

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 11 February 2025

DOCKET NUMBER: AR20230012271

APPLICANT REQUESTS:

- Amendment of Law Enforcement Report (LER) 00686-2021-MPC036-0236315Y to remove him as subject
- To remove and/or correct the related summary of adverse information from his Army Military Human Resource Record (AMHRR)
- Removal/Amendment of DA Form 4833 (Commander's Report of Disciplinary or Administrative Action) from his AMHRR
- Removal of DA Form 67-10-1 (Officer Evaluation Report (OER)) for the period of 14 October through 28 July 2022 from his AMHRR

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

- DD Form 149 (Application for Correction of Military Record), 1 August 2023
 - Memorandum in support of Application for Correction of Military Record
 - Exhibit 1 Response FA23-1265 with Legal Review
 - Exhibit 2 Response FA23-2863
 - Exhibit 3 Declaration from D- M- with his Curriculum Vitae
 - Exhibit 4 Declaration from Applicant
 - Exhibit 5 Letter from Attorney and statement from Z- P-
 - Exhibit 6 Family Advocacy Case Review Committee (CRC) Incident Determination
 - Exhibit 7 Fiscal Year (FY) 21 National Defense Authorization Act (NDAA) Section 545
 - Exhibit 8 California Code Penal Code (CPC)Section 591.5
 - Exhibit 9 CPC) Section 591.5 Information
 - Exhibit 10 LER 00686-2021-MPC036-0236315Y with photos
 - Exhibit 12 Summary of Adverse Information
 - Exhibit 13 DD Form 214 (Certificate of Release or Discharge from Active Duty)
- DD Form 149 (Application for Correction of Military Record), 15 December 2023
 - Letter from Attorney
 - Memorandum in Support of Application for Correction of Military Records

- Enclosure 1 U.S. Army Human Resources Command (AHRC) Response
- Enclosure 2 DA Form 67-10-1 (OER) 14 October 2020 through 28 July 2022 and Letter of Referral
- Enclosure 3 DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Enclosure 4 DA Form 67-10-1 (OER) 10 April 2019 through 26 June 2020
- Enclosure 5 DA Form 1059 (Service School Academic Evaluation Report)
- Enclosure 6 Text Messages
- Enclosure 7 Applicant Declaration

FACTS:

1. The applicant defers to his counsel.
2. In regards to the applicant's request to amend the LER to remove his name as subject, remove and/or correct the related summary of adverse information from his AMHRR, and removal of DA Form 4833 from his AMHRR, his attorney states on his behalf:
 - a. The applicant did not violate CPC 591.5 as he did not actually prevent his wife from calling the police nor did he act maliciously. There is no offense of attempted violation of CPC 591.5. Therefore, he should not be titled. Additionally, no disciplinary action was taken against him for this incident yet the summary of adverse information and the DA Form 4833 state he received a General Officer Memorandum of Reprimand (GOMOR) filed in his AMHRR and was pending a Board of Inquiry (BOI). The GOMOR in his AMHRR is not related to this incident and a subject of a separate Army Board for Correction of Military Records (ABCMR) application.
 - b. On 31 December 2021, the applicant and his wife, Z-, argued over a nebulizer. The entire family had been sick; the applicant had COVID-19. Z- physically assaulted him, which left scratches on his face. He broke the nebulizer then left the house. Z- called the police. The applicant returned to the residence and, although he was later determined to be the victim of physical abuse, was arrested for a violation of CPC 591.5, which prohibits one from preventing another from calling law enforcement for assistance. The police alleged he tried to grab Z's phone away from her, while she called the police. Both the applicant and Z- have submitted statements denying that he tried to prevent her from calling the police.
 - c. He was subsequently titled for violating CPC 591.5 as a violation of Title 18 U.S. Code (USC) 13 (Assimilated Crimes Act). A summary of adverse information was inserted in his AMHRR claiming he received a GOMOR and faced a BOI, as a result of this incident. The associated DA Form 4833 also references a "permanently filed" GOMOR and BOI; however, he did not receive a GOMOR as a result of this incident,

nor did he face a BOI. Instead, he received a GOMOR for a different unrelated incident. This GOMOR is subject of ABCMR docket number AR20220011570. He was discharged on 1 April 2023 for twice failing to be selected for promotion to major.

d. The applicant's application includes a declaration from Chief Warrant Officer Four (CW4) D- M-. CW4 M- is a retired Criminal Investigation Division (CID) agent who reviewed the applicant's case. For the reasons set forth in his declaration, CW4 M- opines that probable cause did not exist to title the applicant for a violation of CPC 591.5, recommends that he be removed as the subject, and recommends correction and/or removal of the associated LER and DA Form 4833.

e. The correction board is a civilian board, through which the Secretary of a military department "may correct any military record...when the Secretary considers it necessary to correct an error or remove an injustice." "The Board is the primary protector of individual members' rights against military over-reaching." The Secretary is obliged to not only properly determine the nature of any error or injustice, but also to take "such corrective action as will appropriately and fully erase such error or compensate such injustice." In carrying out its function, the Board must determine "whether the applicant has demonstrated the existence of a material error or injustice, but also to take "such corrective action as will appropriately and fully erase such error or compensate such injustice." In carrying out its function, the Board must determine "whether the applicant has demonstrated the existence of a material error or injustice that can be remedied effectively through correction of the applicant's military record and, if so, what corrections are needed to provide full and effective relief." While there is no precise definition of "injustice," in general terms, an "injustice" occurs, when a decision is not fair or equitable.

f. "A decision is erroneous when it is arbitrary, capricious, contrary to law, or unsupported by substantial evidence." A legal error "includes a violation of statute, regulation, published mandatory procedure, or unauthorized act." It is a "fundamental principle of administrative law that an agency is bound to adhere to its own regulations," and "failure to do so can lead to arbitrary and capricious decision-making in violation of the Administrative Procedures Act."

g. On 1 January 2021, Congress changed the standards for expungement of criminal records in the FY 2021 NDAA. Section 545 provides for the removal of a person's personally identifying information from a criminal investigative report when probable cause does not exist to believe that the person actually committed the listed offense. Congress also provided for additional factors to consider in expunging someone's criminal record: (1) lack of corroborating evidence; (2) whether adverse administrative or disciplinary action was taken; and (3) the outcome of the action taken.

h. CPC 591.5 contains the following elements: (1) the accused removed, injured, destroyed, damaged, or obstructed the use of any wireless communication device; (2) the accused did so unlawfully and maliciously; and (3) the accused intended to prevent a person from asking for help or notifying law enforcement of a crime. "Maliciously" is defined as an "act done with a wish to vex, annoy, or injure someone."

i. It is a fundamental tenet of criminal law that in order to support an allegation that a person committed a crime, the Government must present evidence to support each element of that crime. Much like a puzzle, if proof of even one element (puzzle piece) of the alleged crime is missing, the Government fails to prove the crime occurred.

j. Such is the case with the applicant. He was erroneously titled for a violation of CPC 591.5, as a violation of Title 18 USC 13, as there was no probable cause for each element. First and foremost, the statute requires the obstruction to be successful; and "attempt" is legally insufficient to constitute a violation of CPC 591.5. The LER shows he did not prevent Z- from using her phone to call the police; his alleged "attempt" to grab her phone was unsuccessful. The attorney-advisor for CID misstated the "attempt" to obstruct the use of the phone was a completed action. Second, if his attempt to grab his wife's phone was successful, there is no evidence he acted "maliciously." The LER contains no evidence that he intended to "vex, annoy, or injure" Z-. A review of the LER shows the opposite - that Z- intended to injure and did, in fact, injure him. The attorney-advisor for CID did not consider the element of the crime. These errors led to the erroneous denial of his request to amend the LER.

k. Consistent with FY 21 NDAA, 545(c)(2), the Board should consider the lack of corroborating evidence for each element of the offense, and lack of disciplinary action taken against him. Mrs. P-'s statement, wherein she denies that he obstructed her ability to call the police, when she wanted to call them, and states the police misunderstood her, should be given greater weight than any statements recorded in the LER, since her statement is written in her own words and signed by her. The applicant's sworn declaration is supported by the pictures the police took of him, showing fresh injuries; the CRC's finding that he was a victim of physical abuse; and his positive COVID test. CW4 M-'s declaration should also be given greater consideration, due to his experience as a CID agent and his consideration of all of the elements of CPC 591.5. Regarding the lack of disciplinary actions, CID's claim that the applicant's file contained a permanently filed GOMOR is simply incorrect, as this Board can determine from reviewing ABCMR docket number AR20220011570.

l. The applicant deserves to be removed as the subject of the LER, to have the associated summary of adverse information removed, and to have its associated DA Form 4833 amended. They urge the Board to grant his application.

3. In regards to the applicant's request to amend the LER to remove his name as subject, remove and/or correct the related summary of adverse information from his AMHRR, and removal of DA Form 4833 from his AMHRR, he the following documents:

- a. Letter from CID, 14 February 2023, states in pertinent part, after review of the LER was completed in accordance with Public Law (PL) 116-283 section 545, it has been concluded that the amendment request is denied. The entire letter and the legal review are available for the Board's review.
- b. Letter from CID, 16 May 2023, in reference to the applicant's request to amend the summary of adverse information and the DA Form 4833. Be advised the LER, to include the DA Form 4833, was previously reviewed in accordance with PL 116-283, section 545 and is denied. The entire letter is available for the Board's review.
- c. Declaration and curriculum vitae from CW4 D- L. M-, a retired CID Special Agent, 1 June 2023, states:

(1) After reviewing the LER; legal opinion by an attorney for CID; CPC 591.5 and PL 116-238 section 545, the NDAA for FY 2021, his opinion is that the applicant is not properly titled. Pursuant to FY 21 NDAA section 545(c)(1)(A), there is no probable cause to believe he violated CPC 591.5.

(2) The LER indicates he attempted to grab his wife's phone, but could not reach it. California does not recognize an "attempt" to violate CPC 591.5 as a crime. If an attempt to violate CPC 591.5 is not a crime in California, then it cannot be a crime under Title 10 USC 13.

(3) One of the elements of CPC 591.5 is that he acted unlawfully and "maliciously". California defines "maliciously" as "a wish to vex, annoy or injure another person." It is not enough for the applicant to act unlawfully in attempting to take the phone from his wife; he must have also acted with an intent to "vex, annoy, or injure" her. The CW4 saw nothing in the LER to indicate he had this intent. Instead, the LER reflects that Mrs. P- injured him.

(4) There appears to be gender bias, in that no action was taken against Mrs. P- for assaulting the applicant, but he was apprehended, despite the fact that he had injuries consistent with his claim that his wife physically assaulted him, during the altercation. With evidence of fairly fresh physical injuries on him, Mrs. P- should have been the individual arrested, as opposed to him, since Mrs. P- did not have any physical injuries, from the alleged incident. Additionally, evidence of gender bias is that the police suggested his claim of his wife throwing alcohol on him was not substantiated. The rubbing alcohol could have evaporated by the time the police arrived, which they did not consider.

(5) Also concerning the fact that police relied on Mrs. P- as an interpreter for her mother, the applicant's mother-in-law. Relying on a family member for interpretative assistance presents a conflict of interest. While understandable in the "heat of the moment," the CW4 would have recommended that the police follow-up with an interview, and independent interpretation, of his mother-in-law's statement.

(6) Consistent with the FY 2021 NDAA section 545(c)(2)(B), the CW4 has considered that the applicant did not receive any adverse administrative, disciplinary, or judicial action for the alleged offense. Because probable cause is lacking to believe he violated CPC 591.5, the CW4 recommends that he be untitled as a subject.

(7) The CW4 also recommends correcting the summary of adverse information and DA Form 4833 in his records, related to this incident. The DA Form 4833, upon which the summary of adverse information is based, incorrectly reflects that he received a GOMOR for the violation of CPC 591.5 and that he faced an administrative BOI. However, the CW4's understanding is that he did not receive a GOMOR for this particular incident nor did he face a BOI as he was honorably discharged from the Army recently.

(8) The CW4's curriculum vitae is available for the Board's review.

d. Declaration from the applicant, 31 July 2023, states:

(1) The incident on 31 December 2021 was a result of misunderstandings, illness, and being coped together in one household. He; his wife, Z-; his mother-in-law; and their children had all been sick or were experiencing illness, at the time of the incident. He believed he had COVID and subsequent testing revealed he did, in fact, have COVID.

(2) On 31 December 2021, he discovered a nebulizer in the house and mistakenly believed it was for the children. It appeared to be a poorly-made device manufactured in China and with COVID originating in China, he did not trust the device. Z- also told him "herbs" were being used, but refused to tell him what kind of "herbs". He and his wife got into an argument over the nebulizer, and he subsequently broke it. The device turned out to be for his mother-in-law. His wife physically assaulted him, which left scratch marks on his face, and which can be seen in the pictures taken of him by the police. While he broke some potted plants, he did not hit his wife, or slap her face, or anything along those lines. Although the CRC for the Presidio of Monterey Family Advocacy Program subsequently determined he was an "offender" for emotional abuse, the CRC determined he was the victim of physical abuse by Z- . The CRC report is included as an exhibit.

(3) Z- did not try to call the police, at this time, nor did she tell him she was going to call the police. He did not try to grab her phone to prevent her from calling the police. Instead, he left the house. He was going to go to Urgent Care to seek medical attention for his injuries, and to be tested for COVID, but he forgot his identification card. He called Z- and was told the police were at the house and to return to the house to give a statement. He returned and told the police what happened, but they seemed to ignore the fact that he was the victim of assault. He believes this is gender bias.

(4) His wife and mother-in-law are also from Ukraine. His wife has close friends and family members who still live there. They have been stressed out about the situation between Ukraine and Russia, which he believes added to the tensions in the house, on that day. Along with the stress from the holidays, and his wife being super sick with an illness that left some neurological effects, everything just boiled over.

(5) He would like to have his records corrected to remove the incorrect titling for violating CPC 591.5, as he did not prevent Z- from calling the police, nor did he try to take her phone to keep her from calling the police. He would also like to have the summary of adverse information removed, as it falsely stated he received a GOMOR for this incident and faced a BOI. He did not receive a GOMOR for this, nor did he face a BOI. The GOMOR in his record was related to something else, and is the subject of a different ABCMR application. He was honorably discharged and never faced a BOI.

e. Letter from applicant's attorney, 10 August 2023, wherein he explains his actions taken in regard to his representation of the applicant pertaining to the incident of a domestic disturbance in December 2021. He spoke with Z- P-, in October 2022, and their conversation was focused on identifying and rectifying the inaccuracies contained within the initial report. He received a letter from Mrs. P-, which states in effect:

(1) She read the police report from 31 December 2021. She would like to make some corrections to the report because she assumes either she miscommunicated some parts of it due to shock, sickness, or language skills or it was misunderstood in some areas.

(2) The slapping with an open hand never occurred. She was not physically threatened. There were no physical incidents in the past, only verbal. The children were in the bedroom area of the house and were not present. He did not have to send them to her mother's room, as they were not around, at that moment. They came out later when she and the applicant were not in close contact, however, she still sent them to the other part of the house. Her mother heard some noise, came out to the entrance, and told the applicant that the nebulizer was for her and took it from the applicant. He let it go on his own. The applicant did not follow her into her mother's bedroom. She and the applicant were in the kitchen when she heard how the applicant was breaking the

nebulizer and went there. She did not announce the call to the police. She was not obstructed from making the call, at the time she wanted to make it.

f. Memorandum for the applicant from CRC, 9 February 2022, states they met on 8 February 2022 to review two incidents which included spouse emotional abuse, wherein the applicant was identified as sponsor-offender; and spouse physical abuse, wherein he was identified as the sponsor-victim. The entire memorandum is available for the Board's review.

g. FY 21 NDAA Sections 545, CPC 591.5, and CPC 591.5 information, which are available for the Board's review.

h. LER - Final - 006862021-MPC036-023631-5Y4, 2 January 2022 shows the offense as prevent calling for assistance from a wireless device. Both the subjects/suspects and victims' identifies were protected. The entire report to include pictures of the applicant are available for the Board's review.

i. DA Form 4833 (Commander's Report of Disciplinary or Administrative Action), 30 August 2022, shows the offense prevent calling for assistance from a wireless device on 31 December 2021. Administrative action was taken in the form of a permanently filed GOMOR and being subject to a BOI to be separated from the Army.

4. In regards to this portion of the applicant's request, his service record was void of information pertaining to the LER, a summary of adverse information, a DA Form 4833, a GOMOR related to this incident, or a BOI showing he was being considered for separation from the Army.

5. In regards to the applicant's request for removal of his OER for the period of 14 October 2020 through 28 July 2022, the applicant defers to his counsel who states on his behalf:

a. The OER does not comply with regulatory requirements and was issued after his discharge. He was not given an opportunity to respond to the derogatory information.

b. He was issued a referred OER for "rated time" from 14 October 2020 through 28 July 2022. However, this OER was not completed until after he was discharged from the Army on 1 April 2023. The from date overlaps with his rated time from his prior OER and DA Form 1059 (Service School Academic Evaluation Report). He was not counseled on his rating chain, nor was his rating chain published. He was not given a duty position, title, or duty description. He spent most of his time at home waiting for his religious exemption for the COVID-19 vaccine to be processed. The senior rater falsely stated he refused to sign the OER, as the applicant was not given the opportunity to

sign it, nor was he given the opportunity to respond; instead, it was mailed to him. He never received it. He only discovered the OER, when he reviewed his AMHRR in June.

c. His attorney repeats the law regarding the Board as stated in her previous submission to the Board, which has previously been considered.

d. Army Regulation 623-3 (Evaluation Reporting System) governs evaluation reports. Standards for establishing a Soldier's rating chain are found in Chapter 2. For example, the rating chain will be established at the beginning of the rating period, the rater will be the immediate supervisor of the rated Soldier, and the senior rater must have been designated as the senior rater for a minimum of 60 days. Evaluation principles are found in Chapter 3. For example, raters will counsel their rated Soldiers, and such counseling will be recorded on support forms, the senior rater will provide his/her support form to the rated officer, at the beginning of the rating period, evaluations will be limited to the dates included in the reporting period, the senior rater will confirm the rated Soldier's acknowledgement of a referred report, and the completed report will be forwarded to Headquarters, Department of the Army no later than 90 days after the through date of the evaluation report.

e. His OER from 14 October 2020 through 28 July 2022 does not comply with the requirements of Army Regulation 623-3. The fact that this OER was issued almost a year after the through date is *prima facie* evidence, it is a bogus OER. Neither Lieutenant Colonel (LTC) B- nor Colonel (COL) K- were established members of his rating chain. Neither of them counseled him or provided him with a copy of their respective support forms. They commented on items that fell outside of the rating period of the OER, particularly his "personal differences with U.S. Government policy," which in reality were prohibited comments about his religious objections to the COVID-19 vaccine, while he was a student. COL K- failed to confirm that he received the referred OER, thus falsely claiming he "refused" to sign. For all of these reasons, this OER is arbitrary and capricious, and issued in violation of regulations. Accordingly this erroneous issuance must be corrected by removing the OER from his AMHRR. They urge the Board to grant his application.

6. In support of his request to have the OER removed from his AMHRR, he provides the following documents:

a. Email from AHRC, 29 November 2023, OER appeal returned without action, states AHRC cannot help him. The Army Special Review Board will not accept appeals from Soldiers who are no longer on active duty or part of the U.S. Army Reserve or Army National Guard.

b. Text message regarding the referred OER wherein the applicant is requesting to speak to his senior rater regarding the OER, which he did not see and does not believe exists. The text messages are available for the Board's review.

e. Declaration from the Applicant, 18 December 2023, states:

(1) He requests that the OER for the period of 14 October 2020 through 28 July 2022 be removed from his AMHRR for administrative and substantive inaccuracy. This OER does not comply with the requirements of Army Regulation 623-3.

(2) He was discharged from the Army on 1 April 2023. Obviously this OER was not completed until after his discharge, and almost a year after the through date, contrary to regulation.

(3) Neither LTC B- nor COL K- were his rater or senior rater, respectively, they certainly were not in those positions for 90 days. They did not counsel him about his "rating chain" for this OER, nor was there a published rating scheme. He was not given a duty position or title, or a description of his duties.

(4) The first he ever heard about an OER was on 19 through 20 March 2023 via text messages. There was no OER support form because he was not asked to submit one until March of 2023, while he was clearing and he could not fill out an OER support form due to the lack of a duty title, position, or a description of duties.

(5) If this OER covers 12 rated months, that timeframe overlaps with rated time from his Academic Evaluation Report, which will be the subject of a separate ABCMR application. The from date is incorrect; it should be 27 June 2020, the date after the through date from his prior OER. He was on convalescent leave in April through May 2022 due to ankle surgery, referenced in the text messages.

(6) The OER is substantively inaccurate and contains unjust comments and ratings. His "rating chain" did not give him the opportunity to submit comments in response to the referral. He did not "refuse" to sign the OER - they mailed it to him, but he did not receive it. He could not digitally sign it, as he no longer had a common access card. The first time he ever saw the OER was on 30 May 2023, when he logged into his account to check his AMHRR and the OER was already in his AMHRR.

(7) He was not "unwilling" to set aside "personal differences with U.S. Government policy." He had sincerely-held religious beliefs against the COVID-19 vaccine, and his request for an exemption to the vaccine was being processed, during this timeframe. While his request was being processed, he was told to stay home; he stayed home about 90 percent of the rated time in his OER.

(8) He was not given an outline to develop a draft building standard operating procedure (SOP) for the Weckerling Center, nor did he "struggle" to complete other tasks to standard. He was given a minimal number of tasks to perform, because he was told to stay home. With respect to the few tasks he was given, he performed them to standard or above standard. He was not counseled for failing to perform tasks to standard.

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

a. DA Form 71 (Oath of Office - Military Personnel) shows he took the oath of office in the Regular Army on 26 May 2012.

b. DA Forms 67-10-1 (OER) show he was rated in the rank of captain (CPT) from:

(1) 5 June 2015 through 5 May 2016, 11 rated months, change of rater OER, in the position of Battalion S-1. His overall performance is rated as proficient. His rater stated he is the best adjutant general CPT his rater has worked with in his career. His senior rater rated him as highly qualified stating he is in the top 15 percent of CPTs he senior raters and the number one adjutant.

(2) 6 May 2016 through 24 October 2016, 6 rated months, change of rater OER, in the position of Joint Task Force JI officer in charge (OIC). His overall performance is rated as excels. His senior rater rated him as highly qualified stating top two percent of CPTs serving in the deployed Joint Special Operations Task Force. Select for promotion to major (MAJ).

(3) 25 October 2016 through 29 May 2018, 5 rated months, change of rater OER, in the position of G1 Essential Personnel Services (EPS) OIC/Battalion S1. His overall performance is rated as proficient. His rater states he ranks in the top 5 percent of CPTs his raters has worked with in 11 years of service. His senior rater rated him as highly qualified stating number two of nine adjutant general CPTs who have worked for the senior rater in his 26 years of service. Promote early.

(4) 30 May 2018 through 9 April 2019, 11 rated months, change of rater OER, in the position of G1 EPS OIC/Battalion S1. His overall performance is rated as proficient. His rater states he is in the top 10 percent of CPTs his rater has worked with. His senior rater rated him as most qualified stating he is in the top 10 percent of incredibly talented CPTs the senior rater has worked with in his 28 years of service. Promote early to MAJ.

(5) 10 April 2019 through 26 June 2020, 13 rated months, extended annual OER, in the position of company commander. His overall performance is rated as excels. His rater states he is in the top 10 percent of all officers with whom the rater has

served. His senior rater rated him as highly qualified stating he is a top third officer. Select for promotion to MAJ.

(6) 14 October 2020 through 28 July 2022 (the OER in question), 12 rated months, change of rater OER, in the position of program assistant foreign area officer (FAO) program. His overall performance is rated as unsatisfactory. His rater states he is in the bottom 10 percent of officers the rater has supervised. His performance, during this period, reflected an unwillingness to put aside personal differences with official U.S. Government policy. He lacks the judgement and interpersonal tact necessary to operate as a FAO in a distributed Joint, Interagency, Intergovernmental and Multi-national environment. When given an outline for the Weckerling Center building SOP, he failed to adequately develop the outline into a workable draft. His senior rater rated him as not qualified stating he refuses to sign. Number 13 of 13 CPTs his senior rater senior rated. No potential for future uniformed service in the U.S. Army. Do not recommend for promotion. A letter of referral is attached to the OER and states, the OER is referred to the applicant for his acknowledgement. The reason for referral is his stated inability to follow certain orders or support U.S. Government policy as a FAO. He must acknowledge receipt of the OER and may provide comments if desired. There is no indication the applicant acknowledged receipt of the OER.

c. DA Form 1059 (Service School Academic Evaluation Report) from 19 November 2020 through 3 August 2021, for Persian-Farsi Basic Course shows he was disenrolled from the course due to disciplinary issues prior to course completion. The entire form is available for the Board's review.

d. GOMOR, 5 August 2021, states, on 6 July 2021, he knowingly failed to wear a face covering, during class, in violation of Pandemic Order 8, placing the health and safety of himself and other military language students and instructors in jeopardy. On 12 January 2022 the commanding general directed the GOMOR be filed in his AMHRR. The entire GOMOR and supporting documents are available for the Board's review.

e. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was honorably discharged on 1 April 2023. He had 10 years, 10 months, and 6 days of active service this period with 11 months and 10 days of prior active service. He was discharged for non-selection, permanent promotion. He has service in Afghanistan from 6 May 2016 through 29 October 2016. He was awarded or authorized the:

- Meritorious Service Medal
- Army Commendation Medal (2nd Award)
- Army Achievement Medal (2nd Award)
- Joint Service Commendation Medal with C Device
- Army Superior Unit Award

- National Defense Service Medal
- Global War on Terrorism Service Medal
- Army Service Ribbon
- Military Outstanding Volunteer Service Medal
- NATO Medal
- Silver Basic Recruiter Badge
- Combat Action Badge
- Senior Parachutist Badge
- Parachutist Badge
- Air Assault Badge

BOARD DISCUSSION:

After reviewing the application and all supporting documents, the Board determined relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the available documentation, the Board made the following findings and recommendations related to the requested relief:

- Amendment of Law Enforcement Report to remove him as subject: GRANT, based upon the statement from the applicant's spouse and the totality of the facts outlined within the available documentation, the Board found that probable cause no longer existed to show the applicant committed the misconduct for which the applicant was titled.
- Removal of all related adverse information AMHRR: GRANT, all information related to the 31 December 2021 misconduct should be removed from the applicant's AMHRR based upon the change to the LER above
- Removal of DA Form 4833 (Commander's Report of Disciplinary or Administrative Action) from his AMHRR: GRANT, based upon the findings of the Board related to removing all adverse information related to the 31 December 2021 misconduct.
- Removal of OER for the period of 14 Oct 21 through 28 Jul 22: GRANT, based upon some of the comments addressing the misconduct connected to the LER which will be corrected.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
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:XXX	:XXX	:XXX	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by;

- amending Law Enforcement Report (LER) 00686-2021-MPC036-0236315Y to remove the applicant as subject for the noted misconduct
- removing of all related adverse information AMHRR
- removing DA Form 4833 (Commander's Report of Disciplinary or Administrative Action) from his AMHRR
- deleting from his record DA Form 67-9 for the rating period 14 Oct 21 through 28 Jul 22
- placing a statement in his record for the rating period 14 Oct 21 through 28 Jul 22 as non-rated time

//SIGNED//

X

CHAIRPERSON

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:

Department of Defense (DoD) Instruction 5505.07 (Titling and Indexing by DoD Law Enforcement Activities), 8 August 2023, establishes policy, assigns responsibilities, and prescribes uniform standard procedures for titling persons, corporations, and other legal entities in DoD law enforcement activity (LEA) reports and indexing them in the Defense Central Index of Investigations (DCII).

a. Public Law 106-398, section 552, and Public Law 116-283, section 545, codified as a note in Title 10, U.S. Code, section 1552, establish procedures for DoD personnel through which:

(1) covered persons titled in DoD LEA reports or indexed in the DCII may request a review of the titling or indexing decision; and

(2) covered persons titled in DoD LEA reports or indexed in the DCII may request their information be corrected in, expunged, or otherwise removed from DoD LEA reports, DCII, and related records systems, databases, or repositories maintained by, or on behalf of, DoD LEAs.

b. DoD LEAs will title subjects of criminal investigations in DoD LEA reports and index them in the DCII as soon as there is credible information that they committed a criminal offense. When there is an investigative operations security concern, indexing the subject in the DCII may be delayed until the conclusion of the investigation.

c. Titling and indexing are administrative procedures and will not imply any degree of guilt or innocence. Judicial or adverse administrative actions will not be taken based solely on the existence of a DoD LEA titling or indexing record.

d. Once the subject of a criminal investigation is indexed in the DCII, the information will remain in the DCII, even if they are found not guilty, unless the DoD LEA head or designated expungement official grants expungement in accordance with section 3.

e. Basis for Correction or Expungement. A covered person who was titled in a DoD LEA report or indexed in the DCII may submit a written request to the responsible DoD LEA head or designated expungement officials to review the inclusion of their information in the DoD LEA report; DCII; and other related records systems, databases, or repositories in accordance with Public Law 116-283, section 545.

f. Considerations.

(1) When reviewing a covered person's titling and indexing review request, the expungement official will consider the investigation information and direct that the

covered person's information be corrected, expunged, or otherwise removed from the DoD LEA report, DCII, and any other record maintained in connection with the DoD LEA report when:

(a) probable cause did not or does not exist to believe that the offense for which the covered person was titled and indexed occurred, or insufficient evidence existed or exists to determine whether such offense occurred;

(b) probable cause did not or does not exist to believe that the covered person committed the offense for which they were titled and indexed, or insufficient evidence existed or exists to determine whether they committed such offense; and

(c) such other circumstances as the DoD LEA head or expungement official determines would be in the interest of justice, which may not be inconsistent with the circumstances and basis in paragraphs 3.2.a.(1) and (2).

(2) In accordance with Public Law 116-283, section 545, when determining whether such circumstances or basis applies to a covered person when correcting, expunging, or removing the information, the DoD LEA head or designated expungement official will also consider:

(a) the extent or lack of corroborating evidence against the covered person with respect to the offense;

(b) whether adverse administrative, disciplinary, judicial, or other such action was initiated against the covered person for the offense; and

(c) the type, nature, and outcome of any adverse administrative, disciplinary, judicial, or other such action taken against the covered person for the offense.

3. 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/NRs) 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, BCM/NRs 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.

4. Army Regulation 623-3 (Evaluation Reporting System), prescribed the policies for completing evaluation reports and associated support forms that are the basis for the Army's Evaluation Reporting System.

a. Paragraph 2-12 (The Rater) stated the rater will provide a copy of his or her support form, along with the senior rater's support form, to the rated Soldier at the beginning of the rating period. For officers in grades warrant officer 1 through COL, the DA Form 67-10A is mandatory for use throughout the rating period.

b. Paragraph 2-14 (The Senior Rater) stated senior raters and reviewing officials will ensure support forms are provided to all rated Soldiers they senior rate at the beginning of and throughout the respective rating periods.

c. Paragraph 3-4 (The Support Form Communication Process) stated the initial and follow-up counseling between the rater and the rated Soldier that is documented in the support forms assures a verified communication process throughout the rating period.

(1) The support form communication process is characterized by initial and follow-up face-to-face counseling between the rater and the rated Soldier throughout the rating period. The initial face-to-face counseling assists in developing the elements of the rated Soldier's duty description, responsibilities, and performance objectives. The follow-up counseling enhances mission-related planning, assessment, and performance development.

(2) Through the communication process, rated Soldiers are made aware of the specifics of their duties and may influence the decision on what is to be accomplished. Thus, the rated Soldier is better able to: direct and develop their subordinates plan for accomplishing the mission gain valuable information about the organization find better ways to accomplish the mission

(3) Although the support or form is an official document covered by regulation, it will not become part of the official file used by selection boards or career managers. Failure to comply with any or all support form or counseling requirements will not

constitute the sole grounds for appeal of an evaluation report. The senior rater will ensure that a completed support form is returned to the rated Soldier when the OER is forwarded to Headquarters, Department of the Army (HQDA).

d. Paragraph 3-36 (Modifications to Previously Submitted Evaluation Reports) addressed requests for modifications to both completed evaluation reports that are filed in a Soldier's AMHRR and evaluation reports that are being processed at HQDA prior to completion.

(1) An evaluation report accepted by HQDA and included in the official record of a rated Soldier is presumed to be administratively correct, to have been prepared by the properly designated rating officials who meet the minimum time and grade qualifications, and to represent the considered opinions and objective judgment of the rating officials at the time of preparation.

(2) Requests for modifications to evaluation reports already posted to a Soldier's AMHRR require use of the Evaluation Report Redress Program.

(3) Requests that a completed evaluation report filed in a Soldier's AMHRR file be altered, withdrawn, or replaced with another report will not be honored if the request is based on the following:

- statements from rating officials that they underestimated the rated Soldier
- statements from rating officials that they did not intend to assess the rated Soldier as they did
- requests that ratings be revised
- statements from rating officials claiming administrative oversight or typographical error in checking blocks on forms for professional competence, performance, or potential
- statements from rating officials claiming OERs were improperly sequenced to HQDA by the unit or organization
- a subsequent statement from a rating official that he or she rendered an inaccurate evaluation of a rated Soldier's performance or potential in order to preserve higher ratings for other officers (for example, those in a zone for consideration for promotion, command, or school selection)

(4) For evaluation reports that have been completed and filed in a Soldier's AMHRR, substantive appeals will be submitted within 3 years of an evaluation report "THRU" date. Administrative appeals will be considered regardless of the period of the evaluation report; decisions will be made based on the regulation in effect at the time reports were rendered.

(5) An exception is granted for evaluation reports when information that was unknown or unverified when the evaluation report was prepared is brought to light or verified and this information is so significant that it would have resulted in a different evaluation of the rated Soldier. The following actions will be accomplished in an effort to modify the evaluation report:

(a) if the information would have resulted in a higher evaluation, the rated Soldier may appeal the evaluation report and rating officials may provide input to support this point; or

(b) if the information would have resulted in a lower evaluation, rating officials may submit an addendum to be filed with the OER.

e. Chapter 4 (Evaluation Report Redress Program) stated the program is both preventive and corrective, in that it is based upon principles structured to prevent and provide a remedy for alleged injustices or regulatory violations, as well as to correct them once they have occurred.

(1) Paragraph 4-3 (Applicability) stated that upon receipt of a request for a Commander's or Commandant's Inquiry, the commander or commandant receiving the request will verify the status of the OER in question. If the evaluation has been submitted and received at HQDA for processing, but has not been filed in the Soldier's AMHRR, the commander or commandant will notify the Evaluations Appeals Office via email with a request to have the evaluation placed in a temporarily administrative holding status until completion of the inquiry.

(2) Paragraph 4-8a (Timeliness) stated because evaluation reports are used for personnel management decisions, it is important to the Army and the rated Soldier that an erroneous report be corrected as soon as possible. As time passes, people forget and documents and key personnel are less available; consequently, preparation of a successful appeal becomes more difficult.

(3) Paragraph 4-11 (Burden of Proof and Type of Evidence) stated the burden of proof rests with the applicant. Accordingly, to justify deletion or amendment of an evaluation report, the applicant will produce evidence that establishes clearly and convincingly that:

(a) the presumption of regularity referred to in paragraphs 3-36a and 4-7a will not be applied to the report under consideration; or

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

(4) Paragraph 4-11d stated 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 applicant'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 applicant'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.

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

- a. Paragraph 3-6 provided that once a document is properly filed in the AMHRR, the document will not be removed from the record unless directed by the ABCMR or other authorized agency.
- b. Appendix B (Documents Required for Filing in the Army Military Human Resource Record and/or Interactive Personnel Electronic Records Management System) contains the list of all documents approved by Department of the Army and required for filing in the AMHRR and/or interactive Personnel Electronic Records Management System and shows the DA Form 67-10-2 is filed in the performance folder.

//NOTHING FOLLOWS//