

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 23 January 2024

DOCKET NUMBER: AR20240000272

APPLICANT REQUESTS: Removal of a substantiated finding in the Department of the Army (DA) Inspector General Action Request (IGAR) database that he failed to take appropriate action when an improperly completing a Noncommissioned Officer Evaluation Report (NCOER) when brought to his attention.

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

- DD Form 149 (Application for Correction of Military Record)
- ABCMR Docket Number AR20160016326, 3 March 2021

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states the Investigating Officer (IO) findings are contrary to the facts and regulation. As a result, he has a substantiated findings in the DAIG database, which will impede future promotions The DAIG has declined to correct their database to reflect the matter as unsubstantiated The IO concluded that he (the applicant) failed to inquire into allegations of an incorrectly rendered NCOER on a subordinate or failed to take steps to correct it. However, the facts of the case are of the exact opposite. When he was apprised of the allegations that the NCOER was rendered incorrectly, he made inquiries into the subject. When he had satisfied himself that the allegation was true, he sought to have the NCOER corrected, but he was blocked by his superiors, who did not wish to address the matter.
- 3 Review of the applicant's service records shows:
 - a. The applicant had prior active enlisted active service (November 1995 to October 2006 and ARNG enlisted service (October 2006 to March 2008).

b. He entered active duty as a member of the ARNG on 29 March 2008 and following completion of Officer Candidate School, he was appointed as a Reserve commissioned officer of the Army and the DCARNG and executed an oath of office on 19 June 2008. He completed the Quartermaster (QM) Basic Officer Leader Course.

b. In November 2011, he transferred from QM Branch to Adjutant General (AG) Branch, and on 11 May 2012, he was promoted to captain (CPT). Additionally, on 11 July 2012, he transferred to the TXARNG.

c. He was honorably released from active duty on 24 September 2012, and he was transferred back to the control of the TXARNG. He reentered active duty on 25 September 2012, and he was honorably released from active duty on 14 July 2014.

d. At the time of this investigation, the applicant was assigned as the Company Commander of the 294th QM Company, 36th Special Troops Battalion, 36th Sustainment Brigade, TXARNG, Camp Mabry, TX. His battalion commander was LTC GMC, and his brigade commander was COL SAP.

e. On 26 November 2013, COL SAP, the Commander, 36th Sustainment Brigade, appointed an IO pursuant to AR 15-6 (Procedures for Administrative Investigations and Boards of Officers) to conduct an informal investigation into allegations that:

(1) The applicant improperly implemented a rating scheme for an NCOER (rating period 20111101 through 20121031) for SSG CPS, in violation of AR 623-3 (Evaluation Reporting System) and failed to take action when it was brought to his attention in violation of AR 600-20 (Army Command Policy) and Texas Code of Military Justice (TCMJ), failure to obey order and regulation and conduct prejudice of good order and discipline in the State Military Forces.

(2) SSG CPS knowingly requested an NCOER be written by an NCO that was not his rater or qualified to be his rater in violation of AR 623-3; and SSG CPS then submitted the NCOER to a military hiring board in violation of Texas Code of Military Justice, false official statement and conduct prejudice of good order and discipline.

f. The IO submitted his findings on 9 January 2014.

(1) The IO found the allegations against the applicant and SSG CPS were founded as a declaration of admittance by both. In interviews conducted by both individuals and others involved in writing SSG CPS's NCOER for the said rating period, the majority of individuals admitted and accepted some level of responsibility. However, there was little evidence indicating malice or deception in the actions taken by all individuals involved. Rather, this seemed to be the case of ill document tracking, lack of clear policy, necessity, time, and urgency.

(2) The IO recommended that although three of the four allegations were founded (supported by a preponderance of the evidence), one allegation against the applicant (failure to take action) and two against Sergeant First Class (SFC) CS (knowingly requested an NCOER be written by an NCO that was not his rater or qualified to be his rater and falsifying official statement by knowingly submitting an NCOER to the AGR (Active Guard Reserve) hiring board), due to the lack of malice in an effort to take care of the Soldiers, he recommended that any punitive action not be taken, but rather a few corrective courses of action.

g. On 16 May 2014, the Office of the IG, TXARNG notified the applicant that:

(1) The [TXARNG] IG received an allegation that he had improperly implemented a rating scheme for an NCOER in violation of AR 623-3 paragraph 1-4b. The IG conducted an investigation and determined that the allegation against him was not substantiated.

(2) The IG also received another allegation that he had failed to take action when the improperly completed NCOER was brought to his attention in violation of AR 600-20, paragraph 4-4. The IG conducted an investigation and determined that the allegation against him was substantiated.

(3) His case is closed; however, under the provisions of AR 20-1 (Inspector General Activities and Procedures) and AR 25-400-2 (The Army Records Information Management System (ARIMS)), the results will be maintained in the IG database." If he would like to receive a redacted copy of the report of investigation, he may request a copy from the DAIG under the Freedom of Information Act (FOIA) by referring to Case Number NTX13XXXX in which he was the subject.

h. During July 2014, the applicant received a change of duty OER, covering 10 months of rated time from 25 September 2013 through 15 July 2014, for his duties as commander of the 294th QM Company. His rater was LTC GMC, the battalion commander, and his senior rater was COL SAP, the brigade commander. The OER shows in:

(1) Part IId (Authentication), an "X" is placed next to the question "This is a referred report, do you wish to make comments?" and another "X" is placed next to the answer "Yes," indicating the rated officer did not desire to attach comments.

(2) Part IV (Performance Evaluation - Professionalism, Competence, and Attributes), the rater rated the applicant "Capable."

- [Proficient: the performance assessment is consistent with the majority of officers in that grade
- Excels: the rated officer's performance exceeds that of the majority of officers in rater's population
- Capable: the rater believes the rated officer should be further developed
- Unsatisfactory: the rated officer's performance is below the majority of officers in the rater's population for that grade, and the rater does not believe the rated officer's performance has met standards required of an Army officer]

(3) Part VI (Senior Rater), the senior rater rated the applicant's potential compared with officers senior rated in the same grade "Qualified," indicated she senior rated 16 Army officers in that grade and entered bullet comments.

- [Highly Qualified: the potential assessment is consistent with the majority of officers in that grade
- Most Qualified: the rated officer's potential exceeds that of the majority of officers in the senior rater's population
- Qualified: the rated officer's potential is adequate, but beneath majority of officers in the senior rater's population for that grade and the senior rater believes rated officer should be retained for further development
- Not Qualified: the rated officer's potential is below the majority of officers in the senior rater's population for that grade and the senior rater does not believe the rated officer should be retained on active duty]

i. The OER was signed by his rater on 3 April 2015, his senior rater on 20 April 2015, and by the applicant on 5 June 2015. It was posted to his records with the referral comments at Headquarters, Department of the Army (HQDA), on 9 June 2015.

j. On 20 November 2015, he appealed the contested OER through the U.S. Army Human Resources Command to the OSRB, and on 13 December 2016, the OSRB, by unanimous vote, determined that the evidence submitted was sufficient to warrant the requested relief. As a result, the OSRB directed the OER covering the period 25 September 2013 to 15 July 2014, be removed from the applicant's official military records and a memorandum annotating the rating period as non-rated time. The OSRB further directed that all associated appeal documentation, and/or investigations and inquiries relating to the appealed evaluation report be removed from his official records. The OSRB indicated that:

- counsel provided evidence of the results of a TXARNG IG report that addressed the applicant's contentions with the contested OER
- the letter was in response to his complaint, dated 25 November 2014, pertaining to the allegation of misconduct of the senior rater and of the contested OER

- after conducting a thorough investigation into the allegations, the IG determined the allegations pertaining to the senior rater's failure to complete his duties as the senior rater in violation of AR 623-3 was sustained
- the investigation also determined that the allegation that the rater failed to ensure that the contested OER was submitted to HQDA within 90 days of the "thru" date in violation of AR 623-3, was substantiated
- based on the IG's findings, there is sufficient evidence provided which validates the applicant's allegations

k. On 17 June 2016, the DAIG – Assistance Division, notified the applicant that:

(1) The DAIG completed a review of his (the applicant's) 21 June 2015 request for reconsideration of a substantiated finding in Inspector General Case Number NTX13XXXX and that the allegation that he failed to take appropriate action when an improperly completed NCOER was brought to his attention, in violation of AR 600-20, paragraph 4-4a(2), should remain substantiated in the Inspector General Action Request database. However, the allegation will be modified to read: That he failed to take appropriate action when an improperly completed NCOER was brought to his attention, in violation of AR 600-20, paragraph 5-8.

(2) The case is closed; however, under provisions of the Army record keeping system; DAIG will maintain the results of the inquiry. He may request a copy under the Freedom of Information Act (FOIA) by submitting a written request to: Records Release Office, The Inspector General, Pentagon, by referring to Case Number NTX13XXXX.

4. Review of the applicant's previous submission to the ABCMR:

a. In September 2016, the applicant submitted an application to this Board. He requested (via counsel) removal of a substantiated finding in the DAIG IGAR database that he failed to take appropriate action when an improperly completed NCOER.

b. On 3 March 2021, The Board denied his request and stated:

(1) The ABCMR is not an investigative agency. Just as the ABCMR does not normally reexamine issues of guilt or innocence under the UCMJ, it does not investigate whether a finding was substantiated or unsubstantiated by an investigator. This is the directing authority's function, and it will not be upset by the ABCMR unless the determination is clearly unsupported by the evidence.

(2) Here, the applicant was fully aware and was informed of the IO investigation, was afforded the opportunity to submit supporting documentary evidence, and was afforded the opportunity to testify. He was also afforded the opportunity to appeal the TXARNG IG and then to the DAIG's finding through the proper channels. He appealed the finding, but his appeal did not result in a reversal of the AR 15-6 finding.

(3) IG records consist of 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 Worldwide Network or other computer Automated Data Processing files or data; and DA Form 1559 when entries are made on either side. IG records may contain documents that an IG did not prepare.

(4) For historical purposes, the Army and the DAIG have an interest in maintaining the integrity of its/their records. The data and information contained in those records should reflect the conditions and circumstances that existed at the time the records were created. In the absence of a showing of material error or injustice, there is a reluctance to recommend that those records be changed.

c. In October 2023, the applicant wrote and requested that his case AR20160016326 be withdrawn. He stated his request is due to an injustice and delay in decision that resided at the ABCMR for more than five years. To proceed with the board's decision of a partial relief and to reinvestigate would be counterproductive and only create further compounding financial and mental hardship. Ultimately, creating unnecessary administrative burden for all parties. It is my intentions to resubmit a follow-on case requesting relief and the removal of the findings for incorrect & wrongfully accused substantiations within the DA IG IGAR databases of record to not further impede or interrupt any future career proregression.

5. Review of the applicant's DCARNG documents:

a. On 5 October 2015, the applicant executed an oath of office and was appointed a Reserve commissioned officer of the DCARNG (Transfer from TXARNG).

b. On 1 February 2018, the National Guard Bureau (NGB) published Special Orders Number 21 promoting the applicant to Major (MAJ) in the ARNG with an effective date and date of rank as 25 January 2018.

c. On 28 October 2019, the NGB published Special Orders 306 amending the applicant's effective date and date of rank for his MAJ promotion from 25 January 2018 to 24 August 2017.

d. On 2 August 2021, Joint Forces Headquarters, DCARNG issued the applicant a Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter).

e. Around early May 2022, the applicant submitted a Unit Vacancy Promotion packet to the DCARNG. He included his APFT scorecard, security memorandum, body fat worksheet, military and civilian education, and other required documents.

f. His packet was forwarded to the DCARNG State Federal Recognition Board (FRB) and following the convening of an FRB (28 June 2022), and the correction of administrative errors with the UVP promotion packet, it was forwarded to the NGB for processing and control grade approval.

g. On 12 January 2023, the NGB published Special Orders 16 AR promoting him to LTC in the ARNG with an effective date and date of rank as 29 December 2022.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered.

a. The evidence shows an AR 15-6 investigating officer (IO) was appointed to conduct an informal investigation into allegations that the applicant improperly implemented a rating scheme for an NCOER pertaining to a SSG and failed to take action when it was brought to his attention. The IO found the allegations against the applicant and the SSG founded. In interviews conducted by both individuals and others involved in writing the NCOER, the majority of individuals admitted and accepted some level of responsibility. However, there was little evidence indicating malice or deception in the actions taken by all individuals involved. Rather, this seemed to be the case of ill document tracking, lack of clear policy, necessity, time, and urgency. Although the allegation against the applicant that he failed to take action was supported by the evidence/founded, due to the lack of malice in an effort to take care of the Soldiers, the IO recommended that any punitive action not be taken, but rather a few corrective courses of action.

b. The TXARNG IG received the allegation that the applicant failed to take action when the improperly completed NCOER was brought to his attention in violation of AR 600-20, paragraph 4-4. The IG conducted an investigation and determined that the allegation against him was substantiated. His case was closed; however, under appropriate regulations, the results are maintained in the IG database. The applicant contends the substantiated finding in the IG database, will impede future promotions.

c. The Board thoroughly reviewed all the facts and circumstances and reached several conclusions that warrant supporting the applicant's request. The IO's finding presumably was made based on the applicant's supposed failure to take appropriate action to correct an NCOER issued from his company that included a rater that was not actually the rater for the rated NCO:

(1) The AR 15-6 investigation was poorly conducted and the finding that the evidence that' the applicant did anything wrong is weak.

(2) The adverse finding against the applicant appears to be based solely upon a follow-up interview the IO conducted with the applicant on 7 January 2014, during which the IO supposedly elicited inculpatory admissions.

(3) The SFC (Br**) who made the IG complaint about the SFC (Mag**) efforts to rater-shop for the SSG's NCOER, originally asserted (and continued to assert) that the applicant made a good faith effort to fix the NCOER mess created by others.

(4) The applicant was a new company commander, taking over a poorly run company and trying to turn it around, with some evidence that others were trying to undermine his efforts.

(5) The supposed offense is based upon the applicant's unsworn, unsigned, and uncorrected transcription of the 7 January 2014 interview. Furthermore, in that interview, the applicant claims he did not know about the interloping rater until several months after the NCOER was sent to HRC. He also claims he brought the problem to the attention of his supervisors, a contention corroborated by the IG complainant.

e. The Army IG's office has determined that the applicant is guilty of violating a regulatory paragraph whose preamble states, "The policies outlined in this paragraph are intended to provide broad and general guidance." In other words, the policies in that particular paragraph are aspirational and precatory - the exact opposite of how a valid punitive regulation should be written.

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 that the evidence presented was 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 removal of a substantiated finding in the DA Inspector General Action Request (IGAR) database that he failed to take appropriate action when an improperly completing a NCOER when brought to his attention.

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

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Army Regulation 20-1 prescribes policy and procedures concerning the mission and duties of The Inspector General (TIG). It also prescribes duties, missions, standards, and requirements for inspectors general (IGs) throughout the Army.

a. Paragraph 1-13(b)(2) (Prohibited Activity, 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) states that all IG records, including ARNG and USAR IG records, are the property of the Secretary of the Army (SA). IGs maintain these records on behalf of the SA. The SA's designated authority for all IG records is The Inspector General (TIG). TIG, Deputy TIG, 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, I GNET 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) states 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 TIG. Requests must be submitted to TIG. 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 3-12 (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 DAIG's Assistance Division for referral to the appropriate divisions within DAIG for review prior to action by TIG, the DTIG, or the Principal Director to the Inspector General for Inspections. Only TIG 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.

e. The Glossary of AR 20-1 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: this is the senior, detailed IG of a Modified Table of Organization and Equipment (MTOE) or Table of Distribution and Allowances (TDA) organization of the active Army, ARNG or USAR. The command IG works directly for the commander, who is normally a CG, installation commander, State Adjutant General, or director of an organization.

(3) Directing authority: this is 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 that 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: this is a conclusion drawn by an IG at the close of an investigative inquiry or investigation when the preponderance of credible evidence suggests that the subject or suspect did not do what was alleged in the allegation.

(6) IG investigation: this is 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 (ROI). 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: this is 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. Inspectors general resolve most allegations using this methodology and report their conclusions using the ROI.

(8) Report of Investigative Inquiry: this 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 or command or State IG approves the Report of Investigative Inquiry.

(9) IG records: this is 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 Worldwide Network (IGNET) or other computer Automated Data Processing (ADP) files or data; and DA Form 1559 when entries are made on either side. IG records may contain documents that an IG did not prepare.

3. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. ABCMR members will review all applications that are properly before them to determine the existence of an error or injustice; direct or recommend changes in military records to correct the error or injustice, if persuaded that material error or injustice exists and that sufficient evidence exists on the record. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

//NOTHING FOLLOWS//