

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 September 2024

DOCKET NUMBER: AR20230013922

APPLICANT REQUESTS: through counsel, correction of the DA Form 4833 (Commander's Report of Disciplinary or Administrative Action), 13 September 2022, by removing his name from the subject (Offender Information) block.

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)
- Counsel's Memorandum ((Applicant) Titling Removal Request), 6 November 2023, with supporting documents organized and labeled in six enclosures –
 - Enclosure 1 –
 - Counsel's Memorandum ((Applicant) Titling Removal Request), 30 August 2023 to Criminal Investigation Division (CID) (9 pages with supporting documents organized and labeled in 8 enclosures)
 - DA Form 4833 (Commander's Report of Disciplinary or Administrative Action), 13 September 2022
 - Army Regulation 195-2 (Criminal Investigation Activities) Excerpt
 - U.S. Army Criminal Investigation Division (CID) (now known as U.S. Army Criminal Investigation Command Memorandum (Law Enforcement Report (LER) – Serious Incident Report (SIR) (Category 3)/Final), 26 January 2022
 - CID Form 94 (Agent's Investigation Report), 28 October 2021, with allied documents
 - Army National Guard Trial Defense Service Memorandum (Phone Interview with Major (MAJ) N____), 14 March 2022
 - Counsel's Email Interview with MAJ N____, 9 May 2022
 - Georgia Army National Guard Memorandum (Phone Conversation with Lieutenant Colonel (LTC) C____ B____ in 2013), 24 February 2022
 - CID Office of the Inspector General (IG) Letter, 15 May 2023
 - CID Office of the Chief Counsel Letter, 21 July 2023, with enclosure

- Enclosure 2 –
- CID Memorandum (Legal Review of Request for Amendment of Record – (Applicant)), 12 September 2023
- CID Letter, 18 September 2023

- Enclosure 3 – Meritorious Service Medal Certificate, 17 November 2022
- Enclosure 4 – Employer Letter (Employment Verification), 25 October 2023
- Enclosure 5 – Employer Memorandum (Verification of Clearance), 18 October 2023
- Enclosure 6 – Harris Mountain Investigations, Limited Liability Company, Letter, 2 November 2023

FACTS:

1. The applicant states he requests removal of his name from the subject block of the CID LER – SIR (Category 3)/Final, 26 January 2022, and all associated documents. He defers all argument to counsel.

2. Counsel states the applicant requests removal of his name from the subject block (Offender Information) of the DA Form 4833 (Commander's Report of Disciplinary or Administrative Action), 13 September 2022. He provides the following the reasons/rationale:

a. Regulation.

(1) Army Regulation 195-2 states that "requests to delete a person's name from the subject block will be granted if it is determined that credible information did not exist to believe that the individual committed the offense for which titled as a subject at the time the investigation was initiated..."

(2) However, Public Law 116-283, section 545, required the Secretary of Defense to establish and maintain a policy and process for a person to request their Department of Defense (DOD) law enforcement record to be amended, corrected, expunged, or otherwise removed when it is determined probable cause did not or does not exist to believe that the individual committed the alleged criminal offense. As of November 2022, DOD had not published implementation guidance; therefore, the Secretary of the Army directed the Department of the Army Criminal Investigative Division to adopt the probable cause standard for review of amendment requests.

(3) Probable cause is defined differently by many different sources. Since Public Law 116-283, section 545, is still being implemented, there is no specified standard. Army Regulation 195-2 contains no definition for probable cause; neither does Article 32

(Preliminary Hearing) of the Uniform Code of Military Justice. Rules for Courts-Martial 302 (Rule Regarding Pre-trial Apprehension) defines probable cause as: "Probable cause to apprehend exists when there are reasonable grounds to believe that an offense has been or is being committed and the person to be apprehended committed or is committing it."

(4) The Black's Law Dictionary defines probable cause as: "a reasonable ground to suspect that a person has committed or is committing a crime...under the Fourth Amendment, probable cause – which amounts to more than a bare suspicion but less than evidence that would justify a conviction – must be shown before an arrest warrant...may be issued."

b. Argument.

(1) The events in question took place on 15 April 2013, 10 years ago, but were reported to CID on 7 October 2021. That alone – the amount of time that passed – should have called into question the credibility of accusation and subjected it to a higher level of scrutiny and investigation by the CID case agent.

(2) The CID report summary noted that a witness corroborated MAJ B____'s statement and placed the applicant in her room on the night of the incident. That witness was LTC P____. It was noted in the investigation that LTC P____ did not actually hear another voice in the room. The sound of "someone getting dressed" and a door opening and closing could have been MAJ B____ moving in the room. It was bold to claim a witness placed the applicant in MAJ B____'s room when the witness did not hear another voice in the room and did not see photographs or video of anyone else in the room. The witness assumed the noises she heard belonged to the applicant, but there are no facts to support her claim. Of the other six witness interviews in CID's report, no one witnessed the applicant in MAJ B____'s room.

(3) In her interview with CID, MAJ B____ stated she was invited by MAJ L____ R____ to his residence to a cookout and drinks in April 2013. MAJ B____ stated the applicant began flirting with her at MAJ R____'s residence by calling her pretty on several occasions. MAJ B____ stated the applicant began challenging MAJ B____ to drink more and more. MAJ B____ stated that at some point she called MAJ K____ N____, her boyfriend at the time, and told him she was uncomfortable with some of the things the applicant was saying to her. MAJ B____ stated she decided it would be best if she left and returned to her room. MAJ B____ stated the applicant insisted on walking her back. MAJ B____ stated that at some point during the walk, the applicant made a comment that "freaked me out" and she began running back to her room. MAJ B____ stated she believed that to be the end of the night and that she was safe. MAJ B____ stated that about 5 minutes after she returned, the applicant began knocking on her door, telling her to open the door and let him in. MAJ B____ stated the

applicant stated, "I have to come in and do a Health and Welfare [inspection]." MAJ B____ stated she was extremely uncomfortable with him being in her room and began thinking of ways to get him out.

(4) In a 5 November 2021 CID telephonic interview with MAJ L____ R____, MAJ R____ stated he remembered the night in 2013 that MAJ B____ and the applicant came over to this house at Fort Stewart. MAJ R____ stated MAJ B____ and the applicant only stayed about an hour and he did not notice any alcohol consumption. MAJ R____ stated the three of them talked about the upcoming deployment and the training they had the next day. MAJ R____ stated this all took place while the sun was still out, so he guessed it was around 1730 hours. MAJ R____ stated he did not notice anything out of the ordinary that night but did remember MAJ B____ and the applicant leaving at the same time around 1830 hours.

(5) In a 10 November 2021 CID telephonic interview with MAJ K____ N____, MAJ N____ stated he was in a relationship with MAJ B____ at the time of the incident. MAJ N____ stated she informed him that she and the applicant had been drinking on the night of the incident and she became unconformable with some of the things the applicant had said to her. MAJ N____ stated he does not remember exactly what MAJ B____ said happened; however, MAJ N____ stated, "I know it was more than just verbal." MAJ N____ stated he doesn't remember exactly how MAJ B____ got away from the applicant, only that she did and then called a friend.

(6) Additionally, MAJ B____ claimed she had filed a restricted sexual assault report against the applicant in 2013; however, on 16 December 2021, MAJ B____'s unit Sexual Assault Response Coordinator from 2013 was telephonically interviewed and stated she had no recollection of MAJ B____ ever filing any report against the applicant.

(7) This, combined with CID not being able to locate any report from 2013 relating to MAJ B____ and the applicant, should further call into question the credibility of MAJ B____'s later allegation. Finally, it is important to note that the applicant waived his rights and denied the allegation to CID; he has remained consistent, in contrast to MAJ B____. Due to the concern about the inconsistencies with the witness statements already mentioned, the applicant filed a complaint through the Georgia National Guard Office of the IG for the Department of the Army IG's Office in January 2023. The IG Office referred his concerns to the Office of Professional Responsibility (OPR). They provided the following [partial] response:

The OPR review did not reveal credible allegations of agent misconduct and determined that bias was not apparent. However, the OPR review did identify some areas that may require additional investigative activity.

Our office subsequently referred your concerns and the OPR review to our agency's Investigations and Operations Directorate (IOD) for further review. Their review contained recommendations that could address some of the concerns with this case. Their review and recommendations have been referred to the Southeast Field Office for some additional investigative activity, which should result in a supplemental report.

(8) This investigation by the Southeast Field Office for further investigation was never completed, evidenced by the lack of any recent investigative steps in the case file that CID disclosed to counsel on 4 August 2023. The applicant attempted to fill in as many of these investigative gaps as possible; CID, on the other hand, refused to conduct any additional investigative activity. Essentially, the IG has confirmed that CID did not conduct a complete investigation, missing several opportunities to conduct follow-on interviews and collect crucial information, and based their titling decision on corroborating information that was not actually corroborating. These errors in the investigation, which should call into question the "titling" decision, combined with all of the discrepancies listed above, should result in the granting the applicant's request.

(9) Finally, the Board should consider the applicant's complete military service, post-service employment, the fact that he still maintains a top-security clearance, and his otherwise clean criminal background. The allegation made against him is completely inconsistent with his normal character, making it less likely that he did what he was accused of doing.

c. Conclusion.

(1) The applicant should not have been titled for Abusive Sexual Contact (Adult), Title 18, U.S. Code, section 2244. Due to all of the information given, which was known by CID at the time of the titling decision, MAJ B____ never made a "credible" accusation. Furthermore, probable cause did not exist at the time of the titling decision.

(2) If the Board disagrees, even if probable cause existed at the time of the titling decision, it is clear that probable cause does not exist currently that the applicant committed the offense of abusive sexual contact. This conclusion is based on additional information provided by the applicant after the titling decision was made. Because MAJ B____ never made a credible accusation, and because probable cause did not and currently does not exist that the applicant committed the offense of abusive sexual contact, the applicant's name should be removed from the subject block of the DA Form 4833.

3. Following prior enlisted service in the Regular Army, the Army National Guard, and a break in service, the applicant was appointed as a Reserve commissioned officer of the

Army in the Georgia Army National Guard (GAARNG) in the rank/grade of second lieutenant/O-1 on 9 August 2003.

4. The Joint Force Headquarters-Georgia memorandum (Notification of Eligibility for Retired Pay for Non-Regular Service (20 Years) (Reissue), 13 December 2016, notified the applicant that he completed the required qualifying years of service for retired pay upon application at age 60 unless he qualified for a reduced eligibility age in accordance with statutory guidance.

5. The applicant was promoted to the rank/grade of LTC/O-5 effective 1 July 2018.

6. The CID memorandum (LER – SIR (Category 3)/Final), 26 January 2022, shows the Fort Stewart CID was notified by Colonel (COL) B____ S. B____, State Judge Advocate, Georgia National Guard, on 7 October 2021 that MAJ B____ (then-Captain (CPT)), reported the applicant (then-MAJ) sexually assaulted her on 15 April 2013 at Fort Stewart, GA.

a. COL B____ reported MAJ B____ disclosed that subsequent to consuming alcohol in the billets, the applicant became very flirtatious, groped her without her consent, and stuck his hands in her pants. MAJ B____ originally filed a restricted report in 2013 regarding this incident and it recently became unrestricted. The applicant waived his rights and denied all allegations. The applicant subsequently terminated the interview and requested legal counsel. A witness corroborated MAJ B____'s statement and placed the applicant in her room on the night of the incident.

b. Legal Coordination. For the purposes of fingerprint card submission, Combined Deoxyribonucleic Acid Index System sample submission, and Defense Incident-Based Reporting System indexing, on 26 February 2019, CPT D____ J. H____, Special Assistant U.S. Attorney, Southern District of Georgia, stated enough information existed to believe the applicant committed the offense of Abusive Sexual Contact in violation of Title 18, U.S. Code, section 2244(b), and to present that information to the U.S. Attorney's Office for consideration regarding prosecution of that or other offenses.

c. The applicant was listed for the offense under Title 18, U.S. Code, section 2244 (Abusive Sexual Contact (Adult)).

7. The applicant was reprimanded in writing by the Commanding General, GAARNG, on 14 February 2022, wherein he stated:

You are hereby reprimanded for sexually assaulting a fellow Soldier in violation of Department of Defense Directive 6495.01 (Sexual Assault Prevention and Response (SAPR) Program) and Articles 1092, 1133, and 1134 of the Georgia Code of Military Justice. An investigation by U.S. Army Criminal Investigation

Division indicates that you sexually assaulted a fellow Soldier at Fort Stewart, Georgia in 2013 by touching her breasts and buttocks in a sexual manner without her consent.

As a commissioned officer, you are expected to uphold the high standards of the U.S. Army and the Georgia Army National Guard and set a positive example for others to follow. The Army Ethic encompasses the enduring moral principles, beliefs, and laws that shape the Army culture of trust. At a minimum, this includes living the Army Values, including Respect – treating others as they should be treated. You failed to do so. Your behavior shows a serious lack of leadership, judgment, and personal discipline, and it reflects poorly on you, the Georgia Army National Guard, and the U.S. Army.

I am imposing this reprimand as an administrative measure in accordance with Army Regulation 600-37 (Unfavorable Information) and not as punishment under the Georgia Code of Military Justice or the Uniform Code of Military Justice. I am considering filing this reprimand in your Army Military Human Resource Record. However, I will not make a final determination regarding the filing of this reprimand until after I receive and consider any response you make.

You will acknowledge receipt of this memorandum by signing the attached acknowledgment. You have 30 calendar days from the receipt of this reprimand to submit any matters for my consideration. Your matters should be submitted through your chain of command to me, in care of the Office of the State Judge Advocate, 1000 Halsey Avenue, Building 447, Marietta, Georgia 30060-4277.

8. The applicant acknowledged receipt of the general officer memorandum of reprimand (GOMOR) on 14 February 2022. His 13-page memorandum to the Commanding General, GAARNG (Rebuttal Statement for GOMOR), 24 March 2022, with supporting documents, noted he was innocent and the Fort Stewart CID Field Office investigation was incomplete, riddled with inconsistencies, and lacked exculpatory information that was available to and known by the CID agents during their investigation. Had they included this evidence, the only conclusion they could have possibly reached was a finding of no probable cause (see attachment for details).

9. After carefully considering the matters submitted in rebuttal, the Commanding General, GAARNG, directed filing the GOMOR with auxiliary documents in the applicant's Army Military Human Resource Record on 1 April 2022.

10. A review of the applicant's records revealed the GOMOR, 14 February 2022, with auxiliary documents is filed in the performance folder of his Army Military Human Resource Record.

11. The DA Form 4833, 13 September 2022, shows in:
- a. item 2 (Offender Information), the applicant;
 - b. item 3 (Referral Information):
 - (1) the offense as "Abusive Sexual Contact (Adult)" on 15 April 2013;
 - (2) the commander's decision date as 10 August 2022;
 - (3) the Sexual Harassment block is marked "No";
 - (4) the Action Taken block is marked "No"; and
 - (5) the Reason as "Prosecution Declined/Other"; and
 - c. item 11 (Commanding Officer or Reporting Officer), the redacted name and signature of a commander or reporting officer with a date of 13 September 2022.
12. Although not available for review, the applicant submitted concerns regarding the CID report to the Georgia National Guard Office of the IG as evidenced by a letter from the Chief, Assistance and Investigations, CID, 15 May 2023, wherein he stated:

This is a final response to your correspondence with the Georgia National Guard Office of the Inspector General (IG) dated January 10, 2023. Your concerns were referred to the Department of the Army Criminal Investigation Division (DACID) Office of the IG on January 23, 2023. Our office was specifically referred concerns you had with the conduct and actions taken by Special Agents assigned to the Southeast Field Office (Fort Stewart, GA CID Office) during the conduct of a CID investigation [case number] where you are listed as the subject for Abusive Sexual Contact.

Our office referred your concerns to the Office of Professional Responsibility (OPR) who conducted a review of your concerns and the associated CID report of investigation (ROI). The OPR review did not reveal credible allegations of agent misconduct and determined that bias was not apparent. However, the OPR review did identify some areas that may require additional investigative activity.

Our office subsequently referred your concerns and the OPR review to our agency's Investigations and Operations Directorate (IOD) for further review. Their review contained recommendations that could address some of the concerns with this case. Their review and recommendations have been referred to the

Southeast Field Office for some additional investigative activity, which should result in a supplemental report.

Based on the above information, our office has four recommendations for you:

- 1) Have your attorney reach out to the Southeast Field Office Directly.
- 2) You may submit a FOIA [Freedom of Information Act] request via the DACID information release specialist requesting a copy of the OPR and IOD reviews. Submit your request to [point of contact's name, title, and email address].
- 3) If coordination between your attorney and the Southeast Field Office determines they conducted additional investigative activity on ROI [case number] resulting in a supplemental report, I recommend you file a FOIA request via the U.S. Army Crime Records Center. Their website with instructions on submitting a FOIA request is: <https://www.cid.army.mil/Resources/Army-Crime-RecordsCenter/>.
- 4) You have a right to appeal the titling process to the via the Assistant Director, U.S. Army Crime Records Center. You must present new evidence to support your request for an amendment. The e-mail address for your submission of this request is: usarmy.belvoir.usacrc.mbx.mailcicr@army.mil.

13. The CID Deputy Chief Counsel's letter, 21 July 2023, with enclosure responded to the applicant's FOIA request for a copy of the OPR and IOD reviews related to his IG complaint. The OPR review was available per his request. However, the IOD review he requested is not a record nor was it maintained in a system of records; therefore, it is not releasable pursuant to the FOIA. The applicant could appeal. The enclosure consisted of the OPR memorandum for record (Review of IG Complaint – (Applicant)), 16 February 2023, wherein the official stated:

a. Background.

(1) Between 7 October 2021 and 26 January 2022, the Fort Stewart CID Office (Southeast Field Office) conducted an ROI after receiving a complaint of Abusive Sexual Conduct committed by the applicant. The ROI documented that a U.S. Army COL reported being told by an acquaintance that on 15 April 2013 after consuming alcohol in the barracks, the applicant became very flirtatious and sexually groped the victim without her consent. The summary of the ROI reflected that the victim in 2013 filed a restricted report, but it had recently become unrestricted. Restricted reports at that time were not reported to law enforcement.

(a) On 18 October 2021, an initial report was dispatched. The applicant was not titled, rather the title block reflected "Known But Not Titled." The report reflected that the applicant was not indexed as of this investigation based on the lack of corroborating information.

(b) On 29 October 2021, a status report was dispatched titling the applicant for the offense of Abusive Sexual Contact. That report reflected: "This Status Report is generated to rescind restricted distribution of this report as it is no longer restricted to CID channels and list [Applicant] as a Subject in the investigation." On 28 October 2021, the applicant was advised of his rights, which he initially waived, and denied all allegations and subsequently requested legal counsel. A subsequent witness interview corroborated the victim's statement, placing the applicant in (Redacted's) room on the night of the incident.

(2) The ROI was finalized on 26 January 2022, listing the applicant in the title block for Abusive Sexual Contact (Adult). The summary documented that the applicant waived his rights and denied all allegations. The applicant subsequently terminated the interview and requested legal counsel. A witness corroborated the victim's statement and placed the applicant in (Redacted's) room on the night of the incident.

(a) A legal opinion in the ROI reflected that the local Special Assistant U.S. Attorney stated enough information existed to believe the applicant committed the offense of Abusive Sexual Contact in violation of Title 18, U.S. Code, section 2244(b), and to present that information to the U.S. Attorney's Office for consideration regarding prosecution of that or other offenses.

(b) That U.S. Code reflected that whoever, in the special maritime and territorial jurisdiction of the United States or in a federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any federal department or agency, knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than 2 years, or both.

(3) The report reflected that the applicant was serving in a Title 32 (National Guard) status, but the offense occurred somewhere on Fort Stewart, GA, giving the Army and CID jurisdiction.

(4) Under Title 18, U.S. Code, section 3282, the statute of limitations for most federal crimes is 5 years. However, the statute of limitations may be longer or may not exist for certain crimes.

b. Findings and Recommendations.

(1) The undersigned reviewed the issues raised in the applicant's complaint. The review did not reveal credible allegations of agent misconduct and action by OPR was not appropriate. Bias was not apparent. They sent an initial report not titling the applicant, and only titled him after an outcry witness corroborated that the victim had reached out after an incident with the applicant. There is no evidence that the CID office knowingly omitted or altered key witness testimony as alleged by the applicant.

(2) The undersigned recommended informing the applicant of his right to appeal the titling process to the U.S. Army Crime Records Center and presenting his new evidence and referring this complaint to the CID IOD. The review found the following issues that might require supplemental reports or further investigation.

(a) The final report reflected that a witness corroborated the victim's statement and placed the applicant in (Redacted's) room on the night of the incident. However, the summarization of the witnesses verbal interview only reflected that the witness heard sounds of someone getting dressed and a door closing. The witness was not in the room and did not know if those noises and door closing were made by the applicant.

(b) The report reflected that the applicant terminated the interview by requesting legal counsel and refused to take a polygraph. However, in his complaint the applicant maintains he agreed to further interviews and polygraph testing with a lawyer present. There is no record that the interview with a lawyer present was arranged.

(c) Three outcry witnesses to support the victim's allegation were interviewed telephonically and verbal summaries of those interviews were prepared. They relayed information that in 2013 the victim told them that something happened involving (Redacted) executive officer (the applicant) but did not provide specific details.

(1) Follow-on in-person interviews of those outcry witnesses to obtain a sworn statement or recorded interview were not conducted. CID Regulation 195-1 (Criminal Investigation Operational Procedures) requires sworn statements or audio/video recordings from consenting witnesses when the person has personal knowledge of incriminating information pertaining to a subject/suspect.

(2) One of those witnesses heard someone getting dressed and a door closing, and that information was used in the report to justify probable cause and titling by saying the witness placed the applicant in the victim's room.

(d) There is no record the CID Office attempted to verify that a restricted report was actually made in 2013, that they initiated efforts to obtain those records now that it was an unrestricted report, or if they determined when the restricted reporting process actually started in DOD (to further corroborate the victim's complaint).

(e) In his complaint, the applicant presented new evidence that he told someone 2 weeks after the alleged incident that the victim had come onto him sexually. The applicant indicated that this witness could corroborate this information. The applicant did not report this during his initial CID interview and he was not reinterviewed with a lawyer present as he had indicated his willingness to do.

(f) Other concerns presented by the applicant do not meet elements that would require further inquiry or concern internal policy and procedures that the applicant was obviously unaware of. They included his interview being conducted before witnesses were that his interview was an interrogation, his individual rights were violated, Fort Stewart CID abused their authority by not recusing themselves from the investigation, failure to consider and/or document exculpatory information, titling only based on noises that placed the subject in (Redacted's) room, and he was shocked he was booked and titled because he had been fully cooperative.

(g) The applicant's concerns that his chain of command and leadership in the judge advocate's office only pursued the investigation to keep him from getting promoted or that there were biases by the senior staff judge advocate who reported this to CID are best addressed by his chain of command or the local IG directly to the Department of the Army IG.

14. Although not available for review, the applicant applied to CID requesting amendment to his CID LER, as evidenced by the CID memorandum (Legal Review of Request for Amendment of Record – (Applicant)), 12 September 2023, showing the CID attorney advisor reviewed the applicant's ROI and amendment packet and determined there was probable cause to believe he committed the offense for which he was tilted (see memorandum for details).

15. The CID letter from the Chief, FOIA/Privacy Act (PA) Division, 18 September 2023, responded to the applicant's 31 August 2023 request to amend his record within the files of CID. The FOIA/PA Division Chief stated:

a. After a review of the applicant's file in accordance with Public Law 116-283 (William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021), section 545 (Removal of Personally Identifying and Other Information of Certain Persons from Investigative Reports, the Department of Defense Central Index of Investigations, and Other Records and Databases), his amendment request was denied.

b. In relation to the redacted legal review, he advised that the names of law enforcement personnel, as well as names, social security numbers, and other personal items of information pertaining to third parties are withheld pursuant to FOIA exemptions which protect the personal privacy of other individuals mentioned in the report.

Moreover, disclosing the withheld information would harm an interest protected by these exemptions.

c. These withholdings also comply with the PA because the responsive records are maintained in a system of records that is exempt from the access provisions of the PA.

d. This partial denial is made on behalf of the CID Director, the initial denial authority for CID records under the FOIA.

e. The applicant has the right to appeal to the Office of the Army General Counsel, the Army's appellate authority. If he decides to appeal at this time, his appeal must be submitted within 90 days of the date of this letter. In the applicant's appeal, he must state the basis for his disagreement with the partial denial and should state the justification for its release. The applicant's appeal is made through this Division and should be addressed to the Chief, Department of the Army Criminal Investigation Division, FOIA/PA Division, 27130 Telegraph Road, Quantico, Virginia 22134, for forwarding to the Office of the Army General Counsel. Please note that the applicant's appeal should address information denied in this response and cannot be used to make a new request for additional or new information.

f. The applicant may appeal the denial of his amendment by submitting a request to the Army Board for Correction of Military Records (ABCMR).

16. Counsel provides the following evidence in addition to those documents discussed above:

a. Enclosure 1 contains:

(1) counsel's memorandum ((Applicant) Titling Removal Request), 30 August 2023, to CID that essentially states the same information as his 6 November 2023 memorandum to the Board;

(2) an Army Regulation 195-2 [Criminal Investigation Activities] excerpt that describes how individuals request access to or amendment of CID LERs;

(3) the CID Form 94 (Agent's Investigation Report), 28 October 2021, with allied documents showing the Fort Stewart CID Office special agent's investigative report wherein they were notified on 7 October 2021 by COL B____, State Judge Advocate, Georgia National Guard, that MAJ B____ was inappropriately groped by the applicant in Marietta, GA (see attachment for details);

(4) Army National Guard Trial Defense Service memorandum (Phone Interview with MAJ N____), 14 March 2022, stating the GAARNG defense paralegal

telephonically interviewed MAJ N____ on 14 March 2022 who was willing to respond to questions (see attachment for details);

(5) counsel's email interview with MAJ N____, 9 May 2022, regarding the incident between MAJ B____ and the applicant (see attachment for further details); and

(6) the GAARNG memorandum (Phone Conversation with LTC C____ B____ in 2013), 24 February 2022, shows the 201st Regional Support Group Commander provided this memorandum as a written record of a phone conversation he had with the applicant in the Spring of 2013. He recalled the applicant called him and disclosed that MAJ B____ made several passes toward him and attempted to kiss him. He could not recall any additional details about the conversation (see attachment for details).

b. Enclosure 3 contains the applicant's Meritorious Service Medal Certificate, 17 November 2022, showing he was awarded the medal as his retirement decoration.

c. Enclosure 4 contains a 25 October 2023 letter from his employer confirming his employment.

d. Enclosure 5 contains an 18 October 2023 memorandum from his employer confirming he currently has a Top Secret/Sensitive Compartmented Information security clearance.

e. Enclosure 6 contains the 2 November 2023 letter from Harris Mountain Investigations, Limited Liability Company, wherein a licensed private investigator noted his company conducted a criminal records check on the applicant and this check indicated the applicant did not have any criminal arrests or convictions.

17. Military Division Office of the Adjutant General Orders 138-0400, 18 May 2022, released him from active duty and placed him on the Retired List in the rank of LTC effective 30 June 2022.

18. He retired on 30 June 2022. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 9 months of active service; 21 years, 9 months, and 2 days of total prior active service; and 5 years, 2 months, and 20 days of total prior inactive service.

BOARD DISCUSSION:

1. 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 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.

2. 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.

3. The Board determined the documents do not support the applicant's version of events and considered all witness statements and found them more credible. The Board noted the witness corroboration that placed the applicant in the room on the night of the incident, specifically noting the phone call that was made on the same night when the victim seemed to be in hysterics.

4. The Board further found support for its determination by the General Officer Memorandum of Reprimand filed in the applicant's Army Military Human Resource Record for sexually assaulting a fellow Soldier by touching her breasts and buttocks in a sexual manner without her consent as evidenced by a Criminal Investigation Division investigation.

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

REFERENCE:

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

a. Pursuant to 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//