

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 4 October 2024

DOCKET NUMBER: AR20230012672

APPLICANT REQUESTS:

- removal of the general officer memorandum of reprimand (GOMOR), dated 12 June 2020, from his Army Military Human Resource Record (AMHRR) or transfer to the restricted folder
- removal of the DA Form 67-10-2 (Field Grade Plate (Major (MAJ)-Lieutenant Colonel (LTC); Chief Warrant Officer 3-Chief Warrant Officer 5) Officer Evaluation Report (OER)) covering the period 9 May 2020 through 1 March 2021 from the performance folder of his AMHRR
- reconsideration for promotion to LTC/O-5 by a special selection board (SSB)

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

- DD Form 149 (Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552)
- Memorandum for the Army Board for Correction of Military Records (ABCMR) (Applicant Statement to ABCMR), 5 September 2023
- Counsel's Memorandum for ABCMR (Request to Respectfully Remove GOMOR dated 12 June 2020 and Referred OER dated 9 May 2020 through 1 March 2021 in the Case of (Applicant's) AMHRR and SSB for Promotion Reconsideration), 5 September 2023
- Divorce Documents, 15 March 2019, 20 December 2019, 14 January 2020, and 29 July 2021
- Headquarters, Joint Readiness Training Center and Fort Polk, Memorandum (GOMOR), 12 June 2020
- GOMOR Response, 22 June 2020
- Board of Inquiry (BOI) Findings and Recommendations, 12 November 2020
- DA Form 67-10-2 covering the period 9 May 2020 through 1 March 2021
- Memorandum (Response to Letter of Referral), 11 June 2021
- Counsel's Memorandum for Department of the Army Suitability Evaluation Board (DASEB) (Appeal of GOMOR of (Applicant)), 10 September 2021, with Auxiliary Documents
- DASEB Docket Number AR20210014710, 28 September 2021, with Associated Documents

- DA Forms 67-10-2 covering the periods 2 March 2021 through 15 June 2022 and 16 June 2022 through 6 November 2022
- four Memoranda (Letter of Support for (Applicant), 26 April 2023, 3 May 2023, and 4 May 2023
- DD Form 214 (Certificate of Release or Discharge from Active Duty), for the period ending 1 November 2023
- Officer Record Brief, 23 May 2023

FACTS:

1. The applicant states he is a combat veteran with 16 years of service and is currently facing involuntary separation from the Army, presumably due to a GOMOR he received in 2020 for adultery and the subsequent referred OER.

a. A BOI convened by the issuing general officer recommended his retention and acknowledged that he should not have received the GOMOR. The BOI findings were based on the original divorce court documents wherein both he and his former spouse acknowledged that they were legally separated at the time under review.

b. His initial civilian lawyer, Mr. J\_\_\_\_ J\_\_\_\_, demonstrated negligence as his representation. His lawyer did not explain that his prior legal separation from his former spouse could have been used to show he was not guilty of adultery under the Manual for Courts-Martial. Consequently, his lawyer provided him with inaccurate and damaging legal counsel. In other words, instead of informing him that legal separation made him not guilty of the alleged Article 134 and Article 133 offenses, Mr. J\_\_\_\_ just told him to follow his advice and admit that he was factually guilty when, as he later learned, he was actually not guilty "as a matter of law."

c. He was separated from his former spouse from 15 March 2019 to 29 July 2021, and he engaged in an extramarital relationship with the Air force captain (Capt) on 25 August 2019. He did not learn about the law regarding legal separations until after he spoke with his military trial defense lawyer who helped defend him at the BOI. He was denied an opportunity to verbally speak to the issuing general officer at the time of his GOMOR proceedings, but he did testify to the BOI, telling them that Capt T\_\_\_\_ K\_\_\_\_ was in the U.S. Air force, was not in his chain of command, and the 25 August 2019 incident occurred after original petitions for divorce were filed. This event in no way impacted any mission, morale, good order and discipline, or other military event for their respective units. He noted this in his GOMOR response. The BOI members did not fault him for not knowing the law and termed the mistake reasonable. He was separated from his wife at the time of the alleged encounter.

d. Given the BOI's findings, he thought, along with his senior officer mentors, that the DASEB would remove the GOMOR from his AMHRR. However, his second civilian

lawyer, Mr. J\_\_\_\_ L\_\_\_\_, ultimately just copied and pasted the BOI findings without really explaining not only what the law stipulates but also why the law is the way it is. Currently, his legal counsel, Mr. S\_\_\_\_ C\_\_\_\_, has attempted to do exactly that: to show that the GOMOR itself is legally wrong so the general officer who imposed it has no discretion to keep it from harming his career when the evidence provided clearly shows he was legally separated at the time.

e. He requests removal or appropriate revision of the GOMOR and referred OER, allowing him the opportunity to appear before an SSB for promotion reconsideration prior to his scheduled involuntary separation date of 1 November 2023.

2. Counsel states the applicant has been twice passed over for promotion to LTC, first in May 2022 and again in April 2023. Thus, this request for relief warrants expedited processing. The U.S. Army has subjected the applicant to a grave injustice that his prior civilian lawyers who tried to help him have failed to convincingly remedy. As a result, counsel has been retained to focus the ABCMR on the fact that the applicant was "legally separated" at the time he engaged in consensual sexual relations with another woman. In short, the applicant had the undeniable right to act with impunity. As a matter of common sense, "legal separations" occur when a spouse physically moves out and therefore no longer cohabitates with the other spouse – which is required by law as a condition precedent – for various periods to obtain the dissolution of a marriage. Put plainly, it is the "legal time" apart needed before a district court judge will sign off on the divorce (see memorandum for details).

a. Statement of Facts.

(1) The underlying facts are candidly not in controversy. As such, by implication, this application for relief should be construed as a matter of law and less as a matter of competing facts. In any case, on 12 June 2020, then-Brigadier General (BG) P\_\_\_\_ D. F\_\_\_\_ issued a GOMOR which reads, in part: "An Army Regulation (AR) 15-6 [Procedures for Administrative Investigations and Boards of Officers] Investigation determined that you [Applicant] engaged in extramarital sexual conduct with Captain (Capt.) T\_\_\_\_ K\_\_\_\_, a woman who was not your spouse. This conduct is in violation of Article 133 and Article 134, Uniform Code of Military Justice (UCMJ)."

(2) The reprimand does not reference any date of alleged extramarital sexual conduct. However, the BOI's exonerating findings do clarify the allegation that the applicant engaged in extramarital sexual conduct with Capt K\_\_\_\_, a woman who is not his spouse, on or about 1 January 2019 and 30 April 2020, is not supported by the preponderance of the evidence. Although the reprimand plainly does not cite any date of misconduct, both the BOI found, and the applicant similarly conceded to the rendezvous "with the Air Force Captain on August 25, 2019," which falls within the period expressed by the BOI's underlying notification for separation. Next, the BOI

tellingly adds: "The Board does not find by a preponderance of the evidence that there was a violation of Article 134 because the service member reasonably believed that he was legally separated in the State of Texas. A petition (70805) for divorce was filed and signed on August 27, 2018."

(3) On 15 March 2019, the applicant physically separated from his spouse and filed for legal separation. The evidence for the legal separation beginning on 15 March 2019 explicitly appears in paragraph 4 of court filing entitled, "Respondent's Statement and Original Petition for Divorce" in the District Court of Beal County, Texas. Equally telling, the applicant's former spouse filed a counterpetition to it, which further corroborates that they physically permanently separated "on or about March 18, 2019" (Counterpetition for Divorce, paragraph 8). Accordingly, when the alleged extramarital sexual encounter occurred on 25 August 2019, the applicant had been legally separated from his spouse pending final divorce for over 6 months.

b. Law.

(1) The Manual for Courts-Martial states: "it is an affirmative defense to the offense of extramarital sexual conduct that the accused, co-actor, or both were legally separated by order of a court of competent jurisdiction." Based upon the undeniable 6-month period of legal separation, as detailed above, the BOI held "the accused [applicant] is not guilty of the offense of extramarital misconduct if: he/she mistakenly believed that he/she was legally separated from his/her spouse and his/her mistaken belief was reasonable."

(2) By way of illustration, United States versus Perez, 1991, held that "while the appellant was still technically married to his wife, the separation agreement would appear to permit sexual intercourse with another woman without violating the sanctity of the marriage contract." In other words, as here, the sexual encounter was immune because the alleged extramarital misconduct occurred after Perez filed for legal separation.

c. Conclusion.

(1) In summary, the unanimous BOI rebuked the overreaching GOMOR claim which ignores the fact that the "extramarital sexual conduct" occurred over a half year after being legally separating from his spouse, which means it was categorically not "misconduct." More succinctly, the applicant did not violate Article 134 or Article 133, UCMJ, because he was "legally separated" at the time of the 25 August 2019 consensual encounter.

(2) Pursuant to Army Regulation 600-8-24 (Officer Transfers and Discharges), paragraph 4-11, "[w]hen a BOI convenes to consider an officer's recommendation for

involuntary separation, the board will determine whether each allegation in the notice of proposed separation is supported by a preponderance of the evidence." The BOI did this job. They reviewed all the evidence, they listened to testimony, and they considered the sage arguments of the applicant's competent trial defense lawyer. Hence, whether one focuses on the GOMOR or the unjust OER that was spawned from it, it is clear that a miscarriage of justice occurred.

3. The applicant was appointed as a Reserve commissioned officer in the Medical Service Corps in the rank/grade of second lieutenant/O-1 and executed his oath of office on 26 July 2006. He was promoted to the rank/grade of MAJ/O-4 effective 1 August 2016.

4. The State District Court Original Petition for Divorce, 15 March 2019, shows the applicant filed for divorce from his spouse, noting they were married on or about 1 June 2006 and stopped living together as spouses on or about 15 March 2019.

5. The State District Court Original Counterpetition for Divorce, 20 December 2019, shows the applicant's spouse counter-petitioned for divorce. This petition states she and the applicant were married on or about 1 June 2006 and ceased living together as spouses on or about 18 March 2019.

6. The State District Court Final Rule 11 Agreement, 14 January 2020, states the applicant and his spouse voluntarily reached an agreement regarding their property and agreed that the final divorce date would be no sooner than 5 December 2019.

7. The applicant became the subject of an Army Regulation 15-6 investigation on 13 March 2020. An investigating officer (IO) was appointed on 13 March 2020 to investigate the facts and circumstances regarding the following allegations of misconduct by the applicant:

a. Allegation 1: The applicant wrongfully engaged in extramarital conduct with Capt T\_\_\_\_ L. K\_\_\_\_, an officer in the U.S. Air Force, not his lawful spouse, from on or about 1 December 2017 until the present in violation of Manual for Courts-Martial Article 134 (Extramarital Sexual Conduct) and Manual for Courts-Martial Article 133 (Conduct Unbecoming an Officer and a Gentleman).

b. Allegation 2: The applicant misused his Government Travel Charge Card while performing temporary duty (TDY) in Orlando, FL, on 1 August 2019 in violation of the Department of Defense (DOD) Government Travel Charge Card Regulations, paragraphs 41005 and 41006; the Manual for Courts-Martial, Article 92 (Failure to Obey a Lawful Order or Regulation); and Article 133 (Conduct Unbecoming an Officer and a Gentleman).

c. The IO was directed to address the following questions at a minimum:

(1) What was the duty status and place of duty for the applicant between on or about 4 November 2017 and 7 December 2017 when he claimed to be performing TDY in Fort Huachuca? During that time, did he engage in extramarital sexual conduct with a person not his wife?

(2) What was the duty status of the applicant on 28 July 2018? What was his place of duty on that day? What location was he physically located at on that day? Did he have any authorization for being at that location, if it was not his designated place of duty? On or about that day, did he engage in extramarital sexual conduct with a person not his wife?

(3) What was the duty status and designated place of duty of the applicant on or about 25 August 2019? Did it include the area in the vicinity of Troy University, AL?

(4) Where was the applicant physically located on 26 August 2019 during his telephone conversation with MAJ C\_\_\_\_ B\_\_\_\_ (applicant's spouse)? Where was MAJ B\_\_\_\_ physically located during that same time?

(5) Examining the DD Forms 1351-2 (Travel Voucher or Subvoucher) or Defense Travel System vouchers the applicant submitted, if any, did he comply with his TDY orders covering the periods 16 through 19 January 2019, 28 July to 3 August 2019, and 22 through 24 August 2019? Did he comply with Government travel regulations? Did he claim any non-reimbursable expenses or make excessive claims for reimbursement of expenses during those periods of temporary duty?

(6) When did the applicant conduct his most recent request for a security clearance? If that request was made after 1 December 2017, was he required to disclose financial debts shown by available financial debt relief letters, and did he make those disclosures as required?

(7) Did the applicant use social media applications, including WhatsApp Messenger, Viber, Snapchat, and Instagram to communicate with Capt T\_\_\_\_ L\_\_\_\_ T\_\_\_\_ (also known as Capt T\_\_\_\_ L\_\_\_\_ K\_\_\_\_) using DOD-provided telecommunications assets? If so, were the communications in furtherance of a personal relationship with Capt T\_\_\_\_? Did the applicant use DOD-provided telecommunications assets to make romantic personal communications with any other person? If so, what was the extent of his personal use of these assets, specifically providing as much detail as possible about the time and data usage?

8. On 30 April 2020, the IO completed the investigation and determined the following:

a. Bottom Line Up Front. The allegation that the applicant wrongfully engaged in extramarital conduct with Capt T\_\_\_\_ L. K\_\_\_\_ in violation of Articles 134 and 133, UCMJ, is substantiated. The greater weight of evidence also supports the conclusion that the applicant was in violation of Article 86, UCMJ, on 3 through 8 December 2017, 28 July 2018, and 18 January 2019.

b. Findings.

(1) The Manual for Courts-Martial defines Article 86 (Absent without Leave) as any member of the Armed Forces who, without authority: (1) fails to go to his appointed place of duty at the time prescribed; (2) goes from that place; or (3) absents himself or remains absent from his unit, organization, or place of duty at which he is required to be at the time prescribed.

(a) He found by a greater weight of evidence that the applicant and Capt K\_\_\_\_ were both in Arizona for a planned tour on or about 7 December 2017. The evidence established that the applicant and Capt K\_\_\_\_ attended at least one Grand Canyon tour together. The evidence showed the applicant was recorded as present for duty (PDY) on 7 December 2017 and there is no evidence showing he was approved for TDY, leave, or pass.

(b) Since no evidence was provided by the applicant's legal representation, he found the applicant was in violation of Article 86 from his place of duty at the 32d Hospital Center, Fort Polk, LA, from 3 through 8 December 2017.

(2) He found the applicant was not at his place of duty at the 32d Hospital Center, Fort Polk, LA, on 28 July 2018 and in violation of Article 86. The evidence showed the applicant was recorded PDY by his unit on 28 July 2018 and there is no evidence showing he was approved for TDY, leave, or pass.

(3) He found the applicant was PDY at his place of duty on or about 25 August 2019. The evidence shows the applicant was recorded PDY on 25 August 2019 and there is evidence to support that he was PDY. The evidence establishes that the applicant and Capt K\_\_\_\_ visited the Rosa Parks Museum at Troy University between 21 June 2019 and 25 August 2019.

(4) He found MAJ B\_\_\_\_ (applicant's spouse) was physically located at her residence on 26 August 2019 during her telephone conversation with the applicant. Despite diligent investigation, he was unable to determine the physical location of the applicant during the telephone conversation with MAJ B\_\_\_\_.

(5) He found the applicant complied with his TDY orders for 28 July through 3 August 2019 and was not in violation of the DOD Government Travel Card regulations, paragraphs 41005 and 41006; Article 92, UCMJ; or Article 133, UCMJ.

(a) Additionally, he found the applicant complied with Government travel regulations and did not make any non-reimbursable expenses or make any excessive claims for reimbursement of expenses.

(b) As there was no evidence provided to the contrary, he found the applicant was not at his place of duty at the 32d Hospital Center, Fort Polk, LA, and was physically located at Falls Church, VA, on 18 January 2019 and in violation of Article 86, UCMJ.

(6) He found the applicant conducted his most recent request for a security clearance after 1 December 2017. Despite diligent investigation, he found no evidence to support that the applicant has been more than 120 days delinquent on any debts or has filed for bankruptcy in the last 7 years.

(7) He found the applicant did not violate any policies or regulations by having downloaded the applications WhatsApp Messenger, Snapchat, and Instagram to his Government iPhone. Furthermore, these applications are available to download using the Personal Use Mobile Application Store application provided on the devices by the Defense Information Systems Agency.

(8) He found the allegations that the applicant wrongfully engaged in extramarital sexual conduct with Capt K\_\_\_\_\_ were substantiated in violation of Article 134 and Article 133, UCMJ. He found the applicant and Capt K\_\_\_\_\_ exchanged emails that, to an objective observer, exhibited a familiar, personal relationship.

(a) A greater weight of the evidence demonstrates the relationship between the applicant and Capt K\_\_\_\_\_ was service discrediting. The applicant's actions led others to create inaccurate PDY reports in furtherance of this affair. The evidence shows Capt K\_\_\_\_\_ had feelings for the applicant; met him during TDY trips; and sent him inappropriate emails, notes, and a postcard that were sexual/intimate. The applicant's actions are service discrediting because he utilized Government TDY travel or claimed to be TDY to facilitate his relationship with Capt K\_\_\_\_\_. These actions tend to bring the Army into disrepute and tend to lower the Army in public esteem.

(b) He found the applicant's actions to engage in an inappropriate relationship with Capt K\_\_\_\_\_ dishonored him as an officer and seriously compromised his character as a gentleman. Text messages between the applicant and MAJ B\_\_\_\_\_ showed the applicant's communications were dishonest and his extramarital sexual conduct



involved moral turpitude since he was going on dates with Capt K\_\_\_\_\_ during TDY trips and lied to a number of people regarding his affairs.

(9) He found Capt K\_\_\_\_\_ provided a false official statement on 18 April 2020 in regard to exchanging emails with the applicant; sending him a letter, postcard, and notes; and sending him socks.

c. Recommendations. Based on his findings, he made the following recommendations:

(1) that the chain of command take appropriate punitive action in accordance with the Manual for Courts-Martial for the applicant's violation of Articles 86, 134, and 133; and

(2) that the chain of command forward a copy of the investigation to the Kadena Law Team in Okinawa, Japan, for that chain of command to take appropriate action against Capt K\_\_\_\_\_.

9. The Administrative Law Division, Office of the Staff Judge Advocate, Fort Polk, memorandum from the Administrative Law Division Chief (Legal Review of Army Regulation 15-6 Administrative Investigation into Allegations of Misconduct by (Applicant)), 29 May 2020, states he found the investigation was legally sufficient.

a. He recommended approval of the findings and recommendations of the IO except for those findings relating to absence without leave, for which he recommended disapproval.

b. He recommended that the approving authority approve the IO's findings and recommendations with modification by circling "b," inserting "see attached memorandum" under Section VII of the DA Form 1574-1 (Report of Proceedings by Investigating Officer), and signing in the provided space at the bottom of the form. If the approving authority chose to take a different action, he should circle the appropriate selection to modify or substitute a finding or recommendation and write in the substitution/modification.

10. Section VII (Action by Approving Authority) of the DA Form 1574-1 shows the approving authority (BG F\_\_\_\_\_) circled the statement: "b1 (Approved with the following modifications: (1) The following findings of fact are added/deleted)" and entered "See Attached Memo[ramum]." The approving authority signed the form on 2 June 2020.

11. The Headquarters, Joint Readiness Training Center and Fort Polk, memorandum from BG F\_\_\_\_\_ (Substituted Findings and Recommendations for Army Regulation 15-6 Administrative Investigation into Allegations of Misconduct by (Applicant)), 2 June 2020,

states that after reviewing the investigation, he approved the investigation with the following modifications to the findings and recommendations of the IO:

a. Findings.

- (1) The findings in paragraphs 3a through 3e of the IO's findings are deleted.
- (2) The remaining findings in paragraphs 3f through 3i are approved.

b. Recommendations.

- (1) The recommendation in paragraph 4a is approved except to delete the reference to Article 86.
- (2) The recommendation in paragraph 4b is approved.
- (3) The following recommendation is added: "The investigation, along with the rebuttal matters submitted by [Applicant], will be forwarded to the Commander, 32 HC [32d Hospital Center] to address the inadequate record keeping for leave in the unit."

12. The applicant was reprimanded in writing by the Commanding General, Joint Readiness Training Center and Fort Polk, on 12 June 2020, wherein he stated:

An Army Regulation (AR) 15-6 Investigation determined that you engaged in extramarital sexual conduct with Captain (Capt.) T\_\_\_\_ K\_\_\_\_, a woman who was not your spouse. This conduct is in violation of Article 133 and Article 134, Uniform Code of Military Justice (UCMJ). You are hereby reprimanded for your actions.

The Army and this command have consistently emphasized the consequences of extramarital sexual conduct. As a commissioned officer, you are charged with the setting the example for subordinates to emulate. Your actions in this regard fell below the standards expected of a commissioned officer and senior leader in the US Army. You have discredited yourself, your unit, and the US Army. Your actions have caused me to lose confidence in your continued ability to lead Soldiers. I trust that your future duty performance will reflect the degree of professionalism expected of every commissioned officer assigned to this command.

This is an administrative reprimand imposed under the provisions of AR 600-37 [Unfavorable Information] and not as punishment under Article 15, UCMJ. You are advised that in accordance with AR 600-37, paragraph 3-5b, I am considering whether to direct this reprimand be filed permanently in your Army

Military Human Resource Record. Prior to making my filing decision, I will consider any matters you submit in extenuation, mitigation, or rebuttal. You will be provided, by separate cover, a copy of the evidence which forms the basis for this reprimand. You will immediately acknowledge receipt of this reprimand in writing. You will forward any matters you wish me to consider through your chain of command within seven calendar days, using the format prescribed in AR 600-37, paragraph 3-7.

13. The applicant acknowledged receipt of the GOMOR on 12 June 2020. His memorandum for the Commander, Headquarters, Joint Readiness Training Center and Fort Polk (GOMOR Response), 22 June 2020, requested eradication of the GOMOR or filing in his local file. He states he and MAJ C \_\_\_\_ B \_\_\_\_ have been married since 2006 and have had their challenges as a dual-military couple. He described his performance and academic achievements. He understood the true purpose of a memorandum of reprimand is to create a record of disapproval, correct underlying behavior, and allow rehabilitation. Eradication or local filing would accomplish all these objectives. He learned from his mistake and requests filing the GOMOR locally so he can rehabilitate and move forward with his career.

14. After carefully considering the matters submitted in rebuttal, the Commanding General, Joint Readiness Training Center and Fort Polk, directed filing the GOMOR in the applicant's AMHRR on 9 July 2020. The applicant acknowledged receipt of the filing determination on 9 July 2020.

15. A review of the applicant's AMHRR revealed the GOMOR and allied documents are filed in the performance folder.

16. Although not available for review, he was required to show cause for retention by a BOI that convened at Fort Polk, LA, on 12 November 2020.

17. The BOI Findings and Recommendations state the board found the following:

a. Findings.

(1) That the applicant engaged in extramarital sexual conduct with Capt K\_\_\_\_, a woman who is not his spouse, between on or about 1 January 2019 and 30 April 2020 is not supported by a preponderance of the evidence. This finding does not warrant separation under Army Regulation 600-8-24, paragraph 4-2b.

(2) The board did not find by a preponderance of the evidence that there was a violation of Article 134 because the applicant reasonably believed he was legally separated in the State of Texas. A petition for divorce was filed and signed on 27 August 2018. The applicant admitted to having an extramarital relationship on

25 August 2019. The Fiscal Year 2017 National Defense Authorization Act (NDAA), paragraph 3a-66-1, that took effect on 1 January 2019, reads: "The accused is not guilty of the offense of extramarital sexual conduct if: he/she mistakenly believed that he/she was legally separated from his/her spouse and his/her mistaken belief was reasonable."

(3) The allegation that the applicant received substantiated derogatory activity resulting in a GOMOR, 12 June 2020, which was filed in his AMHRR is supported by a preponderance of the evidence. This finding does not warrant separation under Army Regulation 600-8-24, paragraph 4-2b.

(4) The evidence does prove by a preponderance of the evidence that the applicant did, in fact, receive a GOMOR, 12 June 2020, and it was filed in his AMHRR. However, based on the board's findings answered in Question Number 1, the applicant reasonably believed he was legally separated and is supported by the NDAA, paragraph 3a-66-1, and the GOMOR does not warrant separation. All board members strongly believe the applicant should never have received a permanently filed GOMOR.

(5) The allegation that the applicant exhibited conduct unbecoming of an officer as indicated by the above referenced items is not supported by a preponderance of the evidence. This finding does not warrant separation under Army Regulation 600-8-24, paragraph 4-2b.

(6) The board does not find that the applicant's conduct was unbecoming of an officer in that he reasonably believed he was legally separated and therefore does not warrant separation.

b. Recommendations. Based upon the findings above, the board recommends the applicant's retention without reassignment.

18. The DA Form 1574-2 (Report of Proceedings by Board of Officers) shows BG D\_\_\_\_ S. D\_\_\_\_, Commanding General, Joint Readiness Training Center and Fort Polk, approved the findings and recommendations of the BOI on 10 December 2020.

19. The Headquarters, Joint Readiness Training Center and Fort Polk, memorandum from the Commanding General for Commander, U.S. Army Human Resources Command (HRC) (Elimination Proceedings Pursuant to Army Regulation 600-8-24, (Applicant)), 10 December 2020, recommended the applicant's retention and transfer to another unit as directed by the G-1/Military Personnel Division.

20. The applicant received the contested OER covering the period 9 May 2020 through 1 March 2021 (10 months) on or about 11 June 2021, which addressed his duty performance as the Health Information Systems Officer for the 115th Field Hospital,

Fort Polk, LA. His rater is shown as LTC J\_\_\_\_ K. M\_\_\_\_, Battalion Commander, and his senior rater is shown as Colonel L\_\_\_\_ C. F\_\_\_\_, Commander, 32d Hospital Center, Fort Polk, LA. His rater and senior rater each digitally signed the contested OER on 15 June 2021. The applicant refused to sign the contested OER. The contested OER shows in:

a. Part I (Administrative Data), block i (Reason for Submission), the entry "Change of Rater";

b. Part II (Authentication), block d (This is a Referred Report, Do You Wish to Make Comments?), a checkmark was placed in the appropriate block, signifying to the applicant that he was receiving a referred report. In that same block, a checkmark was placed in the "Yes" block, indicating the applicant wished to make comments;

c. Part IV (Performance Evaluation – Professionalism, Competencies, and Attributes), block d1 (Character), the rater commented: "[Applicant] received a permanent[ly] filed GOMOR during this rating period for conduct unbecoming a[n] officer from previous conduct. During this rating period he has put people first, lives the Army Warrior Ethos, maintains a high level of professionalism in all circumstances. He is truly committed to EO/EEO/SHARP [Equal Opportunity/Equal Employment Opportunity/Sexual Harassment/Assault Response and Prevention]";

d. Part IV, block e (This Officer's Overall Performance is Rated as), the rater rated his overall performance as "Proficient";

e. Part VI (Senior Rater), block a (Potential Compared with Officers Senior Rated in Same Grade), the senior rater rated his overall potential as "Qualified"; and

f. Part VI, block c (Comments on Potential), the senior rater commented: "Rated Soldier refuses to sign. [Applicant] demonstrated poor judgement as demonstrated by his receiving a General Officer Memorandum of Reprimand for a lapse in his professional conduct. He does possess potential for continued service as demonstrated by his technical and tactical acumen during the execution of Rear Detachment operations. Promote with peers."

21. The applicant's memorandum for record (Response to Letter of Referral), 11 June 2021, acknowledged receipt of the referred OER. His summary of key comments/responses noted the senior rater comments do not align with HRC guidance regarding the rating period; the senior rater comments do not align with the official BOI findings, nor do they align with BG D\_\_\_\_'s decision of the BOI; and the senior rater comments do not align with the Fiscal Year 2017 NDAA or with Article 134 of the UCMJ (see memorandum for details.)

22. A review of the applicant's AMHRR revealed the OER covering the period 9 May 2020 through 1 March 2021 with allied documents is filed in the performance folder.

23. The State District Court Final Decree of Divorce granted the applicant and his spouse a divorce on 29 July 2021.

24. Counsel's memorandum for DASEB (Appeal of GOMOR of (Applicant)), 10 September 2021, with auxiliary documents appealed the GOMOR to the DASEB on the applicant's behalf. Counsel stated:

a. On 12 June 2021, the applicant was issued a GOMOR for violating Articles 133 and 134 of the UCMJ. The GOMOR was permanently filed in his AMHRR.

b. As a result of the GOMOR, a formal BOI was convened on 12 December 2022 at Fort Polk, LA, to determine whether the applicant violated the articles of the UCMJ and whether he should be separated from the Army. After scrutinizing all of the documentary evidence and hearing witnesses and oral arguments from both sides – which the GOMOR issuing authority did not have the luxury of – the BOI members unanimously found that the applicant did not engage in any misconduct and "should have never received a permanently filed GOMOR." The board found the evidence did not support the extramarital affair or any violations of the UCMJ and the applicant did not exhibit any conduct unbecoming an officer. The board recommended his retention in the Army without reassignment.

c. There is clear and convincing evidence that the GOMOR is untrue and therefore unjust. The BOI findings/recommendations, along with the approving authority's approval of those findings/recommendations, is clear evidence that the GOMOR was unjust and should be removed from the applicant's AMHRR. The legal advisor also noted: "The accused is not guilty of the offense of extramarital sexual conduct if: he/she mistakenly believed that he/she was legally separated from his/her spouse and his/her mistaken belief was reasonable" (see memorandum for details).

25. The applicant petitioned the DASEB for removal of the GOMOR, 12 June 2020, from his AMHRR. On 29 September 2021 in Docket Number AR20210014710, the DASEB determined the overall merits of the case did not warrant removal of the GOMOR.

26. The applicant's two subsequent OERs covering the periods 2 March 2021 through 15 June 2022 and 16 June 2022 through 6 November 2022 show the senior raters were general officers. His performance was evaluated as "Excels" and "Most Qualified" for each rating period and his senior raters each noted he should be promoted.

27. The four memoranda (Letter of Support for (Applicant)), 26 April 2023, 3 May 2023, and 4 May 2023, support the applicant's request for removal of the GOMOR from his AMHRR. These memoranda attest to his technical and professional expertise and his dedication to the mission and Soldiers.

28. The applicant was honorably discharged on 1 November 2023 in the rank/grade of MAJ/O-4 by reason of non-selection of permanent promotion under the provisions of Army Regulation 600-8-24. His DD Form 214 shows he completed 17 years and 2 days of net active service during this period.

29. The HRC memorandum from the Accessions Branch Chief (Appointment as a Reserve Commissioned Officer of the Army), 20 December 2023, informed him that he was appointed as a Reserve commissioned officer of the Army in the rank/grade of MAJ/O-4 for an indefinite term effective 1 November 2023.

#### BOARD DISCUSSION:

1. After reviewing the application and all supporting documents, the Board found that relief was warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive review based on law, policy, and regulation. Upon review of the applicant's petition and military records, the Board determined the General Officer Memorandum of Reprimand (GOMOR) administered on 12 June 2020 and directed filing in the performance folder of the applicant's Army Military Human Resource Record (AMHRR) demonstrates an injustice and supports removal. The Board noted the Board of Inquiry on 12 November 2020 found the applicant's extramarital sexual conduct with a woman not his spouse was not supported by a preponderance of the evidence and did not warrant separation. Therefore, the Board concluded, based on a preponderance of evidence found in the military record, the applicant's claim for removal of the GOMOR is warranted.

2. As it relates to the applicant's request for removal of the DA Form 67-10-2 (Field Grade Plate (Major (MAJ)-Lieutenant Colonel (LTC); Chief Warrant Officer 3-Chief Warrant Officer 5) Officer Evaluation Report (OER)) covering the period 9 May 2020 through 1 March 2021 from the performance folder of his AMHRR, the Board determined the applicant demonstrated by a preponderance of the evidence that an injustice occurred prejudicial to the applicant and supports removal, specifically, comments referring to the now removed GOMOR. Therefore, the Board granted relief.

3. The Board further determined, based on the removal of the GOMOR and the OER and all auxiliary documents from his AMHRR, he should be considered by a special selection board (SSB) for promotion to LTC/O-5 under the criteria for any years in which he was in or above the primary zone of consideration based on his date of rank for

MAJ/O-4. If selected, he should retroactively promoted and receive any additional pay and allowances he would then be due as a result of the promotion and correction.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

█	█	█	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

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

- removing the General Officer Memorandum of Reprimand, dated 12 June 2020, with auxiliary documents from his AMHRR
- removing the DA Form 67-10-2 covering the period 9 May 2020 through 1 March 2021 from his AMHRR
- referring his records to a special selection board (SSB) to be considered for promotion to LTC/O-5 under the criteria for any years in which he was in or above the primary zone of consideration based on his date of rank for MAJ/O-4
- if selected for promotion by an SSB, retroactively promoting him to LTC/O-5 and paying him any additional pay and allowances he would then be due as a result of the promotion and correction

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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. Manual for Courts-Martial, United States, 2019 Edition, incorporates the Manual for Courts-Martial, 2016 Edition, including all amendments to the Preamble, Rules for Courts-Martial, Military Rules of Evidence, Punitive Articles, and Nonjudicial Punishment Procedures made by the President in executive orders from 1984 to present, and specifically including Executive Order 13825, 8 March 2018. This edition also contains amendments to the UCMJ made by the Military Justice Act of 2016 (Division E of the NDAA for Fiscal Year 2017), and the NDAAs for Fiscal Years 2018 and 2019. Article 134 (Extramarital Sexual Conduct) states:

a. Text of Statute. Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the Armed Forces, all conduct of a nature to bring discredit upon the Armed Forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court. As used in the preceding sentence, the term "crimes and offenses not capital" includes any conduct engaged in outside the United States, as defined in Title 18, U.S. Code, section 5, that would constitute a crime or offense not capital if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States as defined in Title 18, U.S. Code, section 7.

b. Elements.

(1) that the accused wrongfully engaged in extramarital conduct as described in subparagraph c.(2) with a certain person;

(2) that at the time, the accused knew that the accused or the other person was married to someone else; and

(3) that, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the Armed Forces; (ii) was of a nature to bring discredit upon the Armed Forces; or (iii) to the prejudice of good order and discipline in the Armed Forces and of a nature to bring discredit upon the Armed Forces.

c. Explanation.

(1) Conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. To constitute an offense under the UCMJ, the extramarital conduct must either be directly prejudicial to good order and discipline or

service discrediting or both. Extramarital conduct that is directly prejudicial to good order and discipline includes conduct that has an obvious, and measurably divisive effect on unit or organization discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of or respect toward a service member, or both. Extramarital conduct may be service discrediting, even though the conduct is only indirectly or remotely prejudicial to good order and discipline. "Discredit" means to injure the reputation of the armed forces and includes extramarital conduct that has a tendency, because of its open or notorious nature, to bring the Service into disrepute, make it subject to public ridicule, or lower it in public esteem. While extramarital conduct that is private and discreet in nature may not be service discrediting by this standard, under the circumstances, it may be determined to be conduct prejudicial to good order and discipline. Commanders should consider all relevant circumstances, including but not limited to the following factors, when determining whether extramarital conduct is prejudicial to good order and discipline or is of a nature to bring discredit upon the armed forces, or both:

- (a) the accused's marital status, military rank, grade, or position;
- (b) the co-actor's marital status, military rank, grade, and position, or relationship to the Armed Forces;
- (c) the military status of the accused's spouse or the spouse of the co-actor, or their relationship to the Armed Forces;
- (d) the impact, if any, of the extramarital conduct on the ability of the accused, the co-actor, or the spouse of either to perform their duties in support of the Armed Forces;
- (e) the misuse, if any, of Government time and resources to facilitate the commission of the conduct;
- (f) whether the conduct persisted despite counseling or orders to desist; the flagrancy of the conduct, such as whether any notoriety ensued; and whether the extramarital conduct was accompanied by other violations of the UCMJ;
- (g) the negative impact of the conduct on the units or organizations of the accused, the co-actor or the spouse of either of them, such as a detrimental effect on unit or organization morale, teamwork, and efficiency;
- (h) whether the accused's or co-actor's marriage was pending legal dissolution, which is defined as an action with a view towards divorce proceedings, such as the filing of a petition for divorce; and whether the extramarital conduct involves an ongoing or recent relationship or is remote in time.

(2) Extramarital Conduct. The conduct covered under this paragraph means any of the following acts engaged in by persons of the same or opposite sex:

- genital to genital sexual intercourse
- oral to genital sexual intercourse
- anal to genital sexual intercourse
- oral to anal sexual intercourse

(3) Marriage. A marriage exists until it is dissolved in accordance with the laws of a competent state or foreign jurisdiction.

(4) Legal Separation. It is an affirmative defense to the offense of extramarital sexual conduct that the accused, co-actor, or both were legally separated by order of a court of competent jurisdiction. The affirmative defense does not apply unless all parties to the conduct are either legally separated or unmarried at the time of the conduct.

(5) Mistake of Fact. A defense of mistake of fact exists if the accused had an honest and reasonable belief, either that the accused and the co-actor were both unmarried or legally separated, or that they were lawfully married to each other. If this defense is raised by the evidence, then the burden of proof is upon the United States to establish that the accused's belief was unreasonable or not honest.

2. Army Regulation 15-6 (Procedures for Administrative Investigations and Boards of Officers) establishes procedures for conducting preliminary inquiries, administrative investigations, and boards of officers when such procedures are not established by other regulations or directives. Paragraph 5-2 states IOs may use whatever method they deem most efficient and effective for acquiring information. Although witnesses may be called to present formal testimony, information may also be obtained by personal interview, correspondence, telephone inquiry, or other informal means.

3. Army Regulation 600-37 (Unfavorable Information) sets forth policies and procedures to ensure the best interests of both the Army and Soldiers are served by authorizing unfavorable information to be placed in, transferred within, or removed from an individual's AMHRR.

a. An administrative memorandum of reprimand may be issued by an individual's commander, by superiors in the chain of command, and by any general officer or officer exercising general court-martial jurisdiction over the Soldier. The memorandum must be referred to the recipient and the referral must include and list applicable portions of investigations, reports, or other documents that serve as a basis for the reprimand. Statements or other evidence furnished by the recipient must be reviewed and considered before a filing determination is made.

b. A memorandum of reprimand may be filed in a Soldier's AMHRR only upon the order of a general officer-level authority and is to be filed in the performance folder. The direction for filing is to be contained in an endorsement or addendum to the memorandum. If the reprimand is to be filed in the AMHRR, the recipient's submissions are to be attached. Once filed in the AMHRR, the reprimand and associated documents are permanent unless removed in accordance with chapter 7 (Appeals).

c. Paragraph 7-2 (Policies and Standards) provides that once an official document has been properly filed in the AMHRR, 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 AMHRR. Soldiers must have received at least one evaluation (other than academic) since imposition. If an appeal is denied, a copy of the appeal will be placed in the restricted portion of the AMHRR.

d. Only letters of reprimand, admonition, or censure may be the subject of an appeal for transfer to the restricted folder of the AMHRR. Such documents may be appealed on the basis of proof that their intended purpose has been served and that their transfer would be in the best interest of the Army. The burden of proof rests with the recipient to provide substantial evidence that these conditions have been met.

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

a. Paragraph 1-11 provides that when it is brought to the attention of a commander that a report rendered by a subordinate or a subordinate command may be illegal, unjust, or otherwise in violation of this regulation, that commander will conduct an inquiry into the matter. The Commander's Inquiry will be confined to matters related to the clarity of the evaluation report, the facts contained in the report, the compliance of the evaluation with policy and procedures established by Headquarters, Department of the Army, and the conduct of the rated Soldier and members of the rating chain. The official does not have the authority to direct that an evaluation report be changed; command influence may not be used to alter the honest evaluation of a rated Soldier by a rating official.

b. Paragraph 4-7 provides that evaluation reports accepted for inclusion in the official record of an officer are presumed to be administratively correct, been prepared by the proper rating officials, and represent the considered opinion and objective judgment of rating officials at the time of preparation. To justify deletion or amendment of a report, the appellant must produce evidence that establishes clearly and

convincingly that the presumption of regularity should not be applied to the report under consideration or that action is warranted to correct a material error, inaccuracy, or injustice. Clear and convincing evidence must be of a strong and compelling nature, not merely proof of the possibility of administrative error or factual inaccuracy. The burden of proof rests with the appellant.

c. Paragraphs 4-11a and 4-11b state an evaluation report accepted for inclusion in the official record of a rated Soldier's OMPF is presumed to be administratively correct, to have been prepared by the proper rating officials, and to represent the considered opinion and objective judgment of the rating officials at the time of preparation. The burden of proof rests with the applicant. Accordingly, to justify deletion or amendment of a report, the applicant must produce evidence that establishes clearly and convincingly that the presumption of regularity should not be applied to the report under consideration and action is warranted to correct a material error, inaccuracy, or injustice.

d. Paragraph 4-11d states 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 (see Department of the Army Pamphlet 623-3 (Evaluation Reporting System)). 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 report was rendered.

5. Army Regulation 600-8-104 (Army Military Human Resource Records Management) prescribes Army policy for the creation, utilization, administration, maintenance, and disposition of the AMHRR. The AMHRR includes, but is not limited to the Official Military Personnel File (OMPF), finance-related documents, and non-service related documents deemed necessary to store by the Army.

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

b. Appendix B (Documents Required for Filing in the AMHRR and/or Interactive Personnel Electronic Records Management System) states the DA Form 67-10-2 is filed in the performance folder of the Soldier's OMPF and memorandums of reprimand, censure, and admonition are filed in accordance with Army Regulation 600-37.

6. Title 10, U.S. Code, section 628 (Special Selection Boards), paragraph (b)(1), states if the Secretary of the Military Department concerned determines, in the case of a person who was considered for selection for promotion by a promotion board but was not selected, that there was material unfairness with respect to that person, the Secretary may convene an SSB under this subsection to determine whether that person (whether or not then on active duty) should be recommended for promotion. In order to determine that there was material unfairness, the Secretary must determine:

a. the action of the promotion board that considered the person was contrary to law in a matter material to the decision of the board or involved material error of fact or material administrative error; or

b. the board did not have before it material information for its consideration.

7. Army Regulation 600-8-29 (Officer Promotions), prescribes policies and procedures governing promotion of Army commissioned and warrant officers on the Active Duty List. Paragraph 7-2 states an SSB may be convened under Title 10, U.S. Code, section 628, to consider or reconsider commissioned or warrant officers for promotion when Headquarters, Department of the Army, discovers one or more of the following:

- an officer was not considered in or above the promotion zone by a regularly scheduled board because of administrative error (SSB required)
- the board that considered the officer in or above the promotion zone acted contrary to law or made a material error (SSB discretionary)
- the board that considered the officer in or above the promotion zone did not have before it some material information (SSB discretionary)

//NOTHING FOLLOWS//