

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 June 2024

DOCKET NUMBER: AR20230010900

APPLICANT REQUESTS: in effect, removal of the DA Form 2627 (Record of Proceedings under Article 15, Uniform Code of Military Justice (UCMJ)), 10 April 2009, from the restricted section of his Army Military Human Resource Record (AMHRR).

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

- DD Form 149 (Application for Correction of Military Record)
- DA Form 2627, 10 April 2009, with sworn statements
- DA Form 4856 (Developmental Counseling Form)
- DA Form 268 (Report to Suspend Favorable Personnel Actions)
- Enlisted Record Brief

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states he received a Field Grade Article 15 in 2009 for adultery. Currently filed in the restricted file in iPERMS. Regardless of the time since the Article 15, not only has he continued to serve, but has also attained the rank of sergeant first class. Since receiving the DA Form 2627, the Army also now recognizes legal separation, which they did not at the time. It has not only hindered job opportunities for him, but also for his now former spouse. Had he committed the same action today there would be zero issue in the Army's eyes.
3. The applicant enlisted in the Regular Army on 22 February 2006. He reenlisted on 24 April 2008 and was advanced to sergeant (SGT) /E-5.
4. On 9 April 2009, the applicant's battalion commander notified the applicant that he was considering whether he should be punished under Article 15, UCMJ, for the following misconduct:

a. In that he, did, at or near Fort Bragg, NC, on or about 12 March 2009, with intent to deceive, make to First Sergeant [Name], an official statement, to wit: he (the applicant) and SGT [Name] were sharing living accommodations for the purpose of helping with the cost of rent and there was no relationship involved, or words to that effect, which statement was false in that he and SGT [Name] were involved in a sexual relationship, and was then known by him to be so false. This is in violation of Article 107, UCMJ.

b. In that he, a married man, did, at or near Fort Bragg, NC, on divers occasions between on or about 16 March 2009 and on or about 7 April 2009, wrongfully have sexual intercourse with SGT [Name], a woman not his wife.

5. The applicant consulted with counsel: he declined trial by a court-martial and opted for a closed hearing. He indicated he would present matters on his own behalf.

6. The imposing officer found him guilty of both charges. His punishment consisted of reduction to E-4, forfeiture of pay, and extra duty. The imposing officer ordered this Article 15 filed in the restricted portion of the applicant's official military personnel file (OMPF). The applicant was offered the option to appeal; however, he elected not to appeal.

7. The applicant was promoted to staff sergeant on 1 January 2012 and to sergeant first class/E-7 on 1 May 2018. He reenlisted indefinitely on 1 May 2018.

8. Although not related to the Article 15, on 15 December 2023, the applicant received a General Officer Memorandum of Reprimand (GOMOR) for misconduct. The GOMOR states: During September 2023, he engaged in an inappropriate relationship with a married woman. He also sent her a nude photo of your erect penis that was also viewed by her husband, a fellow soldier.

9. On 7 March 2024, the imposing general officer ordered this GOMOR be permanently filed in the applicant's Army Military Human Resource Record.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition and available military records, the Board determined the applicant did not demonstrate by a preponderance of evidence that procedural error occurred that was prejudicial to the applicant. The Board noted that removal of an Article 15/ UMCJ is generally not warranted unless it is factually

incorrect. The Board determined based on the evidence in the applicant' record the incident did occur and the applicant acknowledged with his acceptance of the Article 15.

2. The Board found insufficient evidence to remove the Article 15. Furthermore, the applicant was provided a second chance regarding his misconduct and was promoted. However, evidence in the records shows the applicant committed the same offense and received a GOMOR. The Board found no error or injustice that warranted removal. Therefore, relief was denied.

3. The purpose of maintaining the Army Military Human Resource Record (AMHRR) is to protect the interests of both the U.S. Army and the Soldier. In this regard, the AMHRR serves to maintain an unbroken, historical record of a Soldier's service, conduct, duty performance, and evaluations, and any corrections to other parts of the AMHRR. Once placed in the AMHRR, the document becomes a permanent part of that file and will not be removed from or moved to another part of the AMHRR unless directed by an appropriate authority. The Board agreed, there does not appear to be any evidence the contested Article 15 was unjust or untrue or inappropriately filed in the applicant's AMHRR.

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.

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

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

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. 2. Army Regulation 27-10 (Military Justice) prescribes the policies and procedures pertaining to the administration of military justice and implements the Manual for Courts-Martial. It provides that a commander should use nonpunitive administrative measures to the fullest extent to further the efficiency of the command before resorting to NJP under the UCMJ. Use of NJP is proper in all cases involving minor offenses in which nonpunitive measures are considered inadequate or inappropriate. NJP may be imposed to correct, educate, and reform offenders who the imposing commander determines cannot benefit from less stringent measures; to preserve a Soldier's record of service from unnecessary stigma by record of court-martial conviction; and to further military efficiency by disposing of minor offenses in a manner requiring less time and personnel than trial by court-martial.

a. Paragraph 3-6a addresses filing of NJP and provides that a commander's decision whether to file a record of NJP in the performance folder of a Soldier's OMPF is as important as the decision relating to the imposition of the NJP itself. In making a filing determination, the imposing commander must carefully weigh the interests of the Soldier's career against those of the Army to produce and advance only the most qualified personnel for positions of leadership, trust, and responsibility. In this regard, the imposing commander should consider the Soldier's age, grade, total service (with particular attention to the Soldier's recent performance and past misconduct), and whether the Soldier has more than one record of NJP directed for filing in the restricted folder. However, the interests of the Army are compelling when the record of NJP reflects unmitigated moral turpitude or lack of integrity, patterns of misconduct, or evidence of serious character deficiency or substantial breach of military discipline. In such cases, the record should be filed in the performance folder.

b. Paragraph 3-28 (Setting Aside and Restoration) states:

(1) This is an action whereby the punishment or any part or amount, whether

executed or unexecuted, is set aside and any rights, privileges, or property affected by the portion of the punishment set aside are restored. NJP is "wholly set aside" when the commander who imposed the punishment, a successor-in-command, or a superior authority sets aside all punishment imposed upon an individual under Article 15. The basis for any set aside action is a determination that, under all the circumstances of the case, the punishment has resulted in a clear injustice. "Clear injustice" means there exists an un-waived legal or factual error that clearly and affirmatively injured the substantial rights of the Soldier. An example of clear injustice would be the discovery of new evidence unquestionably exculpating the Soldier. Clear injustice does not include the fact that the Soldier's performance of service has been exemplary subsequent to the punishment or that the punishment may have a future adverse effect on the retention or promotion potential of the Soldier.

(2) Normally, the Soldier's uncorroborated sworn statement will not constitute a basis to support setting aside punishment.

(3) In cases where administrative error results in incorrect entries on the DA Form 2627 or DA Form 2627-1 (Summarized Record of Proceedings under Article 15, UCMJ), the appropriate remedy generally is an administrative correction of the form and not setting aside of punishment.

(4) The power to set aside an executed punishment and to mitigate a reduction in grade to a forfeiture of pay, absent unusual circumstances, will be exercised only within 4 months after the punishment has been executed. When a commander sets aside any portion of the punishment, the commander will record the basis for this action according to DA Form 2627, notes 11 and 12; DA Form 2627-1, notes 9 and 10; or DA Form 2627-2 (see paragraph 3-38b). When a commander sets aside any portion of the punishment after 4 months from the date punishment has been executed, a detailed addendum of the unusual circumstances found to exist will be attached to the form containing the set aside action.

c. Paragraph 3-37b(2) states that for Soldiers in the ranks of SGT and above, the original DA Form 2627 will be sent to the appropriate custodian for filing in the OPMF. The decision to file the original DA Form 2627 in the performance folder or restricted folder of the OPMF will be made by the imposing commander at the time punishment is imposed. The filing decision of the imposing commander is subject to review by superior authority. However, the superior authority cannot direct filing a DA Form 2627 in the

performance folder that the imposing commander directed to be filed in the restricted folder.

d. Paragraph 3-43 contains guidance for transfer or removal of DA Forms 2627 from the OMPF. Applications for removal of a DA Form 2627 from the OMPF based on an error or injustice will be made to the ABCMR. There must be clear and compelling evidence to support removal of a properly completed, facially valid DA Form 2627 from a Soldier's record by the ABCMR.

3. Army Regulation 600-37 (Unfavorable Information) sets forth policies and procedures 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 AMHRR. Unfavorable information will not be filed in the AMHRR unless the recipient has been given the opportunity to review the documentation that serves as the basis for the proposed filing and a reasonable amount of time to make a written statement in response.

4. Army Regulation 600-8-104 (Army Military Human Resource Records Management) prescribes policies governing the Army Military Human Resource Records Management Program. The AMHRR includes, but is not limited to, the OMPF, finance-related documents, and non-service related documents deemed necessary to store by the Army.

a. Paragraph 3-6 states that once a document is properly filed in the AMHRR, the document will not be removed from the record unless directed by the ABCMR or other authorized agency.

b. Appendix B states the original DA Form 2627 will be sent to the appropriate custodian for filing in the OMPF. The decision to file the original DA Form 2627 in the performance folder or the restricted folder in the OMPF will be made by the imposing commander at the time punishment is imposed. The filing decision of the imposing commander is subject to review by any superior authority. However, the superior authority cannot direct that a report be filed in the performance folder that the imposing commander directed to be filed in the restricted folder. Records of NJP presently filed in either the performance or restricted folder of the OMPF will remain so filed, subject to other applicable regulations.

//NOTHING FOLLOWS//