

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 14 November 2023

DOCKET NUMBER: AR20230006184

APPLICANT REQUESTS: in effect,

- placed on the retired list in his highest grade held of sergeant (SGT)/E-5
- a personal appearance before the Board via video or telephonically

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

- DD Form 149 (Application for Correction of Military Record)
- Memorandum of statement in his own behalf during the Article 15, Uniform Code of Military Justice
- Memorandum to the European Command Commandant
- Character references provided during the Article 15, UCMJ:
 - Colonel (COL) M- K-
 - Major (MAJ) D- B-
 - MAJ M- K-
 - Staff Sergeant (SSG) K- B-

FACTS:

1. The applicant states in effect, he served faithfully and honorably as an SGT in the U.S. Army for over 4-years. He was wrongfully accused and issued a field grade Article 15, despite offering evidence rebutting each accusation for violations of Article 92, UCMJ.
2. A review of the applicant's service record shows:
 - a. The applicant enlisted in the U.S. Army Reserve (USAR) in the Delayed Entry Program (DEP) on 11 March 2014. He was discharged from the DEP and enlisted in the Regular Army (RA) on 11 August 2014.
 - b. The applicant reenlisted in the RA on 3 October 2017.

c. On 27 May 2018, Orders Number 147-018, issued by Headquarters (HQs), Task Force Southeast 1st Security Force Assistance Brigade, the applicant was promoted to the rank of SGT/E-5, effective on with a date of rank of 1 June 2018.

d. DA Form 2166-9-1 (Noncommissioned Officer Evaluation Report (NCOER) (SGT) shows during rating period of 1 June through 15 November 2018, the applicant's rater rated his overall performance as met standard and stated he accepted any challenge and continuously demonstrated the ability to achieve excellent results. His senior rater rated his overall potential as highly qualified and stated he was in the top 25 percent of the SGTs rated in 17-years of service. His analytic capabilities and leadership qualities quickly earned the trust of superiors.

e. DA Form 1059 (Service School Academic Evaluation Report) for the Basic Leaders Course during the period of 26 August through 20 September 2019 shows the applicant was selected as the Commandant's List graduate. He was a dynamic and energetic student who always stood out amongst his peers.

f. DA Form 2166-9-1 shows during the rating period of 16 November 2018 through 15 November 2019, the applicant's rater rated his overall performance as met standard and stated he was an enthusiastic NCO dedicated to service, he promoted unity of effort and support to his fellow Soldiers. He consistently demonstrated leadership and management skills. His senior rater rated his overall potential as qualified and stated he was in the top third of the SGTs served with in 15-years of service. He should be promoted with his peers.

g. DA Form 2166-9-1 shows during the rating period of 16 November 2019 through 15 November 2020, the applicant's rater rated his overall performance as met minimum standard with regards to assigned tasks as an Army Intelligence Analyst. His performance was severely impacted due to his lapse in judgement, and he failed to uphold the Army Values. His senior rater rated his overall potential as qualified and stated he did a disappointing job and although he had untapped potential, he needed further development. He had shown latent potential and intellect but required excessive detailed instruction and supervision.

h. On 9 December 2021, the applicant accepted non-judicial punishment under the provisions of Article 15, UCMJ, for four specifications of failure to obey a lawful order by violating a Military Protective Order. His punishment included reduction to the rank of specialist (SPC)/E-4; forfeiture of pay for 2-months suspended if not vacated before 7 June 2022. The investigative report is attached for further review.

i. DA Form 2166-9-1 shows during the rating period of 17 March through 9 December 2021, the applicant's rater rated his overall performance as did not meet standard and stated he ranked among the bottom 10 percent of the Soldiers he worked

with in 13-years and he resisted suggestions for improvement and actively worked against the orders of his superiors. His senior rater rated his overall potential as not qualified and stated he did not pose the potential for promotion and ranked at the bottom 10 percent of the NCOs worked with in 21-years of service. He did not perform to the level expected of an NCO and was frequently uncooperative and insubordinate.

j. On 25 February 2022, the informal Physical Evaluation Board (PEB) found the applicant physically unfit for retention and recommended he be placed on the Temporary Disability Retired List (TDRL) with 70 percent disability due to major depressive disorder, recurrent, moderate. The applicant concurred with the findings and recommendation of the PEB and waived a formal hearing.

k. On 21 March 2022, Orders Number 080-0002, issued by the Installation Management Command – Europe Stuttgart Transition Center, the applicant was placed on the TRDL, effective 8 May 2022, in the rank of SPC/E-4.

l. The applicant was honorably retired from active duty on 7 May 2022 and assigned to the USAR Control Group (Retired Reserve). DD Form 214 (Certificate of Release or Discharge from Active Duty) shows the applicant completed 7-years, 8-months and 27-days of active service. It also shows in items:

- 4a (Grade, Rate, or Rank): SPC
- 4b (Pay Grade): E4
- 12i (Effective Date of Pay Grade): 9 December 2021

3. The applicant provides documents submitted during his Article 15, UCMJ:

a. Memorandum to the commander dated 8 December 2021 where he explained his side of the alleged violations, he stated:

(1) On 28 July 2021, while adhering to the guidelines provided to him, he and an escort went to celebrate and express his continued support for C- L- when she was accepted into a nursing program. Initially, the guidance that was sent for him regarding visitation and interactions with C- L- was vague and continuously changed. He was informed that if an escort was present the two could meet to discuss matters pertaining to their children, a move, finances, etc.

(2) C- L- consistently violated the Military Protective Order by communicating with the applicant. The applicant brought this to the attention of his chain of command; however, they did nothing to prevent her actions. The two were communicating via e-mails, wherein C- L- stated she left the applicant's belongings outside the apartment for him to pick up. He then went to the apartment to retrieve the items after he consulted legal counsel. While at the apartment, he used his key fob to access a vehicle which

was titled in his name. After he was apprehended, he was told to report to the Commandant's office, during the meeting the applicant inquired if anything could be done regarding C- L- using the protective order as a weapon instead of the intended purpose of protecting a family member. He was given a new Military Protective Order.

(3) On 13 July, the applicant texted C- L- to inform her she had some important mail and inquired if they could meet for her to obtain the mail. She had not replied to the text; however, the applicant did see her leaving the Commandant's office.

(4) On 14 July, the applicant discovered there were some discrepancies in the Military Protective Orders that were dated 25 May and 9 July 2021. The protective orders were missing the commander's initials in several places. After he discovered the discrepancies, he reported it to his first line leader.

He requested the commander consider this information in deciding if he should be punished.

b. Memorandum to the commander, Subject: Letter to the HQs European Command Commandant from SGT J- L- (the applicant) dated 8 December 2021 that was to serve with his defense against the multiple violations of Article 92. He hoped his statements, his letter, documents provided and testimony of those who elected to speak in his behalf be taken into consideration during the determination.

He had a passion for music and hoped to be in musical and film production and he graduated from a community college as magna cum laude. Then after varying hardships, he joined the Army in 2014. He had a passion for being a NCO and he prided himself on unwavering care for Soldiers, seniors, peers and subordinates alike. By finding the best courses of actions on his own he learned the importance of understanding and accurately interpreting the Army and Department of Defense regulations. He understood that the unwillingness to fail his Soldiers can often come across as cocky or contentious at times. A great NCO leaves the Army better than what they had when they joined.

He admitted his actions of the previous year seemed contrary to his statements. Over the past year, he had to confront his short comings and self-doubt more than any other adversary. He had learned there were qualities a leader must possess; dedication, determination and desperation. The words of the NCO Creed are not just words of accountability for one's own actions, it is also a charge to every NCO to exemplify personal courage and confidence to hold those of equal and greater rank accountable for their actions as well.

He implored the commander to consider the facts he provided when deciding whether he in fact violated Article 92 or not. If he was not convinced, the applicant did not

commit the offenses. The applicant asked him to consider his intentions when deciding the severity of punishment.

c. Character reference from COL M- K- stated he served with the applicant for 3-years. During this time, he had the opportunity to observe the applicant's warrior ethos, professionalism and ability to lead. The applicant was one of the few people who understood the importance the command played and he consistently pushed himself and those around him to deliver a four star analysis and products for senior leaders. He coached others to improve the products and analysis. He delivered exceptional results and he consistently raised the performance of those around him. He took responsibility of the team's short comings and never made excuses. Though he heard the applicant was having some hard time, but he was not aware of the specifics or allegations against him but it was understood that he must be held accountable for his actions and expect appropriate consequences. He requested the deciding authority assess the whole person in the context of the circumstances of the proceedings.

d. Character reference from MAJ D- B- stated he worked with the applicant for 60-days and he had always been up front and honest while displaying a high degree of integrity and an outstanding team player. He had the upmost trust in the applicant's character as an individual and a Soldier.

e. Character reference from MAJ M- K- stated she had known the applicant for 2-years and she provided mentorship to him as it was lacking from his chain of command especially when he was struggling with mental health issues. She was the one who spoke with him when he had suicidal ideations though members of his chain of commander were present when he made the comments. She believed the applicant displayed remarkably poor judgement in his actions. However, she believed his circumstances as well as prior demonstrated character argue strongly in favor of leniency in his case. He struggled with mental health problems for several years which increased in 2020 which should be taken into consideration regarding his case. She believed his underlying character was solid despite his display of poor judgement and impulsivity and with the right treatment for his mental health he could remain on the right path.

f. Character reference from SSG K- B- stated she had known the applicant for 60-days during which time he was a stellar Soldier. He had shown to be a competent Soldier and he was willing to stay and help in any way. He took more responsibility as the clinic was short staffed.

BOARD DISCUSSION:

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 contentions, the military record, and regulatory guidance. After reviewing the applicant's record, the Board agreed that prior to issuance of the Article 15, and, as supported by letters of reference, that the applicant consistently displayed warrior ethos, professionalism and an ability to lead. The Board further agreed that it was more likely than not, that the applicant had medical issues that negatively impacted his judgement. Evidence of record reveals that the applicant struggled with mental health problems for several years which should be taken into consideration prior to his discharge. Based on applicable regulatory guidance and the lack of evidence showing that he was afforded consideration by the Army Grade Determination Review Board, the Board agreed that a recommendation for partial relief was warranted.

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 partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned by referring his case to the to the AGDRB for consideration of his request.

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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. Army Regulation (AR) 15-80 (Army Grade Determination Review Board and Grade Determinations), establishes policies, procedures, and responsibilities of the Army Grade Determination Review Board (AGDRB) and other organizations delegated authority to make grade determinations on behalf of the Secretary of the Army (SA).

a. Paragraph 2-3 (Automatic Grade Determination), most grade determinations do not require action by the AGDRB or the exercise of discretion by other authorities because they are automatic grade determination that result from the operation of law and this regulation. Title 10 United States Code (USC), section 7341 states an enlisted Soldier will normally retire at the grade held on the date of retirement, unless service at that grade was deemed unsatisfactory, or failed to meet statutory time in grade requirements. Automatic grade determination does not include cases where reversion to a lower grade was expressly for prejudice or cause, owing to misconduct or punishment to Article 15, Uniform Code of Military Justice (UCMJ) or court-martial.

b. Paragraph 2-4 (Grade Determination Considerations), the AGDRB will consider each case on its own merits. Generally, determinations will be based on the Soldier's overall service in the grade in question, either on active duty or other service qualifying the Soldier for retirement, receipt of retired pay, or separation for physical disability. Circumstances pertinent to whether such service is found satisfactory include, but not limited to:

- medical reason, which may have been a contributing or decisive factor in a reduction in grade, misconduct, or substandard performance
- compassionate circumstances
- length of otherwise satisfactory service in the grade in question, before and after the misconduct

c. Paragraph 2-5 (Unsatisfactory Service), service in the highest grade or an intermediate grade normally will be considered to have been unsatisfactory when:

- reversion to a lower grade was:
 - expressly for prejudice or cause
 - owing to misconduct
 - caused by non-judicial punishment pursuant to UCMJ, Article 15
 - result of the sentence of a court-martial
- sufficient unfavorable information to establish service in the grade in question was unsatisfactory

d. Paragraph 3-1, enlisted Soldiers will usually retire in the grade held on the day before their placement on the retired list and are not subject to discretionary grade determination, except for disability separations. While enlisted Soldiers may be reduced in grade by courts-martial, non-judicial punishment, administrative separations proceedings or inefficiency boards, enlisted grade determinations cannot result in reduction of an enlisted Soldier's current grade. Enlisted grade determinations will result in either a decision to retain in the current grade or to advance to a higher grade in which satisfactorily service or to which advancement is otherwise provided by law. Enlisted Soldiers who are determined not to have served satisfactorily in the highest grade held and who first became members after 7 September 1980 and therefore would normally fall under the high 36-month average for calculation of retired pay, do not get the benefit of that averaging if reduced in grade as the result of court-martial, non-judicial punishment or an adverse administrative action.

e. Paragraph 3-3 (Physical Disability Cases), an enlisted Soldier being processed for physical disability separation or disability retirement, not currently serving in the highest grade served, will be referred to the AGDRB for a grade determination, unless the Soldier is entitled to a higher or equal grade by operation of law.

2. Title 10 USC, section 1372 (Grade on retirement for physical disability: members of armed forces), unless entitled to a higher retired grade under some other provision of law, any member of an armed force who is retired for physical disability or whose name is placed on the temporary disability retired list is entitled to the grade equivalent to the highest of the grade or rank in which he is serving on the date when his name is placed on the temporary disability retired list or, if his name was not carried on that list, on the date when he is retired.

3. AR 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//