

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 October 2024

DOCKET NUMBER: AR20230013103

APPLICANT REQUESTS: through counsel, removal of his name and personally identifying information from any law enforcement criminal investigative report of the Department of Defense (DOD) or its components, any index items or entry in the Defense Central Index of Investigations (DCII), and any other record maintained in connection with such a report or index item alleging a violation of Article 92 (Failure to Obey an Order) of the Uniform Code of Military Justice (UCMJ).

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) (listed as exhibit 9)
- Military Justice Attorneys Memorandum (Appeal from Department of the Army Criminal Investigation Command (CID) Decision – Request to Delete/Expunge Titling Determination in the Case of (Applicant)), 5 September 2023
- United Services Automobile Association Bank Statement covering the period 4 April 2019 to 6 May 2019
- American Express Statement, 17 May 2019
- Capital One Statement covering the period 12 April 2019 to 11 May 2019
- U.S. Army Criminal Investigation Laboratory Deoxyribonucleic Acid (DNA) Database Collection Form v2.0, 5 May 2019
- three DA Forms 2823 (Sworn Statement), 5 July 2019 through 29 August 2019
- Army Achievement Medal Certificate, 24 July 2020
- U.S. Army Japan Memorandum (Award of the Armed Forces Service Medal for Department of Defense Coronavirus Operations and Activities), 15 January 2021
- Secretary of the Army Memorandum (Promotion Review Board AP2011-10 Fiscal Year 2019 (FY19), Captain (CPT), Army Competitive Category (ACC), Promotion Selection Board), 1 July 2021
- Affidavit, 28 September 2021
- Meritorious Service Medal Certificate, 16 November 2021
- Army Review Boards Agency Memorandum (Resolution of Unfavorable Information for – (Applicant) – Case Number AR20220004637), 24 June 2022
- CID Memorandum (Legal Review of Request for Amendment of Record – (Applicant)), 24 April 2023

- U.S. Army Garrison Okinawa Provost Marshal's Office Memorandum (Law Enforcement Report (LER) – 1st Corrected Final), 6 June 2023
- DA Form 4833 (Commander's Report of Disciplinary or Administrative Action), 14 July 2023
- CID Letter, 7 August 2023
- two U.S. Special Operations Command-Korea Memorandum (Acceptance and Wear of Foreign Award), 30 August 2023
- five DA Form 67-10-1 (Company Grade Plate (O1 – O3; WO1 – CW2) Officer Evaluation Report) covering the period 20 October 2017 to 30 April 2023
- DA Form 1059 (Service School Academic Evaluation Report) covering the period 5 January 2022 to 16 June 2022
- DA Form 1059-1 (Civilian Institution Academic Evaluation Report) covering the period 27 June 2022 through 14 October 2022

FACTS:

1. The applicant defers to counsel.

2. Counsel states retention of the applicant's criminal history data in the National Criminal Information Center and/or DCII does not conform with DOD policy as probable cause does not exist to believe the applicant violated Article 92 (Failure to Obey Lawful Order), UCMJ, by consuming alcohol between 12 a.m. and 5 a.m. in violation of the U.S. Forces Japan liberty policy.
 - a. The legal review provided by CID failed to even acknowledge the substantial evidence showing the applicant did not consume alcohol between 12 a.m. and 5 a.m. and therefore did not violate the liberty policy for which he has now been titled. Accordingly, it is legal error to allow the applicant to remain titled for this offense.

 - b. Further, it is fundamentally unfair to criminally title the applicant for drinking alcohol past 12 a.m., a decision that will adversely affect him for decades to come, when he did not violate the liberty order, was above the legal drinking age, and has continued to serve honorably on active duty since the allegation, even being promoted to his current rank.

3. The applicant was appointed as a Reserve commissioned officer of the Army on 29 April 2016.

4. Installation Management Command and Headquarters, U.S. Army Garrison, Fort Carson, Orders CR-348-0064 ordered him to deploy in a temporary duty status in support of the Korea Rotational Force effective 6 February 2017.

5. The U.S. Army Criminal Investigation Laboratory DNA Database Collection Form v2.0, 5 May 2019, lists the applicant as an arrestee and shows fingerprinting and an oral sample were collected on 5 May 2019 as the result of his violation of failure to obey a general order.

6. The sworn statement from S____ W. C____, 5 July 2019, states he was working as a security guard at Club Area Asia in Okinawa, Japan, on or about May 2019. He noticed the applicant on top of a table dancing and approached him to tell him to get down. He explained to the applicant that he did not want him to fall from the table and get hurt due to safety reasons. At the time, he noticed the applicant was highly intoxicated, but he complied with everything he asked him. Later that evening he saw another security guard escorting the applicant out of the club for being drunk and dancing on top of the table after a second warning to get down from the table. The applicant's friend then began to show aggression toward the security officers and they were eventually escorted out of the building to avoid any further conflict.

7. The sworn statements from T____ L____ and B____ W____, 2 August 2019 and 29 August 2019, state they met the applicant and B____ T____ on the street of Okinawa while calling for a cab on 4 May 2019. The applicant and B____ T____ mentioned to them that they were not allowed to consume alcohol after a certain time. They went to Club Area Asia where they saw the applicant get on top of a platform. A security guard told him to get down and asked him to leave. They did not see the applicant or B____ T____ argue or fight with the security guard. While they were together with the applicant and B____ T____, they did not see them consume any alcohol. They only danced and exchanged contact information.

8. On 9 August 2019, the Commanding General, U.S. Army Japan, issued the applicant a general officer memorandum of reprimand (GOMOR) for violating U.S. Forces Japan liberty policy, wherein he stated:

You are hereby reprimanded for being drunk and disorderly and violating the United States Forces Japan (USFJ) liberty policy. On 5 May 2019, you violated the USFJ Liberty policy by consuming alcohol in public after 2400 hours [12 a.m.] at the "Area Asia Club". You acted disorderly by dancing on a table after being told not to do so, arguing with bouncers, and yelling at military police officers. You had to be tazed by military police officers for failing to comply with their orders and being defiant and combative. I am shocked and dismayed by your exhibition of extremely poor judgment, and I sincerely question your ability to lead Soldiers.

Your conduct was reprehensible and totally incompatible with Army values. As an officer you are charged with the responsibility of setting the example for others, and displaying exemplary conduct, both on-duty and off. Your actions fell well

below the standards expected of a leader in the United States Army. There is absolutely no excuse for your foolish and unprofessional behavior.

This is an administrative reprimand imposed under the provisions of AR [Army Regulation] 600-37 [Unfavorable Information]. You are advised that in accordance with AR [Army Regulation] 600-37, Paragraph 3-5, I am considering whether to direct this reprimand to 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 Army Regulation 600-37, paragraph 3-7.

9. On 15 August 2019, the applicant acknowledged receipt of the GOMOR and elected to submit written matters in his own behalf.

10. On 3 September 2019, the applicant submitted a response to the GOMOR wherein he stated he took full responsibility and accepted the consequences of his actions. The incident was not indicative of his true character and potential for future service. He hoped that one night does not define his duty performance for his overseas assignment or stigmatize his overall military career. He admitted that alcohol impaired his judgment and influenced his actions. He was fully aware that incidents like this can always have the potential to threaten the United States-Japanese alliance and it was his duty to always be an excellent ambassador. He requested withdrawal of the GOMOR or filing it locally and not in his AMHRR.

11. On an unspecified date, the Commanding General, U.S. Army Japan, directed permanently filing the GOMOR in the applicant's AMHRR after considering the circumstances of the misconduct and all matters submitted by the applicant in defense, extenuation, or mitigation.

12. The Secretary of the Army Memorandum (Promotion Review Board AP2011-10 FY19, CPT, ACC, Promotion Selection Board, 1 July 2021, shows the applicant was retained on the FY19, CPT, ACC, promotion list pursuant to Army Regulation 600-8-29 (Officer Promotions), paragraph 7-8c.

13. On 28 September 2021, S____ P____ provided an affidavit wherein he stated he was celebrating his birthday with a group of noncommissioned officers on 4 May 2019 when he ran into the applicant, First Lieutenant T____ G____, and another officer with whom he was not familiar at Club Area Asia. He did not witness the applicant or anyone in his group consume any alcohol at any given point at Club Area Asia. Toward the end

of the night, he did witness the applicant stand on a platform, but he immediately and willingly stepped down when asked by one of the club's bouncers.

14. On 21 June 2022 in Docket Number AR20220004637, the Department of the Army Suitability Evaluation Board (DASEB) considered the applicant's request for removal of the GOMOR, 9 August 2019, from his AMHRR or transfer to the restricted folder.

a. The DASEB determined the evidence presented did not clearly and convincingly establish that the document under consideration was untrue or unjust and did not warrant removal of the GOMOR.

b. The DASEB determined by unanimous vote that the evidence submitted was sufficient to warrant partial relief. As a result, the DASEB recommended transfer of the GOMOR, 9 August 2019, to the restricted folder of the applicant's AMHRR.

15. The CID memorandum (Legal Review of Request for Amendment of Record – (Applicant)), 24 April 2023, responded to the applicant's request for amendment of the LER, 6 June 2023. The CID Attorney Advisor determined there was probable cause to believe the applicant committed the offense of violation of failure to obey an order; however, there was no probable cause to believe he committed the offense of resisting apprehension. The applicant's record should be amended to remove his name from the title block for the offense of resisting apprehension and any entry in the DCII should be removed.

16. On 6 June 2023, the U.S. Army Garrison Okinawa Provost Marshal's Office issued a corrected LER showing there was no probable cause to believe the applicant committed the offense of resisting apprehension for which he was titled; therefore, his name was removed from the title block for that offense.

17. On 14 July 2023, an amended DA Form 4833 (Commander's Report of Disciplinary or Administrative Action) was issued for the applicant's offense of failure to obey general order in violation of Article 92, UCMJ. The report indicated there was no probable cause for the offense of resisting apprehension.

18. On 7 August 2023, CID notified the applicant's counsel that their request to amend the applicant's record within the files of the CID had been partially granted. Corrections were made to the DA Form 4833, 14 July 2023, and LER, 6 June 2023, to reflect the legal review.

19. Counsel provided the following additional documents for consideration:

a. two of the applicant's credit card and bank account statements covering the period 4 April 2019 through 17 May 2019;

b. the applicant's Army Achievement Medal Certificate, 24 July 2020, and Meritorious Service Medal Certificate, 16 November 2021, showing he was awarded the Meritorious Service Medal and Army Achievement Medal;

c. the U.S. Army Japan memorandum (Award of the Armed Forces Service Medal for Department of Defense Coronavirus Operations and Activities), 15 January 2021, showing the applicant was awarded the Armed Forces Service Medal;

d. five of the applicant's officer evaluation reports covering the period 20 October 2017 through 30 April 2023, showing he was rated "Highly Qualified" or "Most Qualified" by his senior rater on each occasion;

e. the applicant's service school academic evaluation report covering the period 5 January 2022 through 16 June 2022, showing he successfully completed the Engineer Captains Career Course and showing his rating as "Superior Academic Achievement";

f. the applicant's civilian institution academic evaluation report covering the period 27 June 2022 through 14 October 2022, showing he successfully completed the Master of Science in Engineering Management Course; and

g. two U.S. Special Operations Command-Korea memoranda (Acceptance and Wear of Foreign Award), 30 August 2023, showing he was approved to wear the Armed Forces of the Philippines Parachutist Badge and the Royal Thai Army Parachutist Badge.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the applicant's military records, the Board found that relief was not warranted. The Board considered regulatory guidance including Department of Defense Instruction 5505.07. The Board determined a preponderance of the evidence shows an error or injustice did not occur when the applicant was titled because probable cause existed and still exists to support the titling.

a. The evidence shows on 5 May 2019, military police were notified of an incident concerning the applicant for the offenses of assault, failure to obey a general order (Article 92 of the Uniform Code of Military Justice (UCMJ)), and resisting apprehension (Article 87a of the UCMJ).

b. The Board first considered whether probable cause did or did not exist (when titled) to believe the offense occurred or the person committed the offense. The law enforcement report contains an opinion that shows probable cause existed to believe

the applicant committed the offense of failure to obey a lawful order under Article 92 of the UCMJ. The evidence in the record as further discussed below also supports this conclusion.

c. The Board next considered whether probable cause still exists to believe the offense occurred or the person committed the offense. The Board noted the applicant's contention, through counsel, that substantial evidence showing the applicant violated the policy for consuming alcohol between the hours of 2400 and 0500 is not supported. The Board considered the contemporaneous 911 call placed on 5 May 2019 with Military Police Precinct/Foster (MPP/F)_Desk Sergeant BACA. The Sergeant was notified by 911 Emergency Dispatch of an Assault that occurred at 1-3-1 Chatan (Area Asia), Chatan-Cho, Okinawa, Japan. Area Asia Security informed 911 Emergency Dispatch that applicant and another Soldier were "drinking too much, getting too drunk in the club and becoming disorderly by jumping on stage and yelling." The Board further considered applicant's 3 September 2019 General Officer Memorandum of Reprimand (GOMOR) rebuttal acknowledging that the reprimand states he behaved in a drunk and disorderly manner and "violated the USFJ Liberty Policy by consuming alcohol past 2400 hours on 5 May 2019". Applicant, in his GOMOR rebuttal, stated he takes "full responsibility and accepts the consequences of my actions..." The Board considered witness statements, financial statements and additional matters. Witness statements include "I don't think I saw them drinking" and others individuals who say outright they did not see them drinking in Area Asia. However, this is directly contradicted by other evidence in the file, including Blake Toth's 5 May 2019 admission to military investigators in response to the question: "How much did you drink at Area Asia?" Answer: "I believe only 1 or 2 drinks." The evidence in the file supports the conclusion that probable cause existed, and continues to exist, to believe that applicant violated Art. 92 of the Uniform Code of Military Justice.

d. Finally, the Board noted on 9 May 2023, the law enforcement report was amended to remove the applicant from the titling block for the offense of resisting apprehension (Article 87a of the UCMJ) based on no probable cause to believe the applicant committed the offense for which he was titled.

e. Based on the preponderance of evidence available for review, the Board determined the evidence presented was not sufficient to warrant a recommendation for relief.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

X

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.

REFERENCE:

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 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, establishes 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.

//NOTHING FOLLOWS//