

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 June 2024

DOCKET NUMBER: AR20230010298

APPLICANT REQUESTS:

- promotion to the rank/grade of master sergeant (MSG)/E-8
- retroactive pay and allowances effective 1 November 2021
- a personal appearance before the Board via video or telephone

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel's Brief
- DA Form 268 (Report to Suspend Favorable Personnel Actions (FLAG)), 22 September 2020
- DA Form 2823 (Sworn Statement), 8 October 2020
- Clark County Sheriff's Office Incident Report, 21 October 2020
- CID Form 94 (Agent's Investigation Report), 29 October 2020
- Pharmacy Statement Report, 15 November 2020
- Department of Children, Youth, and Families (DCYF) email, 17 November 2020
- Deoxyribonucleic Acid (DNA) Paternity Report, 7 January 2021
- Court of Washington Termination Order for Protection, 19 January 2021
- General Officer Memorandum of Reprimand (GOMOR), 25 May 2021
- Applicant's Rebuttal to GOMOR dated 25 May 2021
- Ex-Wife's Email Statements, 12 February, 28 and 31 May 2021
- Ex-Wife's Self-Written Statement, 15 June 2021
- Character Reference Letters, June 2021
- Issuing Authority rescinded GOMOR dated 25 May 2021, 19 August 2021
- GOMOR, 19 August 2021
- Applicant's Rebuttal to GOMOR, 13 September 2021
- Issuing Authority Filing Determination on GOMOR (Withdraw and Destroy), 25 October 2021
- DA Form 268, 28 October 2021
- Applicant approved to return to Recruiting Duty, 28 October 2021
- Applicant's Security Clearance Verification, 3 November 2022

- Email communication between applicant and Senior Enlisted Promotions Branch, December 2022 to February 2023
- Applicant Statement to ABCMR, 2 May 2023
- Screenshot of medication and comments
- Photo of a female
- Screenshot of texts
- Order of Merit List (OML) screenshot
- Additional Character Reference Letters and Declarations, various dates

FACTS:

1. Counsel states, in part:

a. We [the applicant and counsel] respectfully contend that the applicant was maliciously and falsely accused of misconduct by his now ex-wife. These accusations resulted in an investigation and the issuance of two GOMORs, both of which were destroyed by the issuing authority following the rebuttal process, which resulted in the issuance of a flag and a loss of his security clearance. While the actions taken by the Army were correct and according to governing regulations, they have clearly resulted in an injustice as the applicant has been deprived of his promotion to MSG/E-8, lost out on an increase in pay and allowances, and had career progression opportunities withheld.

b. The applicant's promotion to MSG/E-8 was halted as a result of the ongoing investigation and follow on actions. He has spent two years attempting to repair the damage to his career and reputation caused by his ex-wife and has incurred thousands of dollars in unnecessary legal fees to defend himself against these actions. His last fight is now before this Board, which involves his request for a backdated promotion to MSG. A promotion that would have taken effect had he not been falsely accused of misconduct and had a flag initiated and his clearance suspended. Accordingly, an injustice clearly exists in this case, and we respectfully ask that this honorable Board exercise its authority to grant relief on the basis of an injustice. The GOMOR and flags initiated against the applicant were rescinded and destroyed on 25 October 2021 by the issuing Authority (Major General K_ V_).

c. The applicant was maliciously accused of serious misconduct by his ex-wife that was subsequently proven to be false. The GOMORs that were initiated following these accusations were destroyed by the issuing authority following successful rebuttals by the applicant. Unfortunately, he was denied his promotion to E-8 due to a flag that was initiated during the investigation process. He has been engaged in a long and lengthy battle, spanning approximately two years, to restore his good name and correct the irreparable damage that his ex-wife caused to his career, to include a suspension of his security clearance and loss of his earned promotion to E-8. But for the false allegations made against him and resulting flag, the applicant would have been promoted to E-8.

This Board has a duty and responsibility to correct errors and injustices and the applicant contends that he is suffering from a grave and substantial injustice of not being promoted although he should have been promoted effective November 2021 but for the maliciously false and wrathfully vindictive and wholly untrue slanderous allegations levied against him by the estranged mother of his children.

d. In conclusion, the investigation into these accusations resulted in an adverse flag being placed in his file, a suspension of his security clearance, and a loss of his promotion to E-8. The applicant has been engaged in a two year long battle to repair the damage done to his career and reputation by his ex-wife. But for these false accusations, the applicant would have been promoted to E-8 in November 2021. An injustice clearly exists in this case, and we respectfully ask this honorable Board to grant the relief requested herein.

2. A review of the applicant's military records show the following:

a. He enlisted in the Regular Army on 17 February 2005, and he is currently serving on active duty.

b. On 19 March 2015, the U.S. Army Human Resources Command (HRC) published Orders Number 78-16, which promoted him to the rank/grade of sergeant first class (SFC)/E-7, effective on with a Date of Rank (DOR) of 1 April 2015.

c. On 15 December 2017, DA Form 1059 (Service School Academic Evaluation Report) shows he exceeded course standards and completed the Recruiting Senior Leader Course.

3. Counsel provides the following exhibits and enclosures which show the following:

a. On 22 September 2020, DA Form 268 shows a flag was initiated against the applicant based on a commander's investigation.

b. On 8 October 2020, DA Form 2823 shows the applicant's ex-wife provided a statement, wherein, she provides a brief history of her relationship with the applicant and states, they tried to reconcile their relationship, however, the applicant informed her he did not want to continue with the relationship anymore. She alleges that an extra marital relationship existed.

c. On 21 October 2020, a Clark County Sheriff's Office Incident Report shows a referral to Child Protective Services prompted interviews with the applicant's ex-wife and children regarding possible physical abuse by the applicant. The concern was due to the applicant's use of physical discipline, none of the disclosures rose to the level of a criminal incident. Case was filed for information and "cleared - unfounded."

d. On 29 October 2020, an Agent's Investigation Report shows the Criminal Investigation Division was notified by the applicant's immediate commander that his ex-wife disclosed during an interview for an Army Regulation 15-6 investigation, that she was raped by the applicant.

e. An EasyFill customer statement report for the period 1 January to 15 November 2020, which shows of list of drugs, quantities, and total dollar amount(s) of the drugs.

f. Email communication dated 17 November 2020, which shows DYCF spoke with the applicant's children outside of his home on 25 September 2020, regarding abuse and the children stated none occurred. It also shows on 26 September 2020 that one of the children stated the applicant has punched and kicked his brother. Another son stated the applicant picked him up by the throat.

g. On 7 January 2021, a DNA Paternity Report shows the applicant was excluded as the biological father of the tested child (M_ M_).

h. On 19 January 2021, the applicant's ex-wife petitioned the Court of Washington to terminate the protection order.

i. On 12 February 2021, an email shows the applicant's ex-wife stated, in pertinent part, she would like to inform whomever it may concern that she would like to retract a statement previously made that has been blown out of proportion and is false. In October when she spoke to Captain C_ she never used the words or terms sexual assault. The applicant did not do those things to her. At the time and moment, she acted out of character and tried to cause defamation against the applicant. There is no reason to believe or evidence that he did that to her.

j. On 25 May 2021, the applicant received a GOMOR after accusations were brought forth suggesting that he violated Articles 120 and 128 of the Uniform Code of Military Justice (UCMJ), when he purportedly committed a sexual act upon his wife without her consent. Further, the GOMOR alleged that he was "verbally and physically abusive towards [his wife] and children."

k. On 15 June 2021, the applicant's ex-wife wrote a letter to the GOMOR issuing authority and stated, in part, she read the GOMOR to her husband [the applicant] about issuing a GOMOR because of his alleged conduct. She was writing to ask the GOMOR issuing authority to refrain from issuing the GOMOR or to keep it locally filed and minimize the impact this event has on the applicant and his family's life. She wanted their family to heal, and punishments for her report will only deepen the wounds.

l. On various dates in June 2021, multiple character reference attest to the applicant's professional, dedication to duty, and hard work. He had a positive impact on

everyone that interacted with him. He was also a great father and friend.

m. On or about 21 June 2021, through counsel, the applicant submitted his rebuttal to the initial GOMOR. In the rebuttal, the applicant contended that an objective review of the evidence would lead a reasonable individual to conclude that no such abuse occurred with respect to his ex-wife and children.

n. On or about 6 August 2021, the applicant received an OML number of 101 out of 1333.

o. On 19 August 2021 –

(1) In response to the rebuttal, the initial GOMOR dated 25 May 2021 was rescinded.

(2) The applicant received another GOMOR alleging an investigation determined his use of physical discipline with his children, ages 6, 10, 14, and 16 years old, was concerning. The allegations include instances of choking, punching, and other harsh forms of discipline.

p. On 13 September 2021, with the assistance of counsel, the applicant submitted a rebuttal to the GOMOR. In his submission he denied all allegations as untrue and provided sufficient evidence to refute the allegations.

q. On 25 October 2021, the issuing authority Major General K_ V_ directed that the GOMOR issued against the applicant be withdrawn and destroyed after carefully considering the applicant's circumstances and matters in defense and mitigation.

r. On 28 October 2021 –

(1) DA Form 268 shows Major R_ removed the initial flag imposed against the applicant and closed it favorably.

(2) The applicant was determined to be qualified to serve in the specified position of Recruiting Cadre. His Brigade Commander directed he continue recruiting duties and Special Duty Assignment Pay be reinstated. The Suitability Action for Disqualification case was closed.

s. On 3 November 2022, the 6th Recruiting Brigade, Personnel Security Specialist issued a memorandum, which shows applicant was granted a "Secret" security clearance, effective 2 November 2022.

t. On various dates in December 2022 and on 10 February 2023, emails show the applicant contacted HRC to inquire about backdating his promotion including all pay and allowances. He communicated with Mr. J_ D_ in the HRC Senior Enlisted Promotions Branch and he stated –

(1) The applicant's clearance was adjudicated on 2 November 2022 which meant he was eligible for pin-on beginning with 1 January 2023 promotions. The applicant's status of "No Determination Made" put him in a non-promotable status until 2 November 2022 when his clearance was adjudicated. Therefore, HRC cannot backdate a promotion to a date when he was in a non-promotable status.

(2) "After going back through all the emails, promotion lists, and your security clearance status, I don't see a way forward for a back dated promotion. One item that cannot be waived for promotion to MSG is the security clearance. During the time frame where your OML passed, you did not have a valid clearance due to "No Determination Made". Once you regained your clearance, your OML has not passed."

(3) Per Army Regulation (AR) 600-8-19 (Enlisted Promotions and Demotions), paragraph 1-11a (Non-promotable status), Soldiers (specialist (SPC) through MSG except as noted) are non-promotable to a higher rank when pending security clearance eligibility determination when it is required for the Soldier's primary military occupational specialty (PMOS). Soldiers will regain promotable status the day they receive the appropriate level of security clearance eligibility approved by the Department of Defense (DOD) Consolidated Adjudication Facility (CAF).

u. On 2 May 2023, the applicant provided a statement to the Board, wherein, he briefly describes his career and reasons for joining the Army. He talks about his father and being a young father. He also stated, the flags were removed on 28 October 2021, but his clearance was still pending for over a year until 2 November 2022. Currently, his wife and him are divorced, and he maintains primary custody of his three older boys while they [ex-wife and applicant] share custody of his youngest child. He hopes the Board notes that he is a victim of false allegations. Throughout his Army career he has always performed well and with distinction.

v. The exhibits and enclosures also contain a screenshot of medication and comments, a photo of a female, screenshots of texts, OML screenshot, and additional character reference letters and declarations that can be reviewed in their entirety within the labeled and tabbed supporting documents.

4. On 24 January 2024, the HRC, Chief, Senior Enlisted Promotions, Promotions Branch provided an advisory opinion for this case and stated:

a. After a review of the applicant's request, the U.S. Army Human Resources Command, Enlisted Promotions Branch has determined administrative relief is warranted and substantiated, however, we cannot promote the applicant to MSG when he did not have a valid security clearance per AR 600-8-19, paragraph 1-19a., which states: "Promotion to MSG and sergeant major (SGM) requires eligibility for an interim secret clearance or higher", unless directed to do so by the ABCMR.

b. The applicant received an OML, as a 79R (Recruiter), of 101 on the Fiscal Year 2021 (FY21) SFC Evaluation Board. Temporary promotions were authorized for the 1 November 2021 promotion security clearance, he was not eligible to promote. Should ABCMR grant the applicant an exemption to the clearance requirement, Senior Enlisted Promotions would promote with a Date of Rank (DOR) and effective date of 1 October 2021. This is due to a Deputy, Chief of Staff G-1 memorandum dated 8 December 2021, amending the DOR of Soldiers promoted on 1 November 2021 to 1 October 2021.

5. On 1 February 2024, counsel responded to the HRC advisory opinion with a brief and three (3) enclosures. Counsel stated, in part:

a. The Advisory Opinion (AO) asserts and recognizes that the applicant was the victim of an error or injustice that warrants corrective action being taken with respect to his request for retroactive promotion to MSG. However, the AO posits that such action cannot be taken because the applicant did not have a valid security clearance at the time in order to be promoted. The AO also states that if the Board were to "grant an exemption to the clearance requirement, Senior Enlisted Promotions would promote with a DOR and effective date of 1 October 2021." While we respectfully agree with the conclusion that a clear error or injustice is present in this matter, we respectfully disagree with the contention that the applicant did not possess a valid security clearance at that time. In consideration of the below discussion, we respectfully ask that this honorable Board grant full relief in this matter.

b. A plain reading of the Statement of Reasons (SOR) does not suggest or otherwise indicate that the applicant's security eligibility had been immediately suspended or otherwise revoked. Rather, a plain reading of the SOR indicates that his clearance would only be revoked should he fail to timely respond to the SOR and mitigate the identified security concerns, or if his Security Management Office suspended his access. There is no evidence indicating that his Security Management Office elected to suspend his clearance at this time.

c. AR 600-8-19, paragraph 1-19a states that promotion to MSG or SGM requires eligibility for an interim secret clearance or higher as a prerequisite for promotion. It does not require that the individual actually possess a clearance at the time of promotion, only that they be eligible for a clearance.

d. AR 380-67 (Personnel Security Program), paragraph 7-2b states that a "personnel security clearance remains valid until (1) the individual has separated from the Armed Forces, (2) separated from DoD civilian employment; (3) has no further official relationship with DoD or other Federal agencies, (4) official action has been taken to deny, revoke or suspend the clearance or access"

e. Additionally, "no unfavorable administrative action as defined in the terms section may be taken by the organization to which the individual is assigned for duty without affording the person the full range of protections contained in paragraph 8-6, below, or, in the case of SCI, Annex B, DCID." at paragraph 8-2a. "No unfavorable administrative action may be taken under the authority of this regulation. When a commander learns of significant derogatory information, the commander "shall determine whether, ... it is in the interests of national security to continue subject's security status unchanged or take interim action to suspend subject's access to classified information or assignment to sensitive duties ... until a final determination is made by the appropriate authority." at paragraph 8-3.

f. If such action is taken against a member, the commander is required to complete a DA Form 5248-R and forward the same to the appropriate authoritative body. at paragraph 8-3b. Here, the applicant was in the midst of exercising his due process rights with respect to his security clearance. The Agency, DOD CAS, had not officially revoked his clearance at that time and there is no evidence indicating that his Security Management Office had suspended his clearance either. Accordingly, the applicant was eligible for an interim security clearance and did in fact possess a valid clearance on 1 November 2021. Accordingly, he met all requirements for promotion to MSG.

6. Counsel also provided three (3) enclosures which show DOD CAF notified the applicant on 24 June 2021 that a preliminary decision was made to revoke his eligibility for access to classified information and/or assignment to duties that had been designated national security sensitive. Information concerning his personal history led to the security concerns was listed in the SOR. He was informed to complete the SOR Receipt and Statement, and forward it to the DOD CAF, via his organization's Security Management Office within 10 days. The three enclosures can be reviewed in their entirety within the tabbed and labeled supporting documents.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition, and executed a comprehensive review based on law, policy, and regulation. The Board reviewed and concurred with the U.S. Army Human Resources Command's

(HRC) advisory finding the applicant received an order of merit list (OML) number of 101 as a 79R (Recruiter) on the Fiscal Year 2021 Sergeant First Class Evaluation Board. Temporary promotions were authorized for the 1 November 2021 promotion month and the applicant's OML passed for this date. However, due to the loss of his security clearance, he was not eligible to promote. The Board determined that the applicant's lapse in security clearance was at no fault of his own and his promotion to master sergeant should be effective 1 October 2021. In granting the applicant's request for promotion to 1 October 2021, the applicant is entitled to all pay and allowances associated with this action, as determined by the Defense and Finance Accounting Service.

2. 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
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by promoting the applicant to master sergeant (MSG)/E-8 with an effective date of rank as 1 October 2021, with entitlement to back pay and allowances (if applicable) as a result of this correction.

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I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. AR 600-8-19 (Enlisted Promotions and Demotions) prescribes enlisted promotion and demotion (previously known as reduction) functions.

a. Paragraph 1-12 (Suspension of favorable personnel actions (Flags) (Regular Army and U.S. Army Reserve only) states, in pertinent part, for Soldiers (SSG and above) who are on an OML stemming from a Headquarters Department of the Army evaluation board, they will retain their OML standing, but their promotion eligibility status will change from most/fully qualified to not fully qualified. Reinstate a Soldier's eligibility for promotion and determine if the Soldier would have otherwise been promoted retroactively when a flag is removed.

b. Paragraph 1-19a (Personnel security investigation requirements) states, the following security clearance eligibility requirements are a prerequisite for promotion: "Promotion to MSG and SGM requires eligibility for an interim secret clearance or higher."

2. AR 380-67 (Personnel Security Program) establish policies and procedures to ensure that acceptance and retention of personnel in the Armed Forces and United States Army, acceptance and retention of civilian employees in the Department of Defense (DOD) and Department of the Army (DA), and granting members of the Armed Forces, Army, DA and DOD civilian employees, DA and DOD contractors, and other affiliated persons access to classified information and assignment to sensitive positions are clearly consistent with the interests of national security.

a. Paragraph 2-4 (Criteria for application of security standards) states, the ultimate decision in applying either of the security standards set forth in paragraphs 2-2 and 2-3, above, must be an overall common sense determination based upon all available facts. The criteria for determining eligibility for a clearance or assignment to a sensitive position under the security standard shall include, but not be limited to the following (see appendix I for further guidance on the application of these factors): "Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information."

b. Paragraph 7-2b (Issuance clearance) provides that, a personnel security clearance remains valid until (1) the individual is separated from the Armed Forces, (2) separated from DOD civilian employment, (3) has no further official relationship with DOD or other Federal agencies, (4) official action has been taken to deny, revoke or suspend the clearance or access, or (5) regular access to the level of classified information for which the individual holds a clearance is no longer necessary in the

normal course of their duties. If an individual resumes the original status of (1), (2), (3), or (5) above, no single break in the individual's relationship with DOD exists greater than 12 months, and/or the need for regular access to classified information at or below the previous level recurs, the appropriate clearance shall be reissued without further investigation or adjudication provided there has been no additional investigation or development of derogatory information.

c. Paragraph 7-2e states, the interim clearance will be recorded on DA Form 873 and shall be recorded in the DCSI by the parent DOD Component in accordance with paragraph 6-103 in the same manner as a final clearance. If a final clearance has not been received within 150 days, commanders will submit DA Form 5247-R (Request for Security Determination) to CDR, CCF (PCCF-M), as a tracer action and extend the interim period for an additional 180 days. If the DCII reveals existence of unevaluated derogatory information, CCF will advise requester that interim clearance is not authorized.

d. Paragraph 8-1 states, for purposes of this regulation, an unfavorable administrative action includes any adverse action which is taken as a result of a personnel security determination, as defined in the terms section, and any unfavorable personnel security determination, as defined in the terms section. This chapter is intended only to provide guidance for the internal operation of the DOD and is not intended to, does not, and may not be relied upon, to create or enlarge the jurisdiction or review authority of any court or administrative tribunal, including the Merit Systems Protection Board.

e. Paragraph 8-2a (Referral for action) states, whenever derogatory information relating to the criteria and policy set forth in paragraph 2-4 and appendix I of this regulation is developed or otherwise becomes available to any DOD element, it shall be referred by the most expeditious means to the commander or the security officer of the organization to which the individual is assigned for duty. The Commander or security officer of the organization to which the subject of the information is assigned shall review the information in terms of its security significance and completeness. If further information is needed to confirm or disprove the allegations, additional investigation should be requested. The commander of the duty organization shall ensure that the parent component of the individual concerned is informed promptly concerning (1) the derogatory information developed and (2) any actions taken or anticipated with respect thereto by forwarding DA Form 5248-R (Report of Unfavorable Information for Security Determination) to the CDR, CCF. However, referral of derogatory information to the commander or security officer shall in no way affect or limit the responsibility of the central adjudication facility to continue to process the individual for denial or revocation of clearance or access to classified information, in accordance with paragraph 8-6, below, if such action is warranted and supportable by the criteria and policy contained in paragraph 2-4 and appendix I. No unfavorable administrative action as defined in the

terms section may be taken by the organization to which the individual is assigned for duty without affording the person the full range of protections contained in paragraph 8-6, below, or, in the case of SCI, Annex B, DCID 1/14.

3. Title 10, USC, section 1552 states the Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army.

4. AR 15-185 (ABCMR) states, the ABCMR begins its consideration of each case with the presumption of administrative regularity. It will decide cases based on the evidence of record and it is not an investigative body. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. Paragraph 2-11 states 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//