

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 July 2024

DOCKET NUMBER: AR20230011074

APPLICANT REQUESTS: removal of his General Officer Memorandum of Reprimand (GOMOR) from 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)
- Memorandum, subject: Request for Army Board for Correction of Military Records (ABCMR) to [Applicant], 10 September 2022
- DD Form 457 (Preliminary Hearing Officer's Report), 19 November 2021
- Memorandum, subject: Article 32 Preliminary Hearing Report – U.S. v. [Applicant], 22 November 2021
- Memorandum, subject: Special Court-Martial Convening Authority Disposition of Charge – U.S. v. [Applicant]
- DA Form 2627 (Record of Proceedings Under Article 15, Uniform Code of Military Justice (UCMJ)), 18 January 2022
- Memorandum, subject: GOMOR
- Memorandum, subject: GOMOR Rebuttal Matters for [Applicant], 25 Apr 22
- Memorandum, subject: Filing Determination for GOMOR, [Applicant]
- Personnel Qualification Record

FACTS:

1. The applicant states:

a. He is requesting the GOMOR signed by Major General J- W- on 4 March 2022, be removed from his AMHRR. This GOMOR was based on an accusation that he committed a sexual assault.

b. He was ordered onto active duty to undergo the court-martial process. At a preliminary hearing under Article 32, UCMJ, a neutral and impartial judge advocate found that there was no probable cause to believe he committed the alleged offense.

c. A GOMOR must be supported by a preponderance of the evidence, which is a higher standard than probable cause. Therefore, if there was insufficient evidence to

support a finding of probable cause, there was insufficient evidence to support the allegations in the GOMOR by a preponderance of the evidence and he should not have received the GOMOR nor should it have been filed in his permanent records.

d. This correction should be made because the GOMOR was supported by insufficient evidence. A neutral fact finder with legal training, acting as a hearing officer, during a preliminary hearing did not find probable cause to believe that the offense he was accused of, and that is the subject of the GOMOR, was committed much less committed by him.

e. The GOMOR he received as a result of events on the evening of 21 March 2020 was an injustice under Army Regulation (AR) 15-185 (ABCMR) paragraph 2-9. He has enclosed documentation that demonstrates, by a preponderance of evidence, that the conduct alleged did not occur.

f. The GOMOR issued on 4 March 2022 states he was being reprimanded for "sexually assaulting a junior enlisted female Soldier" and further specifying that the basis of the sexual assault was a sexual act "without her consent." The GOMOR packet mailed to him included as support for the GOMOR an Article 15 that was issued on 18 January 2022.

g. A proceeding under Article 15, UCMJ did occur, where on 18 January 2022, he was found guilty of the specification that he violated AR 600-20 (Army Command Policy) by wrongfully engaging in an intimate relationship with a junior enlisted Soldier while serving as a noncommissioned officer (NCO) in violation of Article 92, UCMJ. As a result of the Article 15, he received reduction in rank to specialist (SPC)/E-4. He did not appeal the Article 15 and acknowledged his wrongdoing and lapse of judgment as it relates to engaging in intimate relations with junior enlisted Soldiers. Aside from the Article 15, there was no other supporting evidence included with the GOMOR packet mailed to him.

h. The GOMOR cites an incident from 2020. This incident from March 2020 was previously examined as a potential referral to a court-martial. There was a preliminary hearing held on 17 November 2021. The Preliminary Hearing Officer's Report from 22 November 2021, which considered the exact same allegation of sexual assault, makes explicit findings that there was no probable cause to sustain this allegation against him, citing evidence that "directly rebut[s] the lack of consent," including various witness statements.

i. On 25 April 2022, he provided matters for consideration related to the GOMOR. However, notwithstanding the rebuttal matters submitted, he received notice that the GOMOR would be filed in his AMHRR on 26 June 2022.

j. He has exhausted all administrative remedies at his disposal before this appeal. He submitted matters with the help of the 154th Legal Operations Division Trial Defense Services. Nevertheless, the GOMOR was permanently filed in his AMHRR. Since his rank is a SPC, his matter is not eligible for review by the Department of the Army Suitability Evaluation Board, therefore an appeal to the ABCMR is the only remaining option. Further, he brought this appeal in a timely manner in accordance with AR 15-185, paragraph 2-4.

k. The objectives of AR 600-37 (Unfavorable Information) are to both "apply fair and just standards to all Soldiers" and "prevent adverse personnel actions based on unsubstantiated derogatory information." The regulation identifies the "preponderance of evidence" burden as the appropriate one to apply to unfavorable information, which is defined by the regulation as "[e]vidence which is of a greater weight or more convincing than the evidence offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not."

l. The Preliminary Hearing Officer's Report issued on 22 November 2021, after an opportunity to review all the evidence before it presented by the Government, could not even find that a lower standard - probable cause - was met, and consequently, recommended that Charge I related to the alleged sexual assault, be dismissed, which it was. The report did find that Charge II, alleging a violation of Article 92, UCMJ, for fraternization had probable cause and recommended that the second charge "be adjudicated as an Article 15."

m. The GOMOR issued on 22 March 2022 does not cite any new evidence and, in fact, only includes the Article 15 related to the second charge as a supporting document. However, respectfully, he should not be reprimanded for unfavorable behavior that did not occur, especially where a competent preliminary hearing officer could not even sustain a finding of probable cause, an extremely low evidentiary standard.

n. Since October 2020, he has been learning from what he acknowledges was a lapse in judgement. This event never should have happened. However, while he accepts responsibility for the wrongdoing he did engage in - engaging in an intimate interaction with a junior enlisted Soldier - he never engaged in any action without consent, and it is an injustice to have a permanently filed GOMOR for unfavorable conduct that he did not do and is not supported by the record.

o. He humbly petitions the Board to correct an injustice. To allow this GOMOR to remain will be an end to his career in the U.S. Army, even though it has no support in the record.

2. The applicant's service record shows:

- a. He enlisted in the Regular Army (RA) on 18 October 2007.
- b. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was honorably transferred, in the rank of SGT, from the RA to a U.S. Army Reserve (USAR) unit on 20 February 2013. He remained in the USAR through oaths of extension of enlistment or reenlistment.
- c. On 28 October 2021, charges were preferred on the applicant for one specification of sexual assault and one specification of fraternization.
- d. Also on 28 October 2021, the commander appointed an Article 32 investigating officer (IO) to assess the charges of sexual assault and failing to obey an order or regulation against the applicant.
- e. On 17 November 2021, a preliminary hearing was held and on 22 November 2021, the IO submitting his report to the commander.
  - (1) The IO found no probable cause to believe the applicant committed sexual assault.
  - (2) The IO found probable cause to believe the applicant committed the offense of failing to obey an order or regulation.
  - (3) The IO recommended dismissal of the offense pertaining to sexual assault. The evidence was limited and contradictory.
  - (4) The IO recommended withdrawal of the offense pertaining to failing to obey an order or regulation and that it should be adjudicated by nonjudicial punishment.
- f. After reviewing the findings and recommendations of the IO, the Special Court-Martial Convening Authority dismissed the offense pertaining to sexual assault and dismissed the charge pertaining to failing to obey an order or regulation for disposition under nonjudicial punishment.
- g. On 18 January 2022, the applicant accepted nonjudicial punishment for violating a lawful general regulation by wrongfully engaging in an intimate and sexual relationship with a junior enlisted Soldier while serving as an NCO. His punishment consisted of reduction to the rank/grade of SPC/E-4.
- h. On 4 March 2022, the General Court-Martial Convening Authority issued a GOMOR to the applicant for sexually assaulting a junior enlisted female Soldier. On or about 21 March 2020, he sexually assaulted a junior enlisted female Soldier by penetrating her vulva with his penis, without her consent. On or about 21 March 2020, a

junior enlisted female Soldier reported that while playing volleyball and drinking alcoholic beverages with several Soldiers of her class, she became intoxicated and injured her knee. The applicant offered to help clean-up the female Soldier's injury and invited her to his barracks room. Upon reaching the room, her alcohol consumption caused dizziness and she became unconscious. When the female Soldier woke up, the applicant was actively engaging in sexual acts with her to which she did not consent.

i. On 25 April 2022, the applicant submitted rebuttal matters, through counsel, to his GOMOR to the commander.

(1) The applicant requested the GOMOR be rescinded, or in the alternative, direct that the filing be local.

(2) The preliminary hearing officer, which considers the exact same allegation of sexual assault, makes explicit findings that there was no probable cause to sustain the allegation against the applicant, citing evidence that directly rebuts the lack of consent.

(3) The applicant acknowledged that his actions on 21 March 2020 were in violation of the regulation and that his actions on this evening were a lapse in judgement on his part.

(4) He should not be reprimanded for behavior that did not occur.

(5) Since October 2020, the applicant has been learning from what he acknowledges was a lapse in judgement. This event never should have occurred. However, he had been punished for his wrongdoing through nonjudicial punishment.

(6) He includes a self-authored statement indicating his thoughts were not of himself nor were his actions intended to be predatory. His intent and actions were to aid a Soldier who was emotionally distraught and had physically injured herself. While attempting to help her, he initiated a physical contact with a kiss. At the time, he had no way of knowing how much, if any, alcohol she had consumed.

j. After considering all matters in the applicant's case, the commander directed the GOMOR be placed in the performance fiche of the applicant's Official Military Personnel File (OMPF) (now AMHRR).

k. On 4 October 2023, the applicant was discharged from USAR under the provisions of AR 135-178 (Enlisted Administrative Separations), paragraph 11c for misconduct – sexually assaulting a junior enlisted female Soldier on or about 21 March 2020 with a characterization of service of other than honorable conditions. The applicant was reduced to the lowest enlisted grade.

3. A review of the applicant's AMHRR shows the GOMOR, dated 4 March 2022 was filed in the applicant's AMHRR on 10 April 2022.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, 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. Upon review of the applicant's petition and military records, the Board determined that the General Officer Memorandum of Record imposed as an administrative measure lacked supporting evidence to determine that the applicant, beyond a preponderance of the evidence, committed the offense of sexual assault. The Board granted relief.

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 relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by removing the General Officer Memorandum of Reprimand, issued on 4 March 2022, and all associated documents from the applicant's AMHRR.

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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 the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. The regulation provides that 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. Army Regulation 600-37 (Unfavorable Information), 10 April 2018, 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.

a. 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.

b. Unfavorable information that should be filed in official personnel files includes indications of substandard leadership ability, promotion potential, morals, and integrity. These traits must be identified early and shown in permanent official personnel records that are available to personnel managers and selection board members for use in making decisions that may result in selecting Soldiers for positions of public trust and responsibility, or vesting such persons with authority over others. Other unfavorable character traits of a permanent nature should be similarly recorded.

c. Once an official document is properly filed in the AMHRR, it is presumed to be administratively correct and filed pursuant to an objective decision by competent authority. Thereafter, the burden of proof rests with the individual concerned to provide evidence of a clear and convincing nature that the document is untrue or unjust, in whole or in part, thereby warranting its alteration or removal from the AMHRR. Appeals that merely allege an injustice or error without supporting evidence are not acceptable and will not be considered.

d. Transfer those administrative memoranda of reprimand, admonition, or censure that are determined upon appeal to have served their intended purpose from the performance to the restricted folder of the AMHRR, when such transfer would be in the best interest of the Army.

3. Army Regulation 600-8-104 (Army Military Human Resource Records Management), 7 April 2014, prescribes Army policy for the creation, utilization, administration, maintenance, and disposition of the AMHRR. 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. Paragraph 3-6 provides 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.

//NOTHING FOLLOWS//