

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 23 October 2024

DOCKET NUMBER: AR20240001629

APPLICANT REQUESTS: in effect,

- Removal of titling for consensual sexual sodomy/sodomy and from all records
- Personal appearance before the Board via video/telephone

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

- DD Form 149 (Application for Correction of Military Record)
- Self-Authored Letter
- Federal Bureau of Investigation (FBI) Document
- Criminal Investigation Division (CID) Document

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:

a. Back in 1994, when this incident occurred, she was new to the Army and was unaware that oral sex was a punishable crime. She met this guy, shortly after arriving in Germany, and once they were familiar enough, they engaged in an agreed upon sexual relationship.

b. The night of this particular incident, they were in her barracks room, during the encounter. She agreed to him performing oral sex on her; however, further along, when he was just about to penetrate her, he said he did not have a condom. In that moment, she began pushing him off of her and yelling at him to stop, quit etc. She did not want to have unprotected sex with him. He did continue trying by removing her underwear and continually trying to kiss her, while trying to tell her it would be okay this one time. She

told him no several times but he did stop. It is indicated in the findings that she was the "victim" in the case.

c. She was unaware that this incident was on any of her records or official military file as this has never resurfaced in her 23 years of active-duty service in which she honorably served and held positions such as the Sexual Harassment/Assault Response and Prevention noncommissioned officer (NCO), battalion and brigade Sexual Assault Response Coordinator (SARC), and first sergeant.

d. She is a retired master sergeant (MSG). She served in the Army until her retirement and honorable discharge on 1 December 2015. This is her first application and request to the Board for correction of her military records.

e. On or about 1 August 2023, she submitted an application for employment as a substitute teacher in the State of Georgia. In response to her application for employment, she received notification, on 8 August 2023, that a Commander's Report of Disciplinary or Administrative Action regarding an offense occurring on or about 12 July 1994, during her term of military service, resulted in a flag in her employment application background investigation, which hindered her ability to become employed as a substitute teacher in the State of Georgia. She has enclosed the Report of Investigation she received following her request on 28 August 2023 for records from the Army CID.

f. The Commander's Report of Disciplinary or Administrative Action indicated that only administrative action was taken against her and she received an oral reprimand as the result of the same. She continued her military service without issue or incident, being promoted from the rank of private, at the time of the incident, to positions of increasing trust and leadership and ultimately being promoted to the rank of MSG in the Army based on her meritorious service, her excellent performance, and her high moral values, character, and integrity.

g. She had no reason to believe that the Commander's Report of Disciplinary Action from an offense occurring in 1994 would result in a flag in her background investigation for employment as a substitute teacher, well after her retirement. Although more than three years have passed since the date of the incident in 1994 and imposition of an administrative oral reprimand, she has only just now discovered the far-reaching, detrimental impact of the same when she applied for employment as a substitute teacher in Georgia in August 2023. Upon discovery of this issue, she immediately requested records from the Army CID and is now submitting her application and requests that this error be corrected, and this injustice be removed from her military records. In the interest of equity and justice, she asks the Board to use their discretion to review her application and request to correct her military record and remove this injustice from the same.

h. The Commander's Report of Disciplinary or Administrative Action stems from an incident occurring on or about 12 July 1994 while she was a private in the Army stationed in Wiesbaden, Germany, which resulted in her receipt of only an oral reprimand as an administrative action taken against her for the offense of sodomy. The incident was reported on or about 13 July 1994 to CID at Wiesbaden, who initiated an investigation upon receipt of a report that an alleged attempted rape was perpetrated upon her. Although a witness in the investigation reported to CID that they were concerned she was sexually assaulted by another servicemember, she stated to the investigator that the alleged perpetrator servicemember attempted to engage in sexual intercourse with her but stopped when told to do so. She further stated to the investigator that the alleged perpetrator servicemember performed consensual oral sex on her. As a result of her statement, CID ultimately determined that probable cause existed to believe that she engaged in consensual oral sex - then referred to it as "oral sodomy" - when another servicemember performed consensual cunnilingus on her.

i. For further detail, at the time of the incident, she was a new private in the Army and began a romantic, intimate relationship with another servicemember (which was not inappropriate or in violation of any other policy or regulation). On 12 July 1994, their relationship progressed to a more intimate level; however, before sexual intercourse began, he indicated he did not have protection. At that time, she pushed him off of her and instructed him to stop. Although he tried to convince her to continue, he stopped when she again instructed him to stop. Unbeknownst to her, her next-door neighbor heard her exchange with her partner, and believed she was being raped and called the military police (MP). Neither she nor her partner knew they had committed a crime, when they participated in the act of consensual oral sex.

j. During the MP's initial questioning, she recalls she was instructed, multiple times, to answer questions directly with only a "yes" or "no" response - it was impressed upon her that she needed to tell the whole story because she indicated her neighbor's report to the MPs was inaccurate. She was scared and very embarrassed to explain the details of her sexual encounter to a room full of men who actually laughed, when she told them her side before telling her she had committed the offense of sodomy. She was not advised of her rights prior to being questioned by the MPs. Several days after her interview by the MPs, her commander, first sergeant, and supervisor - all of whom were male - called her in to discuss this matter. They read the offense, all laughed, told her never to speak of this matter again, explained that oral sex was for a husband and a wife, and directed her not to speak with the man involved again - this was her only punishment.

k. First and foremost, she is deeply embarrassed regarding this extremely sensitive incident and that the same arose over twenty-five years later as part of a background investigation for an employment opportunity, after her retirement from the Army. She also wants to make clear that she accepts - and has always accepted - her

responsibility and accountability for her actions and role in the incident that made the basis of the Commander's Report. Following the incident that occurred when she was very new to the Army (having only been on station for approximately 90 days and without knowledge of what sodomy was or that it was a crime), she served with distinction and honor for more than twenty years.

I. In accordance with the Memorandum regarding Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records regarding equity, injustice, or clemency determination, 25 July 2018, the Military Departments operating through Boards for Correction of Military Records, have the authority to correct military records to ensure fundamental fairness and are authorized to grant relief for errors or injustices. In determining whether to grant relief on the basis of equity or an injustice, said memorandum directs Boards for Correction of Military Records to consider the following, in pertinent part:

"a. It is consistent with military custom and practice to honor scarifies and achievements, to punish only to the extent necessary, to rehabilitate to the greatest extent possible, and to favor second chances in situations in which individuals have paid for their misdeeds." ...

"f. Changes in policy, whereby a servicemember under the same circumstances today would reasonably be expected to receive a more favorable outcome than the applicant received may be grounds for relief." ...

"g. The relative severity of some misconduct can change overtime, thereby changing the relative weight of the misconduct in the case of mitigating evidence in a case. For example, marijuana use is still unlawful in the military, but it is now legal under state law in some states and it may be viewed, in the context of mitigating evidence, as less severe today than it was decades ago." ...

"h. Requests for relief based in whole or in part on a mental health condition including post-traumatic stress disorder; traumatic brain injury; or a sexual assault or sexual harassment experience, should be considered for relief on equitable, injustice, or clemency grounds whenever there is insufficient evidence to warrant relief for an error or impropriety."

m. She believes that it is important to note that the oral reprimand she received for the offense of sodomy was administrative in nature and not criminal. She was not charged with any offense under the Uniform Code of Military Justice (UCMJ), a court-

martial was not convened, and she was not charged or convicted of any criminal offense. Further, the offense was not related to (and did not occur in connection with) any other offense (such as rape, assault, and the like), was not forcible in any manner, and was not perpetrated upon a child - rather, the act, which is the basis of the offense, was consensual between two adults.

n. Additionally, she respectfully contends that the relative severity of her actions in 1994 have drastically changed over time, and she does not believe that the same offense today - which she reiterates was not characterized by force, connected with any other offense or perpetrated upon a child - would result in any disciplinary action against her, whether administrative or criminal in nature. Furthermore, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the United States Supreme Court invalidated state criminal sanctions against private and consensual acts of sodomy. Although she understands this does not provide a facial or constitutional challenge to the military's ban on sodomy as set forth in Article 125 of the UCMJ. She respectfully contends that offenses under Article 125 should be addressed on a case-by-case basis. In her matter, she believes the facts of the incident at issue would not ordinarily give rise to disciplinary action, and her private actions had no detrimental impact on military performance and were not harmful to the military environment.

o. The single, isolated incident resulting in the administrative action and oral reprimand against her is the only disciplinary action taken against her in her career, and she does not believe the circumstances surrounding the incident or the incident itself reflect her true character, integrity, or service history overall. She served the military with dedication, commitment, and professionalism. She maintained the highest standards of conduct and upheld the values and principles of the Armed Forces. Further, this issue or any concern related to this incident were never subsequently raised, and nothing in her military record prevented continued promotions in rank and appointments to serve in positions of significant trust and leadership (including service as the Brigade SARC NCO and her ability to maintain a top secret security clearance).

p. She respectfully believes it is unjust to make this administrative oral reprimand part of her military record, which has already - and has the potential to continue to - jeopardize her post-military career opportunities and tarnish her reputation, despite her decades of dedicated service and otherwise impeccable record. She humbly asks the Board to take into consideration the substantial impact of the record of this incident on her employment potential, the length of time that has passed since the incident occurred and imposition of the oral reprimand, the circumstances of the incident itself, the change in relative severity of the offense, her excellent service history, and the spirit of equity to correct and remove this incident from her military record. Removal of the record of this administrative oral reprimand would allow her to continue her contribution to society in a meaningful way, particularly in the field of education, where her experience and knowledge could provide a significant benefit to others.

3. The applicant provides the following documents:

a. A document from the FBI, which shows she was charged with consensual sexual sodomy and received an oral reprimand.

b. CID documents which include the Commander's Report of Disciplinary or Administrative Action showing the offense was sodomy on 12 July 1994 the action taken was administrative in the form of an oral reprimand. The Report of Investigation states it was established by probable cause that she and another Soldier engaged in consensual oral sodomy when the other Soldier performed cunnilingus on her.

4. The applicant's service record contains the following documents:

a. DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States) shows she enlisted in the Regular Army on 26 August 1993. She remained in the Regular Army through immediate reenlistments.

b. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows she was honorably retired on 30 November 2015 in the rank of MSG. She had completed 22 years, 3 months, and 5 days of active-duty service.

c. Her service record was void of any derogatory information to include UCMJ action. There was no information regarding an oral reprimand or her being charged with sodomy.

5. The ABCMR may, in its discretion, hold a 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.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, 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 and standard review based on law, policy and regulation. Upon review of the applicant's petition and available military records, the Board determined the applicant was involved in an alleged attempted rape which was perpetrated upon her. The investigation ultimately determined that probable cause existed to believe that she engaged in consensual oral sex - then referred to it as "oral sodomy" - when another servicemember performed consensual cunnilingus on the applicant.

2. During deliberation, the Board considered whether probable cause did exist when the applicant was titled to believe the offense occurred and the applicant committed the offense. The Board noted, the applicant was titled for consensual sexual sodomy/sodomy. Furthermore, the Board recognized the applicant served honorably and retired from the Army as a master sergeant with 23 years of service. The Board found the applicant provided evidence of a convincing nature that the titling action should be removed. The evidence presented does demonstrate the existence of a probable error or injustice. The Board agreed the overall merits of this case are sufficient as a basis for correction of the applicant's records to remove the titling for consensual sexual sodomy/sodomy from all records. As such, the Board granted relief.

3. Titling or indexing on CID reports does not denote any degree of guilt or innocence. If there is a reason to investigate, the subject of the investigation should be titled. This is a very low standard of proof, requiring only the merest scintilla of evidence far below the burdens of proof normally borne by the government in criminal cases (beyond a reasonable doubt), in adverse administrative decisions (preponderance of evidence), and in searches (probable cause).

4. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

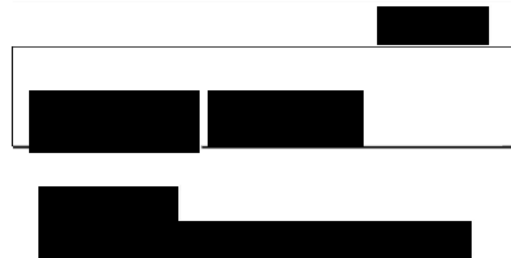
BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	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 to show removal of titling for consensual sexual sodomy/sodomy from all records and appropriate law enforcement electronic databases.



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

a. Public Law 106-398, section 552, and Public Law 116-283, section 545, codified as a note in Title 10, U.S. Code, section 1552, establish procedures for DoD personnel through which:

(1) covered persons titled in DoD LEA reports or indexed in the DCII may request a review of the titling or indexing decision; and

(2) covered persons titled in DoD LEA reports or indexed in the DCII may request their information be corrected in, expunged, or otherwise removed from DoD

LEA reports, DCII, and related records systems, databases, or repositories maintained by, or on behalf of, DoD LEAs.

b. DoD LEAs will title subjects of criminal investigations in DoD LEA reports and index them in the DCII as soon as there is credible information that they committed a criminal offense. When there is an investigative operations security concern, indexing the subject in the DCII may be delayed until the conclusion of the investigation.

c. Titling and indexing are administrative procedures and will not imply any degree of guilt or innocence. Judicial or adverse administrative actions will not be taken based solely on the existence of a DoD LEA titling or indexing record.

d. Once the subject of a criminal investigation is indexed in the DCII, the information will remain in the DCII, even if they are found not guilty, unless the DoD LEA head or designated expungement official grants expungement in accordance with section 3.

e. Basis for Correction or Expungement. A covered person who was titled in a DoD LEA report or indexed in the DCII may submit a written request to the responsible DoD LEA head or designated expungement officials to review the inclusion of their information in the DoD LEA report; DCII; and other related records systems, databases, or repositories in accordance with Public Law 116-283, section 545.

f. Considerations.

(1) When reviewing a covered person's titling and indexing review request, the expungement official will consider the investigation information and direct that the covered person's information be corrected, expunged, or otherwise removed from the DoD LEA report, DCII, and any other record maintained in connection with the DoD LEA report when:

(a) probable cause did not or does not exist to believe that the offense for which the covered person was titled and indexed occurred, or insufficient evidence existed or exists to determine whether such offense occurred;

(b) probable cause did not or does not exist to believe that the covered person committed the offense for which they were titled and indexed, or insufficient evidence existed or exists to determine whether they committed such offense; and

(c) such other circumstances as the DoD LEA head or expungement official determines would be in the interest of justice, which may not be inconsistent with the circumstances and basis in paragraphs 3.2.a.(1) and (2).

(2) In accordance with Public Law 116-283, section 545, when determining whether such circumstances or basis applies to a covered person when correcting, expunging, or removing the information, the DoD LEA head or designated expungement official will also consider:

(a) the extent or lack of corroborating evidence against the covered person with respect to the offense;

(b) whether adverse administrative, disciplinary, judicial, or other such action was initiated against the covered person for the offense; and

(c) the type, nature, and outcome of any adverse administrative, disciplinary, judicial, or other such action taken against the covered person for the offense.

3. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NRs) regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

4. 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. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that 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.

//NOTHING FOLLOWS//