

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 8 January 2025

DOCKET NUMBER: AR20230009034

APPLICANT REQUESTS:

- determination that the servicemember (SM) passed in the line of duty (LOD) and vacating U.S. Army Human Resources Command's (AHRC) determination the SM died not in the LOD
- a video/telephonic appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Attorney's LOD Appeal
- LOD Investigation Appeal

FACTS:

1. The applicant, on behalf of the SM, states:

a. The Department of the Army concluded the SM had no lawful purpose for his presence at the gas station where he was murdered. The SM was exercising his First Amendment rights by waiting to give a statement to law enforcement regarding the gas station attendant's assault of the SM. The SM died in the LOD and was murdered by the gas station attendant who shoved the SM out of the store and shot him multiple times, when the SM was not armed.

b. The letter, from the attorney, appeals the decision received 16 June 2023 not in LOD - due to own misconduct determination for the SM, now deceased. The determination is erroneous and conflicts with the SM's constitutional rights to seek redress, in particular his right to a law enforcement response from the police department and his right to have reported having been assaulted by the store clerk for purposes of investigation and corrective action.

c. Brigadier General (BG) J- reasoned the SM had no reason to return to the gas station "except to settle a score." The SM did not return to the gas station other than to

hold the gas station attendant accountable for the attendant's assault using lawful means.

d. The SM was waiting for law enforcement to take his statement, a statement he had a First Amendment right to give to law enforcement, after he was assaulted by the store clerk. The SM was not engaged in inappropriate behavior, when he was murdered. The SM was shot and killed by a store clerk, while waiting peacefully to give his statement to law enforcement who had been called to the scene. The determination should be vacated and an in the LOD determination entered.

2. The SM's service record contains the following documents:

a. DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States), shows the SM enlisted in the Regular Army on 13 January 2020.

b. DA Form 2173 (Statement of Medical Examination and Duty Status), 27 August 2021, shows the date of the incident was 25 August 2021. The SM was dead on arrival from multiple gunshot wounds. It was unknown if the SM was under the influence of alcohol or drugs. The SM was not absent without leave. He was killed at a Shell Gas Station. He was reported to have engaged in an altercation with a civilian gas station attendant. The dispute escalated from verbal to physical and ended with the attendant administering 10-to-11-gun shots toward the SM. The police department and military police are conducting their investigations. A formal LOD investigation was required.

c. DD Form 1300 (Report of Casualty), 20 September 2021, shows the SM was deceased in a homicide on 26 August 2021. He had multiple gunshot wounds.

d. DD Form 264 (Report of Investigation LOD and Misconduct Status), 9 May 2022, shows the SM was killed by multiple gunshot wounds. He was present for duty. The findings were not in the LOD due to own misconduct.

e. Letter to the SM's spouse from Casualty and Mortuary Affairs, AHRC, 30 March 2023, informing the SM's spouse the SM's death was found not in the LOD. Evidence contained in the investigation indicated the SM was the aggressor in an altercation that led to his death.

f. The appeal to the LOD is not available for the Board's review. On 5 June 2023, BG J- responded to the appeal stating:

(1) After a thorough administrative review of the SM's LOD investigation, he has determined the finding of not in the LOD due to own misconduct will stand.

(2) Army Regulation 600-8-4 (LOD Policy, Procedures, and Investigations) under terms for preponderance of evidence states, "findings must be supported by a greater weight of evidence (more likely than not) than supports any different conclusion."

(3) The appeal addresses Army Regulation 600-8-4, D-6, Rule 6 was misapplied in finding the SM not in line of duty due to own misconduct. D-6, Rule 6 states injury or death caused by wrongful aggression or voluntarily taking part in a fight or similar conflict, in which one is equally at fault in starting or continuing the conflict when one could have withdrawn or fled is due to misconduct and is not in the LOD. An injury received or death suffered by a Soldier in a fight in which he or she is the aggressor is caused by his own misconduct. The Soldier's provocative actions or language, for which a reasonable person would expect retaliation, is a willful disregard for personal safety, and injuries or death directly resulting from them are due to misconduct. When an adversary uses excessive force or means that could not have been reasonably foreseen in the incident, the resulting injury or death is not considered to have been caused by misconduct. Except for self-defense, a Soldier who persists in a fight or similar conflict after a combatant produces a dangerous weapon is acting in a willful disregard for safety and is therefore grossly negligent. This rule does not apply when a Soldier is the victim of an unprovoked assault and sustains injuries or dies, while acting in self-defense

(4) The SM and some friends were at a Shell Gas Station. The SM and his group were very loud and dancing in the parking lot and were asked to calm down on two occasions. On the second occasion, the SM ran at the gas station clerk with a tape measure extended. The clerk stated he feared of being assaulted when he picked the SM up and threw him on the ground causing the SM to hit the back of his head.

(5) The clerk returned inside the store and locked the doors. The SM approached the doors and commented "remember my face" and "I'm coming back." The SM was escorted from the parking lot by his group. The SM and his friends left the gas station and went to a local bar, when the friends noticed the SM had left and his vehicle was also gone.

(6) About 20 to 30 minutes after the initial altercation, the SM returned to the Shell Gas Station alone. The SM stood inside the business by the door with his hands in his pockets. The store clerk called 911 to have the SM removed but the police never arrived. After about 40 minutes and close to midnight, the store clerk approached the SM again and told him to leave because it was closing time.

(7) The clerk grabbed the SM in an attempt to escort him out of the store. The SM wrapped his arms around the store clerk and threw the clerk through the doors and into the parking lot. With the clerk and the SM scuffling for a brief period, the SM ended

up on top of the clerk. The clerk stated he was "gassed" and the SM appeared to be "strong". The clerk drew a pistol from his front waistband and shot the SM several times.

(8) D-6, Rule 6 states one is equally at fault in starting or continuing the conflict when one could have withdrawn or fled, is due to misconduct and not in the LOD. The SM had already departed the gas station and had no reason to return except to settle a score. D-6, Rule 6 goes on to state the Soldier's provocative actions or language, for which a reasonable person would expect retaliation, is a willful disregard for personal safety. Knowingly returning to the gas station could have no positive outcome. The SM chose to return anyway, without thought of the consequences. The SM returning to an establishment where there had already been an altercation that caused death is clearly misconduct.

(9) Moreover, Army Regulation 600-8-4, paragraph 4-17(a)(1) states if a Soldier is assigned within the geographic area of responsibility of the original approval authority or is a Soldier of the Army National Guard, the appeal will be sent through channels to the approval authority. The approval authority may change his previous determination of not in the LOD to in the LOD if there is substantial new evidence to warrant it. Paragraph 4-18(a) goes on to state the Adjutant General of the Army, acting on behalf of the Deputy Chief of Staff, G-1 and acting for the Secretary of the Army, may in cases of fraud, mistake of law, mathematical miscalculations, or pertinent new evidence that was not considered at the time of the original determination [sic].

g. The SM's service record is void of a police report or documentation detailing the incident, which caused his death.

3. The ABCMR may, in its discretion, hold a 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.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board 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 of the applicant's request and available military records, the Board concurs with the findings of the original Line of Duty (LOD) investigation and subsequent appeal review. The SM's death, resulting from multiple gunshot wounds sustained during an altercation at a Shell Gas Station on 25 August 2021, was determined not to be in the line of duty due to own misconduct.

2. The Board noted, although the SM was present for duty and not absent without leave, the investigation revealed the applicant was the aggressor in a confrontation that escalated from verbal to physical. Witness statements and official documentation—DA Form 2173, DD Form 1300, DD Form 264, and communication from Casualty and Mortuary Affairs—consistently reflected this pattern of behavior. Notably, the SM returned alone to the gas station after initially departing, initiated physical contact with the clerk, and failed to withdraw from a situation that had previously escalated. This sequence of actions demonstrated a willful disregard for personal safety.

3. Under the standards set forth by Army Regulation 600-8-4, specifically D-6, Rule 6, such conduct is classified as wrongful aggression and misconduct. The SM's provocative behavior, including threats and re-engagement in a conflict, satisfies the criteria for misconduct, particularly as the outcome—his death was a foreseeable consequence of his decision to reinitiate contact with an adversary who had previously demonstrated hostile intent. As such, the Board agreed with the prior determination that the SM's death was not in the line of duty due to own misconduct. Therefore, relief is denied.

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:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
XXX	XXX	XXX	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.

X //SIGNED//

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 600-8-4 prescribes policies and procedures for investigating the circumstances of disease, injury, or death of a Soldier providing standards and considerations used in determining LOD status.

a. A formal LOD investigation is a detailed investigation that normally begins with DA Form 2173 completed by the medical treatment facility and annotated by the unit commander as requiring a formal LOD investigation. The appointing authority, on receipt of the DA Form 2173, appoints an IO who completes the DD Form 261 (Report of Investigation Line of Duty and Misconduct Status) and appends appropriate statements and other documentation to support the determination, which is submitted to the general court-martial convening authority for approval.

b. An injury, disease, or death is presumed to be in LOD unless refuted by substantial evidence contained in the investigation. LOD determinations must be supported by substantial evidence and by a greater weight of evidence than supports any different conclusion. The evidence contained in the investigation must establish a degree of certainty so that a reasonable person is convinced of the truth or falseness of a fact.

c. The worsening of a pre-existing medical condition over and above the natural progression of the condition as a direct result of military duty is considered an aggravated condition. Commanders must initiate and complete LOD investigations,

despite a presumption of Not In the Line of Duty, which can only be determined with a formal LOD investigation.

d. D-6 Rule 6 states, injury or death caused by wrongful aggression or voluntarily taking part in a fight or similar conflict, in which one is equally at fault in starting or continuing the conflict which one could have withdrawn or fled, is due to misconduct and not in the LOD. An injury received or death suffered by a Soldier in a fight in which he or she is the aggressor is caused by his own misconduct. The Soldier's provocative actions or language, for which a reasonable person would expect retaliation, is a willful disregard for personal safety, and injuries or death directly resulting from them are due to misconduct. When an adversary uses excessive force or means that could not have been reasonable foreseen in the incident, the resulting injury or death is not considered to have been caused by misconduct. Except for self-defense, a Soldier who persists in a fight or similar conflict after a combatant produces a dangerous weapon is acting in willful disregard for safety and is therefore grossly negligent. This rule does not apply when a Soldier is the victim of an unprovoked assault and sustains injuries or dies, while acting in self-defense.

2. Army Regulation 600-8-1 (Army Casualty and Memorial Affairs and Line of Duty Investigations) prescribes policies and procedures for investigating the circumstances of disease, injury, or death of a Soldier. It provides standards and considerations used in determining Line of Duty (LOD) status. It states:

a. LOD determinations are for protecting the interest of both the individual concerned and the U.S. Government where service is interrupted by injury, disease, or death. A person who becomes a casualty because of his or her intentional misconduct or willful negligence can never be said to be injured, diseased, or deceased in LOD. A person stands to lose substantial benefits because of his or her actions; therefore, it is critical that the decision to categorize injury, disease, or death as not in LOD only be made after following the deliberate, ordered procedures described in this regulation.

b. LOD investigations (LODI) are conducted essentially to arrive at a determination of whether misconduct or negligence was involved in the disease, injury, or death and, if so, to what degree. Depending on the circumstances of the case, an LODI may be required to make this determination. A formal LODI must be conducted in circumstances where an: (1) injury, disease, death, or medical condition that occurs under strange or doubtful circumstances or is apparently due to misconduct or willful negligence; (2) injury or death involving the abuse of alcohol or other drugs; and/or (3) self-inflicted injuries or possible suicide.

c. A formal LODI is a detailed investigation that normally begins with DA Form 2173 (Statement of Medical Examination and Duty Status) completed by the Medical Treatment Facility (MTF) and annotated by the unit commander as requiring a formal

LODI. The appointing authority, on receipt of the DA Form 2173, appoints an IO who completes DD Form 261 (Report of Investigation LOD) and appends appropriate statements and other documentation to support the determination, which is submitted to the General Court-Martial Convening Authority (GCMCA) for approval.

d. Decisions on LOD determinations will be made in accordance with the standards set forth in this regulation. Injury, disease, or death proximately caused by the Soldier's intentional misconduct or willful negligence is "not in LOD—due to own misconduct." Simple or ordinary negligence or carelessness, standing alone, does not constitute misconduct. An injury, disease, or death is presumed to be in LOD unless refuted by substantial evidence contained in the investigation. LOD determinations must be supported by substantial evidence and by a greater weight of evidence than supports any different conclusion. The evidence contained in the investigation must establish a degree of certainty so that a reasonable person is convinced of the truth or falseness of a fact, considering: (1) All direct evidence, that is, evidence based on actual knowledge or observation of witnesses; and/or (2) All indirect evidence, that is, facts or statements from which reasonable inferences, deductions, and conclusions may be drawn to establish an unobserved fact, knowledge, or state of mind.

(1) No distinction will be made between the relative value of direct and indirect evidence. In some cases, direct evidence may be more convincing than indirect evidence. In other cases, indirect evidence may be more convincing than the statement of an eyewitness.

(2) The weight of the evidence is not determined by the number of witnesses or exhibits but by the IO and higher authorities accomplishing the following actions: (1) Considering all the evidence; (2) Evaluating factors such as a witness's behavior, opportunity for knowledge, information possessed, ability to recall and relate events, and relationship to the matter to be decided; and (3) Considering other signs of truth.

(3) The rules in appendix B will be considered fully in deciding LOD determinations. These rules elaborate upon, but do not modify, the basis for LOD determinations.

e. The investigation will ascertain dates, places, persons, and events definitely and accurately. The commander must ensure that the investigation contains enough pertinent information and data to enable later reviews to be made without more information. All findings of fact should be supported by exhibits. Copies of military or civilian police accident reports, pertinent hospitalization or clinical records, autopsy reports, and written statements shall be attached as exhibits when appropriate. The commander will thoroughly review chapters 3 and 4 for any additional pertinent procedures or special considerations before conducting and completing the investigation. Promptness in conducting the investigation is of great importance. Delays

often result in failure to secure important data and information, possibly resulting in an improper determination.

f. An injury incurred as the "proximate result" of prior and specific voluntary intoxication is incurred as the result of misconduct. For intoxication alone to be the basis for a determination of misconduct with respect to a related injury, there must be a clear showing that the Soldier's physical or mental faculties were impaired due to intoxication at the time of the injury, the extent of the impairment, and that the impairment was a proximate cause of the injury.

g. The MTF must identify, evaluate, and document mental and emotional disorders. A Soldier may not be held responsible for his or her acts and their foreseeable consequences if, as the result of mental defect, disease, or derangement, the soldier was unable to comprehend the nature of such acts or to control his or her actions. Therefore, these disorders are considered "in LOD" unless they existed before entering the Service and were not aggravated by military service. An injury or disease intentionally self-inflicted or an ill effect that results from the attempt (including attempts by taking poison or drugs) when mental soundness existed at the time should be considered misconduct.

h. Appendix F states in every formal investigation, the purpose is to find out whether there is evidence of intentional misconduct or willful negligence that is substantial and of a greater weight than the presumption of "in line of duty." To arrive at such decisions, several basic rules apply to various situations. The specific rules of misconduct are listed below.

(1) Rule 1 states injury, disease, or death directly caused by the individual's misconduct or willful negligence is not in line of duty. It is due to misconduct. This is a general rule and must be considered in every case where there might have been misconduct or willful negligence. Generally, two issues must be resolved when a soldier is injured, becomes ill, contracts a disease, or dies: (1) whether the injury, disease, or death was incurred or aggravated in the line of duty; and (2) whether it was due to misconduct.

(2) Rule 2 states mere violation of military regulation, orders, or instructions, or of civil or criminal laws, if there is no further sign of misconduct, is no more than simple negligence. Simple negligence is not misconduct. Therefore, a violation under this rule alone is not enough to determine that the injury, disease, or death resulted from misconduct. However, the violation is one circumstance to be examined and weighed with the other circumstances.

(3) Rule 3 states injury, disease, or death that results in incapacitation because of the abuse of alcohol and other drugs is not in line of duty. It is due to misconduct. This rule applies to the effect of the drug on the soldier's conduct, as well as to the

physical effect on the soldier's body. Any erratic or reckless conduct caused by the effect of the drug, which directly causes his injury or disease is misconduct. The fact that the meme may have a pre-existing physical condition which caused him to be susceptible to the effects of the drug does not excuse such misconduct.

3. Army Regulation 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 that 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//