

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 7 February 2025

DOCKET NUMBER: AR20230009895

APPLICANT REQUESTS: in effect,

- Removal of his DA Form 2166-9-2 (Noncommissioned Officer Evaluation Report (NCOER)) for the period ending 4 September 2019 from his Army Military Human Resource Record (AMHRR)
- Personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Memorandum Evaluation Appeal
- Congressional Memorandum
- Heavily Redacted Freedom of Information Act (FOIA) Documents
- Index of Exhibits
- Reverse Page of DA Form 3881 (Rights Warning Procedure/Waiver Certificate)
- Redacted Pages of FOIA Documents
- Enlisted Record Brief (ERB)
- Memorandum Request for Redress
- DA Forms 2166-9-2 (NCOER)
- Screenshot of Changes

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 states, in effect,

a. His rater and senior rater were unjust in the preparation of his NCOER. The NCOER was completed as reprisal for him speaking out to his higher chain of command about issues, during the rating period which unduly influenced the rating on his NCOER.

b. A redress was completed in accordance with Army regulation and the correct procedures were not followed. The result of the commander's inquiry were never posted in his AMHRR or provided to him.

c. The NCOER was returned by U.S. Army Human Resources Command (AHRC) for administrative changes; however, substantive changes were made instead with a commander's inquiry result provided. The senior rater was relieved from her position and it was found that she was not capable of providing a fair, just, and unbiased evaluation in accordance with Army Regulation 623-3 (Evaluation Reporting System).

d. A Congressional was filed regarding his NCOER and the Chief of Staff of the brigade ensured the applicant's Congressman that he would be provided with the FOIA to which he is being denied. His delay is due to the fact that the evidence is being withheld by both the FOIA and brigade.

3. The applicant provides the following documents:

a. Self-authored memorandum evaluation report appeal, 26 September 2022, states in pertinent part:

(1) The appeal is based on both administrative and substantive error. Administrative error: The rater falsified official government documents about the quarterly counseling dates included on the original NCOER that was recalled from AHRC. Once recalled the rater and senior rater changed the dates to fit their narrative. Even after the rater was notified by the applicant that the NCOER contained erroneous counseling dates, the rater and senior rater forwarded the falsified data to Headquarters, Department of the Army (HQDA) anyway. This goes to show they intended to falsify the government document. The rater and senior rater forwarded the NCOER to HQDA without his signature because the administrative data was incorrect. Once the NCOER was returned for administrative corrections and the corrections were then made, the noncommissioned officer (NCO) signed the NCOER in accordance with regulation. The signature was not an admission of agreement with anything on the NCOER.

(2) The rater falsified an official government document. Once it was returned from AHRC, the rater manipulated the through date to fit his narrative and added a nonrated code of Q. The applicant did not accumulate any nonrated time. He was refused an accurate copy of the rating scheme. A letter of redress was submitted to the Brigade Commander and the results were not explained or given to him. He requested a FOIA and was told that the information did not pertain to him, therefore it was redacted fully.

(3) His rater and senior rater removed him from this duty position approximately a month and a half after with no explanation or counseling while he was on leave. The final two months are not eligible for the senior rater qualification as the applicant was no longer assigned to this position. He was not properly relieved from his duty position; however, this was used as a rating criterion. DA Pam 623-3 (Evaluation Reporting System) procedures were not followed, and a subsequent investigation of the matter outlines that failure. The FOIA talks about him being removed from drill sergeant duties. AHRC removed him from the program because he did not have a NACLS [sic] completed following his completion of the IAT PST [sic] course. This is not the same incident as the one being discussed in the NCOER.

(4) A DA Form 2166-9-1A (NCOER Support Form) was not created until after the NCOER was returned from HQDA as part of a commander's redress process. In accordance with regulation, an NCOER Support Form is mandatory, during counseling of all NCOS, corporal through command sergeant major (CSM).

(5) If a rated Soldier has nonrated time that has not been accounted for on an Officer Evaluation Report (OER) or NCOER, the OER or NCOER following that nonrated time has already been completed at HQDA and posted to the Soldier's AMHRR, a rating official on the OER or NCOER, the battalion or brigade S1, or the administrative officer may submit a request for an administrative correction to the "from" date on the OER or NCOER to include the nonrated time in the period covered. His NCOER was changed from seven rated months to five rated months. There was a two month period of non-rated code Q (changed to fit the narrative). The applicant expressed concerns in his letter of redress investigation regarding the number of rated months. His rater and senior rater ignored the regulation and the applicant just has non-rated time because of this inactions. Unacceptable gaps are periods when the rated Soldier was in a status that warranted the preparation of an OER or NCOER, but rating officials failed to render an OER or NCOER. Such gap times will be resolved by the rating chain responsible for completing the missing OER or NCOER. These times will not be covered as nonrated time on any other OER or NCOER.

(6) Substantive error: The applicant filed a memorandum for redress to the brigade commander. An investigation was initiated, and an investigating officer was appointed. However, the applicant has never received a conclusion of the redress. The brigade commander nor his representative have never discussed the findings of the investigation with the applicant. He requested a FOIA and the response for NCOER redress FOIA is attached.

(7) He filed a Congressional. He was never afforded the results of the investigation. His Senator requested results be sent and the Senator was sent a memorandum from the Chief of Staff of the Brigade admitting that an investigation was done, founded, and that the issue was addressed. The applicant requested the FOIA to

which the U.S. Army Pentagon Headquarters sent copies of a heavily redacted document. An appeal to the agency advised him that he was not entitled to said document.

(8) There are over seven investigations pertaining to the rater and senior rater's inability to lead and/or provide fair balance critiques of its assigned servicemembers. Investigations identify bias within the rating chain and identify major issues within the command team. They identify that he was not removed from his duty position in accordance with Army regulations. The move was made with extreme bias and undue influence in regard to his NCOER. His NCOER was unduly influenced by the chain of command to include the sergeant major and the brigade commander.

(9) His NCOER does not capture, nor could it have accurately captured, the entire extent of the applicant's performance as the rater/senior rater changed the NCOER through date, in order to manipulate the truth, causing them to then capture events before and after the rater/senior rater qualifications. The numbers are significantly under reported on purpose. His on Brigade Power Weekend attendance was before the date rater qualification occurred. There is no such program as the brigade management screening. Rater states "developed a physical training program that resulted in the decrease of Army Physical Fitness Test failures." This happened before rater qualifications.

(10) A second element is the various regulatory requirements, such as each evaluation report standing on its own without reference to facts or events occurring prior or subsequent to the rating period and the prohibition against command influence on rating officials, during the preparation of evaluation reports. In block H, the rater stated servicemember assigned equipment (implying a hand receipt). The applicant did not carry a hand receipt throughout his tenure in this duty position. Therefore, the rater is fabricating and falsifying government documents. It is, therefore, impossible for him to provide the evidence of the absence of a hand receipt if it never existed.

(11) The 59th Ordnance Brigade Chief of Staff wrote in the memorandum to his Congressman that the applicant would be able to get a freedom of information act (FOIA) in his Congressional. This information was false, as he has tried for three years to attain them and only got fully blocked out redacted pages.

(12) Block h, bullet number two of his DA NCOER states, "maintained all assigned equipment valued at \$50K with no loss for seven consecutive months." This is a false made up statement, as he never signed for any equipment or assumed responsibility of any equipment, during his tenure. The unit was not able to provide any documentation/hand receipts and/or cyclic inventories showing that this statement is true. In accordance with Army Regulation 735-5 (Property Accountability Policies), it is mandatory for unit supply/property book officers to maintain supply records for six

years. This NCOER covered the period ending on 4 September 2019. Furthermore, the NCOER states he is being rated for five months. Through dates were manipulated to reflect fraudulent counseling dates, and rater qualifications, after the NCOER was returned from HQDA due to him requesting a commander's redress/investigation. Therefore, the statement that reads "for seven consecutive months," is blatantly false. These two things cannot be true at the same time. The rated months are five months and the bullet is rating him for seven months. This also goes to show the inaccuracies and incompetency of the rater of this NCOER. While changing the data to reflect the false counseling dates, the author did not fix the other inconsistent and fraudulent statements.

(13) In accordance with Army Regulation 623-3, Section 4-5(1), rating schemes must be published/established. This was not done. It also states that if a member of the rating chain is relieved, had substantial adverse action against them, or calls into question the rating official's objectivity the NCOER may be appealed. "Improperly designated, unqualified, or disqualified rating officials; that is, a rating official not in the published rating chain, a rating official without the minimum required time to render an evaluation report, or a rating official who, through an official investigation, has had a substantiated adverse finding against them that results in their relief for cause or calls into question the rating official's objectivity." His senior rater and rater were relieved for events escalating from the redress/Congressional pertaining to this NCOER. The FOIA office refuses to provide any end results of the Congressional and/or Army Regulation 15-6 investigation as outlined in the Congressional memorandum.

(14) Section 2 of the regulation discusses inaccurate or untrue statements. The NCOER was changed in multiple locations to include admin as well as non admin data. Therefore it was determined that there were untrue and inaccurate statements.

(15) Section 3 (lack of objectivity or fairness by rating officials) states rating chain was relieved from their duties and the senior rater was court martialed for actions resulting from the escalation of the applicant's original NCOER redress/Congressional FOIA refuses to provide details to him for his appeal.

(16) Section 4-5 (Procedure) states, "the results of the inquiry will be forwarded to HQDA not later than 120 days after the signature date of the senior rater or reviewing official." There were not results forwarded with the inquiry/NCOER. The applicant's NCOER was only tailored to the narrative the rating chain wanted and returned to HQDA. It was then processed in his AMHRR without a memorandum of inquiry. Changes to the NCOER is significant enough to warrant a memorandum in accordance with Army Regulation 623-3.

(17) The regulation states, "if, upon completion of the inquiry, the official conducting the inquiry determines the report has serious irregularities or errors or any

violation of policy, the official will ensure that all member of the original rating chain are allowed to correct or edit the evaluation as necessary. The commander's or commandant's memorandum to AHRC will state that all members of the rating chain have been allowed to add or change comments in accordance with the findings and recommendations, and it will list those who did not choose to edit the evaluation." The commander did not forward the "commandant's memorandum" to AHRC. Although the NCOER was changed significantly. There was no accompanying memorandum once returned to HQDA, which is required by regulation.

(18) "If the evaluation was previously referred, and after editing the evaluation, it is still referred, the rating chain will refer the final evaluation to the rated Soldier for acknowledgement and the opportunity to submit comments before sending it (and any signed comments) to HQDA." The applicant submitted comments to the rater and senior rater. The comments were excluded and he was not afforded due process as the results of the redress was never discussed with him.

(19) "The results of the inquiry forwarded to HQDA will include the specific findings, conclusions, and recommendations in a memorandum that will be filed with the evaluation report in the rated Soldier's AMHRR for clarification purposes. The results will include the commander's or commandant's signature, will stand alone without reference to other documentation, and will be limited to one page. Sufficient evidence and documentation, such as a completed Army Regulation 15-6 investigations, reports, and statements, will be attached to justify the conclusions." The NCOER was not accompanied with the results the inquiry, as required by regulation. The NCOER was manipulated and changed in various admin and non admin sections and returned with no other documentation.

(20) The rater refused to include the equal opportunity (EO) bullet on the NCO due to a prior unfounded EO investigation. This was then changed, due to undue influence from the command teams. Notice the EO bullet is not included until after the NCOER was returned to HQDA with a commander's memorandum of inquiry.

(21) The applicant requests removal of the DA Form 2166-9-2 (NCOER) dated 12 February 2019 to 4 September 2019 from his AMHRR in accordance with a successful appeal and Army Regulation 623-3.

b. Letter to U.S. Senator, 11 May 2021, states in pertinent part, between 1 July 2019 and 22 April 2020, the 59th Ordnance Brigade conducted Army Regulation 15-6 investigations into allegations comparable to those made in the applicant's request for assistance, 13 February 2020. The findings of these investigations led the 59th Ordnance Brigade to take actions addressing the applicant's concerns. Pursuant to FOIA, the applicant requested the investigations and the request is currently being processed.

c. Redacted FOIA request containing 58 pages.

d. Memorandum findings and recommendations for Army Regulation 15-6 Investigation into allegations contained in a complaint made by the applicant, 22 April 2020, states removal of the applicant from his position as a Drill Sergeant/ Advanced Individual Training (AIT) Platoon Sergeant was not improperly done by the chain of command. AHRC removed him from the program because he did not have a National Agency Check with Local Agency Check completed following his completion of the AIT Platoon Sergeant course. The majority of the memorandum and exhibits are redacted. The memorandum includes the following documents that are not redacted:

(1) The applicant's DA Form 2823 (Sworn Statement), 22 April 2022, states, in effect, he refers any question to the memorandum he submitted to his Congressional representative and he does not wish to make any additional sworn statements. The memorandum is available for the Board's review.

(2) Text messages between the applicant and his first sergeant (1SG) regarding his NCOER.

(3) Emails between the applicant and his 1SG regarding his NCOER and his options to appeal.

(4) DA Form 268 (Report to Suspend Favorable Personnel Actions (Flag)), 12 April 2019 shows he was flagged for Commander's Investigation.

(5) His ERB, which is available for the Board's review.

(6) DA Form 4856 (Developmental Counseling Form), 12 April 2019 stating he was being flagged for Commander's Investigation. The applicant agreed with the counseling and signed the form.

(7) DA Form 268, 28 June 2019, which removed his flag because his case was closed favorably.

(8) DA Form 31 (Request and Authority for Leave), 12 August 2019 shows the applicant requested 21 days of leave from 13 August 2019 through 1 September 2019.

(9) DA Form 4187 (Personnel Action), which reassigns the applicant.

(10) DA Form 2166-9-1A (NCOER Support Form), which shows his duty description; performance goals and expectations, during this rating period; and

performance evaluation, professionalism, attributes, and competences. The entire form is available for the Board's review.

(11) The Adjutant General Directorate NCOER frequently asked questions, which is available for the Board's review.

(12) Guide to Investigating Military Whistleblower Reprisal and Restriction Complaints, which is available for the Board's review.

(13) Army Directive 2014-20 (Prohibition of Retaliation Against Soldier for Reporting a Criminal Offense), 19 June 2014, which is available for the Board's review.

(14) Excerpt from Army Regulation 600-20 (Army Command Policy), which is available for the Board's review.

e. Memorandum Request for Redress, 15 November 2019, states, in effect:

(1) The applicant requests his recent NCOER be recalled before it is submitted to his AMHRR due to lack of involvement in the process. His right to review and provide a signature was not given to him.

(2) His 1SG did not afford him the opportunity to sign his NCOER. Although the 1SG had provided him with a soiled draft of the document three weeks prior, it was because he had confronted the 1SG at his vehicle and vehemently requested the 1SG let the applicant see it. The final draft was not submitted to him for review. The Evaluation Entry System was never open for him to have access, see, or sign the NCOER. He told the 1SG that he would not sign the NCOER in the current form, prior to seeing it. The NCOER was returned to the company and he assumes there were changes made from what the 1SG had reluctantly given him. He asked the 1SG numerous times to open the NCOER and the 1SG did not. However, the 1SG and commander then signed the NCOER and forwarded it to AHRC in order to avoid scrutiny from the applicant. Even if he was going to sign the NCOER, he could not have because he was not allowed to see the NCOER until after the rater and senior rater's signature.

(3) He believes the 1SG is using reprisal against him because the applicant used a protected avenue of communication to call out the fact that the 1SG was the one who counseled, initiated, and signed the flag for the applicant's alleged EO complaint in June 2019. The 1SG knew the applicant talked to the Brigade CSM in regards to this issue and the applicant believes the 1SG decided to immediately sign his NCOER and send it forward to the examiner without the applicant in the process.

(4) The applicant requests the NCOER be recalled and that he be given an opportunity to be part of the NCOER process, voice his concerns and decide, through the portal, whether or not he will sign the NCOER once completed. He has no issue signing it, if the fraudulent counseling dates are removed and the dates outside the period he was assigned be updated.

4. The applicant's service record contains the following documents:

a. DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States) shows he enlisted in the Regular Army and entered active duty on 12 August 2004. He remained in the Regular Army through immediate reenlistments.

b. DA Forms 2166-9-2 (NCOER) show he was rated, in the rank of sergeant first class (SFC) on:

(1) 10 May 2016 through 12 May 2017, 9 months rated, change of rater NCOER, in the duty position of motor sergeant. He was rated as character, met standard; presence, exceeded standard; intellect, exceeded standard; leads, exceeded standard; develops, exceeded standard; and achieves, exceeded standard. His rater rated his overall performance as exceeded standard stating superior leader and professional; sets a high standard for his peers and all to emulate. His senior rater rated him highly qualified stating top ten percent of his peers. He is a must select for promotion to master sergeant (MSG).

(2) 13 May 2017 through 12 May 2018, 12 months rated, annual NCOER in the duty position of Operational Readiness Training Complex noncommissioned officer in charge (NCOIC). He was rated as character, met standard; presence, exceeded standard; intellect, far exceeded standard; leads, far exceeded standard; develops, exceeded standard; and achieves, far exceeded standard. His rater rated his overall performance as exceeded standard stating he is the number one of three SFCs the rater rates. He is the best 91 series the rater has rated and in the top ten percent of NCOs the rater has served with. His senior rater rated him most qualified stating he is number one of the three SFCs the senior rater rates and in the top ten percent of SFCs the senior rater has served with. Promote to MSG now. Ready to be a 1SG today.

(3) 13 May 2018 through 11 February 2019, 9 months rated, change of rater NCOER in the position of training management NCO. He was rated as character, met standard; presence, met standard; intellect, exceeded standard; leads, met standard; develops, exceeded standard; and achieves, met standard. His rater rated his overall performance as exceeded standard stating he is a strong NCO who internalizes the mission and takes initiative to solve problems as the lowest level. Top 20 percent of all NCOS the rater has served with. His senior rater rated him highly qualified stating top 20 percent of all SFCs assigned to the brigade headquarters, promote ahead of peers.

(4) 12 February 2019 through 4 September 2019, (the NCOER in question), 5 months rated, change of rater NCOER in the position of platoon sergeant. The applicant signed the NCOER on 20 March 2020. He was rated as character, met standard; presence, met standard; intellect, exceeded standard; leads, exceeded standard; develops, met standard; and achieves, met standard with the comment maintained all assigned equipment valued at 50K with no loss for seven consecutive months. His rater rated his overall performance as met standard stating demonstrated his ability to handle adversity and performed well using the knowledge and experience of a senior NCO. His senior rater rated him highly qualified stating great NCO, he is in the top 30 percent of NCOS the senior rater has rated in his career. Promote with peers. The NCOER included a memorandum, 30 May 2023, from the Army Special Review Board (ASRB), stating the president of the review board approves the unanimous vote to deny the appeal in the appeal of the applicant's NCOER from 12 February 2019 through 4 September 2019.

(5) 5 September 2019 through 1 July 2020, 10 months rated, change of rater NCOER in the position of operations sergeant. He was rated as character, met standard; presence, exceeded standard; intellect, far exceeded standard; leads, exceeded standard; develops, far exceeded standard; and achieves, exceeded standard. His rater rated his overall performance as exceeded standard stating he ranks in the top 20 percent of all NCOs his rater encountered in his military career. His senior rater rated him highly qualified stating top 30 percent of all NCOs he has worked with in his career. Promote to MSG ahead of peers.

(6) 2 July 2020 through 13 September 2021, 13 months rated, extended annual NCOER in the position of platoon sergeant. He was rated as character, met standard; presence, exceeded standard; intellect, far exceeded standard; leads, far exceeded standard; develops, exceeded standard; and achieves, far exceeded standard. His rater rated his overall performance as far exceeded standard stating he is an exemplary leader that the Soldiers deserve and the Army needs. Top five percent of NCOS his rater has worked with; rated. His senior rater rated him highly qualified stating his performance was exceptional this rating period, in the top five percent all NCOS his senior rater has worked with in his 10 year career. Promote now.

(7) 14 September 2021 through 6 June 2022, 9 months rated, change of rater NCOER in the position of operations sergeant. He was rated as character, met standard; presence, far exceeded standard; intellect, exceeded standard; leads, far exceeded standard; develops, exceeded standard; and achieves, far exceeded standard. His rater rated his overall performance as far exceeded standard stating ranks number one of four NCOs the rater rates and is in the top one percent of SFCs the rater has worked with in his 24 year career. His senior rater rated him highly qualified stating he is number 1 of three SFCs the senior rater rates and is easily within the top one percent of SFC he has served with in his 14 year career. Select for MSG immediately.

(8) 7 July 2022 through 17 January 2023, 8 months rated, change of rater NCOER in the position of 1SG. He was rated as character, met standard; presence, far exceeded standard; intellect, exceeded standard; leads, far exceeded standard; develops, exceeded standard; and achieves, far exceeded standard. His rater rated his overall performance as far exceeded standard stating exemplary senior NCO. Works above his grade and is in the top five percent of NCOs the rater has served with in his 12 years of service. His senior rater rated him highly qualified stating superior potential. He is in the top two of 17 SFCs in the battalion. Immediately promote to MSG.

(9) 18 January 2023 through 18 April 2024, 15 months rated, extended annual NCOER in the position of operations NCOIC. He was rated as character, met standard; presence, exceeded standard; intellect, exceeded standard; leads, far exceeded standard; develops, exceeded standard; and achieves, far exceeded standard. His rater rated his overall performance as exceeded standard stating number one SFC the rater rates, clearly the best performer out of eight NCOs in their organization. His senior rater rated him highly qualified stating he is rated number three of SFCs the senior rater has ever rated or senior rated. Promote ahead of peers.

c. ASRB Record of Proceedings, 23 May 2023, regarding the applicant's request to remove his NCOER in his AMHRR states, the evidence presented does not establish a clear and convincingly, that the NCOER under consideration is untrue, unjust, or that action is warranted to correct a material error, inaccuracy, or injustice. Therefore, by unanimous vote, the ASRB determined the overall merit of the case do not warrant the requested relief. The entire record of proceedings is available for the Board's review.

d. Order Number 0009672825.00, 27 September 2024, awarded him the meritorious service medal for his retirement effective 20 August 2024. The order, which contains his achievements and award citation is available for the Board's review.

e. The applicant's service record is void of a Commander's Investigation, Army Regulation 15-6 investigation, and information regarding his retirement from the Army.

5. 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 noted the applicant's contentions that the NCOER was unjustly prepared in reprisal for raising concerns to higher leadership and was influenced by bias, procedural irregularities, and inaccurate administrative data. He also alleges that his rater and senior rater manipulated counseling dates, fabricated performance bullets, misapplied nonrated time, and failed to follow regulatory guidance, including the absence of a properly published rating scheme.
2. The Board acknowledged the seriousness of the applicant's concerns, and the volume of documentation submitted, it found insufficient evidence to support removal of the contested NCOER. The applicant's allegations of reprisal, bias, and falsification are not substantiated by official documentation or investigative findings. The commander's inquiry was conducted in accordance with Army Regulation 623-3, and the NCOER was returned by U.S. Army Human Resources Command (AHRC) for administrative correction not substantive revision. The Board agreed the corrected report was properly authenticated, signed by the applicant in accordance with regulation, and posted to the AMHRR. The Board also determined that concerns regarding FOIA access and redacted materials, while acknowledged, do not constitute grounds for removal of an evaluation report.
3. The Board noted, the Army policy presumes evaluation reports are administratively correct and prepared by duly authorized rating officials unless clear and convincing evidence demonstrates otherwise. The applicant has not provided sufficient documentation to overcome this presumption. Therefore, the Board found no error or injustice and denied removal of the NCOER from the applicant's AMHRR.
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. 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. 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.

3. Army Regulation 623-3 (Evaluation Reporting System), prescribed the policies and tasks for the Army's Evaluation Reporting System.

a. Paragraph 2-12 (The Rater) states the rater will document any substantiated finding of a Army or Department of Defense investigation or inquiry, that the rated Soldier committed an act of sexual harassment or sexual assault. Paragraph 2-14 (The Senior Rater) will do the same.

b. Paragraph 3-5 (Army Performance objectives and special interest items) states Army Regulation 60-20 (Army Command Policy) provides policy for when items will be mentioned in a Soldier's evaluation report when substantiated by a completed command or other official investigation to include investigations by civil authorities.

c. Paragraph 3-19 (Unproven derogatory information) states no reference will be made to an incomplete investigation concerning a Soldier. References will be made only to actions or investigations that have been processed to completion, adjudicated, and had final action taken before submitting and evaluation.

d. Paragraph 3-19d states any verified derogatory information may be entered on an evaluation report. This is true whether the rated Soldier is under investigation, flagged or awaiting trial. While the fact that a rated Soldier is under investigation or on trial may not be mentioned in and evaluation until the investigation or trial is completed, this does not preclude the rating chain's reference to verified derogatory information. For example, when an interim evaluation report with verified information is made available to a commander, the verified information may be included in the evaluation report. For all evaluation reports, if previously reported information later proves to be incorrect or erroneous, the Soldier will be notified and advised of the right to appeal the evaluation report.

e. Paragraph 3-37 (Modifications to Previously Submitted Evaluation Reports) stated an evaluation report accepted by Headquarters, Department of the Army (HQDA), and included in the official record of a rated Soldier is presumed to:

(1) be administratively correct,

(2) have been prepared by the properly designated rating officials who meet the minimum time and grade qualifications, and

(3) represent the considered opinions and objective judgment of the rating officials at the time of preparation.

f. Section II (Commander's or Commandant's Inquiry), paragraph 4-3 (Applicability), stated:

(1) Commanders are required to look into alleged errors, injustices, and illegalities in evaluation reports.

(2) Upon receipt of a request for a Commander's or Commandant's Inquiry, the commander or commandant receiving the request will verify the status of the NCOER in question. If the evaluation has been submitted and received at HQDA for processing, but has not been filed in the Soldier's AMHRR, the commander or commandant will notify the Evaluations Appeals Office via email with a request to have the evaluation placed in an administrative temporary hold status until completion of the inquiry.

g. Paragraph 4-5 (Policy) stated:

(1) A Commander's or Commandant's Inquiry will not be used to document differences of opinion among members of the rating chain about a rated Soldier's performance and potential. The evaluation system establishes rating chains and normally relies on the opinions of the rating officials. Rating officials will evaluate a rated Soldier and their opinions constitute the organization's view of that Soldier. However, the commander may determine through inquiry that the report has serious irregularities or errors. Examples include:

(a) improperly designated, unqualified, or disqualified rating officials; that is, a rating official not in the published rating chain, a rating official without the minimum required time to render an evaluation report, or a rating official who, through an official investigation, has had a substantiated adverse finding against them that results in their relief or calls into question the rating official's objectivity;

(b) inaccurate or untrue statements; and

(c) lack of objectivity or fairness by rating officials.

(2) The inquiry will be made by a commander in the chain of command or military school commandant above the designated rating officials involved in the allegations. In headquarters and other military organizations lacking a commander or commandant, the inquiry will be conducted by the next higher official in the rating chain above the designated rating officials involved in the allegations.

(3) To ensure the availability of pertinent data and timely completion of an inquiry conducted after the evaluation in question has been accepted at HQDA for inclusion in the rated Soldier's AMHRR, the inquiry will be conducted by either the commander or commandant at the time the evaluation was rendered who is still in the command position, or by a subsequent commander or commandant in the position. Requests for inquiry will occur no later than 60 days after the signature date of the rated Soldier (or senior rater, if rated Soldier's signature is omitted). The results of the inquiry

will be forwarded to HQDA not later than 120 days after the signature date of the senior rater.

(4) The official conducting the inquiry will not pressure or force rating officials to change their evaluations.

(5) The official conducting the inquiry may not evaluate the rated Soldier, either as a substitute for, or in addition to, the designated rating officials' evaluations.

(6) The rating chain or official conducting the inquiry will not use the Commander's or Commandant's Inquiry provisions to forward information derogatory to the rated Soldier. If the inquiry reveals matters that might have resulted in a lower evaluation of a rated Soldier, the information will be addressed in the memorandum outlining the results of the inquiry by the commander or commandant responsible for the inquiry in accordance with paragraph 3-39. No changes will be made to an evaluation report to reflect a lower evaluation of a rated Soldier following the results of a Commander's or Commandant's Inquiry.

(7) If, upon completion of the inquiry, the official conducting the inquiry determines the report has serious irregularities or errors or any violation of policy, the official will ensure that all members of the original rating chain are allowed to correct or edit the evaluation as necessary. The commander's or commandant's memorandum to U.S. Army Human Resources Command will state that all members of the rating chain have been allowed to add or change comments in accordance with the findings and recommendations, and it will list those who did not choose to edit the evaluation.

(8) If the evaluation was previously referred, and after editing the evaluation, it is still referred, the rating chain will refer the final evaluation to the rated Soldier for acknowledgment and the opportunity to submit comments before sending it (and any signed comments) to HQDA.

(9) The results of the inquiry forwarded to HQDA will include the specific findings, conclusions, and recommendations in a memorandum that will be filed with the evaluation report in the rated Soldier's AMHRR for clarification purposes. The results will include the commander's or commandant's signature, will stand alone without reference to other documentation, and will be limited to one page. Sufficient evidence and documentation, such as completed Army Regulation 15-6 (Procedures for Administrative Investigations and Boards of Officers) investigations, reports, and statements, will be attached to justify the conclusions.

(10) If the commander finds no fault with the evaluation, then the Commander's or Commandant's Inquiry is filed locally and a copy given to the rated Soldier. There is no requirement to send the Commander's or Commandant's Inquiry forward to HQDA.

h. Paragraph 4-7f (Policies) stated an appeal will be supported by substantiated evidence. An appeal that alleges an evaluation report is incorrect, inaccurate, or unjust without usable supporting evidence will not be considered. The determination regarding adequacy of evidence may be made by the HQDA Evaluation Appeals Branch, National Guard Bureau Appeals Section, or the appropriate State Adjutant General (Army National Guard).

i. Paragraph 4-8 (Timeliness) stated substantive appeals will be submitted within 3 years of an evaluation report "THRU" date. Failure to submit an appeal within this time would require the appellant to submit his or her appeal to the ABCMR. The Army Special Review Board will not accept appeals over 3 years old or appeals from Soldiers who are no longer serving on active duty or as part of the U.S. Army Reserve or Army National Guard.

j. Paragraph 4-11 (Burden of Proof and Type of Evidence) stated the burden of proof in the appeal process rests with the appellant. Accordingly, to justify deletion or amendment of an evaluation report, the appellant will produce evidence that establishes clearly and convincingly that:

(1) the presumption of regularity will not be applied to the evaluation report under consideration and

(2) action is warranted to correct a material error, inaccuracy, or injustice.

k. Clear and convincing evidence will be of a strong and compelling nature, not merely proof of the possibility of administrative error or factual inaccuracy. If the adjudication authority is convinced that an appellant is correct in some or all of the assertions, the clear and convincing standard has been met with regard to those assertions.

l. For a claim of administrative error, appropriate evidence may include:

(1) the published rating scheme used by the organization during the period of the evaluation report being appealed;

(2) assignment, travel, or temporary duty orders;

(3) DA Form 705 (Army Physical Fitness Test Scorecard), DA Form 5500 (Body Fat Content Worksheet (Male)), and DA Form 5501 (Body Fat Content Worksheet (Female));

(4) leave records;

- (5) organization manning documents;
- (6) hospital admission, diagnosis, and discharge sheets;
- (7) statements of military personnel officers or other persons with knowledge of the situation pertaining to the evaluation report in question;
- (8) the results of a Commander's or Commandant's Inquiry, Inspector General, and/or Equal Opportunity investigation; and
- (9) other relevant documents.
- (10) Editable documents must be marked certified true copies. This applies to documents submitted as evidence in support of either an administrative or substantive claim.

m. For a claim of inaccuracy or injustice of a substantive type, evidence will include statements from third parties, rating officials, or other documents from official sources. Third parties are persons other than the rated officer or rating officials who have knowledge of the appellant's performance during the rating period. Such statements are afforded more weight if they are from persons who served in positions allowing them a good opportunity to observe firsthand the appellant's performance as well as interactions with rating officials. Statements from rating officials are also acceptable if they relate to allegations of factual errors, erroneous perceptions, or claims of bias. To the extent practicable, such statements will include specific details of events or circumstances leading to inaccuracies, misrepresentations, or injustice at the time the evaluation report was rendered. The results of a Commander's or Commandant's Inquiry or Army Regulation 15-6 (Procedures for Administrative Investigations and Boards of Officers) investigation may provide support for an appeal request.

n. Paragraph 4-12 (Appeals Based on Substantive Inaccuracy) states a decision to appeal an evaluation report will not be made lightly. Before deciding whether or not to appeal, the prospective appellant will analyze the case dispassionately. The prospective appellant will note that:

- (1) pleas for relief citing past or subsequent performance or assumed future value to the Army are rarely successful and
- (2) limited support is provided by statements from people who observed the appellant's performance before or after the period in question (unless performing the same duty in the same unit under similar circumstances), letters of commendation or

appreciation for specific but unrelated instances of outstanding performance, or citations for awards, inclusive of the same period.

o. Once the decision has been made to appeal an evaluation report, the appellant will state succinctly what is being appealed and the basis for the appeal. For example, the appellant will state:

(1) whether the entire evaluation report is contested or only a specific part or comment and

(2) the basis for the belief that the rating officials were not objective or had an erroneous perception of the performance. A personality conflict between the appellant and a rating official does not constitute grounds for a favorable appeal; it must be shown conclusively that the conflict resulted in an inaccurate or unjust evaluation.

p. Most appellants will never be completely satisfied with the evidence obtained. A point is reached, however, when the appellant will decide whether to submit with the available evidence or to forgo the appeal entirely. The following factors are to be considered:

(1) The evidence must support the allegation. The appellant needs to remember that the case will be reviewed by impartial board members who will be influenced only by the available evidence. Their decision will be based on their best judgment of the evidence provided.

(2) Correcting minor administrative errors or deleting one official's rating does not invalidate the evaluation report.

4. Department of the Army Pamphlet 623-3 (Evaluation Reporting System), 31 March 2014, provided procedural guidance for completing and submitting evaluation reports and associated support forms to HQDA that are the basis for the Army's Evaluation Reporting System. Paragraph 6-1 (Deciding to Appeal) states an appellant who perceives that an evaluation report is inaccurate in some way has the right to appeal for redress to the appropriate agency. However, before actually preparing an appeal, an objective analysis of the evaluation report in question should be made.

5. 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 Official Military Personnel File, 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//