

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 September 2024

DOCKET NUMBER: AR20230010405

APPLICANT REQUESTS: correction of the U.S. Army Criminal Investigation Command (CID) Fort Benning CID Office Law Enforcement Report (LER), 16 December 2016, by amending the report to unfound the alleged offense under the provisions of Army Regulation 195-2 (Criminal Investigation Activities), paragraph 4-4, or making a determination that any information contained in the report is no longer considered adverse information for the purposes of promotion selection, special selection, federal recognition, or any other centralized boards.

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

- DD Form 149 (Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552)
- Headquarters and Headquarters Company, 1st Battalion, 75th Ranger Regiment, Memorandum (Supplemental Information, Application for Correction of Military Record – (Applicant)), 15 June 2023
- DA Form 2823 (Sworn Statement), 8 August 2016
- two Sworn Statements, 10 August 2016 and 25 October 2016
- three CID Forms 94 (Agent's Investigation Report), 29 August 2016 and 2 December 2016
- DA Form 2801 (Polygraph Examination Statement of Consent), 31 October 2016
- Fort Benning CID Battalion Memorandum (Polygraph Examination Report), 31 October 2016
- Fort Benning CID Office Memorandum (LER – Serious Incident Report (Category 3)/Final), 16 December 2016
- Headquarters, U.S. Army Maneuver Center of Excellence, Office of the Staff Judge Advocate, Memorandum (Recommendation Not to Prosecute (Applicant) for Violation of Article 120 (Rape and Sexual Assault), Uniform Code of Military Justice (UCMJ), 10 March 2017
- Headquarters, U.S. Army Maneuver Center of Excellence, Memorandum (Initial Disposition (Applicant), 75th Ranger Regiment, Fort Benning, GA), 4 April 2017
- U.S. Army Human Resources Command Memorandum (Statutory Referral to a Special Selection Review Board (SSRB), 7 September 2021
- seven DA Forms 67-10-1 (Company Grade Plate (O1-O3; WO1-CW2) Officer Evaluation Report) covering the period 21 April 2015 through 25 May 2022

- CID/U.S. Army Crime Records Center (CRC) Letter, 15 July 2022
- CID/CRC Letter, 6 October 2022

FACTS:

1. The applicant states the alleged offense contained in the CID LER, 16 December 2016, is not credible as defined by Army policy, Department of Defense (DOD) policy, and federal law. Specifically, the offense was not "resolved and supported by a preponderance of the evidence." Since the allegation was not supported by a preponderance of the evidence and with the advice of legal counsel, his chain of command affirmatively decided to take no adverse action against him. The servicing trial counsel noted evidentiary insufficiencies in CID's investigation and also collected new evidence after CID's investigation that further undermined the credibility of the allegation. When his commanding general decided to not pursue adverse action against him in April 2017, he mistakenly believed the case was determined to be "unsubstantiated" and closed with no further action. Notwithstanding these facts, the information contained in the CID report was considered "credible information of an adverse nature" pursuant to Title 10, U.S. Code, section 615 (Information Furnished to Selection Boards), and DOD Instruction 1320.14 (DOD Commissioned Officer Promotion Program Procedures), and prompted referral of his promotion recommendation to major (MAJ) to an SSRB on 7 September 2021. This process has significantly altered his career trajectory and prospects for future service.

2. He enlisted in the U.S. Army Reserve on 20 July 2007 for the purpose of being placed on active duty to attend the U.S. Military Academy (USMA) Preparatory School, Fort Monmouth, NJ, Class 2008.

3. Headquarters, USMA, Orders 181-87 released him from active duty effective 29 June 2008 and assigned him to the U.S. Army Reserve Control Group (Reinforcement) as a cadet (CDT) at USMA West Point, NY.

4. His DA Form 71 (Oath of Office – Military Personnel), shows he was appointed as a Regular Army commissioned officer and executed his oath of office on 26 May 2012.

5. The DA Form 2823, 8 August 2016, shows Second Lieutenant (2LT) Z____ W____ W____ provided a sworn statement wherein he stated:

a. While at West Point, NY, in May 2012, First Lieutenant (1LT) D____ U____ went into his room visibly upset and began to cry. He asked her repeatedly what had happened, but she would not tell him what caused her to be upset. 1LT U____ had told him a lot of personal information about herself and they were best friends. The topic of the night which had made her upset frequently came up. Every time he would ask her about it, she would get upset and tell him to stop asking.

b. In May 2016, he arrived in Bagram, Afghanistan, where he saw the applicant walking around. He again asked 1LT U____ about the night in May 2012, but the only thing she could remember was getting ready for bed and getting into bed to go to sleep. 1LT U____ told him that the applicant had told 1LT B____ D____ that he had sex with 1LT U____. He thought it was alarming that the applicant was telling another Soldier that he had sex with 1LT U____ and she was saying she didn't remember anything about it. He told 1LT U____ that "if what he [the applicant] is saying is true, then he raped you."

c. 1LT U____ told him that she agreed to go with 1LT D____ to hang out with her friend and the applicant. The applicant was the driver for the night and the plan was for the four of them to go to a bar north of West Point.

6. On 10 August 2010, 1LT U____ provided a sworn statement wherein she stated:

a. On 5 May 2016 her friend B____ D____, along with the applicant and J____ B____, went to a bar in Poughkeepsie, NY. After an unsuccessful attempt to enter a bar, the four of them went to a hotel instead where they started playing drinking games. On two separate occasions the applicant grabbed her legs and told her how much he liked her legs. Later that night, B____ D____ and J____ B____ went to the bedroom to sleep. She recalled laying the couch cushions out on the other side of the couch where she thought it was mutually understood that was where the applicant was going to sleep. She then laid down on the pull-out couch to go to sleep. The next thing she remembers was waking up on the edge of the bed with the applicant in the bed also. She went to the bathroom feeling sore and felt like sexual penetration had occurred.

b. When they returned to West Point, NY, she told B____ D____ that she may have had sex with the applicant. B____ D____ told her that she was pretty sure they had sex. The applicant called her and asked her if she really did not remember anything and if she was going to tell anyone. She told him no. She knew if she brought it up she would be punished for underage drinking. She also did not remember what happened and she thought people would not take what she had to say seriously because of that.

c. Over the next 4 years, she would just change the subject anytime 2LT W____ would bring up what happened. When she got to Afghanistan, she realized 2LT W____ and the applicant were working in close quarters. 2LT W____ had contacted B____ D____ to ask her what happened the night of 5 May 2016, and B____ D____ had told him that she had had sex with the applicant. 2LT W____ then told her that she had been sexually assaulted.

7. The CID Form 94, 11 August 2016, shows the Bagram CID Office was notified by MAJ J____ M. F____, Command Judge Advocate, on 1 August 2016 that

1LT D____ S. U____ reported she was sexually assaulted by the applicant approximately 4 years ago while both were attending USMA West Point. Special Agent B____ interviewed 1LT U____, who related that on or about 5 May 2012, she, 1LT B____ D____, 1LT J____ B____, and the applicant rented a hotel room in Poughkeepsie, NY, while they were CDTs attending USMA. 1LT U____ related they spent the evening socializing and consuming alcoholic beverages. 1LT U____ stated she fell asleep on the couch and when she awoke the following day, she noticed her vaginal area felt sore. 1LT U____ asked 1LT D____ if she knew what occurred and 1LT D____ informed her that she didn't think anything happened. 1LT U____ and 1LT D____ then asked the applicant about the events of that evening, wherein the applicant stated he engaged in sexual acts with 1LT U____. 1LT U____ informed the applicant and 1LT D____ that she did not remember anything after falling asleep on the couch. 1LT U____ disclosed the incident to her boyfriend, 2LT Z____ W____, after 2LT W____ mentioned he saw the applicant recently on Bagram Airfield.

8. The CID Form 94, 29 August 2016, shows Special Agent C____ interviewed Captain (CPT) J____ B____ on 16 August 2016 wherein CPT B____ stated he was friends with 1LT U____ during his senior year at USMA West Point. He and 1LT D____ had started a romantic relationship during that time. The group of four went to Poughkeepsie, NY, just before finals in order to unwind. They went to a hotel room to play cards and drink alcohol and everything seemed fine. At one point, 1LT U____ and the applicant were "making out," but he was unsure if it was due to the card game or because of romantic intentions. At one point during the night, he went to the bathroom and observed 1LT U____ top of the applicant but did not know if they were clothed or what they were doing. The next morning, they returned to West Point without incident.

9. On 25 October 2016, the applicant provided a sworn statement wherein he stated he "hung out" with Captain (CPT) B____, 1LT D____, and 1LT U____ during a weekend in May 2012. While at the hotel, the four of them were drinking around a table. At some point during the evening, CPT B____ and 1LT D____ moved from the table to the bed of the hotel. He and 1LT U____ moved to the kitchen and started kissing and then had sex on the floor of the kitchen. When they woke up the next morning they had casual conversations with each other and eventually returned to West Point, NY.

10. On 31 October 2016, the applicant agreed to undergo a polygraph examination. An analysis of the polygrams collected determined the applicant was being deceptive when answering relevant questions. During the post-instrument interview, the applicant agreed that there was a "lack of consent" on the part of 1LT U____ based on the totality of facts, and further stated that she did not insert his penis into her vagina as he originally reported. The applicant could not or would not verbalize what the lack of consent was in regard to 1LT U____. However, the applicant continued to deny that he sexually assaulted 1LT U____. The applicant maintained that he remembered 1LT U____ being on top of him and willingly engaging in sexual intercourse with him

and willingly performing oral sex on him. The applicant terminated the interview when he refused to answer any further questions and demanded to leave.

11. The CID Form 94, 2 December 2016, shows Special Agent M____ coordinated with CPT A____ M____, Trial Counsel, Fort Benning, GA, who opined there was probable cause to believe the applicant committed the offense of aggravated sexual assault.

12. The Fort Benning CID Office memorandum (LER – Serious Incident Report (Category 3)/Final), 16 December 2016, names the applicant as the subject/suspect for the offense of aggravated sexual assault from 1 October 2007 through 27 June 2012.

a. The Report of Summary states:

(1) The Bagram CID Office was notified by MAJ J____ M. F____, Command Judge Advocate, Train Advise Assist Command – East, that 1LT U____ reported she was sexually assaulted by the applicant approximately 4 years ago while both were attending USMA West Point.

(2) 1LT U____ stated she and a group of Soldiers rented a hotel room where they socialized and consumed alcoholic beverages. 1LT U____ stated she awoke the following morning with bodily pain consistent with sexual activity and could not recall anything from the night prior. 1LT U____ stated the applicant informed her they engaged in sexual activity. The applicant was interviewed and stated he engaged in consensual sexual intercourse with 1LT U____. The applicant was administered a polygraph which determined he was deceitful.

b. On 2 December 2016, CPT A____ M____, Trial Counsel, Fort Benning, opined there was probable cause to believe the applicant committed the offense of aggravated sexual assault.

13. The Headquarters, U.S. Army Maneuver Center of Excellence, Office of the Staff Judge Advocate, memorandum (Recommendation Not to Prosecute (Applicant) for Violation of Article 120, UCMJ), 10 March 2017, states trial counsel recommended not prosecuting the applicant for violation of Article 120, UCMJ, as alleged by 1LT U____ while they were CDTs at West Point. It was the opinion of the trial counsel that, given the evidence and structure of the law when the alleged misconduct occurred (before 28 June 2012), there was insufficient evidence to prosecute and convict the applicant.

14. The Headquarters, U.S. Army Maneuver Center of Excellence, memorandum (Initial Disposition (Applicant)), 4 April 2017, states the commanding general determined there was insufficient evidence to prefer court-martial charges against the applicant for violation of Article 120, UCMJ. He noted the alleged misconduct in the case occurred prior to the legal framework of Article 120 – Sexual Assault law, which only applied to all

misconduct occurring after 28 June 2012. The structure of the sexual assault law at the time of the alleged incident, the delay in reporting of the incident, a lack of eyewitness testimony of the victim's state of intoxication, evidence contradicting the victim's statement that she was asleep, and eyewitness testimony corroborating the version of events stated by the applicant were the primary factors that influenced his decision.

15. The U.S. Army Human Resources Command memorandum (Statutory Referral to an SSRB), 7 September 2021, notified the applicant that he was being referred to an SSRB for consideration of promotion to the rank of MAJ based on adverse information from the CID LER, 16 December 2016.

16. The CID/CRC letter, 15 July 2022, notified the applicant that his request to amend the LER from the files of CID was denied. CID determined the information he provided did not constitute as new or relevant information needed to amend the report. He was instructed that he may appeal to the Office of the Army General Counsel if he disagrees with this denial.

17. The CID/CRC letter, 6 October 2022, notified the applicant that his request to correct information from the files of CID did not constitute as new or relevant information needed to amend the report. The decision supplements their previous response, 19 September 2022 (not in evidence).

18. His memorandum (Supplemental Information, Application for Correction of Military Record – (Applicant)), 15 June 2023, states, in part:

a. In May 2012 as a USMA CDT, he along with three other CDTs, CDT J____ B____, CDT B____ D____, and CDT D____ U____, went out in nearby Poughkeepsie, NY. The four CDTs booked a hotel suite with one queen bedroom and living area with a pull-out couch and kitchenette at a Residence Inn and spent the evening drinking alcohol, playing cards and other games, and enjoying each other's company. CDT B____ and CDT D____ were in an ongoing relationship and retired to the bedroom at the end of the night, while he and CDT U____ stayed in the living area. He and CDT U____ were just acquaintances prior to this night, but they had hit it off throughout the night. While the four CDTs were playing games, CDT B____ observed him and CDT U____ "making out." After CDT B____ and CDT D____ retired to the bedroom, he and CDT U____ engaged in consensual sexual intercourse. At one point in the evening, CDT B____ got up to go to the bathroom in the common area, observed CDT U____ on top of him, and, based on this observation, presumed they were having sex. The next morning, all four CDTs woke up, had breakfast, and went back to USMA together.

b. In the Summer of 2012, CDT U____ invited CDT D____ and Second Lieutenant (2LT) B____, who had just graduated USMA and was commissioned as a 2LT, to her

lake house early in the summer, just a few weeks after the night in question. While at the lake house, CDT U_____ joked with CDT D_____ about how she had sex with him, an African American, saying "once you go Black, you never go back to Black."

c. In the Summer of 2016, 2LT Z_____ W_____, then-2LT U_____'s boyfriend, saw him at Bagram Airfield, Afghanistan. As CDTs in May 2012, 2LT W_____ and 1LT U_____ were best friends. Then-CDT W_____ knew that then-CDT U_____ had gone out with him on the night in question. In the days after that night, CDT W_____ asked CDT U_____ what happened, and CDT U_____ insisted that she did not want to talk about it with him. CDT W_____ subsequently brought it up multiple times and CDT U_____ continued to rebuff him. After then-2LT W_____ saw him in May 2016, he again confronted 1LT U_____, now his girlfriend, and demanded to know what happened, in 2LT W_____'s words, "since we are together now." 1LT U_____ eventually disclosed that she had sex with him at the end of the night but did not remember many of the details. 2LT W_____ continued to pry and eventually told 1LT U_____, "if what you are telling me is true, then he raped you."

19. He provided seven DA Forms 67-10-1 (Company Grade Plate (O1-O3; WO1-CW2) Officer Evaluation Report) covering the period 21 April 2015 through 25 May 2022, attesting to his character and showing he was rated "Highly Qualified" or "Most Qualified" by his senior rater on each occasion.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the applicant's military records, the Board found that relief was not warranted. The Board carefully 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.

2. The Board noted the standard to determine whether a titling action was appropriate has changed under the National Defense Authorization Act, Fiscal Year 2021, section 545, to a higher increased standard of "probable cause." Based on this, the Board found there was insufficient evidence to support the applicant was improperly titled and should be removed from the law enforcement report (LER) and expunction of his name and personally identifiable information from the Defense Central Investigation Index (DCII), CID databases, and all other federal agency criminal databases and amendment of the LER to reflect that probable cause did not exist to submit criminal history data to the Federal Bureau of Investigation (FBI) National Crime Information Center (NCIC) under Department of Defense (DOD). Based on the facts and circumstances provided, the Board denied relief.

3. The applicant was titled in a law enforcement report for aggravated sexual assault from 1 October 2007 through 27 June 2012. The Board considered the recommendation by the trial counsel not to prosecute the applicant, including the remark lack of sufficient evidence to gain a conviction under the Uniform Code of Military Justice and the Board noted the disposition decision by the commanding general on 4 April 2017 not to prefer charges against the applicant based on insufficient evidence; however, determined the decision whether to prosecute is not the same administrative decision in front of the Board on whether or not probable cause existed or still exists. Probable cause exists where the facts and circumstances, based on reasonably trustworthy information, are sufficient in themselves to warrant a belief by a person or reasonable caution that a crime has been committed. The Board considered the accuser's statement and found it more credible than the applicant's statement.
4. The applicant requested CID amend the law enforcement report and his request was denied.
5. Based on a preponderance of evidence available to the Board for review, the Board determined the evidence presented was not sufficient to warrant a recommendation for relief.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

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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.

REFERENCE:

DOD Instruction 5505.07 (Titling and Indexing by DOD Law Enforcement Activities), 8 August 2023, establishes policy, assigns responsibilities, and prescribes uniform standard procedures for titling persons, corporations, and other legal entities in DOD law enforcement activity (LEA) reports and indexing them in the Defense Central Index of Investigations (DCII).

a. Public Law 106-398, section 552, and Public Law 116-283, section 545, codified as a note in Title 10, U.S. Code, section 1552, establishes procedures for DOD personnel through which:

(1) covered persons titled in DOD LEA reports or indexed in the DCII may request a review of the titling or indexing decision; and

(2) covered persons titled in DOD LEA reports or indexed in the DCII may request their information be corrected in, expunged, or otherwise removed from DOD LEA reports, DCII, and related records systems, databases, or repositories maintained by, or on behalf of, DOD LEAs.

b. DOD LEAs will title subjects of criminal investigations in DOD LEA reports and index them in the DCII as soon as there is credible information that they committed a criminal offense. When there is an investigative operations security concern, indexing the subject in the DCII may be delayed until the conclusion of the investigation.

c. Titling and indexing are administrative procedures and will not imply any degree of guilt or innocence. Judicial or adverse administrative actions will not be taken based solely on the existence of a DOD LEA titling or indexing record.

d. Once the subject of a criminal investigation is indexed in the DCII, the information will remain in the DCII, even if they are found not guilty, unless the DOD LEA head or designated expungement official grants expungement in accordance with section 3.

e. Basis for Correction or Expungement. A covered person who was titled in a DOD LEA report or indexed in the DCII may submit a written request to the responsible DOD LEA head or designated expungement officials to review the inclusion of their information in the DOD LEA report; DCII; and other related records systems, databases, or repositories in accordance with Public Law 116-283, section 545.

f. Considerations.

(1) When reviewing a covered person's titling and indexing review request, the expungement official will consider the investigation information and direct that the

covered person's information be corrected, expunged, or otherwise removed from the DOD LEA report, DCII, and any other record maintained in connection with the DOD LEA report when:

(a) probable cause did not or does not exist to believe that the offense for which the covered person was titled and indexed occurred, or insufficient evidence existed or exists to determine whether such offense occurred;

(b) probable cause did not or does not exist to believe that the covered person committed the offense for which they were titled and indexed, or insufficient evidence existed or exists to determine whether they committed such offense; and

(c) such other circumstances as the DOD LEA head or expungement official determines would be in the interest of justice, which may not be inconsistent with the circumstances and basis in paragraphs 3.2.a.(1) and (2).

(2) In accordance with Public Law 116-283, section 545, when determining whether such circumstances or basis applies to a covered person when correcting, expunging, or removing the information, the DOD LEA head or designated expungement official will also consider:

(a) the extent or lack of corroborating evidence against the covered person with respect to the offense;

(b) whether adverse administrative, disciplinary, judicial, or other such action was initiated against the covered person for the offense; and

(c) the type, nature, and outcome of any adverse administrative, disciplinary, judicial, or other such action taken against the covered person for the offense.

//NOTHING FOLLOWS//