

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 February 2025

DOCKET NUMBER: AR20230010514

APPLICANT REQUESTS:

- In effect, removal of his general officer memorandum of reprimand (GOMOR) from his official military personnel file (OMPF)
- Permission to appear personally before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- GOMOR Filing Determination memorandum
- Pre-Trial Agreement with general court-martial convening authority (GCMCA) approval and GCMCA withdrawal of charges memorandum
- Expiration Term of Service (ETS) change document
- GOMOR Rebuttal
- State Department of Children and Families Confidential Investigative Summary
- Five Character statements
- County Sheriff Investigative Report
- Request for evidence

FACTS:

1. The applicant states his command unlawfully and unethically issued him a GOMOR, changed his ETS, and denied him the opportunity to accept his selection as a warrant officer candidate. The applicant feels the injustice occurred for the following reasons:

- The trial counsel removed a key piece of favorable evidence, and the applicant was not allowed access to this evidence until January 2023
- The GOMOR had the same accusations for which his State had already cleared him; further, the Army never convicted him of any crime and the charges against him were dismissed
- In the pre-trial agreement, the GCMCA committed to not imposing a GOMOR unless he was found guilty at a nonjudicial punishment (NJP) hearing (under the provisions of Article 15, Uniform Code of Military Justice (UCMJ)); no NJP hearing was ever held

- The command shifted his ETS date and forced him out with an honorable discharge, thus preventing him from accepting his appointment as a warrant officer candidate

2. The applicant provides documents associated with his GOMOR, along with five statements of character. The statements of character, written respectively by a U.S. Marine Corps (USMC) colonel, a U.S. Army chaplain (colonel), a USMC master sergeant, and two Army master sergeants, all attest to the applicant's outstanding qualities as a Soldier and affirm their belief the applicant could not have committed the acts of which he was accused.

3. A review of the applicant's service record shows the following:

a. On 5 April 2016, the applicant enlisted into the Regular Army for 4 years and 29 weeks; based upon having completed a bachelor's degree, the applicant entered in the rank/grade of specialist (SPC)/E-4.

b. While still participating in initial entry training, the applicant married Ms. T\_\_ N. Z\_\_ and became the stepfather to K\_\_ M. M\_\_, age 12 (female); K\_\_ L. M\_\_, age 9 (female); and K\_\_ P. Z\_\_, age 6 (male); the applicant and his new spouse subsequently added a son to their family.

c. Upon completion of initial entry training, the Army awarded him military occupational specialty (MOS) 35F (Intelligence Analyst), orders assigned him to Hawaii, and he arrived with his family at his new duty station, on or about 2 November 2016.

d. On 20 March 2019, the applicant immediately reenlisted for 4 years; his new expiration term of service (ETS) date became 19 March 2023. On 22 March 2019, the Army issued orders, reassigning the applicant to U.S. Army Central Command, MacDill Air Force Base, FL; he arrived, on or about 10 July 2019. Effective 1 May 2020, the applicant's leadership promoted him to staff sergeant (SSG)/E-6. In or around September 2021, the Army selected the applicant to become a warrant officer candidate in MOS 350F (All Source Intelligence Technician).

e. On 13 January 2022, the applicant's spouse filed a child abuse complaint against the applicant; the local sheriff's office reported the following:

(1) Through interviews and investigation, the responding officer found that, between June 2019 and April 2021, the applicant allegedly groped the buttocks of his younger stepdaughter (K\_\_ L. M\_\_) while kissing her cheek. Also, at some point, the applicant forced his stepdaughter onto a bed and, in a "missionary position" pressed against her private area; both were fully clothed at the time and no penetration

occurred. Further, the applicant was accused of showing his stepdaughter pornography. The applicant's spouse kicked the applicant out of the house.

(2) The responding officer took digital photos of cell phone messages and contacted the Abuse Hotline; he concluded his investigation after turning the matter over to the State's Department of Children and Families.

f. On 13 January 2022, an investigator for the Department of Children and Families arrived at the applicant's residence and interviewed members of the family. In March 2022, the investigator completed her report:

(1) Narrative.

(a) The applicant had been sexually abusing the oldest stepdaughter (K\_\_ M. M\_\_) while the family still lived in Hawaii; he allegedly kissed her and groped her buttocks. When the applicant's spouse learned of this, she confronted the applicant, but he denied everything; no further incidents occurred involving the oldest stepdaughter.

(b) In January 2019, the applicant turned his attention to the younger stepdaughter (K\_\_ L. M\_\_). He would grab her buttocks and kiss her on the cheek; additionally, he would give her money after sexually abusing her, and he would "spank " her if she tried to move the money he had placed in her pocket. The applicant would also walk into the bathroom while his younger stepdaughter showered and pull back to curtain to look at her.

(c) The applicant and his spouse once caught the younger stepdaughter watching pornography. He later confronted his stepdaughter in her bed by getting on top of her in a "missionary position" and asking her if she liked it; both were fully clothed. The applicant then started showing pornography to his younger stepdaughter.

(d) The applicant's spouse only became aware of what was happening when she took the younger stepdaughter's phone and found notes, made by the stepdaughter, that described what the applicant had done.

(2) Findings. No indications of human trafficking or sexual battery; sexual exploitation by a parent or legal guardian was unsubstantiated.

(3) Analysis.

(a) "The case is being closed with not substantiated findings of exploitation and no indicators of sexual battery or human trafficking...Per (State Code), sexual exploitation 'is any other sexual act intentionally perpetrated in the presence of a child, if such exposure or sexual act is for the purpose of sexual arousal or gratification,

aggression or degradation, or other similar purpose.' The child admitted that the stepfather would show her pornography on the phone. This happened multiple times."

(b) "While an interview with [applicant] was not permitted from his lawyer, it is unclear why [applicant] was showing the child pornographic images if not for the purpose of arousal. [Applicant] touching the child on the buttocks and looking at her naked in the shower when he would come into the bathroom also show a concerning pattern of behaviors. [Applicant] has some inappropriate tendencies that could be perceived as grooming. There are no indicators of sexual battery because there was no penetration. There was no human trafficking as it does not appear there was an arrangement made for the inappropriate touching."

(4) Safety Analysis Summary. "The children are safe in the home with the mother. The mother confronted the father about the allegations and he left the home. He has not been living in the home since the mother became aware of the abuse. The father filed for divorce. The mother does not plan to allow the father back in the home. She is protective. Counseling services were offered, but the mother declined at this time. She has already looked into counseling for her daughter and wants to wait on counseling for herself."

g. In or around January/February 2022, the applicant's command flagged the applicant due to the above-cited civilian investigation. On or about 4 October 2022, the applicant's command preferred court-martial charges against the applicant. On or about 3 February 2023, the command referred the applicant's case to a general court-martial; (documentation pertaining to the foregoing is not available for review). At some point during this period, the command extended the applicant past his 19 March 2023 ETS.

h. On 1 June 2023, the applicant's counsel offered a pre-trial agreement, which included the following:

(1) Paragraph 2. "I, the Accused, have examined the charges and specifications preferred against me, and all the supporting evidence produced by the Government. Understanding that I have a legal and moral right to plead not guilty and to place the burden of proving my guilt beyond a reasonable doubt upon the Government, I hereby offer to enter into the following Pretrial Agreement...."

(2) Paragraph 3. "I, the Accused, understand the (GCMCA) can withdraw from this Agreement under any of the following conditions: At any time before my substantial performance of promises contained in Paragraph 4 of this Agreement (and/or) upon my failure to fulfill any promise or condition in paragraph 4 of this agreement."

(3) Paragraph 4. "In exchange for the (GCMCA's) actions in Paragraph 5, I, the Accused, agree to do the following:"

(a) "To not object to a General Officer Article 15 (i.e., NJP). I understand that under this Agreement, I am not agreeing to plead guilty at an Article 15. Neither am I waiving my right to contest my case at an Article 15 nor waiving my right to appeal the Article 15 if the Commander makes adverse findings against me, the Accused."

(b) "To waive any objection based on the statute of limitations for Article 15 punishment only as it relates to the offenses currently referred to a general court-martial."

(4) Paragraph 5. "In exchange for my Agreements, the (GCMCA), on behalf of the United States, agrees to the following:"

(a) "Withdraw and dismiss the charges in this case, without prejudice, to ripen into prejudice upon the completion of the General Officer Article 15."

(b) "To refer this case to a General Officer Article 15."

(c) "To not initiate a reprimand pursuant to AR (Army Regulation) 600-37 (Unfavorable Information). This does not limit the Imposing Commander's Authority under Article 15, should I be found guilty of an(y) offense, from issuing a punitive letter of reprimand or making a filing determination for the Article 15, IAW (in accordance with) AR 27-10 (Military Justice), para 3-6a-b (Filing Determination)."

(d) "To not initiate any other written or oral reprimand, other than provided for in (sub)paragraph c. above, for the charged misconduct."

i. On 2 June 2023, the GCMCA withdrew all court-martial charges against the applicant and, on 3 June 2023, approved the pre-trial agreement. Additionally, on 3 June 2023, the GCMCA offered the applicant NJP, which listed the following charges:

(a) Article 120b (Sexual Abuse of a Child Involving Sexual Contact), UCMJ; three specifications:

- Between 1 June 2019 and 16 June 2020, the applicant committed a lewd act upon (K\_\_ L. M\_\_) by touching her buttocks with the intent to arouse or gratify his sexual desire
- Between 16 June 2020 and 31 (sic) April 2021, the applicant committed a lewd act upon (K\_\_ L. M\_\_) by touching her buttocks with the intent to arouse or gratify his sexual desire
- Between 16 June 2020 and 31 (sic) April 2021, the applicant committed a lewd act upon (K\_\_ L. M\_\_) by intentionally communicating indecent language with the intent to arouse or gratify his sexual desire

(b) Article 120c (Indecent Viewing), UCMJ – Between 1 July 2020 and 31 August 2020, the applicant knowingly and wrongfully viewed (K\_\_ L. M\_\_)'s private area without her consent and under circumstances in which she had a reasonable expectation of privacy.

(c) Article 128c (Domestic Violence), UCMJ; two specifications:

- Between 1 July 2020 and 31 August 2020, the applicant committed a violent offense against (K\_\_ L. M\_\_), the applicant's immediate family member, by unlawfully pushing (K\_\_ L. M\_\_) with his hands
- Between 1 July 2020 and 31 August 2020, the applicant committed a violent offense against (K\_\_ L. M\_\_), the applicant's immediate family member, by unlawfully holding her legs with his hands

j. On 5 August 2023, the GCMCA issued a memorandum, withdrawing the applicant's pre-trial agreement. The memorandum stated:

(1) "The purpose of this memorandum is to advise you that I am withdrawing from the plea agreement, dated 12 January 2023, pursuant to paragraph 3 of the agreement and Rule for Courts-Martial (RCM) 705(e)(4)(B) (Plea Agreements – Procedure – Withdrawal – By Convening Authority)." (RCM 705(e)(4)(B) states a convening authority may withdraw a plea agreement in cases where: the accused fails to fulfill any material promise or condition in the agreement; a military judge discloses a disagreement as to a material term in the agreement; or when findings are set aside because the plea of guilty is held to be improvident upon appellate review).

(2) "I am dismissing charges currently pending Article 15 proceedings pursuant to the UCMJ. In lieu of the General Officer Article 15 proceedings, I will be issuing you an administrative reprimand for the underlying misconduct. You will receive a copy of that reprimand and an opportunity to respond in accordance with AR 600-37, paragraph 3-7 (Referral of Information)."

k. On 5 August 2023, the GCMCA issued the applicant a GOMOR, citing him for inappropriate conduct of a sexual nature toward the applicant's 13-year-old stepdaughter during multiple occasions in 2019; specifically:

- The applicant walked into his stepdaughter's bathroom while she was showering, pulled back the shower curtain, and looked at her after she asked the applicant not to enter the bathroom while she was showering
- On a separate occasion, the applicant pushed his stepdaughter down onto a bed and pushed her legs into a sexual position while touching he legs

- At another time, the applicant showed his stepdaughter pornographic images and asked inappropriate and sexually explicit questions
- Lastly, the applicant touched his stepdaughter's buttocks on multiple occasions, including times when he would place money in the back pocket of her clothing

I. On 16 August 2023, the applicant's counsel submitted a rebuttal to the GOMOR. After reviewing the sequence of events from when the command first preferred court-martial charges up to the issuance of the GOMOR, counsel made the following arguments:

(1) None of the allegations stated in the GOMOR were true.

(a) Counsel pointed out that the State had declined to prosecute the applicant, and he maintained this was because the State had opined, "no probable cause that the subject crime had been committed." Counsel learned this from the county sheriff's office.

(b) During the applicant's Article 32, UCMJ hearing, the Special Victim Prosecutor (Captain (CPT) B\_\_) stated that, "while the evidence against [applicant] was not all that convincing, it probably met the extremely low threshold of probable cause." According to counsel, the Staff Judge Advocate's Chief of Justice (Major J\_\_ G\_\_) actively sought for a way to "dump" the case because it did not merit the prosecution team's efforts.

(c) In a March 2022 report, an investigator from the State's Department of Children and Families concluded the allegation were unsubstantiated. (Counsel noted the trial counsel did not provide this report until January 2023).

(2) The applicant signed the pre-trial agreement in June 2023 because it "boasted the same standard of proof as a GCM (general court-martial) and less exposure." Furthermore, neither the applicant nor counsel believed the government had requisite evidence to convict the applicant beyond a reasonable doubt.

(a) Counsel contended that the pre-trial agreement was a binding contract, which mandated that the applicant's allegations be resolved via a General Officer Article 15; the agreement specifically stated a GOMOR could not be administered.

(b) Contrary to what the GCMCA may have been advised by his Staff Judge Advocate (SJA), the applicant did "substantially perform on this deal." The government's withdrawal of the pre-trial agreement constituted a "unilateral breach of contract."

(3) On 14 August 2023, representatives from the command's SJA office indicated the command's position was to separate the applicant, based on the fact the applicant was flagged and, with that flag in effect, he would not be allowed to reenlist.

(a) In addition, given that the applicant no longer faced court-martial charges, the separation regulation (AR 635-200 (Active Duty Enlisted Administrative Separations)) dictated that the applicant could be expeditiously discharged. Irrespective of whether the GCMCA decides to permanently file the GOMOR in the applicant's OMPF, it was evident that the command had "predetermined the outcome here, ensuring (the applicant's) exit from the Army, despite the actual facts of the case...."

(b) "To an outsider, it might appear that this Command does not take care of its Soldiers. When the military justice system presents challenges to the Command, or when a Soldier refrains from admitting to crimes he did not commit, the Command seems to use various tactics to ensure the Soldier's termination from the service."

(c) "Here, you have a Staff Sergeant accused of crimes no one thinks he committed – because he did not. Your own Trial Counsel were unwilling to stand in open court and prosecute him. The Command has known that the evidence does not support a finding of guilt, either at court martial or under the Article 15 standard of proof. Instead, a signed contract (the pre-trial agreement) was unilaterally withdrawn from in order to issue him a GOMOR, that (the command) guaranteed he would not receive. In plain terms, this is a breach of contract."

(4) Counsel presented extenuation and mitigation by summarizing the applicant's accomplishments in his Army career.

m. On 21 August 2023, the GOMOR imposing official directed the GOMOR's permanent placement in the applicant's OMPF. On 15 September 2023, the Army honorably discharged the applicant based upon completing his required active service. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 7 years, 5 months, and 11 days of net active duty service. Item 13 (Decorations, Medals, Badges, Citations, and Campaign Ribbons Awarded or Authorized) listed the following:

- Army Commendation Medal (3rd Award)
- Army Achievement Medal (3rd Award)
- Joint Meritorious Unit Award (2nd Award)
- Army Good Conduct Medal (3rd Award)
- National Defense Service Medal
- Noncommissioned Officer Professional Development Ribbon with Numeral "2"
- Army Service Ribbon

- Air Assault Badge

n. On 15 September 2023, the applicant enlisted into the U.S Army Reserve for a one-year term.

4. AR 15-185 (Army Board for Correction of Military Records (ABCMR)), currently in effect, states an applicant is not entitled to a hearing before the Board; however, the request for a hearing may be authorized by a panel of the Board or by the Director of ABCMR.

#### BOARD DISCUSSION:

After reviewing the application and all supporting documents, the Board determined relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the available documentation, the Board concluded the applicant's contentions did not have merit for the following reasons:

- (1) Applicant was never taken to court-martial, so any evidence withheld (if such assertion is true) is irrelevant. Applicant was issued a GOMOR in the summer of 2023, by which time he had the evidence he states was withheld, and was given full opportunity to respond to the GOMOR before a filing decision was made.
- (2) The standard of proof for a GOMOR, preponderance of the evidence, is well below that of a criminal conviction in state court or at a court-martial (beyond a reasonable doubt). Therefore, the dropping of criminal charges or decision to not prosecute hold no bearing on a command's decision to issue the adverse administrative action of a reprimand.
- (3) The Convening Authority did not violate the terms of the PTA by issuing the GOMOR. One important condition of the PTA was that the Government was permitted to withdraw at any time before Applicant substantially performed the conditions imposed upon him by the PTA. Although Applicant signed a memorandum stating he was waiving his right to a court-martial, he had not yet substantially performed his obligation to not object to the GO Article 15. AR 27-10, paragraph 3-16 provides that the right to demand trial by court-martial does not expire until the presentation of evidence begins at an Article 15 hearing. Therefore, regardless of whether Applicant signed a memo, he still retained the right to demand trial by court-martial when the Convening Authority withdrew from the PTA because the second reading of the GO Article 15, at which the hearing of evidence would take place, had not yet happened. Applicant had not fully satisfied his obligation to "not object to a GO Article 15," and the Government's withdrawal from the PTA was valid.

(4) Applicant provides no evidence demonstrating that his ETS date was adjusted wrongfully or that he was wrongfully denied attendance at Warrant Officer Candidate School.

2. As a result of the above conclusions, the Board found insufficient evidence of an error or injustice warranting any of the requested relief.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	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.

//SIGNED//

X

CHAIRPERSON

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

## REFERENCES:

1. Army Regulation (AR) 600-37 (Unfavorable Information), currently in effect, sets forth policies and procedures to ensure the best interests of both the Army and Soldiers were served by authorizing unfavorable information to be placed in, transferred within, or removed from an individual's official military personnel file (OMPF).

a. Paragraph 1-1 (Purpose). The regulation's intent is to ensure the best interests of both the Army and Soldiers are served by authorizing unfavorable information to be placed in, transferred within, or removed from an individual's OMPF.

b. Paragraph 3-2 (Policies). Unfavorable information will not be filed in official personnel files unless the recipient was given the opportunity to review the documents and was given a reasonable amount of time to make a written response.

c. Paragraph 3-5 (Filing of Non-Punitive Administrative Memoranda of Reprimand, Admonition, or Censure).

(1) Authority to issue and direct the filing of such memoranda in an officer's local file is restricted to the recipient's immediate commander or higher level commander; the designated rater, intermediate rater, or senior rater, per AR 623-3 (Evaluation Reporting System); or a general officer who is senior to the recipient.

(2) A memorandum, regardless of issuing authority, can be placed in a recipient's OMPF upon the order of a general officer who exercised general court-martial convening authority over the recipient.

d. Paragraph 7-2 (Policies and Standards).

(1) Once an official document has been properly filed in an OMPF, it is presumed to be administratively correct, and to have been filed pursuant to an objective decision by a competent authority.

(2) For removal of derogatory information, there was no time restriction for submitting an appeal for removal of unfavorable information

(a) The recipient had the burden of proof to show, by clear and convincing evidence, to support assertion that the document is either untrue or unjust, in whole or in part.

(b) Evidence submitted in support of the appeal may include but was not limited to the following: an official investigation showing the initial investigation was untrue or unjust; decisions made by an authority above the imposing authority overturning the

basis for the adverse documents; notarized witness statements; historical records; official documents; and/or legal opinions.

(c) Appeals that merely allege an injustice or error without supporting evidence or a compelling argument were not considered.

2. AR 15-185 (Army Board for Correction of Military Records (ABCMR)), currently in effect, states:

a. Paragraph 2-2 (ABCMR Functions). The ABCMR decides cases on the evidence of record; it is not an investigative body.

b Paragraph 2-9 (Burden of Proof) states:

(1) The ABCMR begins its consideration of each case with the presumption of administrative regularity (i.e., the documents in an applicant's service records are accepted as true and accurate, barring compelling evidence to the contrary).

(2) The applicant bears the burden of proving the existence of an error or injustice by presenting a preponderance of evidence, meaning the applicant's evidence is sufficient for the Board to conclude that there is a greater than 50-50 chance what he/she claims is verifiably correct.

c. Paragraph 2-11 (ABCMR) Hearings. 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//