

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 June 2025

DOCKET NUMBER: AR20240004780

APPLICANT REQUESTS:

- in effect, reconsideration of his request for removal of the DA Form 67-9 (Officer Evaluation Report (OER)) covering the period 1 October 2009 through 31 January 2010 from his Army Military Human Resource Record (AMHRR)
- a personal appearance hearing before the Board via video/telephone

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)
- Congressional Email (Constituent Inquiry: (Applicant)), 15 April 2024
- Headquarters, Department of the Army (HQDA), Office of the Chief of Legislative Liaison Email ((Applicant)), 16 April 2024
- Congressional Casework Request, 28 March 2024
- 9th Battalion, Army Reserve Careers Division, Memorandum (Amendment Order for (Applicant) to Allow Transfer to U.S. Army Reserve Troop Program Unit), 22 March 2017
- U.S. Army Reserve Command (USARC) Email (Separation Action – (Applicant)), 18 June 2012
- DA Form 67-9 Covering the Period 1 October 2009 through 31 January 2010
- USARC Orders 12-222-00015, 9 August 2012
- USARC Orders 12-206-00054, 24 July 2012
- 379th Chemical Company Memorandum ((Applicant) Rebuttal Initiation of Elimination), 30 June 2012

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20130013641 on 26 March 2014 and Docket Number AR20150004997 on 4 February 2016.

2. The applicant states his request for administrative correction of his records is based on heavy racial discrimination in the Forward Support Company of the 367th Engineer Battalion. There were well-documented incidents of racial discrimination in the unit. Furthermore, he was the only Black commissioned officer in the Forward Support Company, 367th Engineer Battalion. The correction should be made due to retaliation against him in his OER. He had complained to the 367th Engineer Battalion regarding having a second lieutenant serving as a company commander over two first lieutenants.
3. Having prior enlisted service in the U.S. Army Reserve, he was appointed as a Reserve commissioned officer in the rank/grade of second lieutenant/O-1 effective 17 October 2007.
4. His DA Form 3349 (Physical Profile), 18 August 2008, shows he was assigned a temporary physical profile rating of "2" in his lower extremities for 60 days for low back pain. His physical limitations included no running, sit-ups, or impact aerobics.
5. His DA Form 2173 (Statement of Medical Examination and Duty Status), 3 September 2008, shows he was examined on 24 July 2008 for a lower back injury sustained on 24 June 2008 due to falling off the back of a light medium tactical vehicle during training. He complained of having issues retaining information since the injury.
6. The statement from Sergeant First Class [REDACTED] Forward Support Company, 367th Engineer Battalion, 21 November 2008, describes a hostile working environment.
7. The memorandum for record from Staff Sergeant [REDACTED] (Work Environment), 28 January 2009, states he has been subjected to an unhealthy work environment over the past year. His integrity has been challenged numerous times. The hostile work environment is making him very reluctant to enter his workplace. He is afraid for his safety and career and those of others.
8. He was promoted to the rank/grade of first lieutenant/O-2 effective 5 August 2009.
9. 416th Theater Engineer Command Orders 09-273-00010, 30 September 2009, involuntarily reassigned him from the 318th Public Affairs Detachment (Rear) to Company A, 367th Engineer Battalion (Forward), for mobilization effective 30 September 2009.
10. His change-of-rater OER covering the period 1 October 2009 through 31 January 2010 shows in:
 - a. Part II (Authentication), block d, this is a referred report and he wished to make comments;

- b. Part III (Duty Description), his principal duty title as Maintenance Control Officer.
- c. Part IV (Performance Evaluation – Professionalism), he was rated "No" in:
- block a.2 – Integrity
 - block a.5 – Respect
 - block a.6 – Selfless Service
 - block a.7 – Duty
 - block b.1 (Attributes), – Mental
 - block b.2 (Skills) – Interpersonal
 - block b.3 (Actions – Leadership) – Motivating, Developing, and Building
- d. Part V (Performance and Potential Evaluation), block a (Evaluate the Rated Officer's Performance during the Rating Period and His/Her Potential for Promotion), his rater rated his performance and potential as "Unsatisfactory Performance, Do Not Promote";
- e. Part V, block b (Comment on Specific Aspects of the Performance), his rater entered the following comments:
- [Applicant] has demonstrated a clear desire to avoid mobilization with the 367th Engineer Battalion. His service has been unmotivated and he has lacked a commitment to his duty as the FSC [Forward Support Company] Maintenance Control Officer. While publicly expressing his desire to avoid deployment, he demonstrated no loyalty to his unit and no desire to meld his subordinates into a cohesive team. He slept during training events, and after failing to qualify with his weapon, made no attempt to improve. No APFT [Army Physical Fitness Test] was taken during this rating period. Most disturbing is the circumstance where a rigorous physical training regimen during Readiness Training Center in December became chronic back pain at the Mobilization Station in January. It would appear the [Applicant] is manipulating the system to avoid mobilization, and calls into question his integrity. In view of this performance, I recommend separation from the Army.
- f. Part V, block c (Comment on Potential for Promotion), his rater entered "Do not promote";
- g. Part VII (Senior Rater), block a (Evaluate the Rated Officer's Promotion Potential to the Next Higher Grade), his senior rater marked "Other";
- h. Part VII, block b (Potential Compared with Officers Senior Rated in Same Grade), his senior rater entered "No Box Check";

i. Part VII, block c (Comment on Performance/Potential), his senior rater entered the following comments:

[Applicant] has proven to be a disappointment as a commissioned officer. While he demonstrated some proficiency to individual Soldier tasks, [Applicant's] public displays of poor attitude, such as publicly stating his desire to avoid deployment, reveal a grave misunderstanding or [on] his part of part of [sic] his duty as an officer and demonstrate his inability to apply the leadership required of an officer. [Applicant's] attitude can be characterized as disruptive to the good order and discipline of his company. Unfortunately [Applicant] is likely not to improve his attitude and I see no capacity in which [Applicant] should remain in the Army as a commissioned officer.

11. His DA Form 3349, 22 August 2011, shows he was assigned a permanent physical profile rating of "2" in his lower extremities due to injuries to his lower back and ankle. His physical limitations included no running, sit-ups, or jumping.

12. The USARC email (Separation Action – (Applicant)) to the applicant's former rater and senior rater from the applicant's trial counsel, 18 June 2012, states one of the reasons that separation action was initiated against the applicant was the referred OER. The reason given for the applicant's unfavorable rating was that he was "manipulating the system to avoid mobilization, and calls into question his integrity." The applicant's rebuttal stated the allegation that he had a desire to avoid deployment was hearsay and unsubstantiated by investigation or a sworn statement. Upon reviewing the record, he agrees with the applicant that the OER is not substantiated by credible facts. There should be an Army Regulation 15-6 (Procedures for Investigating Officers and Boards of Officers) investigation, a U.S. Army Criminal Investigation Command report, or some record of command counseling that would substantiate the referred OER.

a. Evidence in the case file shows the applicant was medically non-deployable during the time in question.

b. Another troubling aspect is the allegation by the applicant and others within the command of racism and a hostile work environment. Upon review of the case file, he noted a statement from a unit enlisted Soldier, 12 December 2008, that stated that a certain second lieutenant counseled her for being on leave for a medical condition and she received adverse action after filing an Equal Opportunity complaint. A statement from another unit enlisted Soldier, 28 January 2009, alleged that he was subjected to an unhealthy work environment for over a year. He stated that his integrity was challenged numerous times, and the hostile environment was making him reluctant to enter the workplace. He stated that he is afraid for his safety and the safety of others, and felt that his career was in jeopardy.

13. The 379th Chemical Company memorandum for U.S. Army Human Resources Command from the applicant ((Applicant) Rebuttal Initiation of Elimination), 30 June 2012, states this is a first-priority appeal because of a pending recommendation for elimination based upon his receipt of a referred OER. The appeal is based upon both administrative and substantive error. He requests removal of the OER from his AMHRR for the following reasons:

a. No rating chain was ever published. No initial or quarterly counseling was ever performed. No developmental tasks were recorded on a DA Form 67-9-1a (Developmental Support Form).

b. The referred report did not follow the mandatory procedures for a "written referral." He was released from the unit on 20 January 2010. The referred OER was not completed for 4 months after he had left the unit. The failure of the senior rater to set forth his rights in a written referral constitutes a denial of due process.

c. The dates of the reporting period are incorrect.

d. The basis of the referred OER comes down to a single allegation that is based on fact. He did not deploy with the unit based on his back condition. He was released from active duty within the first 25 days of mobilization due to his medical condition. Both the rater and the senior rater speculate that he made up the back condition to avoid deployment. The rater stated, "most disturbing is the circumstance... [of chronic back pain the mobilization station." The fact is that he does have back pain. The back injury occurred in the line of duty as he fell out of the back of a light medium tactical vehicle during a training exercise in Phase II of the Basic Officer Leader Course. He was assigned a permanent physical profile rating for his back condition. Based on his physical profile rating and documented physical condition, he was not permitted to deploy with the unit.

e. Using a referred OER and a recommendation to "separate from the Army" is an improper basis to evaluate a medical condition as a basis for continued service. Using the rater and senior rater's logic, one could eliminate the whole Army medical evaluation system. Instead of referring him to a medical evaluation board, the rater and senior rater took it upon themselves to make an evaluation of his true physical condition and whether he was eligible for continued service. This is inconsistent with Army regulations and a denial of his due process rights.

f. He never made any public statements that he desired to avoid deployment. This is pure conjecture on the part of the rater and senior rater. They point to no specific instance where he made such a statement. If the allegations were true, any responsible command would appoint an investigating officer, initiate a Commander's Inquiry and/or an Army Regulation 15-6 investigation, obtain witness statements, and document the

findings in the OER. Additionally, such allegations, if proven, would likely result in issuance of a general officer memorandum of reprimand and/or general officer nonjudicial punishment. None of these actions took place because the statements never happened.

g. There is no evidence that he ever slept at training events or failed to qualify with his assigned weapon. The rater and senior rater fail to cite any specific incident. In fact, the undisputed evidence is quite the opposite. He did qualify with his assigned weapon and he did not sleep at training events.

h. The rater's comment that he was disloyal is contrary to Part IV of the OER, which states that he displays honor, courage, and loyalty.

i. There are well-documented incidents of racial discrimination in the unit. Moreover, he was the only Black commissioned officer in the Forward Support Company.

14. USARC Orders 12-206-00054, 24 July 2012, honorably discharged him from the U.S. Army Reserve effective 1 September 2012.

15. USARC Orders 12-222-00015, 9 August 2012, amended Orders 12-206-00054 to show the discharge effective date as 1 October 2012.

16. On 26 March 2014 in Docket Number AR20130013641, the ABCMR denied the applicant's request to remove the DA Form 67-9 covering the period 1 October 2009 through 31 January 2010 from his AMHRR. The Board determined the applicant had not provided sufficient evidence to show the contested OER was not processed in accordance with applicable laws and regulations. The evidence did not show the OER contained a material error, inaccuracy, or injustice.

17. On 4 February 2016 Docket Number AR20150004997, the ABCMR again denied the applicant's request to remove the DA Form 67-9 covering the period 1 October 2009 through 31 January 2010 from his AMHRR. The Board determined the applicant did not provide sufficient documentary evidence to support his allegation that the contested OER was given in retaliation for filing an Equal Opportunity complaint of racial discrimination. He did not provide sufficient documentary evidence showing a connection between his evaluation and the reports by other Soldiers attesting to having been subjected to an unhealthy and hostile work environment based on racism.

18. The 9th Battalion, Army Reserve Careers Division, memorandum from the Army Reserve Career Counselor (Amendment Order for (Applicant) to Allow Transfer to U.S. Army Reserve Troop Program Unit), 22 March 2017, states the applicant filed a complaint regarding his last OER, making him a two-time passover for promotion. The complaint changed his OER, thus making him eligible for promotion. The applicant is

requesting reassignment to another unit. There is an available position in this unit that he could assign the applicant to once his discharge order is changed or amended.

19. His Congressional Casework Request, 28 March 2024, shows he requested a meeting with the Secretary of the Army to address the discrimination pertaining to his application for correction of his military record and why he was denied due process to have a meeting about the injustice against him and his case regarding racial discrimination in the U.S. Army Reserve.

20. The Congressional email to the HQDA Office of the Chief of Legislative Liaison, from the Community Outreach Coordinator (Constituent Inquiry: (Applicant)), 15 April 2024, requests an update/further information regarding the applicant's inquiry.

21. The HQDA Office of the Chief of Legislative Liaison email to the Community Outreach Coordinator ((Applicant)), 16 April 2024, states the inquiry has been assigned a case number and forwarded to the appropriate Army command for review.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the applicant's military records, the Board found that relief was not 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 that the applicant did not demonstrate, by a preponderance of the evidence, that a procedural error occurred to his detriment or that the contested Officer Evaluation Report (OER) is substantially inaccurate and warrants removal.

2. The Board acknowledged the applicant's extensive documentation regarding his back condition. Evidence confirms that the injury occurred in the line of duty during Phase II of the Basic Officer Leader Course, when the applicant fell from a Light Medium Tactical Vehicle. He was subsequently issued a permanent physical profile that precluded deployment, which was appropriately reflected in his personnel records. The Board noted an inconsistency in the rater's assessment—particularly, the comment suggesting disloyalty stands in contradiction to Part IV of the OER, which rates the applicant as embodying honor, courage, and loyalty. While this contradiction raised concern, the Board did not find sufficient grounds to determine that the overall rating was improperly motivated or factually inaccurate to the extent required for removal.

3. Furthermore, the Board also reviewed a 2012 memorandum from the applicant's trial counsel indicating that the referred OER was cited as a factor in proposed separation proceedings. The OER included a claim that the applicant attempted to manipulate the

system to avoid mobilization. The applicant contested this assertion as hearsay, unsupported by formal investigation or sworn statements. Notably, both his former rater and senior rater later concurred that the claims within the OER were not substantiated by credible documentation. Despite these observations, the Board found that the allegations of retaliation—specifically, that the contested OER was issued in retribution for filing an Equal Opportunity (EO) complaint—were not supported by objective, corroborative evidence. The witness statements provided by the applicant lacked substantiation through formal documentation or investigative findings, such as a 15-6 inquiry. Therefore, based on the totality of the evidence presented and in the absence of compelling proof of procedural error or retaliatory intent, the Board concludes that the OER remain a part of the applicant’s official records. The request for relief is denied.

4. The purpose of maintaining the Army Military Human Resource Record (AMHRR) is to protect the interests of both the U.S. Army and the Soldier. In this regard, the AMHRR serves to maintain an unbroken, historical record of a Soldier's service, conduct, duty performance, and evaluations, and any corrections to other parts of the AMHRR. Once placed in the AMHRR, the document becomes a permanent part of that file and will not be removed from or moved to another part of the AMHRR unless directed by an appropriate authority.

5. 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:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	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 to amend decision of the ABCMR set forth in Docket Number AR20150004997, dated 4 February 2016.


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. Department of the Army Pamphlet 40-502 (Medical Readiness Procedures) provides individual medical readiness and physical profile information; explains the information technology, exams, and forms associated with medical readiness; and describes the physical examination and assessment procedures. Chapter 4 (Physical Profiles) describes processes for communicating functional abilities, medical instructions and recovery time estimates to commanders, for accurate readiness and duty assignment. The basis for the physical profile serial system is the function of body systems and their relation to military duties. The permanent physical profile has six functional areas referred to as "P-U-L-H-E-S" with four numerical designations used to reflect different levels of functional capacity. The determination of the numerical designation 1, 2, 3, or 4 evaluates the functional capacity of a particular organ or system of the body.

a. The functional areas for consideration are:

- P – physical capacity or stamina
- U – upper extremities
- L – lower extremities
- H – hearing and ears
- E – eyes
- S – psychiatric

b. There are four numerical designations to describe a Soldier's functional capacity in each of the six functional areas of the physical profile serial system:

- an individual having a numerical designation of "1" describes a high level of medical fitness, deployable
- a physical profile designator of "2" under any factors indicates some medical condition or physical defect that requires some minor functional or activity limitations, deployable
- a profile containing one or more numerical designators of "3" describes one or more medical conditions or physical defects with significant functional or activity limitations and warrant processing through a Military Occupational Specialty Administrative Retention Review Program or Disability Evaluation System process
- a profile containing one or more numerical designators of "4" describes one or more medical conditions or physical defects with severe limitations of military duty performance, requires a Disability Evaluation System board evaluation

3. Army Regulation 623-3 (Evaluation Reporting System), effective 10 September 2007 and in effect at the time, prescribed policies for completing evaluation reports that support the Evaluation Reporting System.

a. Chapter 2 governed the purpose and development of rating chain qualifications and special evaluation requirements. Paragraph 2-12 stated the rater will discuss the scope of the rated Soldier's duty description with the rated Soldier within 30 days after the beginning of the rating period. This counseling will include, as a minimum, the rated Soldier's duty description and the performance objectives to attain. The discussion will also include the relationship of the duty description and objectives with the organization's mission, problems, priorities, and similar matters.

(1) The rated Soldier will participate in counseling, assessments, and a final evaluation. Assessments will be conducted with the rating chain throughout and at the end of the rating period. Rated Soldiers have the opportunity to express their own views during the assessment to ensure that they are clear, concise, and accurate.

(2) The rater will verify the initial face-to-face counseling by initialing on the working copy of the DA Form 67-9-1 (OER Support Form) and will forward a copy to the senior rater for approval and validation (for officers). Rated officers in the rank of captain, lieutenant, chief warrant officer two or warrant officer one will use both a DA Form 67-9-1 and DA Form 67-9-1a in preparing support-form objectives with the rater.

b. Paragraph 3-4 described the support form communication process. Paragraph 3-4f stated the DA Form 67-9-1 provides an opportunity for the rated individual, rater, intermediate rater (if applicable) and senior rater to communicate. The rater will use the support form for input on the evaluation and forward the support form to the next person in the rating chain. The senior rater will use the support form to complete an evaluation of the rated individual and forward the completed evaluation and support form to the reviewer, if applicable and then back to the rated individual. Paragraph 3-4g stipulated that although the support form is an official document covered by regulation, it will not be part of an official file used by selection boards or career managers. Failure to comply with any or all support form requirements will not constitute the sole grounds for appeal of an evaluation report.

c. Paragraphs 3-20a and 3-20b stated each report will be an independent evaluation of the rated Soldier for a specific rating period. It will not refer to prior or subsequent reports. It will not remark on performance or incidents occurring before or after the period covered.

d. Paragraph 3-34 stated any report with negative comments in Parts Vb, Ve, VI, or VIIe will be referred to the rated officer by the senior rater for acknowledgment and comment before they are sent to HQDA.

e. Paragraph 3-36a stated the senior rater will place an "X" in the appropriate box in Part IId of the completed report. The report will then be given to the rated Soldier for signature and placement of an "X" in the appropriate box in Part IId.

f. Paragraph 3-39 stated evaluation reports accepted for inclusion in the official record of a Soldier are presumed to be administratively correct, have been prepared by the proper rating officials, and represent the considered opinion and objective judgment of rating officials at the time of preparation. To justify deletion or amendment of a report, the appellant 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 is 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 appellant.

g. Paragraphs 6-3 and 6-4 stated 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. A secondary purpose is to obtain command involvement in clarifying errors or injustices after the evaluation is accepted at HQDA. However, in these after-the-facts cases, this paragraph is not intended to be a substitute for the appeals process, which is the primary means of addressing errors and injustices after they have become a matter of permanent record.

h. Paragraph 6-11d stated that for a claim of inaccuracy or injustice of a substantive type in an evaluation report, evidence will include statements from third parties, rating officials, or other documents from official sources. Third parties are persons other than the rated officer or rating officials who have knowledge of the appellant's performance during the rating period. Such statements are afforded more weight if they are from persons who served in positions allowing them a good opportunity to observe firsthand the appellant's performance as well as interactions with rating officials. Statements from rating officials are also acceptable if they relate to allegations of factual errors, erroneous perceptions, or claims of bias. To the extent practical, such statements will include specific details of events or circumstances leading to inaccuracies, misrepresentations, or injustice at the time the report was rendered.

i. Paragraph 6-13 prescribed policies for appeals based on substantive inaccuracy. Paragraph 6-13b(2) stipulated that a personality conflict between the appellant and a rating official does not constitute grounds for a favorable appeal, unless it is shown conclusively that the conflict resulted in an inaccurate or unjust evaluation.

//NOTHING FOLLOWS//