

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 5 June 2024

DOCKET NUMBER: AR20230011182

APPLICANT REQUESTS: in effect, change his Officer Evaluation Report (OER) from 29 March 2019 through 28 June 2020 by changing:

- a. Part VI, block a: Change the Highly Qualified senior rater block to Most Qualified.
- b. Part VI, block c: Change the senior rater block to read: "[The applicant] is #1 of 6 staff officers and a top 5% officer. [The applicant's] exceptional mission-focus, communication skills, and adaptability show tremendous potential [for] positions of greater responsibility. [The applicant] earned my trust and respect by building teams and demonstrating a brilliant organizational acumen for legal and non-legal missions. Already performs at the LTC level, must promote to LTC now. Select for SSC."
- c. Part IV, block e: Change rater block to Excels.
- d. Personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Evaluation Report Appeal with Enclosures
  - Enclosure 1: Subject OER
  - Enclosure 2: Subject OER Support Form
  - Enclosure 3: Letter/statement Winn Army Hospital Deputy Commander, Ms. K- D- (GS-15)
  - Enclosure 4: Letter/statement Winn Army Hospital Deputy Commander, Lieutenant Colonel (LTC) (Retired (R)) C- D. N-
  - Enclosure 5: Result of Trial Command Sergeant Major (CSM) Q- M-
  - Enclosure 6: Medical Command (MEDCOM) Section Judge Advocate General (JAG) Corps Directory
  - Enclosure 7: Articles on Defense Health Agency (DHA) Transition
  - Enclosure 8: AHRC OER Guidance/XVIII Airborne Corps G-1's OER Leadership Training
  - Enclosure 9: Additional OERs

- Registered Mail Receipt
- Email from Applicant to U.S. Army Resources Command (AHRC)
- AHRC Response Evaluation Report Appeal
- Response to AHRC's Appeal Denial

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:

a. He requests the Board grant his enclosed appeal or direct AHRC to correct their errors and re-review the appeal in accordance with Army Regulation (AR) 623-3 (Evaluation Reporting System).

b. The applicant reiterates his OER appeal, which will be discussed later in the Record of Proceedings.

c. On 27 July 2023, the applicant provided a letter, issued by HRC, which states, in effect, that he failed to respond within thirty days to appeal his OER and that he must apply to the ABCMR, in accordance with AR 623-3 paragraph 4-9c.

3. The applicant provides the following documents:

a. Evaluation Report Appeal, dated 24 June 2023, with enclosures. The appeal states:

(1) The basis of the appeal is substantive inaccuracy and administrative error due to an inappropriate rating scheme. The senior rating official, COL M- M-, Winn Army Hospital Commander, was not objective or had an erroneous perception to the applicant's performance that resulted in an inaccurate and unjust evaluation. Due to the applicant's duty requiring involvement in managing misconduct actions against some members of her leadership team, COL M- gave the applicant a lackluster OER, while he was in his promotion zone. Her actions were unjust, reprisal and/or an attempt to scapegoat him. In addition, it was unjust to have the 3d Infantry Division SJA, COL S-R- perform as his rater. He should have been rated by his unit's mission leading SJA at the DHA/MEDCOM - Atlantic Region LTC Y- S-. It is equitable to make the following corrections to the OER:

(2) Part VI, block a: Change the Highly Qualified senior rater block to Most Qualified.

(3) Part VI block c: Change the senior rater block to read: "[The applicant] is #1 of 6 staff officers and a top 5% officer. [The applicant's] exceptional mission-focus communication skills, and adaptability shows tremendous potential [for] positions of greater responsibility. [The applicant] earned my trust and respect by building teams and demonstrating a brilliant organizational acumen for legal and non-legal missions. Already performs at the LTC level. Must promote to LTC now. Select for Senior Service College (SSC)."

(4) Part IV, block e: Change rater block to Excels. THIS IS REDUNDANT.

(5) Along with other supporting documents, enclosed is a statement from the hospitals Deputy Commander, Ms. K- D- (GS-15) and LTC (R) C- D. N-. As the deputy commanders, Ms. D- and LTC (R) N- worked as the closest leaders to the applicant's senior rater COL M-. Their close relationship to COL M- makes them the best possible witnesses to account for COL M-'s actions toward the applicant and conflicts with 3rd Infantry Division. Due to the private nature of the applicant's legal work, Ms. D- and LTC (R) N- are the only witnesses that can account for his situation.

(6) As the CJA of Winn ACH, the applicant worked diligently to resolve several chronic labor/employee issues, drafted and instituted an outstanding medical profession code of conduct, restructured the adverse provider credentialing process, and worked in the office to provide critical on the ground legal guidance throughout the initial response to the COVID-19 pandemic. He was the only Fort Stewart O-4 JA that continued to work full-time in-person throughout the pandemic. This was a challenging position; he performed exceptionally well and is deserving of much better than the OER provided.

(7) There are two matters addressed within this appeal: (1) COL M-, the senior rating official, engaging in reprisal/scapegoating against the applicant as an attack for his lawful and appropriate execution of disciplinary actions against her staff. (2) Due to conflicting mission priorities and changes in organization structure, it was unjust for the applicant to be rated by the 3d Infantry Division SJA while his unit, Winn ACH, was fighting against the Division for healthcare resources. The DHA/MEDCOM - Atlantic Region SJA should have been the applicant's rater. This would have alleviated a perception that he was working against his immediate rater's mission.

(8) As Winn ACH's primary legal officer, the applicant managed disciplinary actions against an O-5 section chief and the removal and prosecution of two successive CSMs. COL M-'s mismanagement of these misconduct issues significantly contributed to the deterioration of the command climate. By providing the applicant a lackluster OER, she, as the senior rating official, contrived a narrative that his duty performance

led to the disfunction that plagued her command. As her time in command came to a poor end, she needed to shift the blame off herself and she placed it upon the applicant.

(9) COL M-'s own erratic behaviors resulted in her time in command ending poorly. She had destroyed the trust of the staff by randomly engaging in in-fighting. In the years the applicant was with her, she turned on a major (MAJ) that served as her executive officer, separately started personal feuds with all three of her military deputies, eliminated her CSM when he appeared to be more popular than she was, and finally turned on the applicant in an effort to explain the problems away. The command climate was poor because she actively attacked her own people and behaved irrationally.

(10) Without providing leadership or OER counseling, she appears to have unreasonably labeled the applicant as the cause of the negative events within her command. COL M-'s reprisal/scapegoating took the form of a lackluster and weak OER, when the applicant was in the primary zone for promotion. He was deserving of a most qualified rating and extremely strong language. Her actions significantly contributed to his non-selection for promotion. Her actions were unjust.

(11) Upon the applicant's arrival, he was told that COL M- was losing control of the unit due to erratic behavior in meetings and dysfunctional relationships with the staff. These issues became exacerbated over the applicant's rating period.

(12) In September 2019, COL M- reported to the applicant that her popular CSM had committed fraternization by marrying an officer at his prior duty station. COL M- knew of this issue since May 2019, and the timing of her accusation led the staff to perceive that she was attacking him due to the CSM's popularity over that of her own.

(13) The applicant dutifully conducted the investigation and follow-up actions against the CSM. At COL M-'s request, the commanding general reprimanded the CSM and removed him from the position. Many of the command's leaders wrote letters in support of the CSM and the issue divided the unit leadership COL M- named Sergeant Major (SGM) Q- M- as the replacement CSM.

(14) In late May 2020, the applicant worked with the Criminal Investigation Division to arrange the arrest of the replacement CSM, SGM Q- M-. He was later convicted at a general court-martial of two specifications of failure to obey a lawful regulation; one specification of extramarital sexual conduct in violations of Articles 92 and 134, Uniform Code of Military Justice (UCMJ); of three specifications of maltreatment, and two specifications of abusive sexual contact in violation of Articles 93 and 120, UCMJ. The members sentenced him to be reduced to the grade of E-4 and to be confined for six months. The victim of his misconduct was a popular Soldier that worked in the command area.

(15) The CSM's arrest was seen as the culminating failure of COL M-'s command. She had eliminated a popular SGM, named the perpetrator as a replacement, and she appeared incompetent when the resulting misconduct occurred within her office.

(16) Near in time to the CSM's arrest, COL M- was not selected for a leadership position she was openly vying for. It was observable that the staff and the MEDCOM leadership lost faith in COL M-. Attempting to salvage her reputation, she needed to change the narrative of her command. She needed to shift the blame off herself, so she placed it onto the applicant with a lackluster OER and award.

(17) In addition, the applicant investigated a difficult deputy commander who foolishly/insensitively referenced fried chicken and watermelon to an African American employee. COL M- took little action against this problematic officer. This further alienated the staff as the officer continued various unprofessional communication behaviors without consequence.

(18) Due to changes in organization structure and conflicts in mission, it was inequitable for the applicant to be rated by the 3d Infantry Division SJA, COL S- R-. He should have been rated by the Hospital's mission leading SJA at the DHA/MEDCOM - Atlantic Region, LTC Y- S-. The applicant makes no allegations of maltreatment against COL R-; he was respectful and professional.

(19) Early in the applicant's rating period, the DHA took over all Department of Defense (DoD) medical facilities and operations, to include the applicant's duties at Winn ACH. This changed Winn ACH's staffing, budget, and medical supply resourcing control. Authority transitioned away from the 3rd Infantry Division and was placed within the mission control of the DHA. For Winn ACH, this resulted in a combative relationship with the 3rd Infantry Division. The applicant was left working for a rater at 3d Infantry Division that was outside of his mission, his agency, and his mission interest that was opposed to his senior rater's.

(20) After the first pandemic case reached Fort Stewart in March 2020, the applicant routinely had to argue against his rater's staff and for the DHA's position. Disputes intensified as the division staff, over the objection of MEDCOM and DHA leaders, grabbed up medical resources for the division's attempt to turn an abandoned school into a COVID-19 ward. The school/ward never saw a patient and was an absolute waste of hundreds of thousands of dollars. Disputes over masks and protective equipment were constant as the division wanted to take supplies from medical staff and patients and give them to healthy non-medical infantrymen. In the end, these conflicts were damaging to the applicant's relationship with his rater's staff and it should have

caused the DHA/MEDCOM and the 3d Infantry Division SJA to adjust his rating scheme.

(21) Hospital Deputy Commander, Ms. K- D- states, "due to changes in organization structure and conflicts in mission, it was inequitable for [the applicant] to be rated by the 3d Infantry Division. He should have been rated by the DHA/MEDCOM SJA. The relationship between Winn/DHA and 3d Infantry Division was too confrontational."

(22) Retired Hospital Deputy Commander, LTC C- N- states, "It was inequitable for [the applicant] to be rated by the 3d Infantry Division. I am unaware of any other MEDDAC staff officer who shared the same rating scheme. Because of COL M-'s behaviors, decisions, and the volume of high-visibility legal issues the relationship between Winn/DHA and 3d Infantry Division was unnecessarily confrontational. He should have been rated by the DHA/MEDCOM SJA."

(23) In addition, during the applicant's first meeting with COL R- in July 2019, he said, as the applicant's position was outside of the Office of the SJA (OSJA) and not in a brigade combat team, it was going to be nearly impossible to gain COL R-'s top block on this evaluation over officers within the division mission set.

(24) The lack of an equitable rating relationship is demonstrated by the JAG Corps directory. The enclosure shows that his CJA position was organized under DHA/MEDCOM and had no relationship with 3d Infantry Division. Not even the applicant's working to address the pandemic could change that outcome of his rating. He should have never been rated by the Division SJA. Due to the separation between his DHA mission and the 3d Infantry Division mission, this was nearly the equivalent of having an officer in another branch of the service rating him.

(25) The applicant arrived at Winn ACH in June 2019 and immediately assumed duties as the CJA. He served as the only attorney dedicated to the MEDDAC for Fort Stewart and Hunter Army Airfield. The facilities provide care for more than 60,000 beneficiaries and included a hospital and trauma center, four outlying primary care clinics, and a Warrior Transition Battalion. Winn ACH operated on an internal budget of \$150 million and employing more than 1,500 civilian and military personnel. It was a challenging position that required great depth and breadth of labor, medical, and fiscal legal skills. In addition, the applicant faced significant mission challenges beyond the normal scope of duties.

(26) Beyond the normal scope of the position, the applicant's performance excelled in the face of significant challenges. He advised the Fort Stewart Medical Community, during the COVID-19 pandemic, the DHA restructuring of the military healthcare system, and overcame a lack of staff and labor attorney support. While his

peers were sent home to attempt to telework on military training missions that would never happen, the applicant was in the hospital helping solve real-world problems.

(27) As the hospital attorney at the onset of the pandemic, the applicant advised the hospital staff on never before encountered mission obstacles. At one point, the medical staff and the applicant developed plans on how to prioritize patients if they were to run out of resources. In addition, he provided planning and support beyond legal expertise on personnel issues, finance, and clinical administrative missions, engaged in union negotiations, and shaped the commander's personnel policies, during the pandemic.

(28) The supporting Fort Stewart OSJA was without a labor attorney and as the largest civilian employer on Fort Stewart, Winn ACH required constant labor support. Due in part to COL M-'s leadership failing, the labor caseload boomed, and the applicant directly produced over 11 labor litigation actions and 60 cases. This is a full case load for a full-time GS-13 labor attorney on top of his normal duties.

(29) Due to the restructuring of the DoD medical services, Winn ACH needed to restructure many administrative processes. The applicant was active with the hospital's Quality and Safety and Clinical Division to redesign the risk management and credentials administrative processes to align with significant regulatory changes. He also worked with other staff sections to account for new DHA requirements.

(30) Although the applicant's mission peaked, during the pandemic he was the only O-4 JA on Fort Stewart without a supporting trial counsel or paralegal. For a short period, he received an E-4 paralegal that had an expiration term of service. Then he received one on a rehabilitative assignment, but he was soon removed due to negative performance. The applicant was the most productive attorney on Fort Stewart, and during his final OER counseling the SJA stated he had no idea the applicant was so busy. His rater's lack of understanding of the applicant's mission is another reason he should have never been the applicant's rater.

(31) On 3 February 2020, COL M- M- went into the applicant's office and told him she knew he was doing a great job and that she was going to give him a top block on his OER. Having recently been passed over in his primary zone for promotion, this news was fantastic. The applicant was so excited he called his wife to tell her. The applicant was over halfway into the rating period and knew that he just had to keep up his performance.

(32) The applicant kept up his performance and more, but on his last day in the unit, COL M- electronically sent him a center of mass OER with lackluster language. She offered no explanation.

(33) The applicant was floored. He immediately saw that COL M- had signed the OER and "locked-in" the center of mass block over 12 days before she sent it to him. They worked together every day in neighboring offices, and she did not counsel him at any point since the February conversation. She made no attempt to explain her change of mind and did not discuss the block or language with the applicant.

(34) In accordance with AHRC's 2019 OER Language Guidance (the Guide) and the XVIII Airborne Corps G-1's OER Leadership Training, the OER has tepid enumeration and language.

(35) The references indicate that the enumeration narrative is critical. The lack of enumeration within the unit, her rating history, or the applicant's peer group populations provides a negative connotation. COL M-'s statement that the applicant was, "the #2 JAG Officer I have worked with in my 28-year career" is harmful because she only worked with one JAG officer. She could have used other enumeration metrics, but this one provides a lackluster and weak performance narrative. #1 of 6 MAJ staff officers would be accurate and appropriate.

(36) COL M-'s statement that the applicant was "the #2 JAG officer I worked with in my 28-year career" rates below "the best I have worked with language" of the Guide and is indicative of a lackluster and weak performance in accordance with the Guide. "[The applicant] is #1 of 6 staff officers and a top 5% officer," is appropriate.

(37) With no enumeration and COL M-'s statement that the applicant was "the #2 JAG officer I have worked with in my 28 year career" rates below "The best Adjutant General officer that I have served with in my 23 years of active duty" and by XVIII Airborne Corps G-1's OER Leadership Training places the applicant's performance as "Select if the is a Requirement, Average Performer/Potential" and barely qualified.

(38) In addition, her use of "must promote to LTC now. Select for SSC" is indicative of an average performance by the Guide's standard.

(39) Then, the applicant was unceremoniously shown the door. COL M-'s administrative assistant asked the applicant to go to an ad hoc award ceremony in a conference room. A few staff members attended, it was not planned or announced and the applicant's family was not included. COL M- presented the applicant with an Army Commendation Medal, the lowest permanent change of station (PCS) award he had received in four tours. The hospital had maintained a large video teleconferencing monthly PCS awards ceremony, but the applicant was not given the ceremony, an exit counseling, or going away gift. He witnessed officers with significant performance issues given far more. The applicant's exit was a hack job done to discreetly send him out the door without notice of the staff. Again, this was a sign that he was being scapegoated for COL M-'s own mismanagement.



(40) It is equitable to make the following changes to the OER:

(41) Change the Highly Qualified senior rater block to Most Qualified.

(42) Change the senior rater block to read, "[the applicant] is #1 of 6 staff officers and a top 5% officer. [The applicant's] exceptional mission-focus, communication skills, and adaptability shows tremendous potential [for] positions of greater responsibility. [The applicant] earned my trust and respect by building teams and demonstrating a brilliant organizational acumen for legal and nonlegal missions. Already performs at the LTC level, must promote to LTC now. Select for SSC."

(43) Change the rater block to Excels or mask the block check.

(44) In November 2022, the applicant reached out to COL (R) M- and provided an explanation of his goals and requested to discuss the subject OER. She did not respond to the applicant's request.

(45) The applicant delayed making this appeal out of embarrassment. This is a challenge for him. He is never one to call attention to himself and this OER is a low point for him personally and professionally. He has waited until the end of the appeal period because the event is painful.

(46) The applicant attached his O-4 OERs for review. Immediately following his assignment with COL M-, he received two outstanding evaluations from two different two-star generals. In addition, he received two top block evaluations prior to his time with COL M-. In addition, he has continued to work in positions of increased responsibility and supervisory duty. The subject evaluation is not a true reflection of his work and ability.

b. The applicant included the subject OER and OER Support Form with the appeal, which are available for the Board's review.

c. Letter/Statement, Winn Army Hospital Deputy Commander, Ms. K- D- states:

(1) As the Winn ACH - Fort Steward Deputy Commander for Quality and Safety, Ms. D- served with the applicant during his term as the CJA. She worked with the applicant daily as they collaborated on administration actions, provider credentialing, DHA policy changes, and employee issues.

(2) The applicant was an outstanding JA and a very productive member of the staff. He is an exceptional officer and undoubtedly deserving of a much better OER.

(3) Ms. D- reviewed the applicant's appeal matters. He dealt with very difficult issues with both military and civilian misconduct with professionalism, foresight, and legal expertise. Also, due to changes in organization structure and conflicts in mission, it was inequitable for the applicant to be rated by the 3d Infantry Division. He should have been rated by the DHA/MEDCOM Atlantic Region SJA. The relationship between Winn/DHA and 3d Infantry Division was too confrontational and lacking in understanding of the scope of practice required.

(4) The mission and command climate at Winn ACH were challenging during the 2019-2020 period and the applicant performed admirably.

(5) Ms. D- fully supported the applicant's requested remedies. The OER he received was not reflective of the performance or had an erroneous perception of his performance that resulted in an inaccurate and unjust evaluation. The applicant was deserving of a Most Qualified OER with strong language. Ms. D- supported this appeal.

d. Letter/statement from LTC (R) C- N- former Winn ACH deputy commander, states:

(1) LTC (R) N- served with the applicant, during his term as CJA for Winn ACH. LTC (R) N- worked with the applicant daily as they collaborated on complex clinical administration actions, provider credentialing, COVID-19 policy, and employee issues. He also worked with the applicant, while they served at the brigade level in 2017. The mission and command climate at Winn ACH during the 2019-2020 period were the most challenging and complex LTC (R) N- experienced in his 20 years of service.

(2) LTC (R) N- reviewed the applicant's appeal matters. His account of events is factually accurate and consistent with LTC (R) N-'s own personal observations and experiences. The assumptions he makes about his senior rater's actions are reasonable. LTC (R) N- frequently found COL M-'s behaviors and decisions to be erratic, inconsistent, and retaliatory toward staff members particularly when events or decisions reflected poorly upon her. Given the applicant's honest, direct, and adept handling of the MEDDAC's exceptional volume of high-visibility legal problems/actions, LTC (R) N- could only believe the applicant's lackluster OER was an attack and undeserved retaliation.

(3) In addition, due to changes in organization structure and conflicts in mission, it was inequitable for the applicant to be rated by the 3d Infantry Division. LTC (R) N- was unaware of any other MEDDAC staff officer who shared the same rating scheme. Because of COL M-'s behaviors, decisions, and the volume of high visibility legal issues, the relationship between Winn/DHA and 3d Infantry Division was unnecessarily confrontational. The applicant should have been rated by the DHA/MEDCOM Atlantic Region SJA.

(4) The applicant is an outstanding JA and he absolutely was the most productive O-4 member of the MEDDAC staff. He is an exceptional officer and undoubtedly deserving of a much better OER. LTC (R) N- fully supported the applicant's requested remedies. The OER he received was not objective or had an erroneous perception of his duty performance that resulted in an inaccurate and unjust evaluation. The applicant was deserving of a Most Qualified OER with strong language. LTC (R) N- supported the appeal.

e. Email from the applicant to AHRC, dated 3 July 2023 states the applicant had previously submitted an OER appeal via email on 24 June and mail on 26 June 2023. The applicant was including the statement from the former deputy commander to his packet.

f. Memorandum from AHRC, dated 27 July 2023 regarding the applicant's OER appeal states:

(1) The Evaluation Appeal office had reviewed the applicant's appeal request and was returning his request without action.

(2) In reference to evaluation 29 March 2019 through 28 June 2020, AR 623-3 paragraph 4-8b places a time restriction on the submission of substantive appeals. Since the evaluation report the applicant was interested in appealing has a through date of 28 June 2020, the applicant appeal was not received within three years of that date, the applicant must apply to the Board to resolve any issue he may have with the evaluation report in question.

(3) In reference to evaluation 29 March 2019 through 28 June 2020 successes not captured during rating period, in accordance with AR 623-3, paragraphs 3-7 and 3-9, "the choice of what to enter in the OER is ultimately up to the rating officials". There is no evidence the rating chain's comments are untrue, unjust, or inaccurate. The ratings on the report appear to be the considered opinion of the rating officials, at that time. The fact that the applicant believed the bullet comments on the report should have resulted in a higher rating is irrelevant and is not sufficient to impeach the rating official's rendered marking reflected on the contested OER. If the applicant felt the rating official's comments were unjust, this would have been a good reason to submit a Commander's Inquiry.

(4) Inappropriate rating scheme, the applicant's signature on the report, in accordance with AR 623-3, paragraph 3-33k(2) indicates the applicant's validation of the rating chain. In accordance with AR 623-3, paragraph 2-2, "established rating chains will correspond as nearly as practicable to the chain of command or supervision within a unit or organization, regardless of component or geographical location."

(5) The applicant's letters of support had been noted. However, they do not overturn the applicant's rater and senior rater's overall potential assessment of the applicant.

h. Self-authored memorandum to the Board in response to AHRC's appeal denial, states, in pertinent part:

(1) The applicant requests the Board grant his appeal or direct AHRC to correct their errors and re-review the appeal in accordance with AR 623-3.

(2) AHRC has acted in an arbitrary and capricious manner by returning his OER appeal without action. The applicant submitted the appeal to AHRC's appeal branch via email on 24 June 2023. In addition, AHRC received a USPS mailed copy on 28 June 2023. On 27 July 2023, AHRC provided the letter stating they failed to provide reasonable due process by inaccurately asserting the appeal was untimely, failing to consider his appeal of administrative error, failing to consider the evidence provided, creating an unrequired criterion for a commander's inquiry, and failing to forward the substantive appeal to the ASRB in accordance with AR 623-3, paragraph 4-9c.

(3) In error, AHRC asserts the appeal was not timely. However, in accordance with AR 623-3, paragraph 4-8, the appeal was submitted and received by AHRC via email and mail not later than 3 years of the evaluation report through date. The applicant submitted the appeal to AHRC's evaluation branch via email on 24 June 2023. In addition, AHRC received a USPS mailed copy on 28 June 2023. AHRC's inability to accurately account for the submission of appeals should not prevent his due process right in this matter.

(4) The applicant was hesitant in making this appeal out of embarrassment and behavioral health induced limitations. Making this appeal was a challenge for the applicant. He is never one to call attention to himself and this OER was a low point for him personally and professionally. He waited until the end of the appeal period because the event was too personally painful for him to deal with. Recent behavioral health counseling for service-related conditions had helped the applicant address this issue and other matters. In addition, immediately following his assignment with COL M-, the applicant received two outstanding evaluations from two different two-star generals. He felt his career could overcome COL M-'s evaluation, but that was not the case. Nonetheless, the appeal was still submitted in a timely fashion and should have been acted upon by AHRC.

(5) AHRC's finding that the applicant's appeal failed to provide evidence was arbitrary and capricious. The signed statements from two deputy commanders are relevant, corroborate the applicant's account of events, and constitute clear and convincing evidence of a substantive inaccuracy on the rating official. In accordance

with AR 623-3, paragraph 4-11d, these statements are the preferred form of evidence, contrary to AHRC's implication that a Commander's Inquiry was required.

(6) AHRC's finding is inaccurate. The appeal contains signed statements from two deputy commanders that corroborate the applicant's account. These are persons who served in positions allowing them a good opportunity to observe firsthand the applicant's performance as well as interactions with rating officials.

(7) Their close relationships to COL M- makes them the best possible witnesses to account for COL M-'s actions toward the applicant and conflicts with 3d Infantry Division. Due to the private nature of the applicant's legal work, their leadership positions and knowledge of the innerworkings of the command, the deputy commanders are the only witnesses that can account for the applicant's situation. The signed statements are relevant and corroborate the applicant's account within the appeal report. AHRC's finding that these letters constitute no evidence the rating chain's comments are untrue, unjust, or inaccurate is arbitrary and capricious. These statements are clear and convincing evidence of the substantive error and should have been considered by the ASRB.

(8) In accordance with AR 623-3, paragraph 4-11 (Burden of proof and type of evidence), there is no requirement for evidence to be provided in the form of a Commander's Inquiry. Therefore, AHRC's implication that a Commander's Inquiry would be required for a substantive error appeal is erroneous.

(9) AR 623-3, paragraph 4-11 states that evidence may be provided in any of the nine forms to include the form the applicant provided, statements of military personnel officer or other persons with knowledge of the situation pertaining to the evaluation report in question. Paragraph 4-11d goes on to state: "For a claim of inaccuracy or injustice of a substantive type, evidence will include statements from third parties, rating official, or other documents from official sources. Third parties are persons other than the rated officer or rating officials who have knowledge of the appellant's performance, during the rating period. Such statements are afforded more weight if they are from persons who served in positions allowing them a good opportunity to observe firsthand the appellant's performance as well as interactions with rating officials...."

(10) Therefore AHRC's finding that the applicant's appeal failed to provide evidence is arbitrary and capricious. The signed statements from two deputy commanders that are relevant corroborate the applicant's account of events and constitute clear and convincing evidence of a substantive inaccuracy of the rating official.

(11) Finally, AHRC's finding that the applicant has waived a right to appeal inappropriate rating scheme by signing the evaluation report is inaccurate. AHRC failed

to consider that AR 623-3 paragraph 4-7g(8) allows for his administrative appeal. It states, "Appeals based on alleged administrative errors in these portions of an evaluation report previously authenticated by the rated Soldier (parts I, II, III, and IV black a) will be accepted only under the most unusual and compelling circumstances."

(12) The applicant's OER occurred under the most unusual and compelling circumstances. Early in the applicant's rating period, the DHA took over all DoD medical facilities, and operations, to include his duties at Winn ACH. This changed Winn ACH's staffing, budget, and medical supply resourcing control. Authority transitioned away from the 3d Infantry Division and was placed within the mission control of the DHA. The applicant was left working for a rater at 3d Infantry Division that was outside of his mission, his agency, and had a mission interest that was opposed to his MEDCOM/DHA senior rater's. In the end, these conflicts were damaging to his relationship with his rater's staff and it should have caused the DHA/MEDCOM and the 3d Infantry Division to adjust his rating scheme.

(13) In light of AHRC's errors and based on the evidence provided in the appeal, the applicant requests the Board grant his appeal or direct AHRC to correct their errors and review the appeal in accordance with AR 623-3. As an officer with 17 years of experience, it is disappointing that AHRC did not fully read his appeal and contradicted their own guidelines and policies. Instead, the applicant received a cut and paste letter with typos, misspelling his name, and inaccurately denying a just appeal. AHRC's lack of diligence is disheartening and allows for perpetration of unjust evaluations.

4. The applicant's service record contains the following documents:

a. DA Form 71 (Oath of Office - Military Personnel) shows he applicant took the oath of office in the Regular Army, Judge Advocate General Corps (JAGC) in the rank of first lieutenant on 2 January 2006.

b. OERs, in the rank of MAJ, which show the applicant as rated as:

(1) From 16 July 2014 through 15 July 2016, excels and highly qualified. His senior rater stated "the best JA I have worked with in 22 years of service and within the top eight exceptional field grade officer I senior rate. Promote ahead of peers to LTC"

(2) From 16 July 2016 through 13 June 2017, proficient and most qualified. His senior rater stated, "[The applicant] is the best special staff officer and within the top 15% of field grade officers in the Brigade. Promote below the zone to LTC."

(3) From 13 June 2017 through 12 June 2018, proficient and most qualified. His senior rate stated "already among the elite top 5 percent of JAG Corps field grade officers. "

(4) From 14 June 2018 through 28 March 2019, excels and most qualified. His senior rater stated, "a top 5% officer, [the applicant] is among our finest Senior Defense Counsel."

(5) From 29 March 2019 through 28 June 2020 (the OER in question), proficient and highly qualified. His senior rater stated, "[The applicant] is a brilliant staff officer and the #2 JAG officer I have worked with in my 28 year career. A must select for promotion to LTC."

(6) From 29 March 2020 through 27 May 2021, proficient and most qualified. His senior rater stated, "[The applicant] is a top 1% officer and one of the very best Jas with whom I have served. Already performing as a senior LTC. Promote to LTC today and select for SSC."

(7) From 28 May 2021 through 16 June 2022, excels and most qualified. His senior rater stated, "[The applicant] is the top 1% of all JA MAJs that I've observed in my 33 years of service. Promote immediately to LTC and select for SSC."

(8) From 17 June 2022 through 16 June 2023, proficient and highly qualified. His senior rater stated, "[The applicant] is a brilliant officer and top 10 percent JA. Promote immediately and select for SSC."

c. The applicant is still on active duty.

#### BOARD DISCUSSION:

1. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

2. 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. The applicant believes his rating officials should have rated him higher than what is currently shown on the contested OER. He asks that the Board substitute the current rating with what he believes is the appropriate rating. The Board reviewed the contested OER, the supporting statements, and the applicant's argument but did not find his argument convincing. First, the Board did not find evidence the applicant requested a Commander's Inquiry to address his alleged injustice or error. Second, the Board noted his appeal to HRC was not timely. Third, and most importantly, the Board found insufficient evidence to support a conclusion that the contested report contains administrative or substantive errors or that it was not prepared in compliance with applicable regulations and policies. Furthermore, the applicant has not shown the

evaluations rendered by the rating officials represented anything other than their objective judgment and considered opinions at the time the contested NCOER was prepared or that they exercised faulty judgment in evaluating him as they did.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	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. 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. Army Regulation (AR) 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. The ABCMR considers individual applications that are properly brought before it. 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. The ABCMR members will 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.
3. 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 ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that 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.
4. Army Regulation 623-3 (Evaluation Reporting System) prescribes the policies for completing evaluation reports that support the Evaluation Reporting System. It also provides guidance regarding redress programs, including commander's inquiries and appeals. The regulation provides that:
  - a. Evaluation reports are assessments of how well the rated Soldier met duty requirements and adhered to the professional standards of the Army Officer or Noncommissioned Officer Corps. Performance will be evaluated by observing action, demonstrated behavior, and results from the point of view of the values, leadership framework and responsibilities identified on the evaluation forms, counseling forms, and as explained in Department of the Army Pamphlet 623-3 (Evaluation Reporting System). Consideration will be given to the relative experience of the rated officer, the efforts made by the rated officer, and the results that could be reasonably expected given the time and resources available. Potential evaluations will be performance-based assessments of the rated officers of the same grade to perform in positions of greater responsibility and/or higher grades. Assessment of potential will apply to all officers, regardless of their opportunity to be selected for higher positions or grades.

b. The senior rater is the senior rating official in the military rating chain or as officially designated by the academic institution. Senior raters use their positions and experience to evaluate the rated Soldier from a broad organizational perspective, military program of instruction, or civilian academic course standards. Senior raters will ensure support forms are provided to all rated Soldiers they senior rate at the beginning of and throughout the respective rating periods; use all reasonable means to become familiar with a rated Soldier's performance; assess the ability of the rated Soldier; ensure that rating officials counsel the rated Soldier individually and throughout the rating period on meeting their objectives and complying with the professional standards of the Army; consider the information on the applicable support forms when evaluating the rated individual; evaluate the rated Soldier's potential relative to their contemporaries; and ensure that all reports, which the senior rater and subordinates write, are complete and provide a realistic evaluation in compliance with procedures established in Department of the Army Pamphlet 623-3.

c. Each report will be an independent evaluation of the rated Soldier for a specific rating period. It will not refer to prior or subsequent reports. It will not remark on performance or incidents occurring before or after the period covered.

d. The burden of proof rests with the appellant.

(1) Accordingly, to justify deletion or amendment of an evaluation report, the appellant will produce evidence that establishes clearly and convincingly that:

(a) the presumption of regularity will not be applied to the report under consideration; and

(b) action is warranted to correct a material error, inaccuracy, or injustice.

(2) For a claim of inaccuracy or injustice of a substantive type, evidence will include statements from third parties, rating officials, or other documents from official sources. Third parties are persons other than the rated officer or rating officials who have knowledge of the appellant's performance during the rating period. Such statements are afforded more weight if they are from persons who served in positions allowing them a good opportunity to observe firsthand the appellant's performance as well as interactions with rating officials. Statements from rating officials are also acceptable if they relate to allegations of factual errors, erroneous perceptions, or claims of bias. To the extent practicable, such statements will include specific details of events or circumstances leading to inaccuracies, misrepresentations, or injustice at the time the evaluation report was rendered. The results of a Commander's or Commandant's Inquiry may provide support for an appeal request.

e. Paragraph 4-7 states an evaluation report accepted for inclusion in the rated Soldier's AMHRR is presumed to be administratively correct, have been prepared by the proper rating officials, and represent the considered opinion and objective judgment of the rating officials at the time of preparation. An appeal will be supported by substantiated evidence. An appeal that alleges an evaluation report is incorrect, inaccurate, or unjust without usable supporting evidence will not be considered.

5. Army Regulation 600-37 (Unfavorable Information) provides that once an official document has been properly filed in the OMPF, it is presumed to be administratively correct and to have been 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 OMPF. Appeals that merely allege an injustice or error without supporting evidence are not acceptable and will not be considered.

6. Army Regulation 600-8-104 (Army Military Human Resource Records Management) governs the composition of the OMPF and states the performance folder is used for filing performance, commendatory, and disciplinary data. Once placed in the OMPF, a document becomes a permanent part of that file. The document will not be removed from or moved to another part of the OMPF unless directed by certain agencies, to include the ABCMR. Appendix B states the DA Form 67-9 and DA Form 67-10-1 are filed in the performance folder of the Soldier's OMPF.

//NOTHING FOLLOWS//