

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 July 2024

DOCKET NUMBER: AR20230011158

APPLICANT REQUESTS:

- an upgrade of the character of his service from under honorable conditions (general) to honorable
- change of the narrative reason and corresponding Separation Program Designator (SPD) code for separation to reflect he was discharged under "Secretarial Authority"
- removal of the General Officer Memorandum of Reprimand (GOMOR) from his Army Military Human Resource Record (AMHRR)
- vacation of the separation action against him and reinstatement in the Army
- promotion to the rank/pay grade of captain (CPT)/O-3 with a date of rank in accordance with his previous selection
- payment of back pay and allowances
- to appear at his own expense before the Board

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for the Review of Discharge from the Armed Forces of the United States)
- Counsel Brief and 11 enclosures (852 pages)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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 in 2016, he was falsely accused of the crimes of abusive sexual contact and sexual harassment by a member of his platoon. The complainant (Sergeant (SGT)/E-5 [REDACTED]) had been under investigation for unrelated misconduct and was attempting to garner sympathy for herself, distract the command, and ultimately secure a unit transfer and avoid adverse action. Furthermore, SGT [REDACTED] statements contained multiple inconsistencies, contradictions, and implausible assertions. No charges of any

kind were ever filed against the applicant. He received a GOMOR for fraternization. He was subsequently eliminated under Army Regulation 600-8-24 (Officer Transfers and Discharges) as a probationary officer for fraternization, conduct unbecoming of an officer, and derogatory information and was issued a General Discharge. The GOMOR and subsequent discharge were based on insufficient evidence and are unjust.

3. Counsel provides two letters, a brief, and 11 Enclosures on behalf of the applicant which are available in their entirety for the Board's consideration. Counsel states, in part, the applicant was falsely accused of the crimes of abusive sexual contact and sexual harassment by a member of his platoon. SGT ■■■ statements contained multiple inconsistencies, contradictions, and implausible assertions. SGT ■■■ also had a reputation for untruthfulness and a history of filing complaints against leaders who required her to perform official tasks that she did not desire to execute. No criminal charges of any kind were ever filed against the applicant. He received a GOMOR for fraternization that was placed in his AMHRR.

a. The applicant then received a notice of elimination action alleging fraternization, derogatory information in his AMHRR, and conduct unbecoming an officer. The derogatory information and conduct unbecoming an officer were based solely on the alleged fraternization. He was then eliminated under Army Regulation 600-8-24 as a probationary officer and received a General Discharge.

c. The involuntary separation action was initiated against the applicant based on fraternization, derogatory information in his AMHRR (the GOMOR), and for conduct unbecoming an officer (based upon the fraternization). So, essentially, the involuntary separation action against the applicant was for fraternization. As a probationary officer, one with under five years of commissioned service, the applicant was not entitled to present his case to a board of officers. If he had been able to appear before a board of officers, the applicant would have also had the right to confront witnesses against him and to call witnesses on his behalf. The board members would have had an opportunity to hear the testimony of the witnesses, observe their demeanor, and make their own determination of the credibility of the witnesses.

d. It is much more difficult for a respondent to prevail, or even to make sure that the recommenders and decision makers are understanding the arguments being made, when presenting a paper defense to an involuntary separation action. In an involuntary separation case with a probationary officer the Trial Counsel will typically brief the company, battalion, and brigade commanders, and will seek a recommendation of whether the officer should be discharged. The Trial Counsel or Staff Judge Advocate briefing these commanders can easily advocate for their recommended course of action, and highlight pieces of evidence in their favor, while neglecting to mention any evidence in favor of the person being investigated. The applicant had no right to make a personal appearance to these commanders and present his arguments in person for

why he should be allowed to remain in the Army. In this case the company, battalion, and brigade commanders all recommended that the applicant be discharged. The Staff Judge Advocate would then present the case to the Division Commanding General and give a recommendation. Again, the applicant had no right to a personal appearance before the Commanding General. After action by the Commanding General, the case would be forwarded to the Department of the Army Ad Hoc Review Board, and then to the Deputy Assistant Secretary of the Army (Review Boards) (DASA-RB) who would take final action on the case. As with the local commanders, the applicant had no right to a personal appearance before this final decision maker. The applicant tried to obtain a personal appearance before the Commanding General and the rest of his chain of command before a final decision in the case through the open door policy, but he was not granted an appearance.

e. The applicant's conduct was not fraternization. He has admitted that he met the complainant off-post to discuss some issues with their upcoming deployment. This coincides with SGT ■■■ statement that the first time she met with the applicant off-post was at a restaurant, that they were there about an hour, and that he made no moves toward her nor tried to touch her. When the applicant received the GOMOR he acknowledged wrongdoing for having engaged in behavior that had the potential to create a perception of partiality or compromise the good order of his unit. He believed that this could possibly create an appearance or impression of favorable treatment and that it would meet the definition of fraternization. The actual definition of fraternization; however, is not so restrictive. Prohibited relationships include dating between officers and enlisted personnel, and any relationship that would:

(1) Compromise, or appear to compromise, the integrity of supervisory authority or the chain of command.

(2) Cause actual or perceived partiality or unfairness.

(3) Involve, or appear to involve, the improper use of grade or position for personal gain.

(4) Are, or are perceived to be, exploitative or coercive in nature.

(5) Create an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission.

f. The lead portion of paragraph 4-14b of Army Regulation 600-20 (Army Command Policy) is important, along with an example given therein.

"Soldiers of different grades must be cognizant that their interactions do not create an actual or clearly predictable perception of undue familiarity between an

officer and an enlisted Soldier, or between an NCO [non-commissioned officer] and a junior-enlisted Soldier. Examples of familiarity between Soldiers that may become "undue" can include repeated visits to bars, nightclubs, eating establishments, or homes between an officer and an enlisted Soldier, or an NCO and a junior-enlisted Soldier, except for social gatherings, that involve an entire unit, office, or work section."

g. The "relationship" between the applicant and SGT ■ consisted of him meeting her off-post briefly to discuss the upcoming deployment. They were not dating. As shown above, Army Regulation 600-20 does not prohibit an officer and enlisted person from going to an eating establishment by themselves. So long as it does not become repeated visits and does not violate one of the specifically enumerated situations above, there is no fraternization. No one in the unit was aware of any private interactions between the applicant and SGT ■ and their "relationship" had no impact on the unit. Fraternization under the Uniform Code of Military Justice (UCMJ) is an Article 134 offense. As such, it must be shown that the conduct was of a nature to bring discredit to the armed forces or was to the prejudice of good order and discipline in the military. The Manual for Courts-Martial explains the elements of fraternization as follows:

In general. The gist of this offense is a violation of the custom of the armed forces against fraternization. Not all contact or association between officers and enlisted persons is an offense. Whether the contact or association in question is an offense depends on the surrounding circumstances. Factors to be considered include whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale. The acts and circumstances must be such as to lead a reasonable person experienced in the problems of military leadership to conclude that the good order and discipline of the armed forces has been prejudiced by their tendency to compromise the respect of enlisted persons for the professionalism, integrity, and obligations of an officer.

h. In view of the foregoing, the GOMOR and subsequent discharge were based on insufficient evidence and are unjust. Therefore, the separation action should be vacated, and the applicant should be reinstated in the Army with payment of all back pay and allowances. Since he was in a promotable status at the time of his separation, he should be retroactively promoted to the rank/grade of CPT/O-3 with a date of rank in accordance with his previous selection for promotion.

i. Counsel notes the applicant's Officer Evaluation Reports provide a snapshot of an individual possessing extremely high moral character and ability, who, at the same time, possesses the innate capacity to care deeply for the well-being and success of others. In other words, nowhere in any of these reports -written by eight different officers over three years, in garrison and while deployed- is there the slightest hint or suggestion of

selfishness, poor judgment, disrespect, lack of discipline or boorish behavior. Not a whiff. On the contrary, the applicant's evaluations reflect impeccable character, personality, and conduct completely inconsistent with the allegation lodged against him. Furthermore, the efficiency report for the period ending 5 July 2016, was written by superiors who were aware of the allegations being made against the applicant and the U.S. Army Criminal Investigation Command (CID) investigation. However, their comments about the applicant, especially CPT [REDACTED] statement that he fully supported the Sexual Harassment and Rape Prevention (SHARP) and Equal Opportunity programs, show that they did not put any credence in the allegations made by SGT [REDACTED]

j. Since being discharged from the Army the applicant moved to [REDACTED] area and is currently employed by a private company performing contracted intelligence duties for the Government. His job title is Intelligence Analyst. He currently works as a contractor at [REDACTED]. His main duties are to analyze intelligence reports, disseminate emerging threat information, and create products in support of executive management projects. This job allows him to use his training and experience to continue serving his country.

k. The applicant is a patriot, an accomplished man and military officer. He is respectful, detail oriented, and extremely thorough. He cared deeply for his unit and those in it. He is physically fit and mentally and intellectually sharp. He is articulate, intelligent, and measured. He also exudes a kindness and caring for others which, as others have noted, sets him apart from the pack. He takes time for just about anyone and anything if asked or needed, and he has a special talent for analyzing problems or issues from all sides before acting. All of these strengths are ones we want and look for in our military leaders. The applicant clearly has future value to his country.

l. Counsel provides the following documents in support of this petition, all of which are available in their entirety for the Board's consideration:

(1) Enclosure 1 - DD Form 214 (Certificate of Release or Discharge from Active Duty) provides a brief synopsis of the applicant's rank and pay grade; primary military occupational specialty; period of service; decorations, medals, and badge; military education; and discharge information.

(2) Enclosure 2 - DD Form 215 (Correction to DD Form 214) showing his DD Form 214 was corrected by deleting the entry "Member has not completed first full term of service."

(3) Enclosure 3 - Separation orders (2 pages) show he was to be discharged effective 7 March 2018.

(4) Enclosure 4 - DASA-RB decision on elimination action (3 pages) shows it was determined the applicant would be involuntarily eliminated from the Army with a General discharge.

(5) Enclosure 5 - Applicant's response to notification of elimination action with supporting documents (38 pages) shows the applicant petitioned his Commanding General to be retained on active duty in the Army.

(6) Enclosure 6 - Extract from notice of elimination action shows the applicant was required to show cause for retention on active duty.

(7) Enclosure 7 - GOMOR with provided documents (144 pages) show a GOMOR was imposed upon the applicant after a CID investigation revealed that he engaged in an inappropriate relationship with a NCO in his section.

(8) Enclosure 8 - Army Regulation 15-6 (Procedures for Investigating Officers and Boards of Officers) Report of Investigation - Hotline Complaint (63 pages) shows the proceedings of the investigation into the allegations against the applicant.

(9) Enclosure 9 - Peak Forensics report (142 pages) provides a detailed synopsis of the forensic investigation of telephones and computers conducted during the investigation into the allegations against the applicant.

(10) Enclosure 10 - SGT ■ deposition (414 pages) provides a detailed summary of SGT ■ oral and videotaped deposition on 14 January 2019 in the case of the applicant versus SGT ■

(11) Enclosure 11 - Applicant's affidavit wherein he states, since being discharged from the Army he moved to ■. He is currently employed by a private company performing contracted intelligence duties for the Government. His job title is Intelligence Analyst. He is currently working as a contractor at the ■

4. The applicant received a Bachelor of Arts degree in Political Science ■ State University in 2008.

5. He enlisted in the Regular Army in the rank/grade of specialist/E-4 for a period of 3 years and 23 weeks on 25 March 2013. A DD Form 214 shows upon completion of Officer Candidate School, the applicant was honorably discharged from the Regular Army for the purpose of accepting a commission in the Army on 28 August 2013.

6. The applicant was appointed as commissioned officer in the rank/grade of second lieutenant (2LT)/O-1 in the Regular Army on 29 August 2013.
7. The applicant was promoted from 2LT to first lieutenant (1LT)/O-2, effective 28 February 2015. He was subsequently placed in a promotable status for CPT.
8. A U.S. Army CID, Camp Buehring, Kuwait memorandum, Subject: Law Enforcement Report, dated 9 January 2017, shows an investigation was conducted due to allegations of offenses in violation of the UCMJ being committed by the applicant against SGT ■ and it was opined that probable cause existed to believe the applicant committed the offenses of Abusive Sexual Contact and Maltreatment of a Subordinate.
9. The applicant received a GOMOR from the Commanding General (CG) of the 29th Infantry Division after a CID investigation revealed that he engaged in an inappropriate relationship (Fraternization) with an NCO in his section. The relationship compromised the good order and discipline of his assigned unit and it led to an unfavorable atmosphere. This relationship was in violation of regulatory guidance set forth within Army Regulations 600-20, paragraph 4-14(b).
  - a. The CG advised the applicant that he was considering whether to direct the GOMOR be filed permanently in his AMHRR and afforded him an opportunity to present matters in his own behalf prior to deciding.
  - b. The applicant acknowledged receipt of the notification and submitted a written response wherein he denied fraternizing with SGT ■ but accepted full responsibility for engaging in behavior that had the potential to create a perception of partiality or compromised the good order of his unit. He also provided the CG a summary of his military career prior to the incident, and requested the CG consider placing the GOMOR in his local file and allowing him to retain his promotable status. The applicant's company, battalion, and brigade-level commanders each recommended filing the GOMOR permanently in the applicant's AMHRR.
10. On 22 February 2017, after carefully considering all matters presented, the CG directed the GOMOR be filed permanently in the applicant's AMHRR.
11. On 31 May 2017, a local flag was imposed on the applicant to prevent favorable personnel actions.
12. On 31 May 2017, the CG, 1st Armored Division and Fort Bliss, Fort Bliss, TX notified the applicant that he was required to show cause for retention on active duty under the provisions of Army Regulation 600-8-24, Chapter 4, due to his personal acts of misconduct, moral or professional dereliction, or in the interest of national security, and due to derogatory information filed in his AMHRR. The CG advised him that he was

recommending he be discharged with a General, Under Honorable Conditions characterization of service, but the final decision on the type of discharge would be determined by the DASA-RB. The applicant acknowledged receipt of the notification on 2 June 2017.

13. The applicant underwent a command-directed mental status evaluation on 25 September 2017 and was determined to be fit for full duty. It was determined he could understand and participate in administrative proceedings, appreciate the difference between right and wrong, and met medical retention requirements. He was also diagnosed with adjustment disorder with depressed mood and recommended for follow-up treatment.

14. The applicant underwent a pre-separation medical examination on 25 September 2017 and was determined to be qualified for service.

15. On 29 September 2017, the applicant's counsel submitted a written response to the CG on the applicant's behalf wherein, he provided a summary of the applicant's military career prior to the incident, attested that he was still a valuable asset to the Army, and requested the CG consider retaining him on active duty. He stated it appeared the applicant had been denied certain fundamental rights and regulatory protections. It was believed the GOMOR imposing authority had never seen two relevant investigations during the filing action process, pertaining to SGT ■■■ Counsel described an investigation pertaining to SGT ■■■ being found sleeping overnight in a military vehicle with a junior enlisted male Soldier during a field exercise at the National Training Center. Counsel also presented argument that the evidence was not strong enough to support the allegation of fraternization under the provisions of Army Regulation 600-20.

16. On December 2017, the CG of Fort Bliss, Fort Bliss, TX, after reviewing the entire file, to include the rebuttal and request for retention submitted by the applicant, recommended the applicant be eliminated from the Army with a General, Under Honorable Conditions characterization of service.

17. On 8 December 2017, the DASA-RB rendered a memorandum informing the Commander, U.S. Army Human Resources Command (AHRC), that the Department of the Army Ad Hoc Review Board had reviewed the applicant's Probationary Officer Elimination Case and determined the applicant would be separated from the Army with a General (Under Honorable Conditions) discharge. This elimination was based on both misconduct and moral or professional dereliction under the provisions of Army Regulation 600-8-24, paragraph 4-2b; and derogatory information under the provisions of paragraph 4-2c.

18. Orders and the applicant's DD Form 214 show he was discharged accordingly on 3 March 2018. He was credited with completion of 4 years, 6 months, and 5 days of net



active service this period. His character of service was Under Honorable Conditions (General). The authority for his separation was Army Regulation 600-8-24, paragraph 4-2b, with Separation Code "JNC." The narrative reason for his separation was "Unacceptable Conduct." Block 18 Remarks initially contained the following statement: "MEMBER HAS NOT COMPLETED FIRST FULL TERM OF SERVICE," however, it was subsequently removed by a DD Form 215, dated 7 November 2018.

19. The applicant petitioned the ABCMR for removal of law enforcement titling from all criminal databases and removal or correction of all derogatory information from his AMHRR. On 5 January 2021, the applicant was informed the Board had considered his application under procedures established by the Secretary of the Army and denied his requests.

20. In reaching its determination, the Board shall consider the applicant's petition, available record, and/or submitted documents in support of the petition. By regulation, an applicant is not entitled to a hearing before the Board. Hearings may be authorized by a panel of the Board or by the Director of the 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 evidence showing the applicant was offered all appropriate due process procedures in the processing of the GOMOR and the probable finding of the CID investigation, the Board made the following findings and recommendations related to the requested relief:

- Discharge Upgrade: DENY, based upon the misconduct leading to the applicant's separation and the lack of any mitigation for such misconduct
- Change of the narrative reason and separation code: DENY, based upon the facts and circumstances leading to the applicant's separation being accurately reflected by the current entries
- GOMOR Removal: DENY, based upon the evidence showing the applicant was offered all appropriate due process rights and the lack of evidence showing an error or injustice warranting removal
- Vacation of the separation action and Reinstatement: DENY, based upon the misconduct leading to the applicant's separation and the lack of any evidence of an error or injustice related to the processing of the applicant's separation

- Promotion to CPT)/O-3: DENY, although the applicant was selected for promotion to CPT, there is insufficient evidence showing he was promoted prior to the misconduct, which would have led to a proper FLAG placed upon the applicant
- Payment of back pay and allowances: DENY, based upon the lack of evidence of promotion to CPT prior to the applicant's separation.

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.

1/7/2025

X [REDACTED]

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CHAIRPERSON

[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, USC, 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. Army Regulation 15-185 (ABCMR) 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. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing. 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.

3. Army Regulation 600-8-24, in effect at the time of the applicant's service, prescribed policies and procedures governing transfer and discharge of all commissioned and warrant officers of the Active Army, The Army National Guard of the U.S., and the U.S. Army Reserve when serving on active duty for a period of 30 or more consecutive days unless otherwise stated. This regulation included policy statements, operating tasks, rules in support of operating tasks, and sequential steps or each operating task. Chapter 4 (Eliminations), Paragraph 4-2b provided elimination action could be or would be initiated against an officer as a result of misconduct, moral or professional dereliction, or in the interests of national security:

- discreditable or intentional failure to meet personal financial obligations
- mismanagement of personal affairs that are unfavorably affecting performance of duty
- mismanagement of personal affairs to the discredit of the Army
- intentional omission or misstatement of fact in official statements or records for the purpose of misrepresentation
- acts of personal misconduct
- homosexual conduct
- intentional neglect of or failure to perform duties
- conduct unbecoming an officer
- conduct or actions that result in the loss of a professional status
- acts or behavior not clearly consistent with the interests of national security
- drug dependent or identified as having committed an act of personal misconduct involving drugs
- failure to respond in a reasonable length of time to rehabilitation efforts regarding repeated acts of child/spouse maltreatment or abuse and/or other acts of family violence
- failure of a course at a service school because of misconduct, moral or professional dereliction

4. Army Regulation 635-5 (Separation Documents), provides, in part, that Block 18 "REMARKS" of DD Form 214 is used for HQDA mandatory requirements when a separate block is not available.

5. Army Regulation 635-5-1 (Personnel Separations – SPD Codes) provides the specific authorities (regulatory or directive), reasons for separating Soldiers from active duty, and the separation codes to be entered on the DD Form 214. It states that the separation code "JNC" is an appropriate code to assign to Soldiers separated under the provisions of Army Regulation 600-8-24, Paragraph 4-2b and Paragraph 4-24, by reason of unacceptable conduct.

6. Army Regulation 600-8-104 (AMHRR Management) prescribes Army policy for the creation, utilization, administration, maintenance, and disposition of the AMHRR. It states the purpose of the AMHRR is to preserve permanent documents pertaining to enlistment, appointment, duty stations, assignments, training, qualifications, performance, awards, medals, disciplinary actions, insurance, emergency data, separation, retirement, casualty, administrative remarks, and any other personnel actions. This regulation and the USAHRC website provide a listing of documents authorized for filing and state to file letters of reprimand, censure, or admonition in the performance folder unless directed otherwise by the DASEB. Folders and documents previously authorized for filing in any part of the AMHRR will remain in the AMHRR. The AMHRR is an administrative record as well as the official permanent record of military Service belonging to a Soldier. The AMHRR is the historical and authoritative source for authentication of veteran or Service-related benefits, entitlements, and services.

7. Army Regulation 600-37 sets forth policies and procedures to authorize placement of unfavorable information about Army members in individual official personnel files; to ensure that unfavorable information that is unsubstantiated, irrelevant, untimely, or incomplete is not filed in individual official personnel files; and to ensure that the best interests of both the Army and the Soldiers are served by authorizing unfavorable information to be placed in and, when appropriate, removed from official personnel files.

8. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NR) regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, Boards shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy

changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

//NOTHING FOLLOWS//