

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 1 October 2024

DOCKET NUMBER: AR20230010793

APPLICANT REQUESTS: expunction of her name from the Defense Central Investigations Index (DCII), Criminal Investigation Division (CID) databases, and all other federal agency criminal databases

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)
- Legal Counsel Brief in Support of Application, undated
- U.S. Army Criminal Investigation Command memorandum (Law Enforcement Report – Final), 11 May 2020
- DA Form 4833 (Commander's Report of Disciplinary or Administrative Action), 29 June 2020
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 13 July 2020
- Department of Justice, Federal Bureau of Investigation fingerprint submission, 3 October 2022
- Headquarters (HQ), 1st Sustainment Brigade memorandum ((Applicant) - Previous Army Conduct), 13 October 2022
- CID memorandum (Legal Review of Request for Amendment of Record), 9 March 2023
- CID letter, 15 March 2023

FACTS:

1. The applicant refers to legal counsel for statement. Her legal counsel states, in effect:

a. Prior to the applicant's discharge, she was subjected to a nearly 6-month-long investigation based upon allegations of extortion and wrongful broadcast of intimate visual images. At the conclusion of the investigation, there was no credible evidence to support a finding of probable cause that the applicant had committed criminal misconduct. The allegations were made by a non-commissioned officer who used his position and authority to engage in an unprofessional relationship with the applicant.

CID seized the applicant's phone to look for evidence and the phone was later returned to her because there was no credible evidence of criminal activity on the device. Fortunately, the fact that the phone contained no evidence demonstrated that there was never probable cause of extortion or threatening to broadcast or distribute an intimate image. Moreover, the only disciplinary action she received was non-judicial administrative action for an unprofessional relationship, and no criminal charges were ever filed against her. Prosecution was declined after an investigation was completed.

b. Several material errors led to the adverse actions in the case. The first and foremost source of material error was the fact that despite a nearly 6-month-long investigation into the applicant, no formal charges were filed against her. Rather than relying on the clear and available evidence and applying the applicable preponderance of the evidence standard, the CID stated that there was probable cause that the applicant committed extortion and wrongful broadcast or distribution of intimate images despite the absence of a credible factual basis. At a minimum, the non-judicial punishment was the first of any disciplinary action in the applicant's Army career.

c. There are significant due process concerns with regard to the handling of the case. The applicant is now suffering career-altering, if not ending, consequences as a result of a fundamentally flawed and biased investigation that failed to obtain any credible evidence of misconduct. While normally the due process requirements afforded to an individual during the course of an investigation are limited, here the applicant should have been afforded at least the protection of a fair and impartial investigation because of the severe consequences that could result from a substantiated finding. It is legal error not to provide the individual affected some measure of due process during the course of the investigation.

d. The process that the applicant went through of having her fingerprints indexed, and the implications of this indexing, has serious negative implications. Without subsequent action of expungement, the effects of this indexing will be lifelong. All federal and cooperating state law enforcement agencies use the National Crime Information Center system. Any time an individual applies for a job that requires a criminal background check, an individual that has been indexed will have a positive hit for an arrest. In the applicant's case, when she applies for jobs, or if she ever requires a security clearance again, her background will show that she was arrested for extortion and wrongfully distributing intimate images. This is extremely prejudicial and unfair to the applicant because, should a background check be performed on her in the future, the person receiving the results will likely assume that the applicant must have done something wrong when they see her indexed records. By having her records expunged, the applicant will be allowed to finally close the painful chapter in her life. Complete expungement is necessary and legally appropriate because the allegations were false and the investigation and original probable cause determination was based on false evidence, false statements, and it was later discovered by the defense that the

allegations was not credible. The applicant was indexed because of fraud and the negligence of investigators and prosecutors. The applicant should not suffer for the lies and mistakes of others.

2. She enlisted in the Regular Army on 9 October 2018.

3. The CID memorandum (LER – Final), 11 May 2020, named the applicant as the subject for the offenses of violation of Article 127, Uniform Code of Military Justice (UCMJ) (Extortion) and Article 117a, UCMJ (Wrongful Broadcast or Distribution of Intimidate Visual Images). The report summary states:

a. This office was notified by (Redacted), Military Police Investigations, Department of Emergency Services, Fort Riles, KS, that Staff Sergeant (SSG) (Redacted) reported the applicant "hacked" his social media accounts, broadcasted an explicit video of him, and extorted him for \$500.00 via "Cashapp."

b. SSG (Redacted) stated the applicant obtained access, through unknown means, to his social medial accounts and obtained an explicit video of himself and another individual participating in a sexual act. SSG (Redacted) stated he confronted the applicant about the video to which she stated she would not distribute the video if he paid her \$500.00. SSG (Redacted) stated after he paid the applicant \$500.00, she distributed the video to numerous Soldiers.

c. The applicant denied she possessed a video of SSG (Redacted) and another individual participating in a sexual act; the applicant further stated she observed the video in question on SSG (Redacted) public Facebook account.

d. Specialist (SPC) (Redacted) admitted to receiving the video of SSG (Redacted) from the applicant via "Snapchat". SPC (Redacted) stated the applicant related to him she had gained access to SSG (Redacted) SnapChat and sent the video to herself. SPC (Redacted) stated the video depicted two individuals engaged in sexual acts but was unable to identify the individuals. SPC (Redacted) stated he showed the video to other Soldiers but did not provide them with a copy.

e. On 7 May 2020, (Redacted), Military Justice Advisor, 1st Infantry Division Sustainment Brigade, 1st Infantry Division, opined probable cause existed to believe the applicant committed the offenses of Wrongful Broadcast or Distribution of Intimate Visual Images, in violation of Article 117a, UCMJ and Extortion, in violation of Article 127, UCMJ.

4. The DA Form 4833, 29 June 2020, shows the applicant's offenses of violation of Article 127, UCMJ (Extortion) and Article 117a, UCMJ (Wrongful Broadcast or Distribution of Intimate Visual Images). The Commander's Decision, 29 June 2020,

shows the applicant was found guilty at a field grade Article 15 non-judicial punishment and all punishment was suspended for 6 months.

5. On 13 July 2020 she was honorably discharged in the rank/grade of private second class/E-2 on by reason of condition, not a disability, under the provisions of Army Regulation 635-200, paragraph 5-15. She completed 1 year, 9 months, and 5 days of net active service.

6. CID memorandum (Legal Review of Request for Amendment of Record (Applicant)), 9 March 2023, the attorney advisor stated, the in part:

The DA Form 4833 reflects that [Applicant] was titled for Extortion, Article 127, and Wrongful Broadcast or Distribution of Intimate Visual Images, Article 117a, of the Uniform Code of Military Justice (UCMJ) for obtaining and distributing an explicit video of another Soldier while demanding a cash payment from the Soldier in exchange for not distributing the material. Based on my review of the LER, I find probable cause existed to believe [Applicant] violated the offense for which she was titled.

Consistent with the direction received from the Secretary of the Army, since probable cause existed to believe [Applicant] committed the offense listed in the LER, her record should not be amended to remove her name from the title block and any corresponding entry into the Defense Central Index of Investigations (DCII) should remain.

I note that in [Applicant] amendment request, she states the record should be amended to indicate that she was not subject to any judicial proceeding. [Applicant] is correct. Article 15 of the UCMJ outlines the procedures for a Commanding officer to impose non-judicial punishment. The DA Form 4833 correctly annotates the imposition of a Field Grade Article 15, but if incorrect information is in the National Crime Information Center (NCIC), or another database, the entry should be amended to reflect the information accurately.

7. The CID letter, 15 March 2023, notified her legal counsel that the request to amend her records within the files of the Department of the Army Criminal Investigation Division (DACID) was denied. She had the right to appeal to the Office of the Army General Counsel, the Army's appellate authority. Her appeal must be submitted within 90 days of the date of this letter through the Assistant Director, U.S. Army Crime Records Center, 27130 Telegraph Road, Quantico, VA 22134, for forwarding to the Office of the Army General Counsel. She was notified she may appeal the denial of her amendment by submitting a request to: Army Review Board Agency, Army Board for Correction of Military Records (ABCMR), 251 18th Street South, Suite 385, Arlington, VA 22202-3531.

8. There is no evidence indicating she appealed to the Office of the Army General Counsel.

9. She provided the following documents with her request:

a. HQ, 1st Sustainment Brigade memorandum for New Jersey Office Attorney General/ New Jersey State Board of Nursing ((Applicant) – Previous Army Misconduct), 13 October 2022, the Brigade Judge Advocate stated in part:

[Applicant's] legal action is considered "Non-Judicial Punishment" under Article 15 of the Uniform Code of Military Justice (UCMJ). What this means is that it is not considered to be judicial in nature and is not considered a conviction.

Article 15 of the UCMJ is a military commander's tool for punishing someone without the defendant having access to a judge or jury. This makes for quicker dispositions and lets commanders and soldiers get back to the mission at hand. The trade-off of having less "rights" as a defendant at this level is that the action is not considered to be a criminal conviction.

[Applicant] was not deceitful when answering that she had no prior convictions if this is the only conduct that is popping up on your radar.

Page two of your letter to her states "Your conviction provides grounds for disqualification ". [Applicant] was never convicted in a court of law of any wrongdoing. The military mechanism to trigger an actual conviction would be a Court-Martial.

My office never prosecuted [Applicant] at a Court-Martial. While I do not have access to [Applicant's] record post military, I can attest with certainty that she does not have any convictions stemming from her time in service.

b. U.S. Department of Justice, Federal Bureau of Investigation, fingerprint submission, 3 October 2022, revealed the applicant was charged for extortion and wrongful broadcast or distribution of intimate images.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered

a. The evidence shows Military Police Investigations, Department of Emergency Services, Fort Riles, KS, were notified that Staff Sergeant (SSG) [Name] reported the applicant "hacked" his social media accounts, broadcasted an explicit video of him, and extorted him for \$500.00 via "CashApp." The SSG stated the applicant obtained access, through unknown means, to his social medial accounts and obtained an explicit video of himself and another individual participating in a sexual act. The SSG also stated he confronted the applicant about the video to which she stated she would not distribute the video if he paid her \$500.00, and that after he paid the applicant \$500.00, she distributed the video to numerous Soldiers.

a. The Board first considered whether probable cause did or did not exist (when titled) to believe the offense occurred or the person committed the offense. Investigators and the Staff Advocate General opined that probable cause existed to believe the applicant committed the offenses of Wrongful Broadcast or Distribution of Intimate Visual Images and Extortion. Additionally, a legal review of the applicant's case also confirmed that probable cause existed to believe the applicant violated the offense for which she was titled. Therefore, the Board found no error or injustice in the titling action.

b. The Board also considered whether probable cause does or does not (now) exist to believe the offense occurred or the person committed the offense. The CID Report provides clear corroborating evidence of what transpired on that date. As a result of this incident, the DA Form 4833, 29 June 2020, shows the applicant's offenses of Extortion and Wrongful Broadcast or Distribution of Intimate Visual Images. The Commander's Decision, dated 29 June 2020, shows the applicant was found guilty at a field grade Article 15 non-judicial punishment and all punishment was suspended for 6 months. The Board noted that aside from her self-reporting of the events that occurred then, the applicant does not provide any new evidence or a persuasive argument of a convincing nature that the titling action should be removed.

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.

REFERENCES:

1. Army Regulation 15-185 (Army Board for Correction of Military Records) prescribes policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. Board members will review all applications that are properly before them to determine the existence of an error or injustice and direct or recommend changes in military records to correct the error or injustice, if persuaded that material error or injustice exists and that sufficient evidence exists in the record. The ABCMR will decide cases on the evidence of record; it is not an investigative body. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

2. Department of Defense (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 DCII.

a. Pursuant to 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//