

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 29 October 2024

DOCKET NUMBER: AR20240002009

COUNSEL REQUESTS:

- in effect, removal of the applicant's name from the titling block of a U.S. Army Military Police (MP) Law Enforcement Report (LER)
- that the DCII be amended in accordance with the above amendment
- all other appropriate relief

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel letter, 7 December 2023
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Two-U.S. Army Criminal Investigation Division (CID) letter with associated legal review, 31 October and 13 November 2023

FACTS:

1. Counsel requests that the applicant's name be removed from LER 55-2021-MP1053-012287-6C9/6H1/9T3. Probable cause does not exist, and no administrative action was taken. If there was probable cause, action would have been required per Army Regulation 600-20 (Army Command Policy) and Army Directive 2013-21 in effect at the time of the investigation.

2. In the counsel's legal brief, he states:

a. The applicant previously appealed the Army Crime Records Center but was denied relief in a decision dated 13 November 2023.

b. The investigation concluded on 21 July 2021. The law and policy in effect at the time the investigation concluded regarding the handling and processing of substantiated sexual assault allegations was Army Directive 2013-21, AR 600-20, chapter 7, and AR 635-200 (Administrative Separation of Enlisted Soldiers). At a minimum, initiation or separation processing was required for all substantiated allegations of a "sex offense."

See AR 635-200, 14.2(g) (defining sex offense to include any offense involving a sexual act).

c. The standard for titling a subject is probable cause. If, at any time, probable cause does not exist, amendment of a prior titling decision is warranted. See H.R. 6395-227 (National Defense Authorization Act (NDAA), Fiscal Year (FY) 2021).

d. While in Basic Training at Fort Jackson, SC, applicant was found to have committed the offenses of indecent conduct a violation of Article 134, Uniform Code of Military Justice (UCMJ); and Indecent Exposure, a violation of Article 120c, UCMJ, and a sexual offense as defined by AR 635-200.

e. The named victim of the offenses was the U.S. Government. No named victim exists in the LER.

f. The allegations amounted to allegations from other trainees that applicant touched herself in view of other trainees while in the showering area of the barracks, and that she touched herself while in her bunk, under the covers.

g. The allegation that was first made is that applicant was lying on her bunk and seen with her hand down her shorts. She was believed to be masturbating. The witness did not observe applicant over a period of time, but rather just saw her in a moment. There was no further evidence to support the allegation that applicant was actually masturbating in front of other Soldiers.

h. As part of the investigation, other Soldiers, stated that applicant touched herself in the shower area while naked. The showering stalls were private stalls.

i. Applicant denied ever touching herself inappropriately or exposing herself indecently.

j. Applicant's commander noted the following in the DA Form 4833 (Commander's Report of Disciplinary or Administrative Action), 20 July 2021: "[Applicant] was originally assigned to Charlie Company 1st Battalion, 61st Infantry Regiment. While there she was counseled on self-harm and misconduct surrounding indecent exposure. [Applicant] maintained that she at no time acted in an indecent manner. She was a rehabilitative transfer to the company, Bravo Company, 1st Battalion, 61st Infantry Regiment. She conducted herself in a professional manner throughout her training and met all graduation requirements. She never received any information or found any information that led me to be concerned about her conduct. She was allowed to graduate basic combat training and move on to her next unit of assignment".

k. A female Soldier being naked in a showering area, limited to other female Soldiers, is not indecent. Even a female Soldier touching themselves in the presence of other female Soldiers in a showering area is inherently required for personal hygiene.

l. If a person has their own hand down their shorts in their bunk, without more explanation, there cannot be probable cause to believe that an indecent sexual act is occurring.

m. The applicant was clearly reported for conduct by other trainees that did not like her and wanted to see her removed from the unit. The allegations worked and applicant was transferred. Her conduct was noted to be professional and appropriate by her new commander. She graduated and moved on with her career.

3. The applicant provides the following:

a. A U.S. Army CID letter dated 31 October 2023, which shows:

(1) A response to a request for a review of [applicant's] amendment of LER 00055-2021-MPI053-012287-6C. Based on the review of the LER and amendment packet, there is probable cause to believe applicant committed the offenses for which she was titled.

(2) Public Law 116-283 (William M. (Mac) Thornberry NDAA for Fiscal Year 2021), section 545 (Removal of Personally Identifying and Other Information of Certain Persons From Investigative Reports, The DOD Central Index of Investigations, and Other Records and Databases), required the Secretary of Defense to establish and maintain a policy and process for a person to request their DOD law enforcement record be amended, corrected, expunged, or otherwise removed when it is determined probable cause did not or does not exist to believe that the individual committed the alleged criminal offense(s). As of November 2022, DOD had not published implementation guidance; therefore, the Secretary of the Army directed the Department of the Army Criminal Investigation Division (DACID) to adopt the probable cause standard for review of amendment requests, as prescribed in Section 545 of Public Law 116-283. Effective 8 August 2023, DOD provided implementation guidance in the DODI 5505.7, Titling by DOD Law Enforcement Activities, which requires the service components to establish and implement the requirements of Section 545 of Public Law 116-283 and DODI 5505.7.

(3) [Applicant] was titled for violation of Article 134, Indecent Conduct and Article 120c, Indecent Exposure, UCMJ, when, during the night, in a female bay with other female Soldiers present, she masturbating in her bed and was seen by another female Soldier and on a separate incident went into the latrine, got undressed in front of a female Soldier and while watching the female Soldier to see her reaction, rubbed her

breasts, inner thighs, and buttocks in front of her. In accordance with DODI 5505.7, paragraph 3.2, they reviewed the LER and amendment request and concur with the Trial Counsel there is probable cause to believe [applicant] violated the offenses for which she was titled.

(4) Consistent with the direction received from the Secretary of the Army and DODI 5505.7, since probable cause existed to believe [applicant] committed the offenses listed in the LER, her record should not be amended to remove her name from the title block and any corresponding entry into the Defense Central Index of Investigations (DCII) should remain.

b. A U.S. CID letter, issued by the Chief Counsel, addressed to the applicant's counsel, 13 November 2023, which shows:

(1) After a review of the LER was completed in accordance with Department of Defense Instruction (DODI) 5505.7, Titling by DOD Law Enforcement Activities, which requires the service components to establish and implement the requirements of Section 545 of Public Law 116-283 and DODI 5505.7 as well as Public Law 116-283 (William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021), section 545 (Removal of Personally Identifying and Other Information of Certain Persons from Investigative Reports, The DOD Central Index of Investigations, and Other Records and Databases), it has been concluded that the amendment request is denied.

(2) In relation to the redacted legal review, be advised, the names of law enforcement personnel, as well as names, social security numbers and other personal items of information pertaining to third parties are withheld pursuant to Freedom of Information Act (FOIA) Exemptions (b)(6), and (b)(7)(C), 5 U.S.C. § 552(b)(6) and (b)(7)(C), which protect the personal privacy of other individuals mentioned in the report. Moreover, disclosing the withheld information would harm an interest protected by these exemptions.

(3) These withholdings also comply with the Privacy Act because the responsive records are maintained in a system of records that is exempt, pursuant to Exemption (j)(2), from the access provisions of the Privacy Act, 5 U.S.C. § 552a(j)(2).

(4) This partial denial is made on behalf of the Director, DACID, the Initial Denial Authority for DACID records under the FOIA.

(5) Please be advised, the DODI 5505.11 establishes policies and procedures for reporting criminal history data to the Federal Bureau of Investigation (FBI) National Crime Information Center (NCIC), Identification Division of the FBI, for all military service members and civilians investigated by DOD criminal investigative organizations

for commission of certain offenses. Those subjects who have resultant judicial, non-judicial military proceedings, or where a servicing Staff Judge Advocate or legal advisor found probable cause existed to believe the subject has committed the offense in which they were titled, will remain in NCIC. Reporting information to the NCIC depends on the offense committed and the final result of the report.

(6) A check of NCIC reflects that [applicant] is listed as the subject in the above referenced LER. We have updated the charges to Indecent Conduct, and Indecent Exposure (other sexual misconduct) with the disposition of no action taken. Consistent with DODI 5505.11, retention of this criminal history data in the NCIC does conform to DOD policy. [Applicant's] name will remain in the NCIC.

4. A review of the applicant's service record shows the following:

a. She enlisted in the U.S. Army Reserve on 29 March 2021.

b. A DA Form 4833, with a referral date of 8 July 2021, for MP Report Number 00055-2021-MPI053, shows in part in:

(1) Item 3 (Referral Information) -

- Offense Number 1, Indecent Conduct, Article 134 UCMJ; commander decision date 18 June 2021, the commander checked "No" for sexual harassment, and "No" for action taken
- Offense Number 2, Indecent Exposure (other sexual misconduct), Article 120c, UCMJ; commander decision date 18 June 2021 the commander checked "No" for sexual harassment, and "No" for action taken

(2) Item 10a (Commander's Remarks) – the commander states, [applicant] was originally assigned to Charlie Company, 1st Battalion, 61st Infantry Regiment. While there she was counseled on self-harm, and misconduct surrounding indecent exposure. The [applicant] maintained that she, at no time, acted in an indecent manner. She was a rehabilitative transfer to his company, Bravo Company, 1st Battalion, 61st Infantry Regiment. She conducted herself in a professional manner throughout her training and met all graduation requirements. The commander never received any information or found any information that led him to be concerned about her conduct. She was allowed to graduate BCT and move on to her next unit of assignment.

c. A U.S. Army, Law Enforcement Report (Redacted), 21 July 2021, that shows in part:

(1) Offense: Indecent Conduct (UCMJ, Article 134) and Indecent Exposure (other sexual misconduct) (UCMJ, Article 120c).

(2) Date/Time/Locations of Occurrences: 23 May and 29 Mar 2021, at various times at Fort Jackson, SC.

(3) Victims: U.S. Government.

(4) Report Summary:

d. On 24 May 2021 Investigator [redacted] received a phone call from the 1st Battalion, 61st Infantry Regiment Sexual Assault Response Coordinators in reference to allegations of indecent conduct/acts and indecent exposure inside the female bay which occurred on 23 May 2021 at approximately 1800 hrs. Initial investigation revealed that [applicant] was lying on her bunk, [redacted] while several other female trainees in the bay witnessed the incident.

e. On 26 May 2021, all five witnesses (Trainees) [redacted] were questioned at the Provost Marshal Office (PMO) regarding the case. The investigators conducted interviews with the trainees. Private [redacted] stated the incident happened inside Bay 3. Private [redacted] stated she saw [applicant] [redacted]. Private [redacted] also said there have been issues in the past with [applicant], including walking around naked in the latrine with no towel, standing awkwardly close next to other females [redacted], and looking through people's laundry. Private [redacted] stated she was the one who reported this incident to her drill sergeant.

f. On 26 May 2021, Investigator [redacted] conducted a witness interview with Private [redacted], she stated that she witnessed [applicant] on her bunk with [redacted] physical fitness shorts, and [redacted]. [Applicant] is very comfortable not wearing clothes, walks around the latrine naked, has bumped to other females in the nude on purpose, and is inches away from other females who change in the latrine.

g. On 26 May 2021, Investigator [redacted] conducted a witness interview with Private [redacted]. Private [redacted] stated she had a personal incident with [applicant] from late March 2021 that she never reported. Private [redacted] stated one night in late March 2021, she was in the latrine getting dressed, when applicant walked into the latrine, quickly got undressed and [redacted] in front of Private [redacted].

h. On 27 May 2021, Investigators [redacted] searched and apprehended [applicant], transported her back to the PMO, and advised her of her legal rights which she invoked and requested a lawyer. [Applicant] did make a spontaneous statement that she was being bullied by her other bay mates, and that the cadre members did not like her at all. [Applicant] said she felt like she was always being singled out from the rest of the company.

i. Coordination was made with [redacted] SJA, who opined that there was probable cause to believe that [applicant] committed the listed offenses.

5. There is no documentation in the applicant's service record that shows she received nonjudicial punishment or that she was separated due to misconduct.

6. On 14 December 2021, the applicant was honorably released from active-duty training. Her narrative reason for separation is due to failed medical/physical/procurement standards. She completed 8 months and 16 days of net active service this period.

### 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.

2. The Board carefully considered the applicant's request, her record and length of service, the frequency and nature of the listed offenses, the legal review establishing probable cause, the absence of actions taken by the chain of command as shown on the DA Form 4833 and her separation due to failure to meet medical/physical/procurement standards. The Board did not find evidence of documentation in the applicant's service record that shows she received nonjudicial punishment or that she was separated due to misconduct. The Board reviewed the law enforcement documents that included witness statements. The Board considered regulatory guidance including Department of Defense Instruction 5505.07. The Board considered the denial from the Army Crimes Records Center to remove her name from the titling block. Based on a preponderance of evidence, the Board found counsels argument persuasive and determined that there was not sufficient evidence of probable cause for the applicant's name to remain in the titling block of LER 55-2021-MP1053-012287-6C9/6H1/9T3 and that it should be removed to correct an injustice.

### 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 removing the applicant's name from the titling block of LER 55-2021-MP1053-012287-6C9/6H1/9T3 and from all law enforcement records/systems.

[REDACTED]

[REDACTED]

[REDACTED]

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

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

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

(2) covered persons titled in DOD LEA reports or indexed in the DCII may request their information be corrected in, expunged, or otherwise removed from DOD LEA reports, DCII, and related records systems, databases, or repositories maintained by, or on behalf of, DOD LEAs.

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

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

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

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

f. Considerations.

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

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

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

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

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

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

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

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

2. AR 190-45 (Law Enforcement Reporting), currently in effect, prescribes policies and procedures for the preparation, reporting, use, retention, and disposition of Department of the Army (DA) forms and documents related to law enforcement (LE) activities.

a. Paragraph 3-2 (Guidelines for Disclosure within the Department of Defense).

(1) "Criminal record information contained in MP documents will not be disseminated unless there is a clearly demonstrated, official, need to know. A demonstrated, official, need to know exists when the record is necessary to accomplish a function that is within the responsibility of the requesting activity or individual, is prescribed by statute, DOD directive, regulation, or instruction, or by Army regulation."

(2) "Criminal record information related to subjects of criminal justice disposition will be released when required for security clearance procedures."

b. Paragraph 3-6 (Amendment of Records).

(1) Subparagraph 3-6a (Policy).

(a) "An amendment of records is appropriate when such records are established as being inaccurate, irrelevant, untimely, or incomplete. Amendment procedures are not intended to permit challenging an event that actually occurred. Requests to amend reports will be granted only if the individual submits new, relevant, and material facts that are determined to warrant their inclusion in or revision of the police report. The burden of proof is on the individual to substantiate the request."

(b) "Requests to delete a person's name from the title block will be granted only if it is determined that there is not probable cause to believe that the individual committed the offense for which he or she is listed as a subject. It is emphasized that the decision to list a person's name in the title block of a police report is an investigative determination that is independent of whether or not subsequent judicial, nonjudicial or administrative action is taken against the individual. In compliance with DOD policy, an individual will still remain entered in the DCII to track all reports of investigation."

(2) Subparagraph 3-6b (Procedures). Individual Provost Marshals (PM) will review amendment requests for records that are 5 or fewer years old; the installation PM either approves the request or forwards the request to the CG, USACIDC with his/her rationale for disapproval. The CG, USACIDC is the sole access and amendment authority for criminal investigation reports and LERs.

c. Paragraph 4-3 (Identifying Criminal Incidents and Subjects of Investigation).

(1) Subparagraph 4-3a. "An incident will not be reported as a founded offense unless adequately substantiated by police investigation. A person or entity will be reported as the subject of an offense on the LER when credible information exists that the person or entity has committed a criminal offense. The decision to title a person is an operational, rather than a legal, determination. The act of titling and indexing does not, in and of itself, connote any degree of guilt or innocence, rather it ensures that information in a report of investigation can be retrieved at some future time for law enforcement and security purposes. Judicial or adverse administrative actions will not be based solely on the listing of an individual or legal entity as a subject in the LER."

(2) Subparagraph 4-3d. "When investigative activity identifies a subject, all facts of the case must be considered. When a person, corporation, or other legal entity is entered in the "subject" block of the LER, their identity is recorded in DA automated systems and the DCII. Once entered into the DCII, the record can only be removed in cases of mistaken identity or if an error was made in applying the credible information standard at the time of listing the entity as a subject of the report. It is emphasized that the credible information error must occur at the time of listing the entity as the subject of the LER rather than subsequent investigation determining that the LER is unfounded. This policy is consistent with DOD reporting requirements. The Director, U.S. Army Crime Records Center (USACRC) enters individuals from the LER into the DCII."

d. The regulation's glossary defines an unfounded offense as, "A criminal complaint in which a determination is made that a criminal offense was not committed or did not occur. This determination is based on police investigation and not on court-martial findings, civil court verdicts, or command determinations."

3. Army Regulation (AR) 195-2 (Criminal Investigation Activities), in effect at the time, established policies and procedures for criminal investigative activities within the Department of the Army. The Commanding General (CG), U.S. Army Criminal Investigation Command (USACIDC) was responsible for prescribing policies and procedures for the release of information from, and the amendment of, criminal investigation records and reports of investigations.

a. Paragraph 4-4 (Individual Requests for Access to, or Amendment of, USACIDC Reports).

(1) "Requests for amendment will be considered only under the provisions of this regulation. Requests to amend or unfound offenses in USACIDC ROIs (reports of investigation) will be granted only if the individual submits new, relevant, and material facts that are determined to warrant revision of the report. The burden of proof to substantiate the request rests with the individual."

(2) "Requests to delete a person's name from the title block will be granted, if it is determined that credible information did not exist to believe that the individual committed the offense for which titled as a subject at the time the investigation was initiated, or the wrong person's name has been entered as a result of mistaken identity."

b. The regulation's glossary:

(1) Credible Information – "Information disclosed to or obtained by an investigator that, considering the source and nature of the information and the totality of the circumstances, is sufficiently believable to indicate that criminal activity has occurred

and would cause a reasonable investigator under similar circumstances to pursue further the facts of the case to determine whether a criminal act occurred or may have occurred."

(2) Founded Offense – "An offense adequately substantiated by police investigation as a violation of the UCMJ, the U.S. Code, state and local codes, foreign law, international law or treaty, regulation, or other competent policy. Determination that an offense is founded is a law enforcement decision based on probable cause supported by corroborating evidence and is not dependent on final adjudication."

//NOTHING FOLLOWS//