

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 16 January 2024

DOCKET NUMBER: AR20230008342

APPLICANT REQUESTS: amendment of Law Enforcement Report (LER), xxxxx-2019-CID043-xxxxxx-xx to show the offense of wrongful use of codeine (Article 112a, Uniform Code of Military Justice (UCMJ)) be unfounded.

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel Statement
- Memorandum, subject: Staff Sergeant (SSG) [Applicant], Headquarters and Headquarters Company, 35th Signal Brigade (Theater Tactical), Fort Gordon, GA 30905 (Battalion Commander's Synopsis)
- DA Form 2627-2 (Record of Supplementary Action Under Article 15, UCMJ)
- Memorandum, subject: Enlisted Separation Action – SSG [Applicant]
- Memorandum, subject: Request to Amend the Record of Investigation of [Applicant]
- Denial Letter from Criminal Investigation Division (CID)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. 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. The applicant, through counsel, states the applicant was the subject of a criminal investigation. The investigation was conducted in response to a positive urinalysis test for codeine during a routine urinalysis in September 2018. Army CID initiated an investigation and concluded that substantive evidence existed to title the applicant with wrongful use of codeine and wrongful use of codeine detected by urinalysis.

a. As a result, a field grade Article 15 was initiated against the applicant in May 2019. Additionally, the applicant faced an administrative separation board in December 2019. During the board proceedings, defense counsel learned there was evidence made available to the command that was not provided to counsel. Defense counsel and

the applicant used the open-door policy to meet with the battalion commander, who set aside the Article 15. The separation board found the applicant did not commit misconduct and therefore was retained on active duty.

b. The applicant's mother indicates the applicant was in serious pain and her mother gave her Tylenol 3, unaware that it was illegal for her daughter to take the medicine without a prescription. She did not tell her daughter at the time. The applicant does not dispute the results of the urinalysis but contends there must be probable cause to believe that the offense was committed.

c. In December 2022, the applicant requested, through CID, that her name be removed from the subject block and to change the status from founded to unfounded for the violation. CID denied her request in February 2023.

d. The applicant's record should be corrected based on a lack of probable cause to suppose the offense of Article 112a.

3. The applicant enlisted in the Regular Army on 25 February 2010.

4. The LER, dated 13 March 2019 shows:

a. On 3 January 2019, CID was notified by the installation drug testing coordinator, Army Substance Abuse Program (ASAP), Fort Gordon, GA that the applicant tested positive for a controlled substance (Codeine) on a unit urinalysis.

b. The applicant denied knowingly using codeine.

c. The applicant's mother admitted she gave the applicant one tablet of her prescription of Tylenol 3 without knowing it was illegal for the applicant.

d. The trial counsel opined probable cause existed to believe the applicant committed the offense of wrongful use of codeine.

5. The applicant provides:

a. A memorandum from her battalion commander, dated 6 January 2020, which shows he granted an open door requested by the applicant's counsel. At the board, the defense counsel learned he considered evidence regarding the urinalysis results that was not presented to the defense counsel/applicant. Defense counsel countered that evidence arguing that the applicant had to knowingly take the substance in order to be found guilty at the Article 15.

b. A record of supplementary action under Article 15, UCMJ, dated 9 January 2020, which shows the battalion commander set aside the punishment of written reprimand imposed on 23 May 2019.

c. A memorandum from the separation authority, dated 5 March 2020, which shows after careful consideration of the applicant's case and the board proceedings, he approved the findings and recommendations of the board. The applicant is retained on active duty.

d. A memorandum from the applicant to CID, dated 2 December 2022, which shows the applicant requested an amendment to the LER in which she was a subject.

e. A denial letter from CID to the applicant, date 7 February 2023, which shows:

(1) After a review of the LER was completed in accordance with Public Law 116-283 (William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021), section 545 (Removal of Personally Identifying and Other Information of Certain Persons from Investigative Reports, The Department of Defense Central Index of Investigations, and Other Records and Databases), it has been concluded that the applicant's request is denied.

(2) This partial denial is made on behalf of the Director, CID.

#### BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The applicant was the subject of a criminal investigation that was conducted in response to a positive urinalysis test for codeine during a routine urinalysis in September 2018. CID and trial counsel opined probable cause existed to believe the applicant committed the offense of wrongful use of codeine. As a result, the applicant was titled. The decision to title the applicant is an investigative determination that is independent of whether subsequent judicial, nonjudicial, or administrative action is taken against the individual. Furthermore, the Board acknowledged that the administrative separation board found the applicant did not commit misconduct and therefore was retained on active duty. However, the purpose of the administrative separation board was to give the applicant a fair and impartial hearing to determine if he should be retained in or separated from the Army. The administrative separation board recommendations were limited to either retention or elimination and its findings had no bearing on whether CID found probable cause for the titling action.

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.

[Redacted]

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[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. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Public Law 116-283 (known and cited as the National Defense Authorization Act, Fiscal Year 2021, section 545 (Removal of Personally Identifying and Other Information of Certain Persons from Investigation Reports, the DCII, 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, PII, 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, PII, 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 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 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.

3. Department of Defense (DOD) Instruction 5505.07 (Titling and Indexing Subjects of Criminal Investigations in the DOD), 28 February 2018, establishes policy, assigns responsibilities, and provides procedures for a uniform standard for titling and indexing subjects of criminal investigations by the DOD.

a. Paragraph 1.2a states DOD components authorized to conduct criminal investigations, as outlined in DOD Instruction 5505.16 (Investigations by DOD Components), 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. Indexing in the Defense Central Investigations Index (DCII) may be delayed until the conclusion of the investigation due to operational security.

b. Paragraph 1.2b states victims and incidentals associated with criminal investigations can be titled and indexed.

c. Paragraph 1.2c states titling and indexing are administrative procedures and will not imply any degree of guilt or innocence.

d. Paragraph 1.2d states once the subject of a criminal investigation is indexed in the DCII, the information will remain in the DCII, even if the subject is found not guilty of the offense under investigation, unless there is mistaken identity, or it is later determined no credible information existed at the time of titling and indexing.

e. Paragraph 1.2e states if a subject's information requires expungement from or correction in the DCII, DOD components will remove the information as soon as possible.

f. Paragraph 1.2f states judicial or adverse administrative actions will not be taken based solely on the existence of a titling or indexing record in a criminal investigation.

g. Paragraph 3.1 states 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.

h. Paragraph 3.2 states a subject who believes he/she was incorrectly indexed, as outlined in paragraph 1.2.d., may appeal to the DOD component head to obtain a review of the decision.

i. Paragraph 3.3 states when reviewing the appropriateness of a titling or indexing decision, the reviewing official will only consider the investigative information at the time of the decision to determine if the decision was made in accordance with paragraph 1.2.a.

j. Paragraph 3.4 states DOD components that conduct criminal investigations will make appropriate corrections or expungements to criminal investigative reports or the DCII as soon as possible.

4. DOD Instruction 5505.11 (Fingerprint Card and Final Disposition Report Submission Requirements) 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 FBI for inclusion in the NCIC 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 FBI, 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.

5. Army Regulation (AR) 190-45 (Law Enforcement Reporting) establishes policies and procedures for offense and serious-incident reporting within the Army; for reporting to the DOD and the Department of Justice, as appropriate; and for participating in the FBI NCIC, Department of Justice's Criminal Justice Information System, National Law Enforcement Telecommunications System, and State criminal justice systems.

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 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 4-3a states an incident will not be reported as a founded offense unless adequately substantiated by a police investigation. A person or entity will be reported as the subject of an offense in the LER when credible information exists that the person or entity has committed a criminal offense. The decision to title a person is an operational, rather than a legal, determination. The act of titling and indexing does not, in and of itself, connote any degree of guilt or innocence; rather, it ensures that information in a Report of Investigation (ROI) can be retrieved at some future time for law enforcement and security purposes. Judicial or adverse administrative actions will not be based solely on the listing of an individual or legal entity as a subject in the LER.

c. Paragraph 4-3d states that when investigative activity identifies a subject, all facts of the case must be considered. When a person, corporation, or other legal entity is entered in the "subject" block of the LER, their identity is recorded in Department of the Army automated systems and the DCII. Once entered into the DCII, the record can only be removed in cases of mistaken identity or if an error was made in applying the credible information standard at the time of listing the entity as a subject of the report. It is emphasized that the credible information error must occur at the time of listing the entity as the subject of the LER rather than subsequent investigation determining that the LER is unfounded. This policy is consistent with DOD reporting requirements. The Director, CRC, enters individuals from the LER into the DCII.

d. Paragraph 4-7 (DA Form 4833) states the DA Form 4833 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.

//NOTHING FOLLOWS//