

IN THE CASE OF: [REDACTED]

BOARD DATE: 3 January 2024

DOCKET NUMBER: AR20230006827

APPLICANT REQUESTS:

- removal of his name from the title block of the U.S. Army Criminal Investigation Command (CID) Law Enforcement Report (LER), 2 March 2020
- removal of his name from the U.S. Army Crime Records Center (CRC) database
- a personal appearance 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 (Applicant's Legal Brief in Support of Removal of Titling Decision), undated, with enclosures –
 - Applicant's Personal Affidavit (listed but not provided)
 - Fort Campbell CID Office Memorandum (LER – Serious Incident Report (SIR) (Category 3)/Final), 19 November 2019
 - Fort Campbell CID Office Memorandum (LER – SIR (Category 3)/1st Final Supplemental), 2 March 2020
 - DA Form 4833 (Commander's Report of Disciplinary or Administrative Action), 4 October 2021
 - CID/CRC Letter, 4 January 2023

FACTS:

1. The applicant states he requests removal of his name as the subject of the CID Report of Investigation because a court-martial found him not guilty of the offenses and he is innocent of the allegations.

2. Counsel states this is a case involving a U.S. Army service member who was unjustly and erroneously accused of offenses under the Uniform Code of Military Justice. The applicant seeks to remedy this injustice through the Army Board for Correction of Military Records (ABCMR). The applicant was found not guilty at trial before a courts-martial panel of enlisted members.

a. The applicant is appealing CID's decision to the Board based on three errors: (1) the underlying basis of the investigation was procedurally defective at the time of the investigation; (2) the adverse information is an unfair portrayal of his character at the time of the allegation; and (3) filing of the adverse titling is inequitable now. On behalf of the applicant, he requests removal of all negative information; the derogatory information has served its purpose.

b. The applicant was erroneously titled by CID and denies all allegations. He was damaged by the false allegations, lost opportunity for promotion, and had to fight to restore his military career.

c. There was a procedural defect in this case and the applicant should not have been titled under the Uniform Code of Military Justice. The Manual for Courts-Martial is the authority that describes the conditions under which a service member is charged with committing a crime in the U.S. Army. There is a requirement for a finding of a preponderance of the evidence.

d. There was also substantive error because there was insufficient proof the applicant committed an offense. He was never found guilty of an offense and the charges are still unsubstantiated. He admitted to making mistakes but did not act with criminal intent. He was honest and worked with his chain of command, but they did not reciprocate. This case should have been resolved through counseling and retraining. He was given due process in responding to the charges but was not able to dispute the allegations due to the extended time between the events and the allegation.

e. Finally, the adverse information does not serve a further purpose. The events that took place are no longer relevant as the applicant has lived an exemplary manner. There are no valid reasons for leaving this negative action in place.

3. The applicant was serving in the Regular Army in the rank of sergeant when he became the subject of a 2019 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 on or about 16-17 February 2019:

4. The Fort Campbell CID Office memorandum (LER – SIR (Category 3)/1st Final Supplemental), 2 March 2020, names the applicant as the subject/suspect for the offenses of rape and sexual assault on 16-17 February 2019.

a. The report summary states:

(1) Captain (Redacted), Headquarters and Headquarters Company, 2nd Battalion, 502nd Infantry Regiment, 2nd Brigade Combat Team, Fort Campbell, KY,

notified CID that Private (PV2) (Redacted) reported she was sexually assaulted by a male Soldier she only knew as "██████████"

(2) PV2 (Redacted) stated she consumed alcohol with Specialist (SPC) (Redacted) and the applicant, both in Company D, 1st Battalion, 327th Infantry Regiment, 1st Brigade Combat Team, Fort Campbell, KY, and a third unknown male Soldier in the 3rd Brigade Combat Team barracks. PV2 (Redacted) stated (Redacted) and removed her clothing in the common area of the barracks room. PV2 (Redacted) stated she was moved into a room, at which time the applicant closed the door and performed sexual acts upon her despite her objections. PV2 (Redacted) further stated SPC (Redacted) later physically assaulted her in order to keep her from reporting the incident.

(3) PV2 (Redacted) waived his rights and stated he attended a party in the applicant's barracks room with PV2 (Redacted) and SPC (Redacted), Company D, 1st Battalion, 327th Infantry Regiment, 1st Brigade Combat Team, Fort Campbell, KY, wherein they socialized and consumed alcoholic beverages in the common area. PV2 (Redacted) stated PV2 (Redacted) became (redacted) and partially undressed herself and entered the applicant's barracks bedroom with the applicant. PV2 (Redacted) stated he gave the applicant "permission" to engage in sexual acts with PV2 (Redacted), and several minutes later the applicant came out and stated PV2 (Redacted) was (redacted). PV2 (Redacted) stated he and SPC (Redacted) attempted to give PV2 (Redacted) water when the applicant entered the room and told everyone to leave. PV2 (Redacted) stated upon arrival to PV2 (Redacted's) barracks room, he slapped PV2 (Redacted) in a sexual manner upon her request.

(4) The applicant waived his rights and stated he engaged in sexual acts with PV2 (Redacted). The applicant stated that after an unspecified amount of time, he realized PV2 (Redacted) was (redacted), at which time he departed the room.

(5) SPC (Redacted) stated he observed flirtatious conversation/interaction between the applicant and PV2 (Redacted) before they went into the applicant's room together. SPC (Redacted) further related he heard moaning coming from the room and the applicant exited a few minutes later.

(6) The charge-of-quarters personnel were interviewed, who stated PV2 (Redacted) and Private First Class (PFC) (Redacted) came to their barracks after the incident and (redacted). Multiple witnesses were interviewed who corroborated the victim's statement.

(7) The applicant was reinterviewed wherein he invoked his rights and requested a legal counsel.

(8) PFC (Redacted) was reinterviewed wherein he waived his rights and stated he told SPC (Redacted) the applicant and PV2 (Redacted) to tell anyone who asked that he went into the room with PV2 (Redacted).

(9) SPC (Redacted) was advised of his rights, which he waived, and stated he told his chain of command that PFC (Redacted) went into the room with PV2 (Redacted) upon request of the applicant and PFC (Redacted). SPC (Redacted) related that PFC (Redacted) stated the applicant told him he "went too far" with PV2 (Redacted) in the room.

b. On 23 October 2019, trial counsel opined that probable cause did not exist to believe the applicant committed the offense of rape, as at least one of the elements was not met; however, trial counsel opined that probable cause existed to believe the applicant committed the offense of sexual assault. There was sufficient evidence to provide to the command for consideration of action.

5. The DA Form 4833, 25 March 2021, lists the applicant as the offender for the offenses of rape and sexual assault. The report shows the commander's decision date as 25 March 2021 and referred the action to a general court-martial. Block 4 (Action Taken) shows the general court-martial found the applicant not guilty of the offenses of rape and sexual assault. Block 10a (Commander's Remarks) states: "[Applicant] was found Not Guilty by Courts Martial. Finding attached." (Note: The general court-martial orders were not attached to the DA Form 4833 and are not available for review.)

6. The applicant was promoted to the rank/grade of staff sergeant/E-6 effective 1 August 2021.

7. The CID letter, 4 January 2023, notified the applicant that his request to correct information from the files of the CID/CRC was denied. He was instructed that if he disagreed with this denial, he may appeal to the ABCMR.

8. The applicant is currently serving in the rank/grade of staff sergeant/E-6 at Fort Drum, NY.

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 carefully through counsel 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 applicant, nor his

counsel provided evidence that clearly exonerates him or shows that there was a clear injustice. The Board found the CID Report shows there was probable cause with credible information regarding the applicant's involvement in the alleged offense. As a result, he was properly titled. The Board recognized that the applicant was found not guilty, however the Board found the titling action appropriate. Based on this the Board determined there was insufficient evidence to delete his name from the title block of the U.S. Army Criminal Investigation Command (CID) Law Enforcement Report (LER), dated 2 March 2020 and his name from the U.S. Army Crime Records Center (CRC) database. The Board denied relief.

2. 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).

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

BOARD VOTE:

<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.

1/10/2024
X 
CHAIRPERSON 

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 regulation provides that 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 the evidence. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing. 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 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. Department of Defense (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 the 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 Defense Central Index of Investigations (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//