

IN THE CASE OF: [REDACTED]

BOARD DATE: 5 December 2024

DOCKET NUMBER: AR20240005609

APPLICANT REQUESTS: through counsel:

- removal of his name from the title and subject blocks of the U.S. Army Criminal Investigation Command (CID) Law Enforcement Report (LER), 28 April 2015, as well as from the Department of Defense Central Index of Investigation (DCII) and all other federal agency criminal databases
- 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)
- Counsel's Letter, 7 January 2024, with supporting documents organized and labeled as enclosures –
 - Enclosure 1 –
 - Privacy Act Documents
 - Applicant's State Temporary Driver License, issued 28 July 2022
 - Enclosure 2 –
 - Director of Public Safety, Provost Marshal Office, Fort Rucker, AL, Memorandum (Law Enforcement Report – 2nd Corrected Final), 28 April 2015
 - DA Form 4833 (Commander's Report of Disciplinary or Administrative Action), 30 April 2015
 - CID Letter, 29 September 2023
 - Enclosure 3 – Applicant's Sworn Declaration in Support of Asylum, undated
 - Enclosure 4 –
- two Memoranda (Human Resources Letter for Verification of Employment for (Applicant)), both dated 21 July 2021

- Character-reference Memorandum, 22 February 2022

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant defers to counsel.

3. Counsel states:

a. The applicant requests amendment of the LER, 28 April 2015, by expunging his name from the titling block and any associated databases and/or indexes. The allegations lack corroboration, and no charges were ever filed against him. This amendment request falls within the scope of amendments contemplated in the 2021 National Defense Authorization Act (NDAA). The applicant was unaware that he was titled in the 2015 LER until approximately the spring of 2022. He immediately appealed to CID to amend the LER and have his name removed from the title block on or about May 2023. CID denied his appeal in September 2023.

b. Summary.

(1) In 2015, the applicant was a lieutenant with the Afghanistan Air Force undergoing training at Fort Rucker, AL. In April 2015, he was accused of "Unlawful Imprisonment" and "Assault" by a housekeeper at the on-post hotel where he was staying. He was detained and questioned by CID but was never charged with any offense. At the time, he had very rudimentary English skills and was not certain what was occurring. Several weeks later, the applicant was directed to return home at the behest of the Afghanistan Government.

(2) Upon returning home, he continued serving in the Afghanistan Air Force alongside the U.S. military until the fall of his country's government. Due to his close working relationship with the U.S. military, he fled Afghanistan for safety reasons and is currently seeking asylum in the United States. His family is currently still in hiding in Afghanistan and are awaiting his asylum case to be successfully resolved. However, while his asylum application was being processed, this allegation was found on his record, jeopardizing his request to remain in the United States and relocating his family out of Afghanistan to safety. Until this issue was brought up by immigration officials, the applicant was completely unaware that he had anything on his criminal record.

c. Basis for the Appeal.

(1) The applicant's case meets the titling amendment standards established under the 2021 NDAA. Specifically, there is a wholly inadequate investigatory file, a lack of corroborating evidence that he committed the act in question, and the alleged crime did not result in any adverse administrative, disciplinary, or judicial punishment. Under Alabama law, where the alleged offense occurred, the applicant's case would likely have been expunged due to no criminal charges being filed.

(2) Even under the stricter standard of "credible information," this case warrants amendment. The LER lacks details and an adequate description of the alleged misconduct to justify the determination that this allegation constituted credible information that a crime was committed. The LER is merely a recitation of vague allegations with no substance or details. There are no firsthand witness statements or even any evidence that the alleged victim ever positively identified him as being the perpetrator.

d. Law and Analysis.

(1) The Board should consider this titling expungement request in accordance with the new standards found in the 2021 NDAA (section 545 of the NDAA and Public Law 116-283). The NDAA lists several factors to consider for the basis of correcting or expunging the titling block of a law enforcement report and other records or indexes. Those considerations from section 545(c)(2) are:

(a) The extent or lack of corroborating evidence against the covered person concerned with respect to the offense at issue.

(b) Whether adverse administrative, disciplinary, judicial, or other such action was initiated against the covered person for the offense at issue.

(c) The type, nature, and outcome of any action described in subparagraph (B) against the covered person.

(2) Except in the most general terms, the LER contains no description of what the alleged victim said to law enforcement or what actions by the applicant constituted the alleged assault and unlawful imprisonment. It is impossible for anyone reading the LER to determine how the alleged victim was assaulted and how that assault constituted unlawful imprisonment.

(3) The allegation itself is vague and lacking any meaningful details and nothing in the LER provides any additional support that a crime was committed by the applicant. There are no witnesses, no pictures, no injuries, etc. It does not appear that CID conducted any investigation or follow-up on the allegation. It is impossible to determine from the LER whether the decision to title the applicant was prudent.

(4) The LER does not provide any details as to how or whether the applicant was positively identified. The alleged victim was a hotel housekeeper who was presumably in the room cleaning when the alleged perpetrator arrived. This alleged perpetrator could have been any individual passing by and not just the individual who was assigned to the room. There is nothing to indicate that the alleged victim identified the applicant, either in person, by photograph, or any other means. Since there is no mention of him being positively identified by the alleged victim, it is likely that CID merely confirmed that he was assigned to the room in question and did nothing to verify that he was the individual who supposedly entered the room to commit assault.

(5) The applicant was not charged with or convicted of any crime. He was not subjected to adverse administrative action or nonjudicial punishment. He was removed from the class at Fort Rucker at the request of his home country who returned him immediately to military service in Afghanistan. The applicant remained in the Afghanistan military, was subsequently promoted to lieutenant colonel, and distinguished himself fighting alongside U.S. service members until the collapse of his country's government.

(6) The applicant wasn't titled for the correct offense based on contents of the LER. The LER, in paragraph one, titled "Offense", lists Title 18, U.S. Code, section 114, as one of the two founded offenses. However, Title 18, U.S. Code, section 114, pertains to the offense of maiming and not assault. There is no evidence or mention of anything pertaining to the offense of maiming. Presumably, the intention was to list Title 18, U.S. Code, section 113, which relates to assault. However, since the LER does not list the correct statute, it therefore does not list the necessary subset of assault. Without knowing what type of assault was allegedly committed it is impossible to evaluate whether the titling was justified based on the alleged facts. Even if CID corrects this error, it is indicative of a haphazard and shoddy investigation.

(7) The other titled offense was "Unlawful Imprisonment" and under Alabama Code, section 13A-6-42. The expungement statute in Alabama Code, section 15-27-2, provides for expungement of records concerning charged felony offenses without a conviction. Here, the applicant was never charged for the offense, let alone convicted of anything. Moreover, these alleged offenses occurred in 2015, well past the statute of limitations for both the military and Alabama and therefore these allegations will never result in any charges or a conviction. (Note: Five years for both in accordance with Alabama Code, sections 15-3-1 through 15-3-8, and the Uniform Code of Justice (UCMJ), Title 10, U.S. Code, section 843, Article 43).

(8) The finding of probable cause in this case during the recent CID review lacks a basis in evidence as well as common sense. The LER does not mention how long the applicant supposedly imprisoned the housekeeper, or how he did so. It does not mention how exactly he grabbed the housekeeper's wrist; was there pressure applied or

any force, or was it literally to get her attention? Nowhere in the LER does it mention that the applicant is not a native English speaker and that he isn't completely fluent in English. Additionally, he did not have extensive experience with western culture or staying in U.S. hotels. When determining probable cause, it would have been prudent to consider the likelihood that there was a misunderstanding of some sort due to cultural and language differences rather than an act with criminal intent.

(9) This case is of the utmost seriousness. The applicant's asylum application hangs in the balance and is being hindered by this bare bones law enforcement report from nearly a decade ago. The applicant has proven himself as a trustworthy friend to the United States, having personally participated in the rescue of a downed U.S. pilot in Afghanistan. Additionally, the applicant has secured letters from several individuals who worked with him and attest to his hard work and good character.

e. Conclusion. The applicant respectfully requests amendment of the LER at issue and expungement of his name from the titling block and from any associated indexes or databases. The LER is a vague allegation from 8 years ago with no context or corroboration, and without any indication of a serious investigation. The applicant was not charged or punished, but instead continued serving in the Afghanistan military alongside U.S. forces. Based upon these facts and the 2021 NDAA's expungement criteria, an amendment is justified.

4. The LER – 2nd Corrected Final, 28 April 2015, states the following occurred at the InterContinental Hotels Group Army Hotel, Building 146, Room 333, Fort Rucker, AL, on 13 April 2015:

a. Report Summary. On 13 April 2015 (Redacted) reported to this station, in person, of a possible assault which occurred at her place of employment. Initial investigation showed that the occupant of room 333, Building 146, used unlawful imprisonment and assaulted (Redacted) to prevent her departure at approximately 1530. Further investigation revealed the applicant as the occupant of room 333. The applicant was detained and transported to the Directorate of Public Safety where he was advised of his rights to which he requested a lawyer. The applicant was further processed and released to a unit representative on a DD Form 2708 (Receipt for Pre-Trial/Post-Trial Prisoner or Detained Person) in apparent good health. The investigation continues by military police investigators.

b. Second Status. (Redacted) reported to this station in a sworn statement on 14 April 2015 that she had reason to believe her bracelet was missing after the incident and was in room 333. (Redacted's) bracelet was located by a guest and returned on 20 April 2015. This is a final report.

c. The investigation noted the following statutes/offenses were considered with this report:

- Unlawful Imprisonment – Federal (U.S. Code) – Alabama 13A-6-42 (Founded)
- Assault – Federal (U.S. Code – Title 18, U.S. Code, section 114) (Founded)

5. The DA Form 4833, 30 April 2015, lists the applicant as the offender.

a. The Referral Information lists the offenses of Title 18, U.S. Code, section 114, and Title 18, and Alabama Code 13A-6-42, on 13 April 2015; Article 120, UCMJ, and Article 107, UCMJ, on 28 June 2020. On 30 April 2015, the commander:

(1) placed a checkmark in the "Yes" box by "Sexual Harassment" for the offense of "Assault" and a checkmark in the "Yes" box by "Action Taken." In the "Reason" block, he entered the statement: "Accepted"; and

(2) placed a checkmark in the "Yes" box by "Sexual Harassment" for the offense "Unlawful Imprisonment" and a checkmark in the "Yes" box by "Action Taken." In the "Reason" block, he entered the statement: "Accepted."

b. No action was taken.

c. The Commander's Remarks contain the following entries:

- Case History: [REDACTED]
- (Applicant) will be removed from training and sent back to country following coordination with Security Assistance Training Field Activity and out-processing of the student

d. The Commanding Officer or Reporting Officer section shows a checkmark was placed in the "Yes" box by "Was a DNA sample collected from the offender?" The commander's name and grade were redacted with a signature date of 30 April 2015.

6. The CID letter, 29 September 2023, responded to the applicant's counsel's 8 May 2023 request to amend his records within the files of the CID. This official opined:

a. After a review of the LER was completed in accordance with Public Law 116-283, section 545 (Removal of Personally Identifying and Other Information of Certain Persons from Investigative Reports, the DCII, and Other Records and Databases), it has been concluded that your amendment request is denied.

b. Corrections have been made to the Commander's Report of Disciplinary Action as well as the LER to reflect the Legal Review. We have updated our databases associated with this LER.

c. In relation to the redacted LER and 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), Title 5, U.S. Code, sections 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.

d. 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, Title 5, U.S. Code, section 552a(j)(2).

e. This partial denial is made on behalf of the Director, CID, the initial denial authority for CID records under the FOIA.

f. The applicant has the right to appeal to the Office of the Army General Counsel, the Army's appellate authority. If he decides to appeal at this time, his appeal must be submitted within 90 days of the date of this letter. In his appeal, he must state the basis for his disagreement with the partial denial and he should state the justification for its release. His appeal is made through this Division and should be addressed to the Chief, Department or the Army Criminal Investigation Division, 27130 Telegraph Road, Quantico, VA 22134, for forwarding to the Office of the Army General Counsel. Please note that his appeal should address information denied in this response and cannot be used to make a new request for additional or new information.

g. Please be advised, Department of Defense (DOD) Instruction 5505.11 (Fingerprint Reporting Requirements) establishes policies and procedures for reporting criminal history data to the Federal Bureau of Investigation National Crime Information Center (NCIC) for all military service members and civilians investigated by DOD criminal investigative organizations for commission of certain offenses. Those subjects who have resultant judicial, nonjudicial 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.

h. A check of the NCIC reflects that the applicant is listed as the subject in the aforementioned LER. Retention of this criminal history data in the NCIC does conform to DOD policy and his name will remain in the NCIC.

i. The applicant may appeal the denial of his amendment by submitting a request to the Army Review Boards Agency, Army Board for Correction of Military Records, 251 18th Street South, Suite 385, Arlington, VA 22202-3531. Please visit their website at [REDACTED] for information on their application process.

j. The applicant has the right to seek dispute resolution concerning this action. If (the applicant intends to do so, he may contact the Army FOIA Public Liaison by email at [REDACTED] Please put "Dispute" in the subject line.

k. The applicant may also seek dispute resolution services by contacting the Office of Government Information Services at 877-684-6448 or by emailing [REDACTED]

7. The applicant, through counsel, provided the following evidence in addition to those documents discussed above:

a. Enclosure 3 contains the applicant's sworn declaration in support of his asylum request. This seven-page declaration noted his asylum request, his background, his assistance to the U.S. Armed Forces, and his and his family's persecution while in Afghanistan (see attachment for details).

b. Enclosure 4 contains two memoranda (Human Resources Letter for Verification of Employment for (Applicant)), both dated 21 July 2021, which both note his support to the U.S. Armed Forces and their support for his request to obtain a Special Immigrant Visa. In addition, it contains a character-reference memorandum, 22 February 2022, expressing his support for the applicant and his family to access to the United States (see attachments for details).

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and CID records, the Board found relief is not warranted. Counsel's contentions and regulatory guidance were carefully considered.

2. The Board found that probable cause did exist and continues to exist to believe the offenses for which the applicant was titled occurred. The Board found the argument that no action was taken to be without merit. While no judicial action may have been taken, the responsible command removed him from training and returned him to his home

country. In other words, a diplomatic resolution won out over further investigation and potential judicial proceedings. Based on a preponderance of the evidence, the Board determined the applicant's name should remain as the subject of investigation for the alleged offenses.

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.

12/8/2024

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. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Army Regulation 15-185 (Army Board for Correction of Military Records) prescribes policies and procedures for correction of military records by the Secretary of the Army acting through the 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. 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.

3. 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 DCII.

a. Public Law 106-398, section 552, and Public Law 116-283, section 545, codified as a note in Title 10, U.S. Code, section 1552, 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.

4. DOD Instruction 5505.11 (Fingerprint Reporting Requirements), 31 October 2019, establishes policy, assigns responsibilities, and prescribes procedures for defense

criminal investigative organizations and other DOD LEAs to submit fingerprints and report disposition data to the Criminal Justice Information Services Division of the Federal Bureau of Investigation criminal history database.

a. CID and other DOD LEAs will collect fingerprints and criminal history record information upon determination of probable cause and will electronically submit to the Criminal Justice Information Services Division of the Federal Bureau of Investigation for all service members who are investigated for all offenses punishable by imprisonment listed in the punitive articles of Title 10, U.S. Code, chapter 47, also known and referred to in this issuance as the UCMJ, or elsewhere in the U.S. Code. Fingerprints and criminal history record information will be collected and submitted using either a Federal Document 249 (Arrest and Institution Fingerprint Card) or its electronic equivalent. When required, a Privacy Act statement will be provided to each individual whose personal data is collected, in accordance with Title 5, U.S. Code, section 5529, and DOD Instruction 5400.11-R.

b. CID and other DOD LEAs will comply with Title 28, Code of Federal Regulations, Part 20.32(b), concerning offenses excluded from fingerprint collection. These exclusions include non-serious offenses such as drunkenness, vagrancy, disturbing the peace, curfew violation, loitering, false fire alarm, non-specific charges of suspicion or investigation, and traffic violations (except data will be included on arrests for vehicular manslaughter, driving under the influence of drugs or liquor, and hit and run).

5. DOD Instruction 5505.14 (DNA Collection and Submission Requirements for Law Enforcement), 5 April 2022, establishes policy, assigns responsibilities, and prescribes procedures for DNA sample collection and submission requirements for the purpose of inclusion in the Combined DNA Index System.

a. CID and other DOD LEAs, DOD correctional facilities, the Coast Guard Investigative Service, and commanders will collect and submit DNA samples from service members and civilians when their fingerprints are collected pursuant to DOD Instruction 5505.11.

b. CID and other DOD LEAs, and DOD correctional facilities will develop expungement procedures and provide instructions concerning expungement rights and procedures to all persons from whom DNA samples are collected as outlined in section 4.

c. CID and other DOD LEAs, DOD correctional facilities, and commands will submit DNA samples to the U.S. Army Criminal Investigation Laboratory (USACIL) at the time of collection. CID and other DOD LEAs will take DNA samples from civilians whom they detain or hold and who remain within their control when it is determined there is

probable cause to believe the civilian has committed an offense that results in the collection of fingerprints.

d. Former or retired service members from whom samples were taken but who were not convicted of any offense by a general or special court-martial, or can provide a certified copy of a final court order documenting the charge has been dismissed or resulted in an acquittal, may request in writing that their DNA records be expunged in accordance with the procedures in this section. Former or retired service members will submit requests for expungement to the Clerk of Court of the Military Department's Court of Criminal Appeals.

(1) Requests will include:

(a) All reasonably available proof showing that none of the offenses giving rise to the collection of DNA resulted in a conviction at a general or special court-martial (including a final court order establishing that such a conviction was overturned, or establishing action by the convening authority that has the effect of a full acquittal). A court order is not final if time remains for an appeal or application for discretionary review with respect to the order.

(b) The former or retired service member's name, social security number, current address and contact information, date of alleged offense, and contact information of the unit that the former service member belonged to when the sample was taken.

(2) Requests that do not provide adequate information to identify the alleged offense or to confirm that the alleged offense did not result in a conviction will be returned by "return receipt requested" with an explanation of the deficiency.

e. The Clerk of Court of the appropriate Military Department's Court of Criminal Appeals will search their records for any conviction pertaining to the former or retired service member and determine whether the former or retired service member is entitled to expungement. The Clerk of Court of the Military Department's Court of Criminal Appeals will send appropriate requests for expungement by former or retired service members to USACIL.

f. USACIL will review all requests for expungement that it receives to ensure they contain all the required information. Incomplete requests will be returned to the submitter. Only such requests that are deemed meritorious, USACIL will expunge the DNA records, destroy the submitted sample, notify the individual of its actions, and maintain documentation of that notice.

g. Civilians whose samples are taken and forwarded pursuant to paragraph 1.2.c., but who are not convicted of any offense, or provide a certified final court order

documenting the conviction has been overturned, may request in writing that their DNA sample be expunged.

//NOTHING FOLLOWS//