

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 December 2024

DOCKET NUMBER: AR20240004852

APPLICANT REQUESTS: through counsel, removal of the DA Form 1059 (Service School Academic Evaluation Report (AER)), 23 March 2022, covering the period 19 November 2020 through 3 August 2021 from his Army Military Human Resource Record (AMHRR).

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

- DD Form 149 (Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552)
- Counsel's Memorandum in Support of Application for Correction of Military Records, undated
- AER
- Applicant's Declaration, 26 February 2024

FACTS:

1. The applicant states he believes the AER covering the period 19 November 2020 through 3 August 2021 did not comply with the regulatory requirements of Army Regulation 623-3 (Evaluation Reporting System).

2. Counsel states the applicant requests removal of the AER covering the period 19 November 2020 through 3 August 2021 from his AMHRR.

a. Statement of Facts. The applicant was issued a referred AER covering the period 19 November 2020 through 3 August 202, based on the outcome of a purported investigation into "toxic classroom environment." However, he was not given the opportunity to participate in it, nor was he given a copy of the investigation. First Lieutenant (1LT) [REDACTED] was not established as his academic rater and Lieutenant Colonel (LTC) [REDACTED] was not established as his rating official. 1LT [REDACTED] did not include important information about the applicant's class projects or test skills. No official above LTC [REDACTED] reviewed his AER.

b. Law.

(1) Army Regulation 623-3 governs evaluation reports.

(a) Standards for establishing a Soldier's rating chain are found in chapter 2. For example, the rating chain is required to be established at the beginning of the rating period (paragraph 2-4a). Specific to the DA Form 1059, those which "reflect 'Did Not Graduate' as a result of a 'Failed to Achieve Course Standards'...a supplementary review is required by the next individual above the reviewing official in the chain of supervision" (paragraph 2-17d).

(b) Evaluation principles are found in Army Regulation 623-3, chapter 3. For example, "[a]cademic performance counseling for students attending Service schools or military courses of instruction or training will be conducted in accordance with procedures established at the local level by the commandant of the school or the CG, TRADOC [Commanding General, U.S. Army Training and Doctrine Command]" (paragraph 3-15a). The use of any remarks or comments that draw attention to differences relating to religion are prohibited (paragraph 3-21a).

(2) Department of Army Pamphlet 623-3 (Evaluation Reporting System) also governs evaluation reports. In relation to academic reports, "[w]hen applicable, the academic rater will list up to three projects or papers that were successfully completed during the course that may have potential value to the Army" (see table 4-2, DA Form 1059, part II, block m). The applicant had two papers that qualified; yet 1LT [REDACTED] failed to include them in block m. 1LT [REDACTED] also failed to mention that The applicant was only one of two students who achieved a perfect score on the Persian-Farsi VLR DLPT [Very Low Range Defense Language Proficiency Test] 1+/1+ [Intermediate – High rating for reading and speaking].

(3) Army Regulation 15-6 (Procedures for Administrative Investigations and Boards of Officers), Chapter 4 (Preliminary Inquiries). When adverse administrative action is contemplated based on the results of an inquiry, then there must be a legal review (paragraph 4-3a). Additionally, the appointing authority must comply with the notice and referral requirements of paragraph 1-11c.

c. Argument.

(1) As the applicant identified in his rebuttal, the AER (19 November 2020 through 3 August 2021) does not comply with the requirements of Army Regulation 623-3. Neither 1LT [REDACTED] nor LTC [REDACTED] were established as members of his academic rating chain. There was no reviewing official above LTC [REDACTED] 1LT [REDACTED] failed to include positive comments that academic raters normally include, such as comments about his projects and his perfect score on the Persian-Farsi VLR DLPT 1+/1+. The comments about "disrespecting and flouting the Commandant's standing pandemic order" were in reality prohibited comments about his religious objections to

the Coronavirus Disease 2019 (COVID-19) vaccine and his request for a religious exemption.

(2) There is no evidence that the preliminary inquiry, upon which the AER is based, received the required legal review. Nor did the applicant receive a copy of the inquiry before having to respond to the AER. While there are exceptions to the notice and referral requirements in Army Regulation 15-6, paragraph 1-11c, those exceptions only apply when there are more stringent safeguards for due process rights (see Army Regulation 15-6, paragraph 1-11e). While the command may have complied with the notice requirement for his AER, it did not provide him with a copy of the inquiry, contrary to paragraphs 1-11d and 1-11e. For all of these reasons, this AER is arbitrary and capricious, issued in violation of Army Regulation 623-3. Accordingly, its erroneous issuance should be corrected by removing it from the applicant's records.

d. Conclusion. The applicant deserves to have the AER covering the period 19 November 2020 through 3 August 2021 removed from his records. He urges the Board to grant his application.

3. He was appointed as a Regular Army commissioned officer in the Adjutant General Corps on 26 May 2012 in the rank/grade of second lieutenant/O-1.

4. He was promoted to the rank/grade of captain/O-3 effective 1 May 2016.

5. His DA Form 1059, 23 March 2022, shows he attended the Persian-Farsi Basic Course 21-003 from 19 November 2020 through 3 August 2021 and shows in:

a. Part I (Administrative Data), block I (Reason for Submission), he did not graduate;

b. Part II (Academic Achievement (Academic Rater)), block f Character/Accountability), block g (Presence/Comprehensive Fitness), block h (Intellect/Critical Thinking and Problem Solving), block i (Leads/Communication and Engagement), block j (Develops/Collaboration), and block k (Achieves/Life Long Learner), an "X" was placed by the statement "Did Not Meet Standards";

c. Part II, block I (Comments), the following entry:

[Applicant] was dis-enrolled from the Persian-Farsi Basic Course at the Defense Language Institute Foreign Language Center (DLIFLC) due to disciplinary issues prior to course completion. [Applicant] displayed character, presence, and critical thinking skills below the expectation of a Captain by disrespecting and flouting the Commandant's standing pandemic order. [Applicant's] classroom leadership contributed to a flurry of disciplinary issues,

derailing the performance of 11 other joint-service students. [Applicant] had an in-course GPA [grade point average] of 3.73 at time of removal, but did not finish the course and therefore did not receive a final GPA, DLPT, or OPI [Oral Proficiency Interview] score. No APFT [Army Physical Fitness Test] conducted IAW [in accordance with] AD 2020-06 [Army Directive 2020-06 (Army Combat Fitness Test)].

d. Part II, block m (Special Project(s) or Paper(s)), no entry;

e. Part III (Overall Academic Achievement (Reviewing Official)), block a (Select One Box Representing Rated Student's Overall Academic Achievement), an "X" by the statement "Failed to Achieve Course Standards";

f. Part III, block b (Comments), the following entry:

[Applicant] was administratively dis-enrolled from the Persian-Farsi Basic Course at the DLIFLC for disciplinary reasons. [Applicant's] behavior was disruptive to the teaching staff and students during the course.

g. Part IV (Authentication), his academic rater as 1LT [REDACTED] Company Commander, and the reviewing official as LTC [REDACTED] Battalion Commander, who each signed and dated the form on 8 October 2021 and 17 November 2021, respectively; and the applicant digitally signed the form on 23 March 2022;

h. Part IV, block c1 (This is a Referred Report, Do You Wish to Make Comments?), an "X" in the "Referred" box and an "X" in the "Yes, Comments Are Attached" box;

i. Part IV, block c2 (Rated Student's Comments), the following entries:

Superior Performance / AER Comments include Unproven Derogatory Information – I received 8 performance counselings from 17 December 2020 through 7 July 2021. All performance counselings indicated superior classroom leadership and academic performance. I received these counselings from officials I believed would be in my AER rating chain. In TRADOC, instructors and course supervisors serve as rating officials for AER-producing courses. The rated Soldier must be notified of any rating chain that deviates from the established precedent.

Failure to Establish AER Rating Chain – As is the norm within TRADOC, all my previous AER rating chains included the instructor and the course director-equivalent supervisor. The rating chain on this AER failed to establish themselves as my academic rater and academic reviewing official. I was never informed of this unorthodox rating chain for an AER-producing course

until mid-December 2021, when I received a copy of this AER from CPT [REDACTED]. I should have been at least verbally notified that my rating chain would be different than what is typical for an AER-producing course. This information was simply never communicated to me. I never received notification from the schoolhouse or CoC [chain of command] that this course even produced an AER. The 8 above-mentioned counselings were conducted by a course instructor who falls under the supervision of the course department chair. I also should have been further notified that my rater would be a non-promotable 1LT, holding a temporary position since only mid-June 2021 of this AER's rated period. The 1LT's time period represents 12.6% of the total time period that I was in the Farsi class. Furthermore, the 1LT never discussed this AER with me. After receiving a copy of the AER in mid-December 2021, the 1LT declined to speak with me about this AER.

DLIFLC Policy Disregarded – "Students who elect to appeal [removal from course] will remain actively enrolled in the course pending disposition of their appeals. When the commandant and/or commander determine that a student's continued participation with the main student body is contrary to good order, discipline or morale, the student will stay enrolled in the class and continue course work separate from the student body." This policy was not followed, and I was not given the opportunity to continue course work since removal on 15 July 2022. I was notified of the appeal decision on 12 January 2022. I had assumed this delay was due to my vaccination status and then further delayed until the outcome of my Religious Accommodation Requests to the COVID-19 vaccine and masking. Of note, the accumulative, long-term effect of 7+ hours per day of masking + face shielding during on-going and intensive foreign language speaking training began to cause documented health issues that forced me to leave class and seek medical treatment in early July 2021. Furthermore, it was known since Spring 2021, that I had a deeply held religious belief preventing me from receiving COVID-19 vaccination, when I was questioned about this topic in class. I was further discriminated against for my deeply held religious beliefs.

Incorrect "Thru-date" – The thru date of this AER should be 12 January 2022, the date of notification of the appeal decision.

"Disrespecting and Flouting the Commandant's Standing Pandemic Order" – I was 1 of 2 students in the class that [who] were following the simultaneous face-masking/face shielding policy for the unvaccinated within 6 feet. All other unvaccinated students in my class were blatantly disobeying the Pandemic Order at all times. This represents provable evidence to state that I was one of the few unvaccinated personnel that [who] was in fact "Respecting and Upholding the Commandant's Standing Pandemic Order." On 6 July 2022, I

removed my mask due to significant medical issues. This is the only time I violated the masking+shielding policy; however, exceptions to masking are supposed to be allowable for "short periods" of drinking, eating and medical issues. Based on my documented medical issues, it was therefore not a violation. That same day, I also requested virtual hybrid attendance, as a way to recover from the medical issues I was experiencing. Of note, there had been ongoing widespread violation of the Commandant's Pandemic Orders. I did my duty as a leader (in a student status) attempting to enforce the standard by notifying those around me to follow the Pandemic Orders. This further included informing the teaching team leader, the section leader, the class leader and the Chief Military Language Instructor about students disregarding the Pandemic Policy.

"Derailing the Performance of 11 other joint-service students" – This statement is unproven derogatory information. 4 out of the 4 class instructors each committed different, egregious actions during April through early July that provably derailed the performance of the entire class. In May, one instructor was recorded sexually propositioning the top female student in the class. This incident occurred multiple times, until it was finally recorded on a smartphone. That instructor was fired. The 2nd instructor committed an EO violation in front of the class towards all female students that resulted in a founded EO complaint. A 3rd instructor blatantly flouted the Pandemic Orders throughout April and May of 2021 when 100% of personnel were required to mask at all times. She would regularly dangle the face mask off her right ear. Furthermore, she encouraged us to disregard the masking policy. Finally, the 4th instructor (the senior instructor), allegedly committed criminal TARP [Threat Awareness and Reporting Program] violations with class students, which resulted in a formal investigation. This covers all 4 instructors that were assigned to this class.

6. The contested DA Form 1059, 23 March 2022, is filed in the performance folder of his AMHRR.

7. He provided a written declaration, 26 February 2024, noting he was not able to include all his comments on the DA Form 1059 in his rebuttal. He stated the following three points should have been added:

- I was not allowed to participate in the "investigation," nor was I provided with a copy that I could review prior to this AER being issued
- 1LT [REDACTED] should have included my Iranian history project and Iranian culture project in block "m" of DA Form 1059. I presented both of these in the Farsi language, and received A's for both of those projects

- 1LT [REDACTED] should also have commented that I [was] only 1 of 2 students who achieved a perfect score on the Persian-Farsi VLR DLPT 1+/1+

8. He was honorably discharged in the rank/grade of captain/O-3 on 1 April 2023 by reason of non-selection of permanent promotion under the provisions of Army Regulation 600-8-24 (Officer Transfers and Discharges). His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 10 years, 10 months, and 6 days of active service during this period and 11 months and 10 days of total prior active service.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, 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 review based on law, policy, and regulation. Upon review of the applicants petition and military records, the Board determined that the applicant did not demonstrate evidence that establishes that the presumption of regularity will not be applied to the DA Form 1059 (Service School Academic Evaluation Report), dated 23 March 2022 filed in his Army Military Human Resource Record (AMHRR) or that action is warranted to correct a material error, inaccuracy, or injustice. The Board noted the applicant's assertion, through counsel, that he was not given the opportunity to participate in the investigation nor was he given a copy of the investigation; however, the Board concluded his evaluation report shows he was removed from the course. Therefore, the Board denied relief.

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.

3/26/2025

X

CHAIRPERSON

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

REFERENCES:

1. Army Regulation 15-185 (Army Board for Correction of Military Records) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the Army Board for Correction of Military Records (ABCMR). Board members will review all applications that are properly before them to determine the existence of an error or injustice and direct or recommend changes in military records to correct the error or injustice, if persuaded that material error or injustice exists and that sufficient evidence exists in the record. The ABCMR will decide cases on the evidence of record; it is not an investigative body. 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.

2. Army Regulation 623-3 (Evaluation Reporting System) prescribes the policy for completing evaluation reports and associated support forms that are the basis for the Army's Evaluation Reporting System.

a. Paragraph 2-4a (General Rules for Establishing Rating Chains) states the rating chain for a rated Soldier will be established at the beginning of the rating period. This allows the rated Soldier and rating officials to properly execute their roles and responsibilities in the evaluation process. Rating officials must meet grade requirements, as well as time in position, in order to render evaluation reports.

b. Paragraph 2-16 (Review Requirements for DA Form 67-10 (Officer Evaluation Report) Series, DA Form 2166-9 (Noncommissioned Officer Evaluation Report) Series, and DA Form 1059 Series) states in certain situations, persons other than the senior rater (Officer Evaluation Report and Noncommissioned Officer Evaluation Report) or reviewing official (AER) will conduct supplementary reviews. Supplementary reviews will be accomplished after receipt and review of the rated Soldier's comments, if provided. A supplementary review is required for all "Failed to Achieve Course Standards" (DA Form 1059) and "Non-Graduate" (DA Form 1059-2) Part III (Overall Academic Achievement), block a, box check selections which result in "Did Not Graduate" as the reason for submission in Part I (Administrative Data), block I. The supplementary review will be conducted by the person in the chain of supervision above the reviewing official unless the commandant is the reviewing official. Supplementary reviews will go no higher than the school commandant.

c. Paragraph 2-17d (Mandatory Review of Officer and Noncommissioned Officer Relief and Academic Failure Evaluation Reports) states for DA Forms 1059 and DA Forms 1059-2 that reflect "Did Not Graduate" as a result of a "Failed to Achieve Course Standards" (DA Form 1059) or a "Non-Graduate" (DA Form 1059-2) selection in Part III (Overall Academic Achievement), block a, a supplementary review is required by the next individual above the reviewing official in the chain of supervision, unless the

school commandant is the reviewing official annotated on the evaluation report. Supplementary reviews will go no higher than the school commandant (see paragraph 2-16 and Department of the Army Pamphlet 623-3 (Evaluation Reporting System)).

d. Paragraph 3-15 (DA Form 1059 and DA Form 1059-2) states AERs are used to document the performance, accomplishments, potential, and limitations of students while attending military schools and courses of instruction or training.

(1) Paragraph 3-15a (Counseling Requirements) states academic performance counseling for students attending Service schools or military courses of instruction or training will be conducted in accordance with procedures established at the local level by the commandant of the school or the Commanding General, U.S. Army Training and Doctrine Command.

(2) Paragraph 3-14f (Active Duty Personnel and U.S. Army Reserve in Active Duty Status) states that in preparing these reports, all significant information that can be evaluated will be reported. The same care and attention will be exercised in preparing AERs as is exercised in preparing officer evaluation reports and noncommissioned officer evaluation reports.

(3) School commandants or training division or brigade commanders will ensure that AER comments are based on observation of a student's qualities, strengths, weaknesses, deficiencies, and overall performance.

(4) Schools will submit AERs to Headquarters, Department of the Army (HQDA), (or the appropriate headquarters) by mail or e-mail, until electronic submission capability is available, for inclusion in the Soldiers' AMHRR.

e. Paragraph 3-18 (Comments) states that in preparing their comments, rating officials will convey a precise but detailed evaluation to communicate a meaningful description of a Soldier's performance and potential. In this manner, both HQDA selection boards and career managers are given the needed information on which to base a decision.

f. Paragraph 3-20e (Unproven Derogatory Information) states evaluation reports will not be delayed to await the outcome of a trial or investigation unless the rated Soldier has been removed from his/her position and is in a suspended status (see paragraphs 3-55 and 3-56). Upon completion of the trial or investigation, processing of evaluation reports will resume. Evaluation reports will be completed when due and will contain what information is verified at the time of the "Thru" date of the evaluation report.

g. Paragraph 3-37 (Modifications to Previously Submitted Evaluation Reports) states an evaluation report accepted by HQDA and included in the official record of a rated Soldier is presumed to:

- (1) be administratively correct,
- (2) have been prepared by the properly designated rating officials who meet the minimum time and grade qualifications, and
- (3) represent the considered opinions and objective judgment of the rating officials at the time of preparation.

h. Paragraph 4-7(f) (Policies) states an appeal will be supported by substantiated evidence. An appeal that alleges an evaluation report is incorrect, inaccurate, or unjust without usable supporting evidence will not be considered. The determination regarding adequacy of evidence may be made by the HQDA Evaluation Appeals Branch, National Guard Bureau Appeals Section, or the appropriate State Adjutant General.

i. Paragraph 4-11 (Burden of Proof and Type of Evidence) states the burden of proof rests with the appellant. Accordingly, to justify deletion or amendment of an evaluation report, the appellant will produce evidence that establishes clearly and convincingly that:

- (1) the presumption of regularity referred to in paragraphs 3-36a and 4-7a will not be applied to the evaluation report under consideration; and
- (2) action is warranted to correct a material error, in accuracy, or injustice.

j. Paragraph 4-12 (Appeals Based on Substantive Inaccuracy) states a decision to appeal an evaluation report will not be made lightly. Before deciding whether or not to appeal, the prospective appellant will analyze the case dispassionately. This is difficult but unless it is done, the chances of a successful appeal are reduced. The prospective appellant will note that:

- (1) Once the decision has been made to appeal an evaluation report, the appellant will state succinctly what is being appealed and the basis for the appeal. For example, the appellant will state:
 - (a) whether the entire report is contested or only a specific part or comment, and
 - (b) the basis for the belief that the rating officials were not objective or had an erroneous perception of his or her performance. Note that a personality conflict between the appellant and a rating official does not constitute grounds for a favorable appeal; it

will be shown conclusively that the conflict resulted in an inaccurate or unjust evaluation.

(2) Most appellants will never be completely satisfied with the evidence obtained. A point is reached, however, when the appellant will decide whether to submit with the available evidence or to forgo the appeal entirely. The following factors are to be considered:

(a) The evidence must support the allegation. The appellant needs to remember that the case will be reviewed by impartial board members who will be influenced only by the available evidence. Their decision will be based on their best judgment of the evidence provided.

(b) Correcting minor administrative errors or deleting one official's rating does not invalidate the report.

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

a. Table 4-2 (Academic Achievement for DA Form 1059), Part II, block m (Special Project(s) or Paper(s)), states when applicable, the academic rater will list up to three projects or papers that were successfully completed during the course that may have potential value to the Army. This entry will remain blank if the course does not require special projects or papers.

b. Table 4-4 (Authentication for DA Form 1059), Part IV, blocks d1 and d2 (Rated Student's Signature and Date), state the rated student will sign and date the DA Form 1059 after it has been completed and by the academic rater and reviewing official. The rated student's signature acknowledges that he or she has seen the DA Form 1059, Parts I through IV, and verifies the accuracy of the administrative data in Part I; the APFT and height and weight data in Part II, blocks b and c (when applicable); and the rating officials identified in Part IV. Confirmation of the administrative data also will normally preclude an appeal by the rated student based on inaccurate administrative data. Any administrative errors noted by the rated student will be brought to the attention of the rating officials prior to the rated student's signature.

4. Army Regulation 600-37 (Unfavorable Information) sets forth policies and procedures to authorize placement of unfavorable information about Army members in individual official personnel files. Chapter 7 contains the policy for appeals and petitions for removal of unfavorable information from official personnel files. Once an official document has been properly filed in the Official Military Personnel File (OMPF), it is presumed to be administratively correct and to have been filed pursuant to an objective

decision by competent authority. Thereafter, the burden of proof rests with the individual concerned to provide evidence of a clear and convincing nature that the document is untrue or unjust, in whole or in part, thereby warranting its alteration or removal from the OMPF. Only letters of reprimand, admonition, or censure may be the subject of an appeal for transfer to the restricted folder of the OMPF.

5. Army Regulation 600-8-104 (Army Military Human Resource Records Management) prescribes Army policy for the creation, utilization, administration, maintenance, and disposition of the AMHRR. The AMHRR includes, but is not limited to, the OMPF, finance-related documents, and non-service related documents deemed necessary to store by the Army. Paragraph 3-6 provides that once a document is properly filed in the AMHRR, the document will not be removed from the record unless directed by the ABCMR or other authorized agency. Table 3-1 (Composition of the OMPF) shows a DA Form 1059 is filed in the performance folder of the OMPF.

//NOTHING FOLLOWS//