

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 2 August 2024

DOCKET NUMBER: AR20230014777

APPLICANT REQUESTS: removal of the DA Form 2166-9-2 (Noncommissioned Officer Evaluation Report (NCOER) (Staff Sergeant-First Sergeant/Master Sergeant (MSG))) covering the period 1 July 2021 thru 30 June 2022 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, 9 May 2023
- U.S. Army Inspector General (DAIG) Agency Letter, 20 August 2023
- DAIG Letter, 30 August 2023

FACTS:

1. The applicant states the erroneous evaluation should be removed from his records due to the proven allegation of reprisal by his rater. The DAIG substantiated his formal complaint of whistleblower reprisal.

2. He enlisted in the U.S. Army Reserve on 13 May 2005 in the rank/grade of private first class/E-3. He was promoted to the rank/grade of MSG/E-8 effective 1 July 2020.

3. He received the contested NCOER on 10 March 2022, an annual report covering the period 1 July 2021 through 30 June 2022. His rater is shown as Major L____ T. W____, Battalion S-3, and his senior rater is shown as Lieutenant Colonel R____ L. D____, Battalion Commander. His principal duty title is shown as Battalion S-3 Noncommissioned Officer-in-Charge (NCOIC) of Headquarters and Headquarters Company, 411th Engineer Battalion, Honolulu, HI. The NCOER shows in:

a. Part II (Authentication), block a3 (Rater's Signature), his rater authenticated the form with his digital signature on 30 September 2022;

b. Part II, block b3 (Senior Rater's Signature), his senior rater authenticated the form with his digital signature on 10 March 2023;

c. Part II, block d1 (Counseling Dates), an initial counseling date of 1 July 2021 and three later counseling dates of 1 October 2021, 3 January 2022, and 1 April 2022;

d. Part II, block d2 (Rated NCO's Signature), he authenticated the form with his digital signature on 10 March 2023;

e. Part IV (Performance Evaluation, Professionalism, Attributes, and Competencies), block c (Character), the rater placed an "X" in the "Met Standard" block and entered the following bullet comments:

- knows the Army Values work tries to live them everyday
- complied with the command SHARP [Sexual Harassment/Assault Response and Prevention] and EO/EEO [Equal Opportunity/Equal Employment Opportunity] program with no reported events

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

- demonstrated military bearing that leaders expect from a MSG [master sergeant] at the BN [battalion] level
- maintained military bearing and enforced standards with NCOs and Soldiers in the battalion
- physically capable of handling physical challenges

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

- helped established the BN's [battalion's] PRT [physical readiness training] policy; resulted in improved physical fitness standard and promoted esprit-de-corps
- knowledgeable NCO who demonstrated the ability to manage task in concert with his plans officer's assistance
- task oriented and detail minded; completes all assignments to while staying focused to make sound and thoughtful decisions

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

- led the the [sic] S3 NCO to execute BN [battalion] FTXs [field training exercises]

- provided guidance and mentorship to subordinate Operations and Training NCOs
- sought out daily by subordinates for direction and guidance

i. Part IV, block g (Develops), the rater placed an "X" in the "Exceeded Standard" block and entered the following bullet comments:

- worked to improve leadership [sic] skill which resulted in the improvement of leadership skills of some NCOs in the S3
- encouraged Soldiers to attend military schools to enhance there [sic] career progression
- completed DTMS [Digital Training Management System] T3 [Train the Trainer] course; trained all 20 DTMS [Digital Training Management System] operators in the battalion

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

- assisted the S3 in the completion of several BN [battalion] taskers and the completion of five operations orders
- in the absence of training guidance, he stepped in and assisted the BN's [battalion's] five companies in the completion of the YTBs [yearly training briefs]
- assisted in BN [battalion] physical security and helped his subordinate units with their Physical Security plans

k. Part IV, block i (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:

- contributed to the execution of 411 EN BN [411th Engineer Battalion] and while [sic] oversight to S3 personnel; performance during this was satisfactory and laid the ground work [sic] for the battalion's improvement in the years to come
- in the top 60% E8s that I have rate [sic] in my military career; often completed the mission in stressful situations

l. Part V (Senior Rater Overall Potential) (I Currently Senior Rate 5 NCOs in This Grade), his senior rater rated his potential as "Highly Qualified" and entered the following comments in block b (Comments): "[Applicant] has unlimited potential for promotion and is in the top 5% of MSG. He will undoubtedly be a Command Sergeant Major. Select now for resident Sergeants Major academy and promote Below the Zone."

4. The applicant filed a whistleblower reprisal allegation against a member of his unit as evidenced by a Whistleblower Reprisal Report of Investigation, 9 May 2023. This report shows, in part (see attachment):

a. Section I (Executive Summary).

The 9th Mission Support Command (MSC) Inspector General (IG) conducted this investigation in response to allegations that [Redacted] rendered [Applicant], complainant, an unfavorable Noncommissioned Officer Evaluation Report (NCOER) in reprisal for communicating with an Investigating Officer (IO) and the IG.

We found that [Applicant] made three protected communications (PC) to an IO and the IG that resulted into an investigation of misconduct by [Redacted]. However, it should be noted that only two (PC 1 and PC 2) of the three PCs are relevant to the causation analysis and [Applicant] was the subject of one personnel action (PA). The 9th MSC IG found the Responsible Management Official (RMO) had knowledge of the PCs and rendered the PA in reprisal for the PCs. Thus, there was an inference of causation.

We substantiated the allegation that [Redacted] rendered [Applicant] an unfavorable NCOER in reprisal for a protected communication in violation of Title 10, United States Code [section] 1034 (10 USC 1034), Protected communications; prohibition of retaliatory personnel actions," as implemented by Department of Defense Directive (DoDD) 7050.06, Military Whistleblower Protection.

We did recommend substantiating the allegation on [Redacted] and forward the completed report to his command for appropriate corrective action.

b. Section VII (Discussion).

Based on the evidence, the 9th MSC IG determined that [Applicant] made three PCs and the RMO had knowledge of PC 1 and PC 2. Evidence supported that [Redacted] had direct knowledge of the PCs prior to rendering the unfavorable NCOER. The PCs created motive for [Redacted] due to being the subject of the sworn statements and the PCs reflected negatively towards him. Subsequently, evidence supported that [Redacted] acted based on the motive. Although the timing indicated prima facie [accepted as correct until proved otherwise] reprisal, other evidence established that it was causative and not coincidental. The evidence clearly indicates [Redacted's] knowledge of the PCs influenced his decision to render the unfavorable NCOER to [Redacted].

In two days after [Redacted] was made aware of his investigation and received the sworn statement from [Applicant] there was a lack of communication between the RMO and complainant which is reflected in the evidence. The draft NCOER, while it contained specific comments regarding a Master Sergeant's performance that were removed in the final version, was not consistent with a fair assessment of [Applicant's] performance in the rating period. [Applicant] expressed his concerns with [Redacted], but [Redacted] failed to communicate the reason for the change with either him or [Redacted] to possible [sic] clear up any concerns with the ratings. [Applicant] anticipated receiving a favorable NCOER at the time he made his PCs. We found the draft and final versions of the NCOER were not consistent with the testimonial and documentary evidence independent of the PCs.

As a result, the evidence further supported that [Redacted's] direct knowledge of the PCs caused him to render the PA. [Redacted] acted inappropriately by rendering the NCOER because [Applicant] was performing duties outside of his scope of responsibilities due to [Redacted's] absences from the unit. The preponderance of evidence indicated that [Redacted] rendered the NCOER with knowledge of the PCs; thus, the actions were taken as reprisal for the PCs.

[Next paragraph wholly redacted.]

c. Section VIII (Conclusion).

The 9th MSC IG concluded, by a preponderance of credible evidence, the allegation that [Redacted] rendered [Applicant] an unfavorable NCOER in reprisal for a protected communication in violation of DoDD 7050.06, Military Whistleblower Protection, was substantiated.

d. Section X (Recommendations).

(1) Concur with the conclusions above substantiating the allegation against [Redacted] and forward the completed report to his command for appropriate action.

(2) Forward the case to DODIG for final approval.

e. The concurrence block is redacted.

f. The Commanding General, 9th Mission Support Command, Honolulu, HI, approved the report of investigation with his digital signature on 9 May 2023.

5. The DAIG Agency letter from the Assistance Division Chief, 20 August 2023, informed him that they completed the investigation into his allegation of reprisal as implemented by Department of Defense (DOD) Directive 7050.06. The DAIG determined his allegations of reprisal were substantiated. The DODIG agreed with their findings and therefore closed his case. The DAIG also informed him that he could submit an application to this Board for correction of his records as result of the findings.

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

7. He is currently serving in an Active Guard Reserve status in the rank/grade of MSG/E-8 as an operations sergeant with the 321st Engineer Battalion, Boise, ID.

BOARD DISCUSSION:

1. After reviewing the application and all supporting documents, the Board found that relief was warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive review based on law, policy, and regulation. Upon review of the 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 Evaluation Report (NCOER) (Staff Sergeant-First Sergeant/Master Sergeant (MSG))) covering the period 1 July 2021 thru 30 June 2022 are substantially incorrect and support removal. Therefore, the Board granted relief.

2. The Board determined an unfavorable NCOER was rendered in reprisal for a protected communication in violation of Title 10, United States Code 1034, Protected Communications and determined removal of the form from his Army Military Human Resource Record (AMHRR) was appropriate.

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 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 (Noncommissioned Officer Evaluation Report (NCOER) (Staff Sergeant-First Sergeant/Master Sergeant (MSG))) covering the period 1 July 2021 thru 30 June 2022
- placing a statement in his record for the rating period 1 July 2021 thru 30 June 2022 as non-rated time

█

█ █

█

█

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//