

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 22 January 2025

DOCKET NUMBER: AR20240007424

APPLICANT REQUESTS: reconsideration of his previous request to

- Amendment to Law Enforcement Report (LER) [REDACTED] to remove him as a subject of fraudulent receipt of pay and allowances and larceny; or in the alternative
- Amendment to list him as "incidental" instead of "subject"

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

- DD Form 149 (Application for Correction of Military Record)
- Memorandum in Support of Request for Reconsideration of Army Board for Correction of Military Records (ABCMR) Docket number AR20190009192
- Declaration
- Department of Defense Instruction (DoDI) 5505.07 (Titling and Indexing by DoD Law Enforcement Activities)
- *Stars and Stripes* Article (Proving your innocence: Veterans fight to clear their names for military crimes they did not commit)
- ABCMR Docket number AR20190009192

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the ABCMR in Docket Number AR20190009192 on 22 September 2022.

2. The applicant defers to his attorney.

3. The applicant's attorney states, on behalf of the applicant:

a. The evidence shows he did not commit "fraud" or "larceny" as he was lawfully entitled to the pay and allowances he received. Therefore, he should not be listed as a "subject". Additionally, although the Board's previous decision was dated 22 February 2023, he did not receive the decision until 25 March 2023. Therefore, his request for reconsideration should be considered timely.

b. The applicant respectfully requests the Board reconsider its decision to deny his application to be removed from the title block as a subject for fraud and larceny in the LER, on the basis of legal error and injustice, and instead be listed as an "incidental." This request for reconsideration is based on a change in policy in DoDI 5505.07, based on Congressional action in Public Law (PL) 116-282 section 545, 1 January 2021.

c. The Board is a civilian board, through which the Secretary of a military department "may correct any military record... when the Secretary considers it necessary to correct an error or remove an injustice." "The Board is the primary protector of individual members' rights against military over-reaching." The Secretary is obliged not only to properly determine the nature of any error or injustice, but to also take "such corrective action as will appropriately and fully erase such error or compensate such injustice." In carrying out its function, the Board must determine "whether the applicant has demonstrated the existence of a material error or injustice that can be remedied effectively through correction of the applicant's military record and, if so, what corrections are needed to provide full and effective relief." "The Secretary and his boards have an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief." While there is no precise definition of "injustice,": in general terms, an "injustice" occurs when a decision is not fair and equitable.

d. "A decision is erroneous when it is arbitrary, capricious, contrary to law, or unsupported by substantial evidence". A legal error "includes a violation of statute, regulation, published mandatory procedure, or unauthorized act." It is "a fundamental principle of administrative law that an agency is bound to adhere to its own regulations," and "failure to do so can lead to arbitrary and capricious decision-making in violation of the Administrative Procedures Act."

e. On 1 January 2021, Congress changed the standards for expungement of criminal records in the Fiscal Year (FY) 2021 National Defense Authorization Act (NDAA):

Personally identifying information shall be expunged or otherwise removed from a record when probable cause did not or does not exist to believe that the offense(s) for which the person's name was reported, or insufficient evidence existed or exists to determine whether the offense occurred, or whether the named person committed such offense(s).

f. PL 116-283 section 545(c)(1)(A)-(B) provides:

The following shall be considered in determining whether to expunge the information: (A) the extent or lack of corroborating evidence against the covered person with respect to the offense(s) at issue; (B) whether

adverse action was initiated against the covered person for the offense(s) at issue; and (C) the type, nature, and outcome of such action.

These standards were subsequently incorporated in DoDI 5505.07, Section 3.

g. It is a fundamental tenet of criminal law that in order to support an allegation that a person committed a crime, the Government must present evidence to support each element of that crime. Much like a puzzle, if proof of even one element (puzzle piece) of the alleged crime is missing, the Government fails to prove the crime occurred.

h. Such is the case with the applicant. He was erroneously titled for larceny when, as the trial counsel acknowledged in his legal opinion, there was not probable cause to believe he committed larceny. There is no "larceny" because he was entitled to receive the pay and allowances he received based on his dependents who remained in the United States. Consistent with PL 116-283 section 545(c)(1)(A)-(B) and DoDI 5505.05 paragraph 3.2(a) (1)-(2), as probable cause did not exist to believe he committed a "larceny", the Board must expunge his criminal record for this offense.

i. Similarly, the offense of "fraud" under Article 132, Uniform Code of Military Justice (UCMJ), consists of false official statements and larceny. While there is probable cause to believe the applicant made false official statements, the evidence is insufficient to establish he committed a larceny. Therefore, the Board must also expunge his criminal record for this offense. Keeping him titled for an offense he did not commit is unfair to him, as shown in the enclosed *Stars and Stripes* article.

j. Consistent with the FY 2021 NDAA, section 545(c) and DoDI 5505.07, paragraph 3.2(b), the Board should consider that he was limited to making false official statements by claiming his wife and two of his three children continued to live in New York. Notably, his other dependents, his mother-in-law and third minor child, continued to reside in the United States, while he was in Korea. Therefore, he is entitled to continue receiving Basic Allowance for Housing for the New York area, as well as Family Separation Allowance, regardless of where his wife and two minor children lived. Again, there is no "larceny" in this situation. It would be appropriate to remove him as a "subject" and list him as an "incidental," as "someone who was associated with an investigation and whose identity may be of subsequent value for law enforcement or security purposes."

4. The applicant provides the following documents:

a. A declaration, 8 March 2024, which states he received the decision in ABCMR docket number AR20190009192 in Korea on or about 25 March 2023.

b. A *Stars and Stripes* article, which is regarding Veterans who fight to clear their names for military crimes they did not commit. The entire article is available for the Board's review.

5. The applicant's service record contains the following documents:

a. DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States) shows he enlisted in the Regular Army and entered active duty on 20 March 1992. He remained in the Regular Army through immediate reenlistments.

b. A General Officer Memorandum of Reprimand (GOMOR), 27 January 2017, wherein he was reprimanded for making false official statements on two separate finance documents. On 31 January 2017, he acknowledged receipt of the GOMOR stating he would submit matters on his behalf. On 15 February 2017, after consideration of the GOMOR, the circumstances of the misconduct, and all matters submitted by the applicant in defense, extenuation, or mitigation, the filing authority directed the GOMOR be filed in his Army Military Human Resource Record (AMHRR). The entire GOMOR packet is available for the Board's consideration.

c. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was honorably retired on 31 March 2018. He had completed 26 years and 11 days of active duty service.

d. ABCMR docket number AR201800010391, shows the Board made a determination regarding the applicant's request to remove the GOMOR from his AMHRR. The Board denied that portion of the applicant's request. The entire case is available for the Board's review.

6. On 22 September 2022, the Board made a decision in the applicant's original request in ABCMR docket number AR20190009192 stating they determined relief was not warranted. His contentions, the military record, and regulatory guidance were carefully considered. Based upon the available documentation, the Board made the following findings and recommendations related to the requested relief:

- Removing the titling: Based upon the legal review completed, at the time of the incident, finding credible evidence did exist to title him for the misconduct outlined, the Board recommended denying the removal of the titling.
- Removal or amendment of a DA Form 4833 (Commander's Report of Disciplinary or Administrative Action): Based upon the findings of the legal review, the Board concluded there was insufficient evidence of an error or injustice, which would warrant a change to the document.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. Upon review of the applicant's petition, available military records, and applicable law, policy, and regulation, the Board determined that probable cause not only existed at the time of titling but continues to exist today to support the applicant's designation as a subject in Law Enforcement Report (LER) [REDACTED]. The Board found the evidence supported a conclusion that the applicant knowingly submitted false official statements regarding the location of his dependents, which directly impacted his entitlement to pay and allowances. The applicant's misrepresentations were not clerical errors or misunderstandings, they were deliberate actions that resulted in the receipt of unearned financial benefits. The investigation produced clear and corroborated evidence that the applicant provided false information on official documents.

2. Under the standards set forth in DoD Instruction 5505.07 and Public Law 116-283, titling is appropriate when probable cause exists that a criminal offense occurred and the individual concerned committed it. The Board found that this threshold was met and remains valid. The Board noted that the applicant's argument that he was entitled to the benefits is undermined by the fact that the entitlements received were based on knowingly inaccurate information, not the least of which was that his dependents never actually lived at the New York address the applicant provided. The Board noted that although the applicant disputes the larceny charge, the totality of the evidence, including the financial impact and the false statements, supports both allegations. Moreover, the issuance of a GOMOR and the absence of any contrary findings or reversal of administrative action further reinforce the legitimacy of the original titling decision. The Board determined that the applicant's actions were not incidental to the investigation, they were central to it. Therefore, the request to amend the LER to remove him as a subject or reclassify him as "incidental" is without merit. The Board found no error or injustice and denied relief.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

|     |     |     |                      |
|-----|-----|-----|----------------------|
| :   | :   | :   | GRANT FULL RELIEF    |
| :   | :   | :   | GRANT PARTIAL RELIEF |
| :   | :   | :   | GRANT FORMAL HEARING |
| XXX | XXX | XXX | DENY APPLICATION     |

BOARD DETERMINATION/RECOMMENDATION:

The Board found 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 the decision of the ABCMR set forth in Docket Number AR20190009192 on 22 September 2022.

X //SIGNED//

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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:

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

a. 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, establish 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.

3. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NRs) regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

//NOTHING FOLLOWS//