

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 July 2024

DOCKET NUMBER: AR20230013222

APPLICANT REQUESTS: removal of the DA Form 2166-9-2 (Noncommissioned Officer (NCO) Evaluation Report (NCOER) (Staff Sergeant-First Sergeant/Master Sergeant)) covering the period 21 November 2021 through 31 May 2022 from her Army Military Human Resource Record (AMHRR).

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

- DD Form 149 (Application for Correction of Military Record)
- DA Form 2166-9-2
- U.S. Army Inspector General (DAIG) Agency Letter, 4 April 2023

FACTS:

1. The applicant states the allegation of reprisal against her was unsubstantiated by the DAIG and Department of Defense (DOD) Inspector General (IG).
2. Following prior enlisted service in the Regular Army, she enlisted in the U.S. Army Reserve on 18 May 2011.
3. U.S. Army Human Resources Command Orders R-03-808956, 19 March 2018, ordered her to active duty in an Active Guard Reserve status for a period of 3 years effective 27 March 2018.
4. She was promoted to the rank/grade of staff sergeant/E-6 effective 1 March 2019.
5. The contested change-of-rater NCOER covering 6 months of rated time from 21 November 2021 through 31 May 2022 shows her rater as Sergeant First Class L____ F____, Jr., Financial Management NCO, and her senior rater as First Lieutenant B____ B. H____, Management Analyst. Her principal duty title is shown as Financial Management NCO. The NCOER shows in:

- a. Part II (Authentication):

- block a3 (Rater's Signature) and b3 (Senior Rater's Signature), the rater and senior rater authenticated the form with their digital signatures on 5 November 2022
- block c5 (Supplementary Reviewer's Signature), the Supplementary Reviewer authenticated the form with his digital signature on 5 November 2022
- block d1 (Counseling Dates), an initial counseling date of 2 December 2021 and a later counseling date of 20 April 2022
- block d2 (Rated NCO's Signature), the applicant did not authenticate the form with her signature

b. Part IVc (Character), the rater placed an "X" in the "Met Standard" block and entered the following bullet comments:

- fully supported the Army SHARP [Sexual Harassment/Assault Response and Prevention] and EO [Equal Opportunity] programs by fostering an environment free of harassment through dedicated training and development
- welcomed new arrivals and helped them integrate into sections [sic] mission

c. Part IVd (Presence), the rater placed an "X" in the "Met Standard" block and entered the following bullet comments:

- consistently displays confidence and enthusiasm for a successful mission accomplishment
- maintained compliance with AR [Army Regulation] 670-1 [Wear and Appearance of Army Uniforms and Insignia] and AR [Army Regulation] 600-9 [The Army Composition Program]

d. Part IVe (Intellect), the rater placed an "X" in the "Met Standard" block and entered the following bullet comments:

- demonstrated effective training skills and technical knowledge
- demonstrated the ability to execute the mission based on given standards

e. Part IVf (Leads), the rater placed an "X" in the "Did Not Meet Standard" block and entered the following bullet comments:

- exhibited questionable judgement and a lack of integrity
- willingly shares knowledge with others
- transitioned duties to assist command where needed

f. Part IVg (Develops), the rater placed an "X" in the "Met Standard" block and entered the following bullet comments:

- used experiences and training to prepare subordinates to become future leaders
- displayed resilience; used missteps as learning blocks instead of failures

g. Part IVh (Achieves), the rater placed an "X" in the "Met Standard" block and entered the following bullet comments:

- made risk management an essential part of all missions resulting in zero training accidents
- assisted in training a Financial Management team with zero incidents

h. Part IVi (Rater Overall Performance) (Select One Box Representing Rated NCO's Overall Performance Compared to Others in the Same Grade Whom You Have Rated in Your Career. I currently rate 1 Army NCOs in This Grade), the rater placed an "X" in the "Met Standard" block and entered the following bullet comments:

- average performance by an NCO
- accepted challenges with a spirit to excel

i. Part V (Senior Rater Overall Potential) (I Currently Senior Rate 1 NCO in This Grade), block b (Comments), the senior rater entered the following bullet comments:

NCO Refuses to sign. [Applicant] is a capable of producing adequate results with moderate supervision. Promote to Sergeant First Class with peers after further development. Enroll in DLC [Distributed Leader Course] 4 when eligible.

7. The DAIG Agency letter from the Assistance Division Chief, 4 April 2023, informed her that they completed the investigation into her allegation of reprisal as implemented by DOD Directive 7050.06 (Military Whistleblower Protection). They determined the allegation that she received an unfavorable NCOER in reprisal for making protected communications was substantiated. The allegations that she received counseling statements (not in evidence) and an unfavorable memorandum for record (not in evidence) regarding an assignment deletion request in reprisal for making protected communications were not substantiated. The counseling statements were event orientated and found to be within Army regulations standards. The memorandum for record was written to document observations at the request of another and not in reprisal. They also informed her that she could submit an application to the Army Board for Correction of Military Records if she believes an error or injustice exists in her Army record as result of these findings.

BOARD DISCUSSION:

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 applicants petition and military records, the Board determined that the applicant demonstrated by a preponderance of evidence that procedural error occurred prejudicial to the applicant and by a preponderance of evidence that the contents of the DA Form 2166-9-2 (Noncommissioned Officer (NCO) Evaluation Report (NCOER) (Staff Sergeant-First Sergeant/Master Sergeant)) covering the period 21 November 2021 through 31 May 2022 are substantially incorrect and support removal. The Board reviewed and concurred with the Department of the Army Investigator General advising official finding the allegation that she received an unfavorable NCOER in reprisal for making protected communications was substantiated. Therefore, the Board granted relief of removal of the NCOER from her Army Military Human Resource Record (AMHRR).

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 DA Form 2166-9-2 (Noncommissioned Officer (NCO) Evaluation Report (NCOER) (Staff Sergeant-First Sergeant/Master Sergeant)) covering the period 21 November 2021 through 31 May 2022 from the applicant's AMHRR.

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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. DOD Directive 7050.06 (Military Whistleblower Protection) implements the provisions of the Military Whistleblower Protection Act as codified in Title 10, U.S. Code, section 1034.

a. The directive established policy that:

(1) Members of the Military Services (referred to in this directive as "service members") are free to make protected communications.

(2) No person will restrict a service member from making lawful communications to a member of Congress or an IG.

(3) Service members will be free from reprisal for making or preparing to make or being perceived as making or preparing to make a protected communication.

(4) No person may take or threaten to take an unfavorable personnel action or withhold or threaten to withhold a favorable personnel action in reprisal against any Service member for making or preparing to make, or being perceived as making or preparing to make a protected communication.

b. Protected communications are defined as:

(1) any lawful communication to a Member of Congress or an IG; and

(2) a communication in which a member of the Armed Forces communicates information that the member reasonably believes evidences a violation of law or regulation, including:

- a law or regulation prohibiting sexual harassment or unlawful discrimination
- gross mismanagement
- gross waste of funds or other resources
- an abuse of authority
- a substantial and specific danger to public health or safety

c. Reprisal is defined as "taking or threatening to take an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, for making or preparing to make a protected communication."

d. A "personnel action" is any action taken that affects, or has the potential to affect, the military member's current position or career. Personnel actions include promotions; disciplinary or other corrective actions; transfers or reassignments; performance

evaluations; and any other significant changes in duties or responsibilities inconsistent with the military member's grade.

2. According to the DOD Whistleblower Program Guide to Investigating Military Whistleblower Reprisal and Restriction Complaints, there are four elements that must be established to make a finding of reprisal:

a. Element 1 – Protected Communication. Did a complainant make or prepare to make a protected communication, or was complainant perceived as having made or prepared to make a protected communication?

b. Element 2 – Personnel Action. Was an unfavorable personnel action taken or threatened against the complainant, or was a favorable personnel action withheld or threatened to be withheld from complainant?

c. Element 3 – Knowledge. Did the responsible management official(s) have knowledge of complainant's protected communication(s) or perceive complainant as making or preparing protected communication(s)?

d. Element 4 – Causation. Would the same personnel action(s) have been taken, withheld, or threatened absent the protected communication(s)?

3. Army Regulation 20-1 (Inspector General Activities and Procedures) prescribes policy and procedures concerning the mission and duties of the DAIG. It also prescribes duties, missions, standards, and requirements for IGs throughout the Army.

a. Paragraph 1-13 (Prohibited Activity), subparagraph b(2) (Prohibitions against Reprisal – Military Whistleblower), provides that persons subject to this regulation will not take (or threaten to take) an unfavorable personnel action or withhold (or threaten to withhold) a favorable personnel action with respect to a member of the armed forces for making or preparing a (lawful) protected communication. Lawful communications are those communications made to an IG; Member of Congress; member of a DOD audit, inspection, or investigation organization; law enforcement organization; or any other person or organization (including any person or organization in the chain of command starting at the immediate supervisor level) designated under regulations or other established administrative procedures to receive such communications. The term "lawful communication" encompasses information that the Soldier reasonably believes provides evidence of a violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination, gross mismanagement, a gross waste of funds or other resources, an abuse of authority, or a substantial and specific danger to public health or safety.

b. Paragraph 3-1 (Nature of IG Records) provides that all IG records, including U.S. Army Reserve IG records, are the property of the Secretary of the Army. IGs maintain these records on behalf of the Secretary of the Army. The Secretary's designated authority for all IG records is the IG. The IG, the Deputy IG, the Principal Director to the Inspector General for Inspections, and their designated representatives (DAIG's legal advisor and deputy legal advisor) have the authority to release IG records. Army IG records are any written or recorded IG work product created during the course of an IG assistance inquiry, inspection, investigative inquiry, or investigation. An IG record includes, but is not limited to, correspondence or documents received from a witness or a person requesting assistance, IG reports, IG Network data, or other computer automatic data processing files or data, to include IG notes and working papers.

c. Paragraph 3-3 (Use of IG Records for Adverse Action) provides that IG records will not be used as the basis for adverse action (see Glossary) against any individual unless specifically authorized by the Secretary of the Army, the Under Secretary of the Army, the Army Chief of Staff, the Army Vice Chief of Staff, or the IG. Requests must be submitted to the IG. Any request to use the results of an IG investigation for adverse action must state why the command did not initiate a command investigation into the alleged misconduct and why a follow-on command investigation would be unduly burdensome, disruptive, or futile. Command investigations preclude the necessity of using IG records for adverse action and thereby safeguard the integrity of the IG system. An exception to this rule is the use of DODIG-approved reports of investigation or investigative inquiry containing substantiated non-senior official allegations of violations of Title 10, U.S. Code, section 1034 (Reprisal), as a basis for adverse action.

d. Paragraph 3-8 (Release of Records and Reports under the Military Whistleblower Reprisal Statute) provides that an IG may provide information relating to complaints of whistleblower reprisal and improper mental health evaluation referral directly to the DODIG Military Reprisal Investigations upon request without the IG or the DAIG's Records Release Office approval. This information includes, but is not limited to, the original complaint with supporting documentation; IG records or investigation material; official personnel and medical records (orders, evaluations, and so forth); Army Regulation 15-6 (Procedures for Administrative Investigations and Boards of Officers) investigations, commander's inquiries, or equal opportunity investigations; and any other information deemed relevant to resolving an official complaint. This exemption only applies when the DODIG Military Reprisal Investigations requests the information in support of a preliminary inquiry or investigation.

e. Paragraph 3-12 (Requests for Reconsideration of IG Findings, Opinions, Judgments, or Conclusions) provides that all requests to add or delete a subject, alter a function code, and/or alter an allegation determination in an IG record will be forwarded or directed to the DAIG Assistance Division for referral to the appropriate divisions

within the DAIG for review prior to action by the IG, the Deputy IG, or the Principal Director to the IG for Inspections. Only the IG may approve or disapprove requests to amend determinations in IG records. All requests to amend determinations in IG records will include one copy of the record for which the amendment is sought; any documents in support of or related to the disputed record; acknowledgement to the requester; and recommendations, with supporting rationale, concerning whether the amendment should be approved or disapproved. Requests for amendments concerning opinion, judgment, or conclusion may be granted upon a showing of fraud, mistake of law, mathematical miscalculation, or newly discovered evidence.

f. Paragraph 7-4b (Soldier Allegations of Whistleblower Reprisal under Title 10, U.S. Code, Section 1034) provides that IGs within Military Departments are authorized to grant whistleblower protection for reprisal allegations presented directly to them by service members. If a Soldier presents a reprisal allegation that appears to meet the criteria outlined in Title 10, U.S. Code, section 1034, the IG who receives the allegation will separate all other issues or allegations from the complaint and then forward only the reprisal complaint and all supporting documentation directly to the Military Reprisal Investigations Office at the DODIG. The DODIG is the final approving authority for whistleblower reprisal cases that are declined or closed administratively in accordance with DOD Directive 7050.06.

g. The Glossary provides the following definitions:

(1) Assistance Inquiry. This is an informal fact-finding process used to address or respond to a complaint involving a request for help, information, or other issues but not allegations of impropriety or wrongdoing.

(2) Command IG. The senior detailed IG of a Modified Table of Organization and Equipment or Table of Distribution and Allowances organization of the Active Army, Army National Guard, or U.S. Army Reserve. The command IG works directly for the commander, who is normally a commanding general, installation commander, State Adjutant General, or director of an organization.

(3) Directing Authority. An Army official who has authority to direct an IG investigation or inspection. Commanders or directors who are authorized detailed IGs on their staffs may direct IG investigations and IG inspections within their commands. Although command and State IGs may direct IG investigative inquiries, they are not considered directing authorities.

(4) Founded/Unfounded. "Founded" is one of two final dispositions for an IG issue to be used when the IG's inquiry into the matter determined the problem had merit and required resolution. "Unfounded" is the second of two final dispositions for an IG

issue to be used when the IG's assistance inquiry into the matter yields no evidence that a problem existed for the IG to resolve.

(5) Not Substantiated. A conclusion drawn by an IG at the close of an investigative inquiry or investigation when the preponderance of credible evidence suggests the subject or suspect did not do what was alleged in the allegation.

(6) IG Investigation. A formal fact-finding examination into allegations, issues, or adverse conditions of a serious nature that provides the directing authority a sound basis for making decisions and taking action. An IG investigation involves the systematic collection and examination of evidence that consists of testimony recorded under oath, documents, and, in some cases, physical evidence. Only the directing authority can authorize IG investigations using a written and signed directive. IGs normally do not resolve allegations using this methodology but instead rely on the investigative inquiry. IGs report the conclusions of their investigations using a Report of Investigation. Occasionally, IG investigations may examine systemic issues, especially when the possibility of some wrongdoing exists. For example, an IG might investigate an allegation that the development of a weapon system is fraught with fraud, waste, and abuse.

(7) IG Investigative Inquiry. An informal fact-finding examination into allegations, issues, or adverse conditions that are not significant in nature – as deemed by the command IG or directing authority – and when the potential for serious consequences (such as potential harm to a Soldier or negative impact on the Army's image) are not foreseen. The IG investigative inquiries involve the collection and examination of evidence that consists of testimony or written statements, documents, and, in some cases, physical evidence. Command IGs direct investigative inquiries and provide recommendations to the directing authority or subordinate commanders as appropriate. The directing authority reserves the right to direct an investigative inquiry if he or she feels an investigation is not appropriate. IGs resolve most allegations using this methodology and report their conclusions using the Report of Investigative Inquiry.

(8) Report of Investigative Inquiry. A written report used by IGs to address allegations, issues, or adverse conditions to provide the directing authority, command, or State IG a sound basis for decisions. The directing authority, command, or State IG approves the Report of Investigative Inquiry.

(9) IG Records. Any written, recorded, or electronic media information gathered and produced by an IG. These include, but are not limited to, any correspondence or documents received from a witness or a person requesting assistance; IG reports of inspection, inquiry, and investigation; IG Network or other computer automated data processing files or data; and DA Forms 1559 (IG Action Request) when entries are made on either side. IG records may contain documents that an IG did not prepare.

4. Army Regulation 623-3 (Evaluation Reporting System) states an evaluation report accepted for inclusion in the official record of a rated Soldier's Official Military Personnel File 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.

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. 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 Army Board for Correction of Military Records or other authorized agency.

//NOTHING FOLLOWS//