

IN THE CASE OF: [REDACTED]

BOARD DATE: 29 August 2024

DOCKET NUMBER: AR20240000277

APPLICANT REQUESTS: through counsel, reconsideration of his previous request for:

- vacation of the Withdrawal of Federal Recognition (WOFR) board proceedings findings
- reinstatement of his federal status in the U.S. Army Reserve in the rank/grade of major (MAJ)/O-4
- correction of his DA Form 67-10-2 (Field Grade Plate (MAJ – Lieutenant Colonel (LTC); Chief Warrant Officer 3 – Chief Warrant Officer 5) Officer Evaluation Report (OER)) covering the period 21 September 2017 through 24 May 2018 (presumed to mean removal from his Army Military Human Resource Record (AMHRR))
- a personal appearance hearing before the Board

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 Brief in Support of Application for Correction of Military Records, undated, with enclosures –
  - Enclosure 1 – DA Form 1574-1 (Report of Proceedings by Investigating Officer), 8 August 2017
  - Enclosure 2 – Seventh Army Training Command Memorandum (Findings and Recommendations for Preliminary Inquiry – Complaint of Inappropriate Conduct of (Applicant)), 7 February 2018
  - Exhibit 3 –
- Joint Multinational Training Group-Ukraine (JMTG-U) Memorandum (Administrative Letter of Reprimand), 20 March 2018, with auxiliary documents
- Headquarters, [REDACTED] Army National Guard ([REDACTED] ARNG), Memorandum (General Officer Memorandum of Reprimand (GOMOR)), 28 May 2018, with auxiliary documents

- Enclosure 4 – Headquarters, [REDACTED] ARNG, Memorandum (WOFR (Applicant)), 14 June 2018
- Enclosure 5 – Headquarters, First Army, Memorandum (WOFR), 14 February 2019
- Enclosure 6 – Headquarters, 42d Infantry Division, Memorandum (WOFR), 30 March 2020
- Enclosure 7 – Counsel's Memorandum (Regarding: WOFR Held in Latham, NY, on 20 September 2019 in Case of (Applicant)) for Commander, First Army, 21 September 2019
- Enclosure 8 – [REDACTED] ARNG Army Element Joint Force Headquarters Orders 0000311234, 7 April 2020
- Enclosure 9 – Counsel's Letter (Regarding: (Applicant) – Request for Reconsideration) to The Adjutant General, [REDACTED] ARNG, 14 January 2021
- Enclosure 10 – Counsel's Letter ((Applicant) – Request for Reconsideration of WOFR Findings) to Commander, First Army, 1 June 2021
- Enclosure 11 – First Army Staff Judge Advocate Email ((Applicant) – Request for Reconsideration of WOFR Findings), 8 July 2021
- Enclosure 12 – Counsel's Letter ((Applicant) – Request for Reconsideration of WOFR Findings) to Chief Counsel, National Guard Bureau (NGB), 29 July 2021
- Enclosure 13 – Army Regulation 15-6 (Procedures for Administrative Investigations and Boards of Officers) Excerpt, 1 April 2016
- Enclosure 14 – Counsel's Documents Concerning Witness Access
- Enclosure 15 – [REDACTED] Police Department Case/Incident Report, 16 May 2006
- Enclosure 16 – WOFR Board of (Applicant) Transcript with Findings and Recommendations, 20 September 2019, with allied document
- Enclosure 17 – JMTG-U Memorandum (Reassignment of JMTG-U Personnel), 29 December 2017, with allied document
- Enclosure 18 – Army Board for Correction of Military Records (ABCMR) Docket Number AR20220008509, 14 February 2023

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the ABCMR in Docket Number AR20220008509 on 14 February 2023.
2. The applicant states he requests vacation of the WOFR Board findings, reinstatement as a Reserve commissioned officer, and correction of his OER (presumed to mean removal from his AMHRR).

3. Counsel states the applicant requests reconsideration of his previous case on the grounds of new evidence to clarify and support his claim. He submits this application to set aside the action taken by the WOFR Board leading to his discharge, thereby reinstating his federal status and allowing him to enter a Reserve status. The applicant served honorably in the [REDACTED] ARNG for 18 years. He entered military service in 2001 and was commissioned primarily as an infantry officer in June 2003.

a. In May 2017, an Army Regulation 15-6 investigation was conducted into allegations of sexual harassment against the applicant. On 19 May 2017, the investigating officer (IO) released findings stating the applicant did not commit the allegations (see enclosure 1). In August 2017, the [REDACTED] ARNG Assistant Adjutant General modified the findings to state the evidence was inconclusive. Further, the applicant was ordered to attend sexual harassment prevention training.

b. In February 2018, a second investigation was launched to determine the facts and circumstances surrounding the complaint of inappropriate conduct by the applicant with a civilian female. On 7 February 2018, the IO concluded that the nature of the relationship between the applicant and the woman was casual. There was no evidence to prove the applicant acted in an inappropriate or unprofessional manner. The only possible issue raised was him eating breakfast at an Army lodging facility in which he was not staying (see enclosure 2). However, he received two administrative reprimands in March and May 2018. The first was from the commanding officer of the unit he was assigned to while deployed to Ukraine. This dealt with the subject matter of the second investigation. The second reprimand was issued by the [REDACTED] ARNG Commanding General. This reprimand was for material in both the first and second investigations, including material he had already been reprimanded for by the commander in Ukraine.

c. On 14 June 2018, approximately 1 month after both reprimands were issued, the applicant received notice that he was being recommended for WOFR as a member of the [REDACTED] ARNG for moral or professional dereliction under the provisions of National Guard Regulation 635-101 (Efficiency and Physical Fitness Boards). On 14 February 2019, 8 months after the original notice, the applicant was again notified of his recommendation for WOFR, but with an additional allegation that he allegedly "repeatedly ate breakfast at Army Lodging Grafenwöehr, where you were not a paying guest, without paying for it."

d. On 20 September 2019, the WOFR Board convened to consider whether the applicant's federal recognition should be withdrawn. On 25 March 2020, the applicant was involuntarily separated from the ARNG upon recommendation of the WOFR Board with characterization of his service as under honorable conditions (general). At the time of his separation, he had just over 18 years of service. On 30 March 2020, the applicant was notified that he was being separated from the service under honorable conditions (general) (see enclosure 6). The applicant, through counsel, objected to many

procedural and substantive due process violations that occurred prior to and during the trial (see enclosure 7).

e. On 14 January 2021, the applicant, through counsel, petitioned The Adjutant General of the [REDACTED] ARNG to reinstate him (see enclosure 9). On 1 June 2021, he petitioned the Commander, First Army, to reverse the findings of the WOFR Board (see enclosure 10). On 8 July 2021, the First Army Staff Judge Advocate referred him to the Chief, NGB, for relief (see enclosure 11). On 29 July 2021, the applicant, through counsel, petitioned the NGB for relief (see enclosure 12). To date, no replies have been received from this petition.

f. The procedural violations raised by both of his previous counsels included the lack of proper notice of allegations of misconduct that would be introduced at the WOFR Board, improper notice of Government witnesses, and improper access to testimony of Government witnesses. The substantive errors alleged were the introduction of evidence that was not relevant and was prohibited by regulation.

g. National Guard Regulation 635-101, section III, extends "privileges" to the officer who is requested to appear before a board. The officer is entitled to appear in person, be furnished copies of the records that will be submitted to the board, submit statements in his own behalf, be represented by counsel, and be allowed time to prepare his own cases. Further, section IV states the provisions of Army Regulation 15-6 are to be followed.

h. According to Army Regulation 15-6, paragraph 3-7d, there are limitations as to what evidence may be introduced in an investigation or board proceeding. Subparagraph d(1) requires evidence to be relevant. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence (see enclosure 13).

i. The original notice was provided to the applicant that he was facing WOFR based on three incidents: one, a January 2015 incident regarding following a female in his car in [REDACTED]; two, a May 2017 incident where he acted in an unprofessional manner toward a subordinate female while transporting her in his car; and three, an October 2017 incident where he brought a female to his quarters and she feared for her personal safety. In the second notice, a fourth allegation was made that he improperly ate breakfast in a military lodging while performing temporary duty (TDY) in Germany.

j. Procedurally, his counsel sought to speak to the witnesses prior to the board, and in each case, the named witness declined via email to answer any questions. Further, the Government failed to provide any notice as to the expected testimony of their expert witness, who refused to speak to his counsel prior to the hearing (see enclosure 14).

k. During the WOFR Board proceedings, evidence was introduced of a 2006 incident completely unrelated to the three incidents before the Board in the notification memorandum. An 18-page police report from 13 years prior to the first incident was submitted as evidence, over objection, to the WOFR Board (see enclosure 15). In addition, the Government representative relied heavily on this incident of consensual sex during the WOFR Board. The fact was used that the applicant was investigated for having sex with a civilian woman while on the job as a [REDACTED] State Trooper to imply that he was more likely to have committed the three incidents in the actual notice (see attachment for details).

l. According to Army Regulation 15-6, this was not relevant evidence, as it was not related to any of the specified allegations listed in the notice. The test for relevancy is whether it "makes the existence of any fact relevant to the allegations any more probable or less probable." There should be no question that this evidence was not relevant and should have been excluded. Not only was it not relevant, it was highly inflammatory. It was from 13 years prior to the first incident listed in the notification memorandum and cannot be said to have any relevance to the charges before the board. Despite this, it was included as both a document and used in closing arguments as a method to inflame the WOFR Board.

m. In addition, evidence was introduced regarding alleged fraudulent vouchers from an incident where he was investigated for improperly eating breakfast at a hotel while performing TDY. The argument was made that he was not entitled to any per diem during his time in Germany, which was in fact inaccurate. After the WOFR proceedings, he was provided access to a memorandum that was dated from the time of his TDY showing he was entitled to meals and incidental expenses. This was included in his requests for reconsideration, but no reply was received (see enclosure 17).

n. On 28 April 2022, the applicant petitioned this Board for reinstatement to the ARNG. In his original petition, he alleged the above procedural and substantive due process violations that occurred during the WOFR board proceedings. He also challenged a relief-for-cause OER that includes procedural and substantive violations. The Board denied him a personal appearance hearing. In a poorly worded decision letter, the Board stated that relief was warranted. The decision then went on to deny all requests for relief. The decision stated there was neither an error nor injustice in the actions taken by The Adjutant General or the NGB (see enclosure 18).

o. The ABCMR did not evaluate or offer any explanation for the use of improper evidence at the WOFR Board, or mention the proceedings at all, other than saying there was no injustice committed by the NGB. The Board stated that appointments in the ARNG are a function of the State, which is not disputed by the applicant. This Board; however, is tasked to review administrative actions taken by the NGB and is charged with correcting any procedural and substantive violations of rights that affect Soldiers. In failing to address any of the claims raised by the applicant, this Board has acted arbitrarily and capriciously when reviewing and deciding his petition for relief.

p. Considering the new evidence submitted demonstrating the improper actions of the WOFR Board in allowing highly prejudicial non-relevant evidence, the applicant respectfully requests that this Board set aside the WOFR Board proceedings, thus reinstating his federal status, or in the alternative, transferring him to the Ready or Inactive Reserve. The evidence presented was in violation of Army Regulation 15-6 and was highly inflammatory before the WOFR Board.

q. Additionally, the applicant requests a personal appearance hearing before the Board.

4. The applicant was appointed as a Reserve commissioned officer in the [REDACTED] ARNG in the rank/grade of second lieutenant/O-1 and executed his oath of office on 29 June 2003. He was promoted to the rank/grade of MAJ effective 2 June 2016.

5. The DA Form 1574-1, 8 August 2017, shows an investigation was initiated by the Assistant Adjutant General, [REDACTED] ARNG, on 19 May 2017 into allegations against the applicant. On 10 July 2017, the investigating officer (IO) completed his investigation and determined:

a. Findings.

(1) He found the applicant did not make inappropriate comments toward Specialist (SPC) [REDACTED]

(2) He found the applicant did not place his hand on SPC [REDACTED] thigh.

(3) He found the applicant did not create a hostile work environment at the armory in [REDACTED].

(4) He found the applicant did not sexually harass SPC [REDACTED]

b. Recommendations (pertinent to the applicant).

(1) He recommended that the applicant not return to the [REDACTED] or transfer of SPC [REDACTED] to another armory. These two members cannot be at the same facility together as clearly noted in SPC [REDACTED] sworn statement and the [REDACTED] State Police Incident Report.

(2) As it relates to the applicant, on hand are two documented sworn statements attesting that the applicant allegedly: (a) made unwelcomed sexual advances and/or (b) made unwelcomed verbal comments/gestures; however, both incidents cannot be corroborated. The applicant needs to attend training focused on sexual harassment and Inspector General (IG) 101. This, in his view, will facilitate a mindset to the applicant to get his attention, but also plant the seed for possible consequences to sexual harassment allegations.

(3) Section VII (Action by Approving Authority) shows the approving authority approved the IO's findings and recommendations on 8 August 2017, except the following added/deleted or modifications:

(a) The evidence is inconclusive as to whether the applicant placed his hand on SPC [REDACTED] thigh, made inappropriate comments, and sexually harassed SPC [REDACTED]. Those portions of the findings where these actions "did not" occur are deleted.

(b) The evidence supports Ms. [REDACTED] statement that the applicant followed her in his car in January 2015 and acted in a harassing manner toward her.

(c) The applicant will attend individualized sexual harassment prevention training conducted by the State Equal Employment Manager.

(d) Only the applicant will be moved from the [REDACTED].

6. Office of the Adjutant General, State of [REDACTED] Orders 36-264-0002, 21 September 2017, ordered the applicant to active duty as a member of his Reserve Component unit for a period of 365 days effective 1 October 2017 in support of the Atlantic Resolve-European Reassurance Initiative.

7. The applicant became the subject of an Army Regulation 15-6 investigation on 30 January 2018 while serving with the 27th Infantry Brigade Combat Team, [REDACTED] ARNG/JMTG-U. An IO was appointed on 30 January 2018 to investigate the facts and circumstances surrounding the allegations made by Mrs. [REDACTED] against the applicant. The IO was directed to address the following questions at a minimum:

a. What is the nature of the relationship between the applicant and Mrs. [REDACTED]? How and when did they meet?

b. Determine the 5Ws [who, what, where, when, and why] surrounding an alleged recent encounter between the applicant and Mrs. [REDACTED] that began at Starbucks and ended at the applicant's bachelor officer quarters (BOQ) at [REDACTED]. Under the circumstances, did the applicant act inappropriately or unprofessionally?

c. Determine whether the applicant is eating breakfast provided by the [REDACTED] Army Lodging facility, and if so, whether these meals are authorized in light of his duty status and living arrangements in the BOQ?

d. Include any other matters relevant to the investigation which are discovered during the course of the investigation.

8. The Headquarters, Seventh Army Training Command, memorandum (Findings and Recommendations for Preliminary Inquiry – Complaint of Inappropriate Conduct of (Applicant)), 7 February 2018, shows the IO completed the investigation and determined the following:

a. Summary. After conducting the investigation and reviewing all sworn statements, the IO believed the applicant did not act inappropriately or unprofessionally with Mrs. [REDACTED]

b. Findings. After carefully considering the evidence, the IO found that:

(1) The nature of the relationship between the applicant and Mrs. [REDACTED] was casual. They would both greet one another when he would go to the Tower Barracks lodging facility for breakfast.

(2) The applicant and Mrs. [REDACTED] had minor differences regarding what took place at the post exchange, but their versions of what occurred in his BOQ room were different. Mrs. [REDACTED] accused the applicant of inappropriately touching her by trying to unzip her coat. The applicant denies ever touching her. They both agree they sat down in his living room and continued to have a conversation until her phone rang and she left his BOQ. Even if Mrs. [REDACTED] statement was factual, and that the applicant tried to take off her jacket, he left her alone immediately after she told him "no, no, no I'm fine". The IO did have questions about the credibility of Mrs. [REDACTED] after speaking with her, her co-worker, and evaluating the totality of the circumstances of the interaction between her and the applicant. But, with either version of events he did not find that the applicant acted in an inappropriate or unprofessional manner.

(3) The applicant admits to eating breakfast provided by the [REDACTED] Army lodging facility starting from October 2017. He started eating there after being invited by one of his friends, Captain [REDACTED] who was staying at the lodging facility. He

continued eating there after Captain [REDACTED] left. These meals were not authorized in light of his duty status and living arrangements in the BOQ.

c. Recommendations. Because the applicant was having unauthorized meals at the Tower Barracks Army lodging facility, the IO recommended his receipt of a formal counseling statement about his roles and responsibilities as a senior leader while he is serving at U.S. Army Garrison Bavaria.

9. He received an administrative letter of reprimand from Colonel [REDACTED] Commander, 27th Infantry Brigade Combat Team (Forward), JMTG-U, 20 March 2018, wherein he stated:

You are reprimanded for wrongfully appropriating food from Army Lodging-Grafenwöehr (Tower Barracks) in violation of Article 121 [Larceny and Wrongful Appropriation], UCMJ [Uniform Code of Military Justice]. You were found to have consumed breakfast at Army Lodging-Grafenwöehr, without being a paying guest, during instances from November 2017 to February 2018. You were also found to have invited a married woman to your living quarters on 16 January 2018, while being married yourself.

I am disappointed that a Commissioned Officer would engage in this type of conduct. Your actions demonstrate a disregard for good order and discipline in the Armed Forces. Wrongfully appropriating property is strictly prohibited and such action reflect poorly on all uniformed personnel. Moreover, the behavior of inviting a married woman to your apartment, puts you in a compromising position and raises doubts about your morals and integrity. Your exercised [sic] poor judgment undermines your position as a Field Grade Officer and a leader, and your conduct raises serious questions as to your potential for continued advancement in the United States Army.

This reprimand is imposed as an administrative measure in accordance with Army Regulation 600-37 [Unfavorable Information] and not as punishment under the Uniform Code of Military Justice. I have not determined where I will direct the filing of this reprimand, but you must be aware that my disposition options include a decision not to file the reprimand, a local filing, or request that it be filed in your Army Military Human Resource Records. I will defer my final filing decision for ten (10) days to allow you time to submit a rebuttal statement or documents for consideration. Failure to submit a statement or matters in rebuttal within ten (10) days constitutes a waiver of your right to do so. You will acknowledge receipt of this reprimand by signing and dating the attached memorandum.

10. The applicant acknowledged receipt of the reprimand on 20 March 2018 and elected to submit matters in rebuttal. In a 24 March 2018 statement, he addressed the

two issues in the reprimand. In regard to the wrongfully appropriating food from the Army lodging, he acknowledged he consumed food on several occasion but denies "stealing" the food. In regard to inviting a married woman to his quarters while being married himself, he states he did not invite the woman to his BOQ. They engaged in conversation at Starbucks and when he was ready to depart, she offered him a ride to his BOQ. After dropping him off she got out of her car and followed him in; thereby inviting herself in. He was trying to be polite, not telling her to "get lost" – a mistake on his part. He asked for leniency and would accept any type of punishment that he deemed appropriate for the rations. He requested that the administrative letter of reprimand or any formal counseling statement not be filed locally or in his AMHRR (see attachment for details).

11. The JMTG-U memorandum from the Commander, 27th Infantry Brigade Combat Team (Forward) (Memorandum of Reprimand Filing Determination – (Applicant)), undated, states after reviewing the applicant's case file, recommendations from his chain of command, and rebuttal matters, he directed forwarding the reprimand and filing decision to the Commanding General, Seventh Army Training Command, or a general officer in the [REDACTED] ARNG with a request for filing in the applicant's AMHRR.

12. After carefully considering the matters submitted in rebuttal and all other matters submitted, the Commanding General, Seventh Army Training Command, directed permanently filing the administrative reprimand in the performance folder of the applicant's AMHRR on 4 May 2018.

13. A review of the applicant's AMHRR revealed the administrative reprimand and allied documents are filed in the performance folder.

14. The applicant was reprimanded in writing by the Commanding General, [REDACTED] ARNG, on 28 May 2018, wherein he stated:

Documents and information provided to me revealed you engaged in a course of conduct that is incompatible with the behavior expected of members of the [REDACTED] Army National Guard. The substantiating documents include statements, registrations records and investigations.

The substantiating documents and information demonstrate a clear pattern of misbehavior towards women, including fellow Soldiers on more than one occasion. In January 2015 you followed a civilian female in your privately owned vehicle through the streets of [REDACTED] Whereupon, you solicited her, which in turn caused her to fear for her personal safety. In May 2017, in the vicinity of [REDACTED] you acted in an unprofessional manner towards a subordinate female Soldier while transporting her in your privately owned vehicle. While deployed in Germany on or about 7 October 2017 you acted in

manner causing fear towards a female civilian, when you brought her to your quarters without any valid reason and under circumstances where she feared for her personal safety. These series of acts and others cause me great concern regarding your behavior towards women.

You are hereby reprimanded for your conduct. As a Field Grade Officer, I expect you to exercise mature judgement and to set the standard for our Soldiers to follow. Your conduct has compromised your position as a leader and brought discredit upon the [REDACTED] Army National Guard.

This memorandum of reprimand is an administrative measure under AR [Army Regulation] 600-37 and is not punishment under the [REDACTED] State Military Law. I am considering filing this reprimand and supporting documentation in your Official Military Personnel File (OMPF), unless you submit matters that show such filing is unwarranted. You may submit matters in rebuttal to these allegations. You may seek legal assistance from the Trial Defense Service, or from civilian counsel at no expense to the Government.

You must acknowledge receipt of this reprimand by signing and dating the attached acknowledgement. Any matters you wish to submit for my consideration must be submitted 10 calendar days of the date you receive this memorandum. After the 10-day period has expired, I will consider anything you have submitted, and then make a final determination as to filing.

15. The applicant acknowledged receipt of the reprimand on 29 May 2018 and elected not to submit matters in rebuttal. However, it appears he changed his mind and elected to submit matters for consideration. In an undated statement to MG [REDACTED] the applicant alleges the January 2015 incident did not happen as alleged. In regard to the May 2017 incident, he did not make inappropriate comments to the female and was not unprofessional in any way. In regard to the October 2017 incident, the IO concluded he did not find any credible evidence that he was inappropriate or unprofessional. He requests not filing the GOMOR in his AMHRR (see attachment for details).
16. After carefully considering the matters submitted in rebuttal that were received on 11 June 2018, the Commanding General, [REDACTED] ARNG, directed permanently filing the GOMOR in the performance folder of the applicant's AMHRR on 12 June 2018.
17. A review of the applicant's AMHRR revealed the GOMOR and allied documents are filed in the performance folder.
18. The Headquarters, First Army, memorandum from the commander (WOFR), 14 February 2019, informed the applicant's that sufficient basis existed to initiate action for withdrawal of his federal recognition in the ARNG for moral or professional

dereliction in with accordance with National Guard Regulation 635-101, paragraphs 9d and 9f.

a. Specifically:

(1) In January 2015 in [REDACTED] while in uniform, the applicant pursued a civilian woman in his car whom he did not know, repeatedly attempting to get her to pull over and speak with him, and continuing to follow her even after she indicated that she did not want to meet him.

(2) In May 2017, the applicant placed his hand on the leg of a subordinate female Soldier and spoke to her in an unprofessional manner.

(3) In January 2018, the applicant, while married and staying in the BOQ in Germany, brought a female civilian whom he knew was also married into his quarters without any valid reason.

(4) Between November 2017 and February 2018, he repeatedly ate breakfast at Army Lodging-Grafenwöehr – where he was not a paying guest – without paying for it.

b. It noted a board of officers would be convened under the provisions of National Guard Regulation 635-101 to make a recommendation regarding his continued retention in the ARNG. Under the provisions of National Guard Regulation 635-101, paragraph 14a, he had the following options:

(1) show cause for retention before a board of officers convened for that purpose; or

(2) submit a resignation of in lieu of proceedings for withdrawal of federal recognition.

c. He had 15 calendar days of receipt of the notification to submit his option.

19. Although not available for review, his records conclude he elected a hearing before a board of officers.

20. His OER covering the period 21 September 2017 through 24 May 2018 addressed his duty performance as the Liaison Officer to the Seventh Army Training Command. The reason for submission is shown as "Relief for Cause." His rater is shown as LTC [REDACTED] Chief of Staff, and his senior rater is shown as COL [REDACTED] Brigade Commander. The rater and senior rater both digitally signed the OER on 9 August 2019. The applicant digitally signed the OER on 22 August 2019. The OER shows in:

- a. Part II (Authentication), block d (This Is a Referred Report, Do You Wish to Make Comments?), a checkmark was placed in the appropriate block, signifying to the applicant that he was receiving a referred report. In that same block, a checkmark was placed in the "Yes" block, indicating the applicant wished to make comments;
- b. Part II, block f1 (Supplementary Review Required?), a checkmark was placed in the "No" block;
- c. Part IV (Performance Evaluation – Professionalism, Competencies, and Attributes), block d1 (Character), the rater commented: "[Applicant] fully understands all SHARP [Sexual Harassment/Assault Response and Prevention Program], EO [Equal Opportunity], and EEO [Equal Employment Opportunity] policies";
- d. Part IV, block d2 (Provide Narrative Comments which Demonstrate Performance Regarding Field Grade Competencies and Attributes in the Rated Officer's Current Duty Position), the rater commented:

[Applicant's] competencies as a field grade Officer can be inconsistent at times. He can be proactive in some tasks but not in others. As a field grade officer he will need to develop the ability to influence levels above him if he is assigned to additional staffs. He has average critical thinking skills among his peers in solving complex problems. [Applicant's] strongest attribute is his communication skills.

- e. Part IV, block e (This Officer's Overall Performance is Rated as), his rater rated his overall performance as "Capable" and entered the following comments:

The applicant was effective in assisting in the movement of Soldiers into theater from the Fort Bliss Mobilization site. However, at times he was inconsistent in establishing critical staff integration with higher headquarters staff as the JMTG-U Liaison Officer, resulting in key staff tasks being delayed or incomplete.

- f. Part VI (Senior Rater), block a (Potential Compared with Officers Senior Rated in Same Grade), his senior rater rated his overall potential as "Qualified" and entered the following comments:

I directed the Relief for Cause. [Applicant] has reached his maximum potential. He clearly displayed this as the JMTG-U LNO [liaison officer] to 7th Army Training Command where he proved to be ineffective with little or no capability or initiative for planning and executing field grade tasks needed to coordinate across larger staffing processes. Because of [Applicant's]

character and performance he should not be considered for future assignments requiring complex field grade duties and responsibilities.

21. The applicant submitted a memorandum for record (Evaluation Record Letter of Referral – Rated Officer Response), 20 August 2019, wherein he stated:

I write in response to the revised comments to the OER which is inexplicably fifteen (15) months overdue. First and foremost, this inordinately delayed OER has irreparably harmed my career progression by making me ineligible to enroll in the required professional military education; a prerequisite for consideration for promotion to the next rank. Specifically, my rating chain initially provided this OER to me on 30 May 2019, which was, itself, well over 12 months after the completion of my rating period. I digitally signed the OER and included my written response on 28 June 2019. On 6 August 2019, my senior rater summarily ordered me to remove my digital signature to permit the rater to alter the already belated OER. The altered OER was sent back to me for signature on 9 August 2019.

Second, this relief-for-cause OER is legally unfounded and factually unjustified. Tellingly, my command did not provide me any verbal or written counseling during this rating period that remotely justified their negative comments. Simply stated, they never told me, during the entirety of this rating period, that my performance was unsatisfactory. Even more, my rater only vaguely states that I was "inconsistent in establishing critical staff integration with higher headquarters staff...resulting in key staff tasks being delayed or incomplete." Similarly, my senior rater ambiguously avers that my performance indicated "little or no capability or initiative for planning and executing field grade tasks needed to coordinate across larger staffing processes." It cannot be over emphasized that I was not informed of these generalized complaints until 30 May 2019, which is when I received the initial OER.

Finally, my senior rater states that "[b]ecause of [Applicant's] character...he should not be considered for future assignments requiring complex field grade duties and responsibilities." This is another example of an unsubstantiated statement which is categorically unjust.

22. The applicant's records are void of documentation and he did not provide any evidence showing a Commander's Inquiry was requested or conducted. Additionally, there is no evidence showing he appealed the contested OER to the U.S. Army Human Resources Command and/or the Officer Special Review Board.

23. A review of his AMHRR shows the contested OER is filed in the performance folder.

24. A WOFR Board convened on 20 September 2019 to determine whether the applicant should have his federal recognition withdrawn due to moral or professional dereliction, particularly based on acts of intemperance or personal misconduct, or conduct unbecoming an officer. The board determined the following by a majority vote:

- a. In or around January 2015 in [REDACTED] the applicant used an automobile to pursue a civilian female, also driving an automobile, repeatedly attempting to induce her to pull over and speak with him. Moreover, after said female informed him that she did not want to meet or converse with him, he nonetheless continued to follow her.
- b. The applicant did engage in moral and professional dereliction per National Guard Regulation 635-101, paragraphs 9d and 9f.
- c. In or around May 2017 in the vicinity of [REDACTED] the applicant placed his hand on the leg of a subordinate Soldier and spoke to her in an unprofessional manner.
- d. The applicant did engage in moral and professional dereliction per National Guard Regulation 635-101, paragraphs 9d and 9f.
- e. In or around January 2018 while deployed in Germany, and despite being married, the applicant brought a female civilian, who he knew was also married, into the BOQ where he resided for no legitimate reason.
- f. The applicant did engage in moral and professional dereliction per National Guard Regulation 635-101, paragraphs 9d and 9f.
- g. Between in or around November 2017 and February 2018 while deployed in Germany, and despite being ordered to pay for meals, the applicant repeatedly ate breakfast at Army Lodging-Grafenwöehr – where he was not a paying guest – without paying for said breakfast meals.
- h. The applicant did engage in moral and professional dereliction per National Guard Regulation 635-101, paragraphs 9d and 9f.
- i. The applicant's federal recognition should be withdrawn.

25. Counsel's (Mr. [REDACTED]) memorandum for Commander, First Army (WOFR Held in [REDACTED], on 20 September 2019 in the Case of (Applicant)), 21 September 2019, noted three errors/defects in the applicant's record that violated his due process privilege (see enclosure 7 for details):

- counsel sought to speak to each of the witnesses prior to the board but was denied

- counsel objected to certain wording and phrases used in all the allegations related to Mrs. [REDACTED]
- counsel objected to language in National Guard Regulation 635-101 which shifts the burden upon the applicant to proving his federal recognition should not be revoked and notes that it is unconstitutional and deprives him of his right to a fair hearing

26. The applicant's NGB Form 22 (National Guard Report of Separation and Record of Service) shows he was discharged effective 25 March 2020. His service was characterized as general under honorable conditions. He completed 16 years, 8 months, and 27 days of net service during this period and 18 years, 3 months, and 16 days of total service for retired pay.

27. [REDACTED] ARNG Army Element Joint Force Headquarters Orders 0000311234, 7 April 2020, involuntarily separated the applicant by reason of withdrawal of federal recognition for substandard performance. He was issued a general under honorable conditions discharge effective 25 March 2020.

28. NGB Special Orders Number 101, 8 April 2020, withdrew the applicant's federal recognition effective 25 March 2020 due to discharge.

29. On 14 February 2023 in Docket Number AR20220008509, the ABCMR denied the applicant's request for correction of his records to show 20 years of qualifying service for retirement, reinstatement in the U.S. Army Reserve in the rank of MAJ, and correction of the contested OER. After reviewing the application and all supporting documents, the Board found that relief was not warranted. (Note: There was a typographical error in the Board Discussion wherein it noted "the Board found that relief was warranted.")

30. Counsel provided the following evidence in addition to those documents discussed above:

- a. Enclosure 9 contains counsel's (Mr. [REDACTED]) letter to The Adjutant General, [REDACTED] ARNG ((Applicant) – Request for Reconsideration), 14 January 2021, wherein he requested reconsideration of the WOFR Board findings and reinstatement of the applicant as a MAJ in the [REDACTED] ARNG. He noted the applicant had 18 years of military service and should be sanctuaried to earn a Reserve retirement.
- b. Enclosure 10 contains a counsel's (Mr. [REDACTED]) letter ((Applicant) – Request for Reconsideration of WOFR Findings) to Commander, First Army, 1 June 2021, wherein he requested reconsideration of the WOFR Board findings and reinstatement of the applicant as a MAJ in the [REDACTED] ARNG. He noted the applicant had 18 years of military service and should be sanctuaried to earn a Reserve retirement.

c. Enclosure 11 contains the email from LTC [REDACTED] Staff Judge Advocate, First Army ((Applicant) – Request for Reconsideration of WOFR Findings) 8 July 2021, who acknowledged counsel's (Mr. [REDACTED]) 1 June 2021 letter and noted he should contact the Office of the Chief, NGB, as the Commander, First Army, does not have the authority to grant his request of vacating the findings of the WOFR Board and reinstating the applicant as a Reserve commissioned officer.

d. Enclosure 12 contains counsel's (Mr. [REDACTED]) letter to Chief Counsel, NGB ((Applicant) – Request for Reconsideration of WOFR Findings), 29 July 2021, wherein he requested withdrawal of the WOFR Board findings and reinstatement of the applicant as a MAJ in the [REDACTED] ARNG. He noted the applicant had 18 years of military service and should be sanctuaried to earn a Reserve retirement.

e. Enclosure 13 contains an excerpt of Army Regulation 15-6, 1 April 2016, that addresses limitations. It states: "although administrative proceedings governed by this regulation generally are not subject to exclusionary or other evidentiary rules precluding the use of evidence, the following limitations do apply" and notes relevance and privileged communications.

f. Enclosure 14 contains documents wherein counsel requests witness access to interview in order to assist the applicant.

g. Enclosure 15 contains the Fairfield Police Department Case/Incident Report, 16 May 2006, regarding a sexual violation.

h. Enclosure 17 contains the JMTG-U memorandum (Reassignment of JMTG-U Personnel), 29 December 2017, assigned the applicant to the Seventh Army Training Command, Grafenwöehr, Germany, to provide support as a liaison officer from 7 October 2017 to 30 September 2018 with authorization of \$17.35 per day for meals and incidental expenses.

#### BOARD DISCUSSION:

1. After reviewing the application and all supporting documents, the Board determined partial relief is warranted. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.
2. The Board found there were failures of due process during the Withdrawal of Federal Recognition (WOFR) board proceedings as outlined in counsel's argument, and these failures were sufficiently prejudicial to the applicant to warrant vacating the WOFR board's decision. The Board recommends the National Guard Bureau vacate the WOFR Board's decision and take any other appropriate action consistent with that recommendation.

3. The Board did not find evidence of error or injustice in the contested OER. The Board determined the OER should remain in the applicant's AMHRR.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:      :      :      GRANT FULL RELIEF

[REDACTED]      [REDACTED]      [REDACTED]      GRANT PARTIAL RELIEF

:      :      :      GRANT FORMAL HEARING

:      :      :      DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army and Army National Guard records of the individual concerned be corrected by referring this case to the NGB and the state of jurisdiction to address the ABCMR's recommendation to vacate the WOFR board finding and take any other appropriate action after vacating the WOFR board's decision.
2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to any relief in excess of that described above.

X

CHAIRPERSON

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

**REFERENCES:**

1. Army Regulation 15-185 (Army Board for Correction of Military Records) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. The ABCMR may, in its discretion, hold a hearing (sometimes referred to as an evidentiary hearing or an administrative hearing) or request additional evidence or opinions. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.
2. Army Regulation 15-6 (Procedures for Administrative Investigations and Boards of Officers) establishes procedures for investigations and boards not specifically authorized by any other regulation or directive. The primary function of any preliminary inquiry, administrative investigation, or board of officers is to ascertain facts, document and preserve evidence, and then report the facts and evidence to the approval authority. It is the duty of the IO or board to thoroughly and impartially ascertain and consider the evidence on all sides of each issue, to comply with the instructions of the appointing authority, to make findings that are warranted by the evidence, and, where appropriate, to make recommendations to the approval authority that are consistent with the findings.
  - a. Paragraph 1-6 states a preliminary inquiry is a procedure used to ascertain the magnitude of a problem, to identify and interview witnesses, to summarize or record witnesses' statements, to determine whether an investigation or board may be necessary, or to assist in determining the scope of a subsequent investigation.
  - b. Paragraph 1-12 states this regulation does not require that a preliminary inquiry, administrative investigation, or board of officers be conducted before taking adverse administrative action, such as relief for cause, against an individual.
  - c. Paragraph 3-7 (Rules of Evidence and Proof of Facts) states proceedings under this regulation are administrative, not judicial. Therefore, IOs and boards are not bound by the rules of evidence for courts-martial or court proceedings generally. Subject only to the provisions of subparagraph d below, anything that a reasonable person would consider relevant and material to an issue may be accepted as evidence. For example, medical records, counseling statements, police reports, and other records may be considered, regardless of whether the preparer of the record is available to give a statement or testify in person. All evidence will be given the weight warranted by the circumstances.

d. Paragraph 3-7d (Limitations). Although administrative proceedings governed by this regulation generally are not subject to exclusionary or other evidentiary rules precluding the use of evidence, the following limitations do apply:

(1) Relevance. Evidence must be relevant. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence (see Military Rule of Evidence (MRE) 401, section II, part III, Manual for Courts-Martial (MCM), United States, 2012). Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence (see MRE 403, section II, part III, MCM, United States, 2012). Witnesses will not be asked whether they believe a particular individual because it is not relevant.

(2) Privileged Communications. MRE, section V, part III, MCM, protects privileged communications with lawyers (MRE 502), clergy (MRE 503), spouses (MRE 504), psychotherapists (MRE 513), and victim advocates (MRE 514). Present or former IG personnel will not be required to testify or provide evidence regarding information that they obtained while acting as IGs. They also will not be required to disclose the contents of IG reports of investigation, inspections, IG action requests, or other memoranda, except as approved by the appropriate authority (an official authorized to approve release of an IG investigation or inspection) or higher authority.

3. Army Regulation 623-3 (Evaluation Reporting System) prescribes the policy and tasks for the Army's Evaluation Reporting System, including officer, noncommissioned officer, and academic evaluation reports focused on the assessment of performance and potential.

a. Paragraph 1-11 (Commander's or Commandant's Inquiry) states during the evaluation process or after it has been completed, when a commander or commandant discovers that an evaluation report rendered by a subordinate or a subordinate command may be illegal, unjust, or otherwise in violation of this regulation, he or she will conduct an inquiry into the matter. The definition of a rendered evaluation report is one that is authenticated by all designated rating officials with a senior rater's intent to present the final evaluation report to the rated Soldier for authentication, or apply the appropriate statement in the absence or inability for the rater Soldier to authenticate. The Commander's or Commandant's Inquiry will be confined to matters related to the clarity of the evaluation report, the facts contained in the evaluation report, the compliance of the evaluation with policy and procedures established by Headquarters, Department of the Army (HQDA), and the conduct of the rated Soldier and members of the rating chain. The official does not have the authority to direct that an evaluation

report be changed; command influence may not be used to alter the accurate evaluation of a rated Soldier by a rating official that was made in good faith.

b. Chapter 4 (Evaluation Report Redress Program) states the Evaluation Report Redress Program consists of several elements at various levels of command. The program is both preventive and corrective, in that it is based upon principles structured to prevent, and provide a remedy for, alleged injustices or regulatory violations, as well as to correct them once they have occurred.

c. Paragraph 4-3 states commanders for OERs are required to look into alleged errors, injustices, and illegalities in evaluation reports. Upon receipt of a request for a Commander's or Commandant's Inquiry, the commander or commandant receiving the request will verify the status of the OER in question. If the evaluation has been submitted and received at HQDA for processing but has not been filed in the Soldier's AMHRR, the commander will notify the Evaluations Appeals Office via email with a request to have the evaluation placed in an administrative temporary hold status until completion of the inquiry.

d. Paragraph 4-4 states alleged errors, injustices, and illegalities in a rated Soldier's evaluation report may be brought to the commander's or commandant's attention by the rated Soldier or anyone authorized access to the report. The primary purpose of a Commander's Inquiry is to provide a greater degree of command involvement in preventing obvious injustices to the rated Soldier and correcting errors before they become a matter of permanent record.

e. Paragraph 4-5 states a Commander's or Commandant's Inquiry will not be used to document differences of opinion among members of the rating chain about a rated Soldier's performance and potential. The evaluation system establishes rating chains and normally relies on the opinions of the rating officials. Rating officials will evaluate a rated Soldier and their opinions constitute the organization's view of that Soldier. However, the commander may determine through inquiry that the report has serious irregularities or errors.

f. Paragraph 4-7 (Policies) states evaluation reports accepted for inclusion in the official record of a Soldier are presumed to be administratively correct, to have been prepared by the proper rating officials, and to represent the considered opinion and objective judgment of rating officials at the time of preparation. An appeal will be supported by substantiated evidence. An appeal that alleges an evaluation report is incorrect, inaccurate, or unjust without usable supporting evidence will not be considered. The determination regarding adequacy of evidence may be made by the HQDA Evaluation Appeals Branch. Appeals based on administrative error only will be adjudicated by the HQDA Evaluation Appeals Branch. Alleged bias, prejudice, inaccurate or unjust ratings, or any matter other than administrative error are

substantive in nature and will be adjudicated by the Army Special Review Board. These are generally claims of an inaccurate or an unjust evaluation of performance or potential or claims of bias on the part of the rating officials.

g. Paragraph 4-11 (Burden of Proof and Type of Evidence) states 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 or that action was warranted to correct a material error, inaccuracy, or injustice. Clear and convincing evidence must be of a strong and compelling nature, not merely proof of the possibility of administrative error or factual inaccuracy. The burden of proof rests with the applicant.

4. Department of the Army Pamphlet 623-3 (Evaluation Reporting System) provides procedural guidance for completing and submitting evaluation reports and associated support forms to HQDA.

a. Paragraph 2-28 provides that:

(1) If a referred OER is required, the senior rater will place an "X" in the appropriate box in Part II d of the completed OER. The OER will then be given to the rated officer for signature and placement of an "X" in the appropriate box in Part II d.

(2) The rated officer may comment if he or she believes the rating and/or remarks are incorrect. The comments must be factual, concise, and limited to matters directly related to the evaluation rendered in the OER; rating officials may not rebut rated officer's referral comments.

(3) The rated officer's comments do not constitute an appeal. Appeals are processed separately. Likewise, the rated officer's comments do not constitute a request for a Commander's Inquiry. Such requests must be submitted separately.

b. Paragraph 2-30 provides that an additional review of relief-for-cause OERs is required following referral to the rated officer.

(1) When an officer (commissioned or warrant) is officially relieved of duties and a relief-for-cause OER is subsequently prepared, the OER will be referred to the rated officer or warrant officer as described in the referral process in Army Regulation 623-3. This referral must be completed before taking any of the actions in the following subparagraphs.

(2) Changed relief-for-cause OERs will be referred again by the senior rater (or other reviewer in accordance with the referral process in Army Regulation 623-3 to the rated officer so the corrected OER may be acknowledged and comments can be

provided, if desired. Only the final referral and acknowledgment are forwarded with the report to HQDA.

5. National Guard Regulation 635-101 (Personnel Separations – Efficiency and Physical Fitness Boards) provides that the Chief, NGB, acting for the Secretary of the Army, will review and approve the findings and recommendations of a board of officers convened by area commanders to determine whether the federal recognition of officers of the ARNG should be withdrawn by reason of incapacity or general unfitness. If the approved findings and recommendations are against the officer, the Chief, NGB, will withdraw the officer's federal recognition.

a. Section II (Reasons for Action to Withdraw Federal Recognition) provides that Officers substandard in performance of duty or conduct, deficient in character, below standards for retention or otherwise unsuited for military service should have their Federal Recognition withdrawn. Paragraph 9 (Moral or Professional Dereliction) states existence of one of the following or similar conditions constitutes moral and professional dereliction and requires the withdrawal of Federal recognition from an officer for general unfitness unless the officer proves that recognition should not be withdrawn:

- acts of intemperance or personal misconduct
- conduct unbecoming an officer

b. Section III (Initiation and Processing of Actions to Withdraw Federal Recognition), paragraph 14a (Initiating Action for Withdrawal of Federal Recognition), states if the area commander determines that sufficient basis exists to initiate action for withdrawal of federal recognition, he will, if the whereabouts of the officer is known or may be ascertained by reasonable procedures, notify the officer concerned setting forth the reasons therefore, and inform him that he must acknowledge receipt of the above notification, and elect one of the following options with 15 days of receipt of notification:

- (1) show cause for retention before a board of officers convened for the purpose;
- (2) submit a resignation in lieu of withdrawal of federal recognition; or
- (3) elect transfer to the Retired Reserve.

c. Section IV (Boards of Officers) provides the general provisions governing boards of officers convened under the provisions of this regulation to afford the officer a fair and impartial hearing to determine whether he should be retained in the ARNG. The burden of proof rests with the officer to produce convincing evidence that his federal recognition should not be withdrawn. In the absence of such a showing by the officer, the board must recommend withdrawal of federal recognition.

6. Army Regulation 135-175 (Separation of Officers) paragraph 2-13 (Acts of Misconduct or Moral or Professional Dereliction), provides that the standard of proof required by Army Regulation 15-6 authorizes a commander to initiate separation proceedings for moral or professional dereliction. Officers may be discharged for acts of serious or recurring misconduct punishable by military or civilian authorities, intentional neglect, failure to comply with applicable directives, receipt of a relief-for-cause OER involving acts of misconduct or moral or professional dereliction or for conduct unbecoming of an officer.

//NOTHING FOLLOWS//