

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 July 2024

DOCKET NUMBER: AR20230013522

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 16 April 2019 through 24 February 2020 from his Army Military Human Resource Record (AMHRR).

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)
- Whistleblower Reprisal Report of Investigation, 6 May 2022
- U.S. Army Inspector General (DAIG) Agency Letter, 15 July 2022
- DAIG Letter, 5 September 2022

FACTS:

1. The applicant states the erroneous evaluation will have an adverse impact on his career if not removed. The DAIG substantiated his formal complaint of whistleblower reprisal.

2. He enlisted in the Regular Army on 31 October 2006. He was promoted to the rank/grade of staff sergeant/E-6 effective 1 June 2014.

3. He received the contested NCOER in May 2020, a change-of-rater report covering 8 months of rated time from 16 April 2019 through 24 February 2020. His rater is shown as First Lieutenant [REDACTED] Platoon Leader, and his senior rater is shown as Captain [REDACTED] Company Commander. His principal duty title is shown as Senior Drill Sergeant of Company C, 2d Battalion, 58th Infantry Regiment, Fort Benning, GA. The NCOER shows in:

a. Part II (Authentication), block d1 (Counseling Dates), an initial counseling date of 29 April 2019 and two later counseling dates of 29 July 2019 and 28 October 2019.

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

- demonstrated unquestionable moral and ethical leadership; set the precedent for discipline and instilled the Army values in the Soldiers that he has trained
- fully supported the Army's SHARP [Sexual Harassment/Assault Response and Prevention] and EO [Equal Opportunity] programs; set the example for his peers and superiors to emulate

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

- maintained the Army Physical Fitness Excellence Badge; scored 272 on last APFT [Army Physical Fitness Test]
- implemented a rigorous PRT [physical readiness training] program; raised the Platoon APFT average by over 80 points during one 14 week OSUT [one station unit training] cycle
- exhibited unquestionable professionalism and moral aptitude serving in a GI [gender integrated] Infantry BN [battalion]; set the precedent for all to emulate

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

- chosen by the CDR [commander] to assist in land resource allocation for class #9061; deconflicted 30 land requests for over 52 training days
- established a systematic Platoon OCIE [Organizational Clothing and Individual Equipment] equipment inspection program; achieved an overall operational readiness rate of 90%
- planned and supervised the training of over 450 trainees for BTT [Buddy Team Training], FTT [Fire Team Training], and LFX's [live fire exercises]; achieved a 100% GO rate on all tasks

e. Part IVf (Leads), the rater placed an "X" in the "Far Exceeded Standard" block and entered the following bullet comments:

- hand selected over 10 SSG's [staff sergeants] by the CSM [command sergeant major] to serve as senior drill sergeant; displayed leadership ability that far exceeded his peers
- led 30 realistic training events for over 400 Soldiers; produced results unmatched throughout the Company without oversight
- selected to lead range safety operations for 60 static firing ranges and 25 live fire exercises without injury or incident

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

- transformed 103 civilians into Infantrymen during two 14 week OSUT cycles; achieved highest Platoon graduation rate of 80%
- inspired his Platoon through his unparalleled leadership; produced two OSUT DHG [distinguished honor graduates], two Iron Solders, and one top shot
- singlehandedly developed a Platoon training plan for RM [rifle marksmanship]; enabled 28 out of 43 expert qualifications, highest in the company

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

- recognized by the 1SG [first sergeant] as an extraordinarily dedicated leader; regarded as the Top Platoon due to his superior performance
- instilled pride and discipline in his Platoon; commended by the Battalion Command team for IP [inspection period] 8 for class 9061
- maintained 100% accountability of \$250,000 worth of assigned equipment; incurred zero losses through exceptional diligence

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 "Far Exceeded Standard" block and entered the following bullet comments:

- exceptional performance that exceeded his superiors expectations for his ability to drive the Company's success; demonstrated proven dedication to provide equal standards that produced a lethal gender integrated Infantry force
- consistently performed at a level beyond a Sergeant First Class and possesses the unique ability to identify friction points at the Company level; regularly mitigated risk to force through his engaged leadership and attention to detail

i. Part V (Senior Rater Overall Potential) (I Currently Senior Rate 6 NCOs in This Grade), block b (Comments), the senior rater entered the following comments:

NCO Refuses to sign. [Applicant] is a capable Noncommissioned Officer who diligently served as a Senior Drill Sergeant during this rating period. He demonstrated potential for further service. Continue to train and mentor so that he may be ready to assume greater responsibilities in the future. Promote to Sergeant First Class with peers.

4. The contested NCOER shows the rater and senior rater authenticated the form with their digital signatures on 10 May 2020 and 12 May 2020, respectively. The applicant did not authenticate the form with his signature.

5. He was promoted to the rank/grade of sergeant first class/E-7 effective 1 April 2020.

6. It appears the applicant filed a whistleblower reprisal allegation against a member of his unit as evidenced by a Whistleblower Reprisal Report of Investigation, 6 May 2022. This report shows, in part (see attachment for details):

a. Section I (Executive Summary).

The Maneuver Center of Excellence (MCoE) Office of the Inspector General (IG) conducted this investigation in response to allegations that [Redacted] used his position and authority as a senior rater to draft, sign, and submit a less than favorable Non-Commissioned Officer Evaluation Report (NCOER) to Headquarters Department of the Army (HQDA) for the Complainant, [Applicant], U.S. Army, Senior Drill Sergeant, C Company (C Co), 2-58th Infantry Battalion (2-58 IN) [2d Battalion, 58th Infantry Regiment], Fort Benning, GA 31905, in reprisal for the Complainant's protected communications with his (redacted), the MCoE IG, [Redacted] and [Redacted].

We substantiated the allegation that [Redacted] threatened two unfavorable personnel actions on 11 & 23 March 2020 by digitally signing an NCOER with intent to submit to HQDA, containing a less than favorable senior rater rating and comments for the Complainant, [Applicant], U.S. Army, Senior Drill Sergeant, C Co, 2-58th IN, Fort Benning, GA 31905, in reprisal for the Complainant's protected communications, in violation of Title 10, United States Code, Section 1034 (10 U.S.C. 1034), "Protected communications; prohibition of retaliatory personnel actions," as implemented by DoD [Department of Defense] Directive 7050.06, "Military Whistleblower Protection."

We substantiated the allegation that [Redacted] took an unfavorable personnel action on 12 May 2020 by digitally signing and submitting an NCOER to HQDA, containing a less than favorable senior rater rating and comments for the Complainant, [Applicant], U.S. Army, Senior Drill Sergeant, C Co, 2-58th IN, Fort Benning, GA 31905, in reprisal for the Complainant's protected communications, in violation of Title 10, United States Code, Section 1034 (10 U.S.C. 1034), "Protected communications; prohibition of retaliatory personnel actions," as implemented by DoD Directive 7050.06, "Military Whistleblower Protection."

We recommend that the Secretary of the Army direct the Army Board for Correction of Military Records (ABCMR) to expunge the erroneous NCOER (HQDA#: 3407492 // Period Covered: 20190416 – 20200224 [16 April 2019-24 February 2020]) from the Official Military Personnel File (OMPF) of [Applicant], U.S. Army. Furthermore, that Army officials take appropriate action against [Redacted] for his violations of Title 10, United States Code, Section 1034 (10 U.S.C. 1034).

b. Section VII (Conclusion).

We conclude, by a preponderance of the evidence, that: [Redacted] used his position and authority to provide substandard comments and rating on two draft NCOERs on 11 & 23 March 2020 against [Applicant] in reprisal for his protected communications.

([Redacted] used his position and authority to provide substandard comments and rating on a final NCOER on 12 May 2020 against [Applicant] in reprisal for his protected communications.

c. Section VIII (Recommendations).

We recommend that the Secretary of the Army direct the following actions:

The Army Board for Correction of Military Records (ABCMR) permanently expunge the erroneous NCOER (HQDA#: 3407492 // Period Covered: 20190416 – 20200224) from the Official Military Personnel File (OMPF) of (Applicant), U.S. Army.

Army officials take appropriate action against [Redacted], U.S. Army.

d. Section X (Command Inspector General Concurrence and Commanding General Approval).

Concur with the above conclusion that substantiates both allegations of reprisal by [Redacted], U.S. Army.

Concur with the above recommended corrective action to assist [Applicant], U.S. Army who was wronged by this act of reprisal.

e. The Commanding General, U.S. Army Maneuver Center of Excellence and Fort Benning, concurred with and acknowledged the report of investigation with his signature on 6 May 2022.

7. The DAIG Agency letter from the Assistance Division Chief, 15 July 2022, informed him that they completed the investigation into his allegation of reprisal as implemented by DOD Directive 7050.06. They determined his allegations or reprisal were substantiated and closed his case. They also informed him that he could submit an application to this Board for correction of his records as result of the findings.

8. The DAIG Agency letter from the Deputy Legal Advisor, 5 September 2022, provided him with a copy of the DAIG report for his records.

9. He is currently serving in the rank/grade of sergeant first class/E-7 as a Military Science I Instructor at [REDACTED] College, [REDACTED]

BOARD DISCUSSION:

After reviewing the application and all supporting documents, the Board determined relief was warranted. The applicant's contentions, his military records, and regulatory guidance were carefully considered. Based upon the DAIG findings outlined in their investigation memorandum, dated 15 July 2022, that the applicant's allegations of reprisal were substantiated, the Board concluded there was sufficient evidence of an error or injustice warranting the removal of the DA Form 2166-9-2 (Noncommissioned Officer (NCO) Evaluation Report (NCOER) (Staff Sergeant-First Sergeant/Master Sergeant)) covering the period 16 April 2019 through 24 February 2020 from his Army Military Human Resource Record (AMHRR), and replacing it with a memorandum of unrated time.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

[REDACTED]	[REDACTED]	[REDACTED]	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

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

- deleting from his record DA Form 2166-9-2 covering the period 16 April 2019 through 24 February 2020 from his Army Military Human Resource;
- placing a statement in his record for the rating period 16 April 2019 to 24 February 2020 as non-rated time

1/6/2025

X

CHAIRPERSON

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

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 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.

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 ABCMR or other authorized agency.

//NOTHING FOLLOWS//