. These letters are yet more evidence of [Applicant's] overall good character. The totality of [Applicant's] military record and good character evidence provide you with affirmative evidence that he did not wrongfully use THC.

9. On 14 March 2022 after carefully considering the circumstances of the misconduct; the recommendations made by the applicant's chain of command; and all matters submitted by the applicant in defense, extenuation, or mitigation; the commanding general directed permanently placing the GOMOR in the applicant's AMHRR. He further directed that all enclosures would be forwarded with the reprimand for filing as appropriate.

10. On 6 October 2022, a BOI was appointed to determine whether the applicant should be retained in the Army under the provisions of Army Regulation 600-8-24 (Officer Transfers and Discharges), paragraph 4-2b (Acts of Personal Misconduct) and paragraph 4-2c (Derogatory Information).

11. On 7 December 2022, the BOI convened in a closed session and, upon secret ballot with a majority vote taken, made the following findings and recommendations:

- the applicant's wrongfully use of THC-9 was not supported by a preponderance of the evidence
- the substantiated derogatory activity resulting in a GOMOR on 31 January 2022 was not supported by a preponderance of the evidence
- the offenses do not warrant the applicant's separation
- the applicant should be retained and the U.S. Army

12. Counsel provided a letter from [REDACTED], an independent forensic consultant. The letter notes the consultant is retired from the Navy Drug Screening Laboratory with over 40 years of experience in forensic

chemistry and is qualified as an expert in forensic chemistry, toxicology, and the identification of drugs in urine in state, federal, and military courts over 200 times.

a. He was asked to review laboratory test results relative to a service member testing positive for 30 ng/ml of the delta-9 THC metabolite in a random urinalysis sample taken on 20 July 2021. The sample was subsequently sent to the Department of Defense (DOD) Drug Testing Laboratory at Fort Meade where testing was completed. The results also indicated there was an unreported level of 13 ng/ml of delta-8 THC present in the sample.

b. The military drug testing program presently identifies two different THC compounds in the urine, delta-8 THC and delta-9 THC. Delta-9 THC is the primary active ingredient of naturally grown marijuana and appears in that product in very high concentrations. Delta-8 THC can be found in naturally grown marijuana, but it appears in relatively negligible concentrations and was not identified by the military program as an unapproved drug until July 2021.

c. The Federal Farm Bill Act of 2018 legalized the growing of hemp products as long as the delta-9 THC content of the hemp product was less than 0.3 percent. Focusing on the new Farm Bill provisions, many product manufacturers decided to extract delta-8 THC from legal hemp products and concentrate the delta-8 THC, and market the delta-8 THC form in edible, drinkable, and vaping products. The presence and concentration of delta-8 THC is not always clearly labeled or understood by non-chemist consumers. The manufacturers also synthetically created the delta-8 THC from cannabidiol (CBD), another marijuana product that is commonly available legally, and then marketed this delta-8 THC form in edible, drinkable, and vaping products.

d. Delta-8 THC products are readily available both on-line and over the counter and are often consumed by individuals without an understanding of the product's contents. There is very little oversight and regulation of the over-the-counter products, so it is not uncommon to find both delta-8 and delta-9 THC in many products. The only way to verify how much of either THC is present is to have a product tested.

e. Since this sample had both delta-8 and delta-9 THC present, it is very possible that the service member was exposed to both forms of THC in a non-intentional or unknowing manner prior to testing positive. The exposure would have likely been within a week or so prior to the urinalysis but it is impossible to say with certainty when the exposure occurred as all THC is quite fat soluble and can linger in the body for longer periods depending on the exposure dose.

f. A review of the laboratory documents also indicates the specimen was received by the laboratory on 22 July 2021 but was not tested until 13 August 2021. This is an approximate 3-week time lag from receipt to testing. It was his understanding that DOD has a requirement to release sample results within 4 to 6 days. Three weeks is an exceptionally long period of time to initiate testing.

g. From an analytical standpoint, the laboratory documentation indicates this sample was tested in a batch that included multiple samples that tested at extremely high levels of delta-8 and delta-9 THC. Samples exceeding 3,600 ng/ml are reported for delta-9 THC in these documents. THC levels in excess of 2,500 ng/ml are also reported for the delta-8 THC category. These levels are extraordinarily high and the processing of these samples required extreme care and diligence. There are multiple pouring and handling phases of the testing where there could possibly be close-proximity contact. If any of these strong samples came in close contact with the service member's sample listed in this report, a close-proximity cross contamination event could have occurred compromising the service member's test result.

h. The level of 30 ng/ml reported for this sample is relatively low. Levels of awareness, impairment, or knowledge of exposure cannot be made from test levels, particularly a low level of this nature. A chemical such as delta-8 or delta-9 THC can enter someone's body without his/her knowledge, especially in light of the large number of lawfully sold products that contain it and especially if the service member has little or no training or knowledge regarding the use of these lawful commercial products.

13. The Headquarters, U.S. Army Maneuver Center of Excellence, memorandum from the Commanding General (Elimination Action – (Applicant)), 14 December 2022, states:

I have reviewed the supporting documentation, board proceedings, chain of command recommendations, and rebuttal matters regarding [Applicant's] elimination. I approve the board's findings and recommendations and direct [Applicant] be retained In the United States Army. This elimination action will be closed.

14. On 14December 2022, counsel petitioned the DASEB for removal of the GOMOR from the applicant's AMHRR.

15. Counsel sent an email inquiry to HRC on 23 January 2023 to determine whether the applicant was considered for promotion during the FY22 and FY23 LTC selection boards.

a. The HRC Military Justice Chief responded the same day, noting "neither the HRC – Office of the Command Judge Advocate, nor the HRC – Officer Personnel Management Directorate (LTC ██████ Career Manager – FAO [Foreign Area Officer] Branch), is the appropriate office/POC [point of contact] to facilitate your request." Counsel was also provided the FOIA/PA webpage to facilitate his request.

b. Counsel responded to HRC the same day, explaining their confusion as the applicant's branch manager previously conveyed that he was not considered for promotion on the above-mentioned boards.

c. The HRC Judge Advocate also responded to applicant's counsel the same day, referring him to the FOIA/PA website.

16. On 25 January 2023, counsel submitted a FOIA request for any documents or other records relating to the applicant's consideration and non-consideration for promotion by the FY22 and FY23 LTC PSBs; any document and/or record relating to the applicant's current promotable status; and any document and/or record relating to the outcome of any promotion board that considered the applicant for promotion to LTC/O-5.

17. On 8 March 2023, the FOIA/PA office responded, stating:

Please see the enclosed documents found responsive to your request. Portions of the record contained privacy-related information about parties other than the applicant. This information may include social security numbers, home addresses telephone numbers, signatures, etc., and this personal information of others has been excised from the documents.

The Memorandum of Instructions and medical documents located within your board file falls under the legal purview of other Initial Denial Authority; and therefore, unable to make a release determination for these documents. Please be advised that I forwarded your request and the medical documents to Headquarters U.S. Army Medical Command – Fort Sam Houston, Texas Office, and the Memorandum of Instructions to the Office of the Administration Assistant to the Secretary of the Army, as a matter under their purview for release determination and direct response to you....

18. On 13 March 2023, counsel requested the applicant's referral to as SSB for consideration for promotion to LTC/O-5 in accordance with Army Regulation 600-8-29 (Officer Promotions), paragraph 6-2, due to excluding the applicant from consideration for promotion to LTC/O-5 by at least two promotion boards for which he was otherwise qualified. His exclusion from consideration and/or selection for promotion constituted both an administrative error and a material unfairness.

19. On 15 March 2023, the applicant submitted his declaration, wherein he noted:

Pursuant to 28 U.S.C. § 1746 [Title 28, U.S. Code, section 1746], I hereby declare as follows:

I, [Applicant], do not believe I was considered for promotion at either the Fiscal Year 2022 nor 2023 Active Component (AC), Lieutenant Colonel (LTC), Promotion Selection Boards (PSB). Four reasons tell me this.

One, LTC [REDACTED] served as my branch manager and informed me over the phone before the FY22 board that I was not eligible for promotion due to the flag for the positive urinalysis. LTC [REDACTED] was and still is my branch manager.

Two, I noticed that I did not have a "my Board File" in which to approve documents for submission to a board. This is standard for everyone competing. Then again, for the FY 23 board, in July 2022, I sent LTC [REDACTED] an email asking what I should do about a board file. My electronic personnel file showed a "my Board File" but again had nothing to approve. LTC [REDACTED] simply stated "If they give you the option, validate the board file." LTC [REDACTED] as the branch manager responsible for preparing me and other Officers for an upcoming board, at best did not know whether or not I was eligible. He is the conduit through which Officers prepare board packets and then click to submit their files via "my Board File." I reviewed nothing simply because the option was not available.

In January 2023, after discussing future possibilities over the phone, my branch manager informed me that I could be eliminated from service after not being promoted. This shocked me since, to the best of my knowledge, I did not compete for the previous and recently completed promotion board. He told me that it should not matter and recommended I apply for a special promotion board. I found this irregular and sought legal counsel on the matter. I asked LTC [REDACTED] via my legal counsel in email, on whether or not I was considered for promotion or not. LTC [REDACTED] did not answer and informed me that "Unfortunately, we are going to have to limit the scope and medium of our conversations." From that point, any request for information on myself had to be routed through the Army Human Resources Command via a Freedom of Information Act (FOIA). Once I did a FOIA request on myself, I received a non-answer.

To summarize: (1) I was informed that I could not compete the first time (FY22 PSB); (2) the electronic review and submission for "my board file" was not available to me for the FY22 nor FY22 PSB; (3) branch manager was not

certain what to do about FY 23 PSB [selection board]; and finally, when I asked formally via email and lawyer (not on the phone), (4) neither branch manager nor FOIA request (on myself) would not answer my question which was and remains: Was I considered for promotion?

I declare under penalty of perjury that the foregoing is true and correct.

20. On 4 April 2023 in Docket Number AR20230003191, the DASEB determined the evidence presented did not establish clearly and convincingly that the GOMOR was untrue or unjust and the overall merits of the case did not warrant removal of the GOMOR from his AMHRR. The DASEB noted:

a. There is insufficient evidence which supports removal of the contested GOMOR. The evidence does not substantiate counsel's contention that the applicant did not wrongfully use THC.

(1) Intent served is not a basis for removal of a GOMOR from the AMHRR.

(2) The applicant did not submit a letter from the issuing authority (IA) stating the GOMOR was untrue, unjust, filed erroneously, or new evidence was being considered.

(3) The applicant did not submit a new investigation (resulting from a challenged inspection, Inspector General, or CID investigation), which concluded the GOMOR was unjust or untrue or that his due process had been violated.

b. The DASEB is not bound by the finding and recommendations of the BOI. Army Regulation 600-8-24 states a BOI is limited to providing a fair and impartial hearing for the purpose of determining whether to retain, with or without reassignment, an officer on active duty or to eliminate an officer.

c. Further, the DASEB, in compliance with Army Regulation 600-37, does not have a policy of removing unfavorable information based on an alleged injustice resulting from non-selection for promotion, passage of time, previous job performance, schooling, or special assignments. Likewise, the DASEB does not have an automatic removal policy based upon implementation of new Army personnel management programs.

d. The governing regulation states the officer who directed the filing of an administrative GOMOR, admonition, or censure may request its revision, alteration, or removal, if a later investigation determines it was untrue or unjust, in whole or in part. The basis for such determination must be provided to the DASEB in sufficient

detail so as to justify the request. There is no evidence that the IA supports this appeal.

e. The IA concluded that he had sufficient evidence upon which to base a decision and the applicant's actions merited issuance of a GOMOR. While the applicant may disagree with the IA's decision to issue the GOMOR, it was within the IA's authority to reprimand him for the misconduct addressed in the GOMOR.

f. The governing regulation permits the issuance of a written reprimand when there is reasonable belief that someone has deviated from the Army Values, personal conduct, or the expectations of a Soldier.

21. The Headquarters, HRC, memorandum (Notification of MRD due to Non-Selection for Promotion), 6 April 2023, states:

The Department of the Army Fiscal Year 2023, Lieutenant Colonel (LTC), Operations (OPS), Operations Support (OS), Force Sustainment (FS), and Information Dominance (ID), PSB, convened pursuant to United States Code (USC) Title 10, Section 611 (a) [Title 10, U.S. Code, section 611(a)], to consider officers for promotion to the next higher grade. The established strength ceiling limited the number of eligible officers that could be selected for promotion; therefore, much to our regret, many highly qualified officers could not be promoted.

Unfortunately, you were not among those selected for promotion by the board. In its comparative judgment of future potential, the board considered such factor as performance reflected by Officer Evaluation Reports, assignments, military and civilian training, and education. Your non-selection reflects the unavoidable fact that not all of our highly professional officer corps can be promoted through each successive grade.

Pursuant to USC Title 10, Section 632 (a) (1) [Title 10, U.S. Code, section 632(a)(1)], you must be removed from the Army no later than the first day of the seventh month from the approval of the promotion board's report. The promotion board's report was approved in March 2023; therefore, you must be separated no later than 1 October 2023, with entitlement to separation pay, if eligible for such pay, according to DoD Financial Management Regulation, Volume 7A Chapter 35. You may request an earlier separation date, which will not affect your eligibility for separation pay but because the MRD is established by Federal statute, it cannot be postponed.

If upon separation from active duty, you prefer to continue affiliation with the U.S. Army by joining the U.S. Army Reserve or National Guard, you must

submit a waiver requesting transfer of your commission as soon as possible but no earlier than 12 months prior to the MRD....

22. The applicant was honorably released from active duty on 1 October 2023 and transferred to the U.S. Army Reserve. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows in:

- item 12c (Net Active Service This Period) – 17 years, 4 months, and 5 days
- item 28 (Narrative Reason for Separation) – Non-Selection, Permanent Promotion

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the applicant's military records, 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. Upon review through counsel of the applicant's petition and available military records, the Board determined the counsel did not demonstrate by a preponderance of evidence that procedural error occurred that was prejudicial to the applicant and by a preponderance of evidence that the contents of the general officer memorandum of reprimand (GOMOR) are substantially incorrect and support removal. The Board found insufficient evidence to support the applicant counsel's contentions for reinstatement to active duty in the rank of major (MAJ) with back pay and allowances or consideration for promotion to lieutenant colonel (LTC) by a special selection board (SSB).

2. Careful consideration was given by the Board of the applicant's 17 plus years of service, his officer evaluations throughout his military career. However, the Board found the applicant counsel's request is without merit and the available evidence does not clearly indicate that the conditions for referring the applicant to an SSB was met. During deliberation, the Board noted that official promotion and selection boards select members for promotion based upon their performance and potential; the Board does not. The Board may refer records to appear before a special selection board (SSB) for promotion consideration when there is a clear error or injustice. Evidence shows the applicant tested positive for THC prior to changing duty stations, counsel did not provide sufficient evidence to show there is an error nor did the applicant provide sufficient proof supporting the wrongful allegation of testing positive for drug use. Based on the preponderance of evidence, the Board denied relief.

3. Removal of a GOMOR is generally not warranted unless it is factually incorrect. The Board determined that the applicant and her counsel have not demonstrated by

a preponderance of evidence that any procedural error occurred that was prejudicial to the applicant, or that the applicant and her counsel demonstrated by a preponderance of evidence that the contents of the GOMOR are substantially incorrect to support removal. Furthermore, 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.

4. 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:

<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.

4/8/2024

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. Army Regulation 15-185 (Army Board for Correction of Military Records) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. The ABCMR will decide cases on the evidence of record; it is not an investigative body. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of evidence. The ABCMR may, in its discretion, hold a hearing (sometimes referred to as an evidentiary hearing or an administrative hearing) or request additional evidence or opinions. 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.

2. Army Regulation 600-85 (The Army Substance Abuse Program) prescribes the policies and procedures needed to implement, operate, and evaluate the Alcohol and Drug Abuse Prevention and Control Program (ADAPCP).

a. Paragraph 3-4 provides that command identification occurs when a commander observes, suspects, or otherwise becomes aware of an individual whose job performance, social conduct, interpersonal relations, physical fitness, or health appears to be adversely affected because of abuse of alcohol or other drugs (apparent or suspected). When abusers or suspected abusers are identified, they will be interviewed by their unit commander or designated representative. If appropriate, they will be referred to the ADAPCP for an initial screening interview.

b. Paragraph 3-5 provides that when a service member has a positive urinalysis as a result of drug screen testing, mandatory referral for ADAPCP screening and medical evaluation is required to determine whether the positive urinalysis is the result of administrative error, medically prescribed use of the substance, or actual drug abuse.

3. Manual for Courts-Martial, Article 112a (Wrongful Use, Possession, etc., of Controlled Substances), Uniform Code of Military Justice, provides that:

a. Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the forces a substance described in subsection (b) shall be punished as a court-martial may direct.

b. Wrongful use of controlled substance:

(1) that the accused used a controlled substance; and

(2) that the use by the accused was wrongful.

4. Army Regulation 600-8-29 (Officer Promotions) prescribes the officer promotion function of military human resources support operations. It provides for career progression based upon recognition of an officer's potential to serve in positions of increased responsibility. Additionally, it precludes promoting officers who are not eligible or become disqualified, thus providing an equitable system for all officers.

a. Paragraph 2-7 (Promotion Eligibility) states captains, MAJs, and LTCs must serve at least 3 years of time in grade to be considered for promotion.

b. Chapter 6 (Special Selection Boards) states an SSB may be convened to consider or reconsider commissioned officers for promotion when Headquarters, Department of the Army, determines that one or more of the following circumstances exists:

(1) Administrative error. An officer was not considered from in or above the promotion zone by a regularly scheduled board because of an administrative error; or

(2) Material Unfairness. The action of the promotion board that considered the officer from in or above the promotion zone was contrary to law in a material to the division of the board or involved material error or fact or material administrative

error; or the board that considered the officer from in or above the promotion zone did not have before it for its consideration material information.

5. Army Regulation 600-8-24 (Officer Transfers and Discharges) prescribes the officer transfers from active duty to the Reserve Component and discharge functions for all officers on active duty for 30 days or more. It provides principles of support, standards of service, and policies to support officer transfers and discharges.

a. Paragraph 4-6 (Board of Inquiry) states the BOI's purpose is to give the officer a fair and impartial hearing determining if the officer will be retained in the Army.

b. Paragraph 4-15b(3) (Conclusion of Hearing) states the board may not recommend removal of documents such as OERs, DA Forms 2627 (Record of Proceedings under Article 15, Uniform Code of Military Justice), and memoranda of reprimand from an officer's AMHRR. The board recommendations are limited to either retention (with or without reassignment) or elimination.

d. Paragraph 4-18 (Elimination of Non-Probationary Officer) states elimination action may be initiated against an officer who is identified by one or more of the reasons outlined in paragraph 4-2.

e. Paragraph 5-6 (Separation of Commissioned Officers and Chief Warrant Officers Who Are Twice Non-Selected for Active Duty List Promotion by a Headquarters, Department of the Army, Centralized Board) states commissioned officers on the Active Duty List twice non-selected for promotion to the grade of LTC will be involuntarily released or discharged.

6. 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 AMHRR.

a. An administrative memorandum of reprimand may be issued by an individual's commander, by superiors in the chain of command, and by any general officer or officer exercising general court-martial jurisdiction over the Soldier. The memorandum must be referred to the recipient and the referral must include and list applicable portions of investigations, reports, or other documents that serve as a basis for the reprimand. Statements or other evidence furnished by the recipient must be reviewed and considered before a filing determination is made.

b. A memorandum of reprimand may be filed in a Soldier's OMPF only upon the order of a general officer-level authority and is to be filed in the performance folder. The direction for filing is to be contained in an endorsement or addendum to the

memorandum. If the reprimand is to be filed in the OMPF, the recipient's submissions are to be attached. Once filed in the OMPF, the reprimand and associated documents are permanent unless removed in accordance with chapter 7 (Appeals).

c. Paragraph 7-2 (Policies and Standards) states that once an official document has been properly filed in the OMPF, it is presumed to be administratively correct and to have been filed pursuant to an objective decision by competent authority. Thereafter, the burden of proof rests with the individual concerned to provide evidence of a clear and convincing nature that the document is untrue or unjust, in whole or in part, thereby warranting its alteration or removal from the OMPF.

d. Paragraph 7-3c (Filing Authority to Redress Actions) states an officer who directed filing an administrative memorandum of reprimand, admonition, or censure in the AMHRR may request its revision, alteration, or removal, if evidence or information indicates the basis for the adverse action was untrue or unjust, in whole or in part. An officer who directed such a filing must provide a copy of the new evidence or information to the DASEB to justify the request.

7. Army Regulation 600-8-104 (Army Military Human Resource Records Management) prescribes Army policy for the creation, utilization, administration, maintenance, and disposition of the AMHRR. The AMHRR includes, but is not limited to the OMPF, finance-related documents, and non-service related documents deemed necessary to store by the Army.

a. Paragraph 3-6 (Authority for Filing or Removing Documents in the AMHRR Folders) provides that once a document is properly filed in the AMHRR, the document will not be removed from the record unless directed by the ABCMR or another authorized agency.

b. Appendix B (Documents Required for Filing in the AMHRR and/or Interactive Personnel Electronic Records Management System) shows memorandums of reprimand, censure, and admonition are filed in accordance with Army Regulation 600-37.

//NOTHING FOLLOWS//