

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 22 October 2024

DOCKET NUMBER: AR20240002309

APPLICANT REQUESTS:

- correction of his line of duty (LOD) determination to show “In the LOD” in lieu of “Not in the LOD – Due to Own Misconduct”
- removal of reference to right middle finger fracture from LOD determination
- personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- self-authored statement
- 3 pages of Medical Records, 9 January 2020, 13 January 2020, and 25 March 2020
- DD Form 261 (Report of Investigation – LOD and Misconduct Status, 10 September 2020 (sic 10 September 2021))
- National Guard Bureau (NGB) memorandum, 1 November 2022
- Adjutant General's Office Commonwealth of Pennsylvania (PA) memorandum, 7 December 2022
- U.S. Army Human Resources Command (AHRC) memorandum, 3 October 2023

FACTS:

1. The applicant states:

a. He is requesting the LOD determination made in 2020 be corrected to show “In the LOD” instead of “Not in the LOD” and to remove any reference to a right middle finger fracture from the LOD, regardless of the determination.

b. The accident was due to simple negligence and not willful misconduct. The LOD findings inaccurately attribute a right middle finger fracture to an accident in which the fracture did not happen. The finger fracture happened in January 2020. The accident to which the LOD findings refer happened in February 2021.

c. An initial appeal of the LOD determination was submitted in January 2021 and did not result in any corrections to his record, despite having provided medical records indicating his middle finger was fractured in 2020. The reviewing individual did not accept his personal statement as additional evidence and the determination remained unchanged.

2. A National Guard Bureau (NGB) Form 22 (Report of Separation and Record of Service) shows the applicant enlisted in the PA Army National Guard (ARNG) on 26 January 2009 and was honorably discharged after 5 years, 2 months, and 6 days of service on 1 April 2014, for the purpose of appointment as a commissioned or warrant officer.

3. Commonwealth of Pennsylvania Orders 087-1035, dated 28 March 2014, appointed the applicant as a Warrant Officer One (WO1) in the ARNG effective 2 April 2014.

4. The applicant provided multiple Medical Records that show:

a. On 9 January 2020, the applicant was treated at the Walter Reed National Military Medical Center (WRNMMC) emergency room where x-rays were done reflecting his previously dislocated distal interphalangeal joint (DIP) joint now had a more anatomic arrangement, albeit fracture fragments were apparent at the joint, evident at the palmar/radial side of the joint. Suggested donor site possibly from the middle phalanx.

b. A Right Finger Series Report, from WRNMMC, Department of Radiology, dated 13 January 2020, shows findings of unchanged mildly comminuted volar plate avulsion at the radial aspect of the long finger proximal interphalangeal joint with persistent surrounding soft tissue swelling. Other osseous structures are intact.

c. On 25 March 2020, the applicant was treated at WRNMMC for a primary diagnosis of displaced fracture of middle phalanx of right middle finger, subsequent encounter for fracture with routine healing. The applicant injured his right middle finger with proximal interphalangeal joint (PIPJ) dislocation and fracture on 8 January 2020 and had complaints of continued stiffness and loss of motion in the finger. Referral for occupational therapy was placed with a provision diagnosis of displaced fracture of middle phalanx of right middle finger.

5. A DD Form 214 (Certificate of Release or Discharge from Active Duty) shows:

a. The applicant was ordered to active duty in support of Operation Enduring Freedom (OEF) on 18 June 2020, with duty in Kuwait from 23 August 2020 through 3 March 2021.

b. He was honorably released from active duty on 4 August 2021, due to completion of required active service with transfer back to his PAARNG unit.

c. He was credited with 1 year, 1 month, and 17 days of net active service this period.

6. A DD Form 261, shows:

a. On 19 February 2021, at 1100 at Patrol Base Shaddadi, Syria, the applicant was injured while operating an unauthorized cruiser style street bike off road, with no personal protective equipment (PPE), at a speed not appropriate for the conditions. He allowed the front tire to enter a deep rut, causing sudden stoppage and the motorcycle to flip.

b. He was resent for duty, mentally sound, and it was determined intentional misconduct or neglect was the proximate cause of the injury.

c. The remarks show due to his failure to adhere to published orders and policy and his overconfidence in his ability to operate a street bike off-road with no PPE, the applicant crashed the motorcycle and sustained injuries in the form of five broken ribs, broken clavicle, lacerations requiring stitches, and blood in the chest.

d. The Investigating Officer found the injury was "Not in the LOD – Due to Own Misconduct."

e. The appointing authority and the reviewing authority approved the findings on 8 September 2021 and the reviewing authority approved the findings on 21 November 2022.

f. On 7 December 2022, the Chief, NGB, by the authority of the Secretary of the Army, approved the findings at "Not in the LOD – Due to Own Misconduct" for left lung contusion, left clavicle fracture, left ribs multiple fractures, right middle finger fracture, and concussion without loss of consciousness.

g. The approving authority's reasons shows the applicant was on OEF (Spartan Shield) orders starting 18 June 2020. On 19 February 2021, he was involved in a motorcycle accident and sustained multiple rib fractures, a broken clavicle requiring surgery, and several other injuries. Theater command had prohibited the use of motorcycles; however, the applicant's leadership failed to follow these rules and was allowing Soldiers to operate motorcycles without proper safety equipment. In addition, the applicant was not properly trained to operate the motorcycle. In accordance with Army Regulation 600-8-4, Appendix D, Rule 7, a soldier who operates a motor vehicle in a negligent manner that was the proximate cause of an injury, illness, disease, or

death may be found to have engaged in misconduct depending on the circumstances as a whole. Simple negligence alone does not constitute misconduct.

7. An NGB memorandum, dated 1 November 2022, provided the applicant's command with a copy of the DD Form 261 with the final LOD determination of "Not in the LOD – Due to Own Misconduct" for left lung contusion, left clavicle closed displaced fracture, left side ribs multiple closed fractures, right middle finger closed nondisplaced fracture of proximal phalanx, concussion without loss of consciousness. The applicant was to be provided a copy of the document and advised of his right to appeal the LOD determination.

8. An Adjutant General's Office Commonwealth of Pennsylvania memorandum, dated 7 December 2022 shows on 21 December 2022, the applicant acknowledged having received a copy of the final LOD investigation determination and was advised of his rights. He indicated he would submit an appeal with new and additional supporting documentation on his behalf within 30 days.

9. The applicant's undated personal statement for the appeal of the LOD determination shows:

a. During casual conversation with leaders and peers alike, it came to his attention that exaggerated stories and myths regarding the event have circulated to such an extent as to have possibly influenced the decision of his LOD determination. The LOD determination states, "overconfidence in his ability to operate a street bike off road" and refers to the motor vehicle being operated negligently. It is his belief that his conduct was nothing more derogatory than simple negligence and that, only by the mere fact that the motor vehicle was not permitted. His operation of the motor vehicle was not in a negligent manner. Per Army Regulation 600-8-4 (LOD Policy, Procedures, and Investigations), Appendix D, states violation of military regulations, orders, or instructions, or of civil laws, if there is no further sign of misconduct, may be no more than simple negligence.

b. The decision to operate a prohibited motor vehicle is not one he is proud of and it is that regret that originally motivated him not to submit a statement, but after reviewing the determination and listening to the many rumors, he is certainly devoted to defending his honor as someone who does not and did not operate in gross negligence, despite the exaggerated stories that have been circulated. The motorcycle overseas was used in the normal course of everyday life in an austere environment where the Soldiers positioned there had to rely on local resources for their well-being. They had significant lack of transportation and the general store and restaurant were about 1/2 mile away. He used the motorcycle in the course of routine, daily activities to retrieve food and supplies from the store and restaurant for himself and often times for the crews that

were on shift and unable to do so themselves. Overall, the motorcycle was a great asset writ large.

c. On the day of the accident, he detoured to the south of the patrol base to check in with some Soldiers who were down at the range, before traveling to the restaurant. After checking in with them, he circled around the area they often used for hoist training to familiarize himself with the area from the ground. While he was driving in that area, he ran into what was essentially a ravine or ditch in the road. It was an area that reminded him of a washed-out area, possibly caused by water flowing over the road. He was unable to see the ditch until it was too late in order to apply the necessary corrective action and the motorcycle's front tire stopped suddenly. The sudden stop caused him to launch over the handlebars and impact the other side of the ditch with no ability to brace his fall. He was able to get up under his own strength and walk to get help.

d. Included in the list of injuries sustained by the accident is a right middle finger closed nondisplaced fracture of proximal phalanx. His right middle finger was injured in January 2020, and was not related to his accident. Sufficient evidence will be provided.

10. An AHRC memorandum, dated 3 October 2023, shows

a. The AHRC Casualty and Mortuary Affairs Operations Division received the applicant's request for an appeal of the finding of his LOD investigation related to his conditions of left lung contusion, left clavicle fracture, left ribs multiple fractures, and right middle finger fracture.

b. Based on Army Regulation 600-8-2, AHRC was unable to consider his appeal for a different LOD finding. After a completed review, new evidence must be submitted for their office to analyze his case and render a determination. His appeal did not include any new evidence from the initial investigation. The finding of "Not in the LOD – Due to Own Misconduct" will stand. He was advised of his right to appeal to the Army Review Boards Agency (ARBA).

11. A second NGB Form 22 shows the applicant was honorably discharged from the ARNG on 15 July 2023, due to resignation. He was credited with 9 years, 3 months, and 14 days of net service this period and 14 years, 5 months, and 20 days of total service for retired pay.

12. In the adjudication of this case, an advisory opinion was obtained from the AHRC Casualty and Mortuary Affairs Operations Division on 5 August 2024, which shows:

a. While operating an unauthorized cruiser style street bike off road, with no PPE, at a speed not appropriate for the conditions, the applicant allowed the front tire to enter a deep rut, causing sudden stoppage and the motorcycle to flip. The applicant flipped

over the handlebars, resulting in 5 broken ribs, broken clavicle, lacerations requiring stitches and blood in the chest cavity.

b. While stationed in Syria as a Medical Evacuation Pilot, at approximately 1100 hours local time, he elected to ride an unauthorized motorcycle without a license and without training, in direct contravention to Army Regulation 385-10 (Army Safety Program), Army Regulation 600-55 (The Army Driver and Operator Standardization Program), Central Command (CENTCOM) Theater Policy, 28th Expeditionary Combat Aviation Brigade (ECAB) Standard Operating Procedures (SOP) and lawful order from a superior commissioned officer.

c. Contributing to the severity of the accident, the applicant was not wearing PPE and was attempting to ride a street style cruiser motorcycle off-road in adverse terrain. The motorcycle was not designed or intended for off-road operation. Due to his failure to adhere to published orders and policy and failure to follow a lawful order regarding operating a street bike off-road, and coupled with no PPE and an inappropriate speed, he crashed the motorcycle and sustained injuries in the form of 5 broken ribs, broken clavicle, lacerations requiring stitches, and blood in the chest cavity.

d. The applicant was on quarters for a minimum of 6 weeks for recovery. In an appeal letter to AHRC, he stated the vehicle was used every day to go to the store and the restaurant. He also added it was a prohibited motor vehicle but was a great asset to use. Army Regulation 600-8-4, Appendix D, Rule 7 states a Soldier who operates a motor vehicle in a negligent manner that was the proximate cause of an injury, illness, disease, or death may be found to have engaged in misconduct, depending on the circumstances as a whole. Simple negligence alone does not constitute misconduct. If the applicant had violated only one regulation, policy, or direct order, they could give him the benefit of doubt for simple negligence. However, violating multiple regulations, Army policies, and a direct order has a greater preponderance to determine misconduct when it comes to adjudicating LOD cases.

13. On 9 August 2024, the applicant was provided a copy of the AHRC advisory opinion and given an opportunity to submit comments, but he did not respond.

BOARD DISCUSSION:

1. The Board determined 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.
2. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered.
 - a. The applicant was involved in a motorcycle accident while operating an unauthorized street bike off road, with no PPE, without a license, without training, at a speed not appropriate for the conditions, that resulted in motorcycle to flip, in direct contravention to safety regulations, theater policy, brigade SOP, and lawful orders. The applicant flipped over the handlebars, resulting in 5 broken ribs, broken clavicle, lacerations requiring stitches and blood in the chest cavity. The investigating officer determined the due to the applicant's failure to adhere to published orders and policy, he crashed the motorcycle and sustained injuries.
 - b. By regulation (AR 600-8-4, Appendix D, Rule 7), a Soldier who operates a motor vehicle in a negligent manner that was the proximate cause of an injury, illness, disease, or death may be found to have engaged in misconduct, depending on the circumstances as a whole. Simple negligence alone does not constitute misconduct. If the applicant had violated only one regulation, policy, or direct order, they could give him the benefit of doubt for simple negligence. However, violating multiple regulations, Army policies, and a direct order has a greater preponderance to determine misconduct when it comes to adjudicating LOD cases. The Board reviewed and agreed with the advisory official's determination that the finding of "Not in the LOD – Due to Own Misconduct" stands.
 - c. The Board found no reason to remove the information mentioned in the LOD in relation to the applicant's finger as the LOD reflects the conditions and circumstances found by the investigating officer at the time of the LOD investigation. Additionally, medical records reflect the observations and opinions of medical professionals at the time they were created. Alteration of a diagnosis in those records after the fact may lead to fundamental questions about the veracity of the records in this case and in general. For these reasons, the Board determined it would not be proper to change any of the medical documents which would, in effect, alter a diagnosis in the applicant's medical records.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

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

REFERENCES:

Army Regulation 600-8-4 (Line of Duty (LOD) Policy, Procedures, and Investigations) prescribes policies and procedures for investigating the circumstances of disease, injury, or death of a Soldier providing standards and considerations used in determining LOD status.

a. A formal LOD investigation is a detailed investigation that normally begins with DA Form 2173 (Statement of Medical Examination and Duty Status) completed by the medical treatment facility and annotated by the unit commander as requiring a formal LOD investigation. The appointing authority, on receipt of the DA Form 2173, appoints an investigating officer who completes the DD Form 261 (Report of Investigation Line of Duty (LOD) and Misconduct Status) and appends appropriate statements and other documentation to support the determination, which is submitted to the General Court Martial Convening Authority for approval.

b. The worsening of a pre-existing medical condition over and above the natural progression of the condition as a direct result of military duty is considered an aggravated condition. Commanders must initiate and complete LOD investigations, despite a presumption of Not In the Line of Duty, which can only be determined with a formal LOD investigation.

c. An injury, disease, or death is presumed to be in LOD unless refuted by substantial evidence contained in the investigation. LOD determinations must be supported by substantial evidence and by a greater weight of evidence than supports any different conclusion. The evidence contained in the investigation must establish a degree of certainty so that a reasonable person is convinced of the truth or falseness of a fact.

d. A Soldier may appeal, in writing, within 30 days after receipt of the notice of the LOD determination. For appeals not submitted within the 30-day time limit, the reason for delay must be fully explained and a request for exception to the time limit justified.

e. Appendix D, Rule 7 states a Soldier who operates a motor vehicle in a negligent manner that was the proximate cause of an injury, illness, disease, or death may be found to have engaged in misconduct depending on the circumstances as a whole. Simple negligence alone does not constitute misconduct.

//NOTHING FOLLOWS//