IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	) BRIEF ON BEHALF OF APPELLEE)
v.	)
	) Crim. App. Dkt. No. 20140071
Major (O-4) **DAVID L. JERKINS** United States Army, Appellant	)) USCA Dkt. No. 17-0203/AR)

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY ALLOWING A GENERAL OFFICER MEMORANDUM OF REPRIMAND INTO SENTENCING EVIDENCE WHERE THE REPRIMAND WAS ISSUED TWO WEEKS BEFORE THE COURT-MARTIAL AND CONTAINED HIGHLY PREJUDICIAL AND MISLEADING LANGUAGE.

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice, 10 U.S.C. § 866(b) (2012) [hereinafter UCMJ]. The statutory basis for this Court's jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A panel of officers sitting as a general court-martial convicted Major (MAJ) David L. Jerkins (Appellant), contrary to his plea, of assault consummated by battery upon a child, in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928 (2012) [hereinafter UCMJ]. (JA 6-8, 17). The panel sentenced Appellant to be confined for six months and dismissed from the service. (JA 153). The convening authority approved five months of confinement and dismissal from the service. (JA 8).

On November 30, 2016, the Army Court of Criminal Appeals affirmed the findings and sentence. (JA 1). On January 26, 2017, the Appellant submitted to this Court a Petition for Grant of Review. On March 21, 2017, this Honorable Court granted the Appellant's petition for review.

Statement of Facts

Several photographs of TB, a three year old child, and the injuries caused by Appellant's belt were admitted during the merits portion of the trial. (Supp. JA 157-165)[1]. TB was not the biological son of Appellant. (JA 19). During the government's presentencing case, the military judge admitted Appellant's Official

[1] Contemporaneous with this brief, Appellee submitted a motion to supplement the Joint Appendix with Prosecution Exhibits admitted at trial, to include photographs of TB, an exam of TB, and portions of Appellant's service record.

Military Personnel File (OMPF) reflecting poor performance during a recent rating period. (JA 17-29).

During the Appellant's presentencing case, Appellant introduced evidence of his rehabilitative potential and military character through the testimony of Colonel (COL) Michael C. Peters, COL Shawn Rasmussen, and MAJ Dwayne Culbertson. (JA 32-39, 76-86). They primarily based their opinions on observations of Appellant's duty performance. Colonel Peeters testified, "He had strong, excellent duty performance . . . .Very reliable and accomplished the mission any time we asked him to." (JA 35-36). When asked about rehabilitative potential, COL Peeters testified that Appellant had "High" rehabilitative potential and that he would take him again to work for him in a military or civilian capacity. (JA 37-38). Colonel Rasmussen testified "Dave has great passion and excitement and you can see that . . . .We all did very well. In retrospect, a large part of that was due to Dave's leadership." (JA 79).

Likewise, MAJ Culbertson testified, "yes, he has outstanding [rehabilitative potential]." (JA 86). Colonel William Spray, Major General (MG) David S. Elmo, and MG Joseph J. Chaves also recounted Appellant's positive duty performance and military character. (JA 61-75). Colonel Spray testified that the Appellant was "even keel all the way. He's a very steady guy and I'm very proud of what he did." (JA 63). Major General Elmo testified the Appellant was "industrious,

interested in working, energetic. I felt he was bright and had a good future. I also thought that he was one of the few guys that I kept in touch with over the last few years." (JA 67). Major General Chaves stated that "his duty performance was outstanding." (JA 75). After "[t]he rules of evidence [were] relaxed for the proceedings[,]" Appellant offered exhibits and testified about his military service. (JA 96, 97-111).

During rebuttal, trial counsel offered a general officer memorandum of reprimand (GOMOR) received by the Appellant for fraternization. (JA 125, 154). The GOMOR was issued on January 8, 2014, by MG Warren E. Phipps, Jr. (JA 154). Defense counsel objected, arguing the GOMOR was not fully issued under Rule for Courts-Martial [hereinafter R.C.M.] 1001(b)(2) because Appellant's rebuttal and MG Phipps's filing determination were still pending. (JA 116). In addition, defense counsel objected to the GOMOR under Military Rule of Evidence [hereinafter Mil. R. Evid.] 401 as irrelevant and Mil. R. Evid. 403 as unfairly prejudicial because it allegedly contained inaccurate information. (JA 120). Defense counsel also argued the GOMOR was improper rebuttal as extrinsic evidence and outside the scope of the mitigation evidence. (JA 118-119, 126-127).

In response, the military judge made three initial findings. First, she found the GOMOR was fully issued, with only the filing determination pending. (JA 116). The military judge also found the GOMOR was permissible rebuttal and,

like cross-examination, could relate to specific instances of poor duty performance. (JA 119-120). Third, she found the GOMOR was relevant under Mil. R. Evid. 401. (JA 120). However, the military judge explained that she was still weighing the GOMOR's probative value against its prejudicial effect under Mil. R. Evid. 403. (JA 120). After a recess, the military judge returned to the admissibility of the GOMOR and stated:

> I have considered Prosecution Exhibit 38 for identification, the defense's objection, and my 403 considerations. I am overruling the objection. I am admitting Prosecution Exhibit 38 for identification. I find it's proper rebuttal, specifically with regard to rehabilitative potential.

(JA 126). The military judge added that she also considered the defense objection under R.C.M. 1001(b)(2). (JA 127-128).

Summary of Argument

This Court should deny the Appellant's request for relief and affirm the lower court's findings, as the military judge did not abuse her discretion at sentencing by admitting a valid personnel record to rebut evidence of good duty performance and rehabilitative potential. Any error was harmless, as there was no substantial impact on the sentence of six months and a dismissal for beating a toddler with a belt to the point of causing substantial, visible injuries.

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY ALLOWING A GENERAL OFFICER MEMORANDUM OF REPRIMAND INTO SENTENCING EVIDENCE WHERE THE

REPRIMAND WAS ISSUED TWO WEEKS BEFORE THE COURT-MARTIAL AND CONTAINED HIGHLY PREJUDICIAL AND MISLEADING LANGUAGE.

Standard of Review

Courts review a military judge's ruling on the admissibility of evidence for abuse of discretion. *United States v. Bowen*, 76 M.J. 83 (C.A.A.F. 2017) citing *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003). "An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact." *Id.* citing *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003). "To reverse for 'an abuse of discretion involves far more than a difference in . . . opinion. . . . The challenged action must . . . be found to be arbitrary, fanciful, clearly unreasonable, or clearly erroneous in order to be invalidated on appeal.'" *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (citation omitted).

Law

During presentencing, the prosecution may present "personnel data relating to the accused and the character of the accused's prior service as reflected in the personnel records of the accused[.]" R.C.M. 1001(a)(1)(A)(ii). "'Personnel records of the accused' includes any records made *or* maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused." R.C.M. 1001(b)(2) (emphasis added).

Army Regulation (AR) 600-37 states the "[a]uthority to issue and direct the filing of [nonpunitive letters of reprimand] in the [military personnel records jacket (MPRJ)] of commissioned officers" is restricted to "[a]ny general officer . . . who is senior to the recipient or an officer who exercises general court-martial jurisdiction over the recipient." Army Reg. 600-37, Personnel—General: Unfavorable Information [hereinafter AR 600-37], paras. 3-4a(2), 3-4a(2)(c) (19 Dec. 1986).

Separately, during presentencing rebuttal, the prosecution "may rebut matters presented by the defense." R.C.M. 1001(d). While rebuttal evidence may present some of the same concerns as addressed by R.C.M. 1001(b), the limitations of R.C.M. 1001(b) are inapplicable to rebuttal evidence as it is governed by R.C.M. 1001(d). See *United States v. Eslinger*, 70 M.J. 193, 199 (C.A.A.F. 2011) (rejecting the limitations of R.C.M. 1001(b)(5) as inapplicable to rebuttal evidence, which is properly governed by the more liberal standard in R.C.M. 1001(d)). In addition, "[i]f the Military Rules of Evidence were relaxed under subsection (c)(3) of [R.C.M. 1001], they may be relaxed during rebuttal . . . to the same degree." R.C.M. 1001(d) (emphasis added).

Argument

The military judge did not abuse her discretion when she admitted the GOMOR into evidence because it was proper rebuttal to Appellant's mitigation

evidence and not unfairly prejudicial. Moreover, even if the military judged erred in admitting Appellant's GOMOR, any error was harmless.

A. Appellant's GOMOR was Properly Admitted as Rebuttal to the Mitigation Evidence.

Appellant offers two complaints regarding the admission of the GOMOR: (1) the GOMOR was "incomplete" and, therefore, did not meet the requirements of R.C.M. 1001(b)(2), and (2) the information in the GOMOR was unfairly prejudicial and precluded under Mil. R. Evid. 403. (Appellant's Br. 27-33). The military judge, however, did not abuse her discretion when she accepted Appellant's GOMOR as rebuttal evidence because her ruling was consistent with the applicable procedural and evidentiary rules.

First, as the court in *Eslinger* explained, the rules applicable to rebuttal under R.C.M. 1001(d) are different from the rules applicable to the government's presentencing case under R.C.M. 1001(b). 70 M.J. at 199. In *Eslinger*, "the defense counsel opened the door to rebuttal indicating that they would gladly serve with Appellant again. Therefore the Government was free to rebut with proper evidence that this was not the consensus of the command." *Id.* at 198 citing *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005); *United States v. Blau*, 5 U.S.C.M.A. 232, 243 (C.M.A. 1954) (explaining "As the probability of the guilt of the accused has vanished upon the valid findings of guilty by the court, there also ceases to exist the 'overriding policy' for excluding evidence of accused's prior

misconduct -- 'despite its admitted probative value' -- on the assumption that it "tends to prevent confusion of issues, unfair surprise and undue prejudice"). In *Eslinger*, the government called five witnesses in rebuttal, to include a colonel, the group commander, all of whom opined that Appellant should not remain in the Army. *Id.* at 196-197.

In the case at hand, COL Peeters testified he would want Appellant to work for him again in a military or civilian capacity. (JA 37-38). Accordingly, to the extent that the GOMOR referenced doubts about Appellant's continued service, such was proper rebuttal, even if it came in the form of a letter from the commander. Here, there was less risk of prejudice or command influence than in *Eslinger*, as only one opinion was presented, the commander did not testify in person, and he did not express a definitive opinion that Appellant should not remain in the military. Additionally, the military judge here instructed the panel that whether Appellant should receive a punitive discharge was a matter for them alone to determine. (JA 147-148).

In *Brewer*, this Court found that defense sentencing evidence regarding duty performance and character for truthfulness opened the door to cross examination regarding specific instances of conduct involving fraternization. 43 M.J. 43 (C.A.A.F. 1995). The Court explained "the only relevance of Appellant's duty performance is the extent to which that translates into good military character, both

generally and as an officer." *Id.* at 47. *See* also *United States v. Kuhn*, 2014 CAAF LEXIS 844 (C.A.A.F., Aug. 21, 2014) (affirming an ACCA finding that sentencing rebuttal testimony regarding Appellant's poor duty performance subsequent to his misconduct was properly offered to rebut the good duty performance evidence offered by defense witnesses). Here, the defense witnesses testified regarding duty performance, character, and rehabilitative potential. (JA 32-86). Therefore, Appellant's defense opened the door to cross-examination *and* rebuttal regarding fraternization, which indicates poor duty performance, character, and less rehabilitative potential as a law abiding citizen.

Second, even under the limitations of R.C.M. 1001(b)(2), Appellant's GOMOR could have been introduced by trial counsel prior to rebuttal. Personnel records "includes" any record that is made or maintained (i.e., not made and maintained) in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused. R.C.M. 1001(b)(2). The use of the word "includes" indicates a broad applicability of the words "personnel records." Additionally, the stated purpose of AR 600-37 is to "authorize placement of unfavorable information about Army members in individual *official personnel files*," not courts-martial. AR 600-37, para. 1-1a(1) (emphasis added). R.C.M. 1001(b)(2), on the other hand, refers to "personnel records of the accused" and does not use the "official personnel file" language

from AR 600-37. This omission, combined with the disjunctive "or maintained in accordance with departmental regulations" indicates the President did not intend for R.C.M. 1001(b)(2) to be read as narrowly as the Appellant suggests. Even if the Appellant's GOMOR was later torn up and never filed, at the time of the court-martial, it was a record of the accused. Appellant makes no argument that the GOMOR was not made in accordance with departmental regulations. Any eventual filing determination or destruction of Appellant's GOMOR relates to how the record is maintained; it does not reflect on the regulatory authority of MG Phipps to make (i.e., create and issue) the GOMOR in the first instance.

Third, the probative value of the GOMOR as *rebuttal* was high because the Appellant chose to build his sentencing case on testimony of his positive duty performance, military character, and rehabilitative potential. (JA 60-70, 73-86). While the GOMOR standing alone was not highly probative, it became probative in the context of Appellant's sentencing case. In particular, the Appellant chose to put testimonial evidence of Appellant's rehabilitative potential before the panel. (JA 32-39, 76-86). Although already relevant under R.C.M. 1001(a)(1)(A)(ii), trial counsel did not offer the GOMOR until rebuttal because the GOMOR's probative value was heightened by Appellant's mitigation evidence.

Fourth, Appellant was not unfairly prejudiced by the admission of the GOMOR. Despite Appellant's contention regarding the GOMOR's

characterization of his marriage and subsequent pregnancy of his wife, the gravamen of the GOMOR was his relationship with Mrs. Jerkins prior to their marriage (i.e., fraternization). (Appellant's Br. 10; JA 154). While the GOMOR contains some language that Appellant argues is misleading, the first sentence of the GOMOR states, "You are being reprimanded for fraternization." (JA 154). Any inaccuracies in the GOMOR about the timing of Mrs. Jerkin's pregnancy do not change the underlying reason for the GOMOR. Appellant does not dispute that at the time of his marriage, Mrs. Jerkins was a specialist and he was a major. The focus of the GOMOR was on Appellant's "relationship with [Mrs. Jerkins] prior to the marriage" while she was a junior enlisted soldier. (JA 154). The panel was made aware of the recent issuance of the GOMOR, as well as the pending rebuttal and filing determination. (JA 126-127). Therefore, after a parade of general and field-grade officers testified to Appellant's high rehabilitative potential, military character, and positive duty performance, Appellant was not unfairly prejudiced when the panel received evidence that he was reprimanded for fraternization.

Lastly, the evidence of fraternization did not overshadow the seriousness of the charged offense—Appellant's assault on his young step-son. Therefore, Appellant's reliance on *United States v. Zakaria* is misplaced. In *Zakaria*, the accused was convicted "of wrongful appropriation, larceny, and presenting a fraudulent claim," but the military judge admitted during presentencing a letter of

reprimand "for committing indecent acts with four minor girls[.]" 38 M.J. 280, 281 (C.M.A. 1993). The court in *Zakaria* found the reprimand was inadmissible under Mil. R. Evid. 403 because it was unfairly prejudicial. *Id.* at 283 (explaining that "it is difficult to imagine more damaging sentencing evidence to a soon-to-be sentenced thief than also branding him as a sexual deviant or molester of teenage girls."). In this case, there is no danger that a GOMOR for fraternization "would unduly arouse the members' hostility of prejudice against" Appellant when compared to the testimonial and photographic evidence of Appellant's assault on his three-year-old step-son. *Id.* at 282-83. Accordingly, the military judge did not abuse her discretion when she admitted Appellant's GOMOR as rebuttal evidence after balancing its probative value against the danger of unfair prejudice.

B. Even if Improperly Admitted, Appellant was Not Prejudiced by the GOMOR.

"A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2012); *Griggs*, 61 M.J. at 410. This Court tests the erroneous admission or exclusion of evidence during the sentencing portion of a court-martial to determine if the error had a substantial influence on the sentence. *See United States v. Boyd*, 55 M.J. 217, 221 (C.A.A.F. 2001) (citing *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)).

The Appellant's argument that *Pope* requires the court to assess prejudice using a harmlessness beyond a reasonable doubt standard is not accurate. (Appellant's Br. at 19). The facts in this case are distinguishable from *Pope*, as this case contains no evidence of unlawful command influence. 63 M.J. 68, 76 (C.A.A.F. 2006). In *Pope*, a command-wide policy letter referencing "harsh punishment" was offered by the government in aggravation for a purpose outside those permitted in R.C.M. 1001b. The court specifically addressed that policy directives cannot be used to compel a certain result. *Id.* at 75 (citing *United States v. Fowle*, 7 C.M.A. 349, 351, 22 C.M.R. 139, 141 (1956).

In contrast, the government here offered a GOMOR, a personnel record of the Appellant, in rebuttal. While a general policy letter referencing harsh punishment is not permitted, records of the Appellant, to include "evidence of *any* disciplinary actions, including punishments under Article 15," are expressly permitted. R.C.M. 1001b(2). A letter of reprimand is most certainly included in this broad description, given its administrative nature and lower standard of proof than an Article 15. While the GOMOR discussed the Army Values and doubts regarding continued service, the commander did not testify in person and did not unlawfully influence the panel. Even the GOMOR itself indicated a continued openness by the commander to consider rebuttal before making a filing

determination. As such, this case is distinguishable from *Pope* and the Court should review for harmlessness, not harmlessness beyond a reasonable doubt.

Even if the Court finds the GOMOR was admitted in error, it did not have a substantial influence on the sentence. In *Sanders*, this court considered the severity of the Appellant's crimes in assessing prejudice. 67 M.J. 344, 346 (C.A.A.F. 2009). In *Bridges*,[2] this Court did not decide error but found no prejudice after considering the forum, the evidence in aggravation, the testimony of witnesses, and the brevity of confinement. 66 M.J. 246 (C.A.A.F. 2008).

Here, there are several factors indicating the GOMOR did not have a substantial influence on the sentence. The most compelling factor is the severity of Appellant's crime. The Appellant assaulted TB, a three-year-old child, by hitting him on his back, bottom, and arms, to the point of leaving several bruises, three lacerations, and visible belt marks on the child. (Supp. JA 157-165). The panel was able to examine photographs of these injuries. (JA 12). This was a young toddler who was not Appellant's biological son and the panel was able to hear about the emotional impact Appellant's actions had on TB from his biological father. (JA 19, 22-24).

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[2] The *Bridges* facts were somewhat similar to the case at hand, as the defense requested to relax the rules of evidence and offered a letter indicating the Appellant was "more squared away now than he has ever been in his life." *Id.* at 247. The government rebuttal was admitted over a defense objection and consisted of a letter from the "Brig" regarding Appellant's uncooperative behavior while in pretrial confinement. *Id.*

While the crime alone would have justified both the confinement and a dismissal, Appellant never apologized for his conduct or showed any remorse for severely beating a young toddler. At most, he said, "I no longer use a belt, corporal punishment, as a form of punishment." (JA 95). Additionally, Lieutenant Commander Simpson, a psychotherapist at Family Behavior Health Services who provided group therapy to Appellant, testified that the Appellant told him he was in therapy due to his son having an accidental fall or dog bite. (JA 57). This was consistent with Appellant's failure to take responsibility, especially in combination with Mrs. Jerkins' characterization of TB's injuries as originating from a dog bite. (JA 20).

Significantly, the panel was also able to examine the Appellant's OMPF, to include a recent Officer Evaluation Report (OER) reflecting poor performance and adherence to the Army Values. (Supp. JA 173-174). The OER indicated that Appellant "repeatedly made false statements and made attempts to manipulate events in his favor . . . [and] struggled to comprehend and adhere to the Army Values." (Supp. JA 173-174). While there was a later recommendation to expunge that OER, an Officer Special Review Board determined that the case did not warrant the relief requested. (Supp. JA 175-185). These records revealed disturbing observations about Appellant's duty performance in combat and integrity, issues completely separate from the GOMOR in question. Such strong

observations likely had a tremendous impact on the Panel's decision. Further, Appellant has not demonstrated here or through clemency matters, that the voiced concerns about the possibility of a later decision to tear up the GOMOR actually materialized. While the timing of the GOMOR precluded rebuttal and a filing determination prior to trial, Appellant failed to show that the GOMOR was not later added to the Appellant's MPRJ.

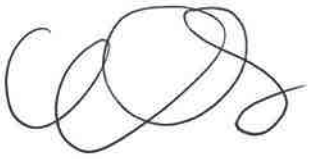
Any erroneous admission of the GOMOR was also harmless because appellant received a sentence far short of the maximum and trial counsel's recommendation. The maximum punishment authorized in this case included confinement for two years. (JA 143). Although the trial counsel recommended a minimum of ten months confinement and a dismissal, the panel only adjudged six months confinement and a dismissal. (JA 132, 153). The resulting sentence in this case stands in stark contrast to the result in *Zakaria* where the accused received near the maximum allowed confinement for relatively low-value property offenses. 38 M.J. at 284.

The assault itself, the Appellant's failure to take full responsibility or exhibit remorse for causing extensive injuries to a toddler, and the Appellant's record reflecting a recent referred OER, were each strong pieces of evidence that likely influenced the panel in determining a sentence. The GOMOR paled in comparison

to these other factors and did not likely have a substantial influence on the sentence.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the sentence in this case because the military judge did not abuse her discretion when she admitted appellant's GOMOR into evidence during presenting rebuttal and any error was harmless.



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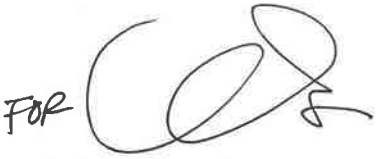

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because:

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March 13, 2017

Appendix 1

10 of 66 DOCUMENTS

UNITED STATES, Appellee v. Sergeant First Class SHAUN P. KUHN, United States Army, Appellant

ARMY 20120098

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

2014 CCA LEXIS 338

May 29, 2014, Decided

NOTICE: NOT FOR PUBLICATION

SUBSEQUENT HISTORY: Review denied by *United States v. Kuhn, 2014 CAAF LEXIS 844 (C.A.A.F., Aug. 21, 2014)*

PRIOR HISTORY: [*1]
Headquarters, United States Army Intelligence Center of Excellence and Fort Huachuca. Karen W. Riddle, Military Judge, Colonel Thomas C. Modeszto, Staff Judge Advocate.

COUNSEL: For Appellant: Colonel Kevin Boyle, JA; Lieutenant Colonel Jonathan F. Potter, JA; Major Amy E. Nieman, JA; Captain Matthew M. Jones, JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Lieutenant Colonel James L. Varley, JA; Major Robert A. Rodrigues, JA; Captain Carl L. Moore, JA (on brief).

JUDGES: Before LIND, KRAUSS, and BORGERDING, Appellate Military Judges. Senior Judge LIND and Judge KRAUSS concur.

OPINION

MEMORANDUM OPINON

BORGERDING, Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of willful disobedience of a superior commissioned officer, violation of a lawful general regulation, and false official statement in violation of Articles 90, 92, and 107, Uniform Code of Military Justice, *10 U.S.C. §§ 890, 892, 907 (2006)* [hereinafter UCMJ]. Contrary to his pleas, a panel com-

posed of officer and enlisted members convicted appellant of maltreatment and wrongful interference with an adverse administrative proceeding in violation of Articles 93 and 134, UCMJ, *10 U.S.C. §§ 893*, [*2] *934 (2006)*.* The panel sentenced appellant to a bad-conduct discharge, confinement for 180 days, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the adjudged sentence.

* The panel acquitted appellant of rape, wrongful sexual contact, and forcible sodomy, violations of Articles 120 and 125,UCMJ, *10 U.S.C. §§ 920, 925 (2006 & Supp. IV 2011)*.

This case is before the court for review under *Article 66, UCMJ*. Appellant assigns two errors, one of which merits discussion but no relief. We have also considered those matters personally raised by appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, and find they are without merit.

FACTS

Specialist (SPC) AJ was a member of the Army National Guard. In November 2010, SPC AJ arrived at Goodfellow Air Force Base (AFB) and reported to Advanced Individual Training (AIT) to become a 35N, Signal Intelligence Analyst. Specialist AJ was not a traditional AIT student, but was a Military Occupational Specialist Transfer or MOS-T and as such, she was "considered a squad leader" for the AIT students. Consequently, she was not allowed to have contact other than professional interactions [*3] with the AIT students. Similarly, she was not allowed to have non-professional contact with the permanent party cadre because of her student status.

Appellant was a cadre member in SPC AJ's AIT platoon. In December 2010, appellant began sending texts to SPC AJ on her phone. Specialist AJ testified that, with one exception, the texts were all professional at first. Nevertheless, on one occasion in January 2011, appellant cornered SPC AJ in an empty classroom, hugged her, and kissed her.

In February 2011, appellant was transferred to the Warrior Training Team with duty at a Field Training Exercise (FTX) site "in the far reaches" of Goodfellow AFB. However, appellant would still drive around the main area of the base, "showing up" wherever SPC AJ happened to be and following her everywhere she went. She testified that it got to the point where she stopped working out trying to avoid him. Appellant would tell SPC AJ that he was watching her and then "make it a game" by trying to make her guess where he was located. On one occasion, appellant texted SPC AJ that he was watching her as she walked to a house and that he could see what she was doing inside. Appellant then asked her to come outside. [*4] Specialist AJ told appellant, "no," and made sure all of the blinds were shut and the doors were locked. Appellant told SPC AJ that he could get into the house and that if she said, "no," he would "still have control over [her] platoon and that he was able to make [her] soldiers have a miserable time . . . and that he would tell different sergeants that they were bad soldiers and they would reap the repercussions." This convinced SPC AJ to go outside to meet appellant. On another occasion, appellant asked SPC AJ to let him into her barracks room, but she lied and told him that her roommate was there.

After approximately two weeks, appellant would only follow SPC AJ sporadically, which she testified was worse because she was left "wondering what was going to happen, where he was, if I was walking next to him and didn't notice at the time." Also during this time, appellant sent SPC AJ thousands of text messages, many that were sexually explicit and graphic, including one text which contained a photo of his penis.

While at the FTX site, appellant would task SPC AJ to play "roles" during exercises, resulting in her being alone at times, which allowed appellant to hug her or try to kiss her [*5] neck. During this time, appellant would tell SPC AJ that various cadre members did not like her or thought she was a "bad soldier," and thus she did not report any of appellant's actions. Specialist AJ testified she "felt trapped" but was hoping to graduate soon and return to her National Guard unit.

Of her time with appellant, SPC AJ testified:

> I think I was stuck in a sort of snow globe that I had no way of seeing out of, that everything [appellant] had created a bond with me in the beginning as a mentor, so I had respect for him, and as everything progressed between us, for me at that time in the Army, I felt like that's just something I had to deal with. As a female in the military, I thought you just deal with it until you get away and you hold it off the best you can because sexual harassment happens all the time.

As part of its case in aggravation, the government called appellant's company commander, Captain (CPT) BS, to testify as to appellant's duty performance. Captain BS told the panel that prior to appellant's misconduct, his duty performance was "satisfactory," but after the allegations came to light, appellant's performance "diminished." Nevertheless, CPT BS gave appellant [*6] a "seven to eight" on the rehabilitative potential scale. In response to a question from a panel member, CPT BS elaborated on this saying: "I believe he can be rehabilitated and put back into society after being held accountable for his actions. . . . a man can be rehabilitated through appropriate treatments or correctional facilities and be put back into society and still function in society."

Appellant called three witnesses in his case in extenuation and mitigation, all of whom testified as to appellant's excellent duty performance, particularly during deployments. In rebuttal to this testimony, the government recalled CPT BS to "expand upon" appellant's duty performance before and after his misconduct. Captain BS again told the panel that after appellant was under investigation, his performance "diminished," and that "he [was] of very little value" to the organization. Captain BS indicated that the reasons for this opinion were appellant's mental health issues as well as child care issues. Although defense counsel made two objections to CPT BS's rebuttal testimony, both of which were sustained, he did not object at all to this particular testimony.

Appellant gave a short unsworn [*7] statement, during which he referred three times to his association with SPC AJ as a "relationship." In response to this characterization, the assistant trial counsel made the following assertion during her sentencing argument:

> You've seen all of the evidence at this point. Compare that statement. Compare his acceptance of responsibility with what has been presented before you today. Compare that to the graphic text messages, to the photos, to him shoving his penis in her mouth. Compare that to him saying, "We had a romantic relationship with text messages and phone calls, that's how I violated a regulation."
>
> Today, he said he's sorry for his bad judgment, for letting his emotions lead him to a mistake--a mistake, which was caveated; he is still a leader. He just made a single mistake. This is a man who needs specific deterrence. He's proven to you that he just doesn't grasp the pure criminality of his behavior. He doesn't even understand that this

> was misconduct. He considers it to be an inappropriate decision. He considers it to be a single solitary mistake. This shows you that he has a total disregard for the rules and regulations that apply to service and he has no understanding of [*8] what he managed to do to Specialist [AJ].

Assistant trial counsel went on to argue:

> The fact is he broke that girl. He tore her down, he destroyed her spirit, keeping her in isolation, under surveillance, oppressive, extreme--he was aggressive and flat-out vulgar towards that girl--that junior enlisted service member for 120 days. . . . This was her prison for 120 days.
>
> ---
>
> Specialist [AJ] lived in her prison for 120 days. For four months. I argue for you that a minimum of one year for every month of that oppression is an appropriate sentence. A minimum of four years for that--for the maltreatment of Specialist [AJ] in such a grossly vulgar and pervasive manner an appropriate response--an appropriate sentence . . . Four months--I argue four years minimum is the most appropriate sentence for the maltreatment.

She continued:

> So, I'm going to leave it to you to figure out the appropriate sentence for lying to a commissioned officer and a first sergeant, for disobeying a company commander, for convincing a junior service member to do the same; to lie to a commissioned officer, and for multiple violations of a general regulation that demonstrates a true disregard as to its purpose and intent. [*9] And he did that to satisfy his own personal desires. An inappropriate decision or four months--four months of consistent behavior that is absolutely contrary to the honor and integrity of an NCO.

During assistant trial counsel's sentencing argument, she also highlighted that CPT BS testified appellant "will likely be able to rehabilitate into society." Assistant trial counsel did not mention CPT BS's opinion that appellant was "of little value" or the reasons behind this opinion.

Appellant's civilian defense counsel did not object at all to trial counsel's argument. Instead, he argued:

> He did not act like an NCO for four months. He did not act like a leader for four months. He shamed us all for four months. Take your four months back. Right now you represent the United States Army. Take the four months back. Put him in confinement for four months. Take your four months back.

Appellant asserts three separate errors, arising from CPT BS's rebuttal testimony and assistant trial counsel's sentencing argument, that appellant argues amount to plain and obvious errors that

materially prejudiced his substantial rights. First, he avers that assistant trial counsel improperly referred to him "shoving [*10] his penis in [SPC AJ's] mouth" even though he had been acquitted of forcible sodomy. Second, without further discussion, appellant takes issue with the fact that "[t]he government elicited testimony that [appellant] was no longer an asset because of his mental health and child-care issues." Finally, appellant notes that assistant trial counsel asked the panel to sentence appellant to four times the maximum allowable amount of confinement for maltreatment.

LAW AND ANALYSIS

Improper Testimony

Because appellant did not object to the portions of CPT BS's testimony he now claims were improper, we will apply a plain error analysis. *United States v. Eslinger, 70 M.J. 193, 197-98 (C.A.A.F. 2011)* ("Failure to object to the admission of evidence at trial forfeits appellate review of the issue absent plain error."). Appellant bears the burden of demonstrating that: "(1) there was error; (2) the error was plain, clear, or obvious, and (3) the error materially prejudiced one of his substantial rights." *United States v. Fisher, 67 M.J. 617, 620 (Army Ct. Crim. App. 2009)*; *see also United States v Powell, 49 M.J. 460, 463-65 (C.A.A.F. 2008)*.

We find that CPT BS's rebuttal testimony regarding appellant's [*11] duty performance subsequent to his misconduct was properly offered to rebut the good duty performance evidence offered by the defense witnesses. *See United States v. Brewer, 43 M.J. 43 (C.A.A.F. 1995)*; Rule for Courts-Martial 1001(b)(5)(A), (d). To the extent that CPT BS's brief testimony regarding appellant's mental health and child care obligations could be construed as improper or irrelevant, we still do not find any error to be plain, clear, or obvious. *See generally Fisher, 67 M.J. at 620.*

Even assuming plain or obvious error, we find no material prejudice to appellant's substantial rights. "We test the erroneous admission . . . of evidence during the sentencing portion of a court-martial to determine if the error substantially influenced the adjudged sentence." *Eslinger, 70 M.J. at 200-01* (quoting *United States v. Griggs, 61 M.J 402, 410 (C.A.A.F. 2005))*. Any possible error in CPT BS's rebuttal testimony did not substantially influence the adjudged sentence for the following reasons. First, CPT BS also gave a favorable opinion as to appellant's rehabilitative potential during his testimony in the government's case in aggravation, and it was this favorable opinion, not the rebuttal [*12] testimony, that assistant trial counsel highlighted in her sentencing argument. Second, appellant himself raised his mental health issues in his unsworn statement and in the video of his statement to law enforcement authorities, both of which were admitted without objection during the prosecution's case in chief. Finally, the military judge properly instructed the panel that whether or not appellant should "receive a punitive discharge or any other authorized legal punishment is a matter for you alone to decide in the exercise of your independent discretion based on your consideration of all the evidence."

Accordingly, we hold appellant has failed to meet his burden to establish all three prongs of the plain error test with respect to CPT BS's testimony.

Improper Argument

Appellant also did not object at any time to assistant trial counsel's sentencing argument. Thus, we review "the propriety of the argument for plain error." *United States v. Halpin, 71 M.J. 477, 479 (C.A.A.F. 2013)* (citing *United States v. Marsh, 70 M.J. 101, 104 (C.A.A.F. 2011))*. Under plain er-

ror review, appellant must prove "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced [*13] a substantial right." *Marsh, 70 M.J. at 104* (quoting *United States v. Erickson, 65 M.J. 221, 223 (C.A.A.F. 2007))*.

We find no plain or obvious error in the assistant trial counsel's sentencing argument. We focus not "on words in isolation, but on the argument as 'viewed in context.'" *United States v. Baer, 53 M.J. 235, 238 (C.A.A.F. 2000)* (quoting *United States v. Young, 470 U.S. 1, 16, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985))*.

With respect to her use of the phrase "shoving his penis in her mouth," we find that assistant trial counsel did not "assert that [appellant] could and should still be punished for crimes of which he had just been acquitted," as appellant claims in his brief. To the contrary, her comment was meant as an example of appellant's maltreatment of SPC AJ--along with the graphic and inappropriate text messages and photos--in order to illustrate a contrast to appellant's description in his unsworn statement of their "relationship." In short, assistant trial counsel's argument was that appellant needed "specific deterrence" because he did not appreciate the gravamen of his crimes against SPC AJ. We find this assertion to be within the limits of a proper sentencing argument.

Assistant trial counsel's argument [*14] that appellant should be sentenced to four years confinement for maltreating SPC AJ, when maltreatment carries a maximum of only, *inter alia*, one year of confinement is more problematic. *Manual for Courts-Martial, United States* (2008 ed.), pt. IV, ¶ 17.e. However, after a review of the assistant trial counsel's argument as a whole, we conclude that while her comments regarding her punishment recommendation may have been inartful, she did not focus solely on the specification alleging maltreatment under the Uniform Code of Military Justice during her entire argument. This is evidenced by the end of her argument, when, after describing all of the misconduct for which appellant had been convicted during the same period of time--to include his false official statement, willful disobedience of a superior commissioned officer, and violation of a lawful general regulation--she referenced appellant's "four months of consistent behavior that is absolutely contrary to the honor and integrity of an NCO" and urged the panel "to get to the appropriate sentence." Accordingly, we find no plain or obvious error in this argument.

Even assuming we were to find plain or obvious error with one or both of [*15] these arguments, we conclude appellant has failed to meet his burden to demonstrate a material prejudice to his substantial rights. To make this determination, we have examined the "*Fletcher* factors," articulated in *United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005)*, as applied in the context of an allegedly improper sentencing argument. *United States v. Frey, M.J. , 73 M.J. 245, 2014 CAAF LEXIS 534, *9 (C.A.A.F. 19 May 2014)* (citing *Halpin, 71 M.J. at 480*). In *Fletcher*, our superior court instructed us that the "best approach [in assessing prejudice] involves a balancing of three factors: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *62 M.J. at 184*; *see also Frey, M.J. , 2014 CAAF LEXIS 534, *10*. We consider whether "trial counsel's comments, taken as a whole, 'were so damaging that we cannot be confident that [the appellant] was sentenced on the basis of the evidence alone." *Frey, M.J. , 2014 CAAF LEXIS 534, *9-*10* (quoting *Halpin, 71 M.J at 480*) (alteration in original).

Assistant trial counsel's brief reference to appellant "shoving" his penis in SPC AJ's mouth is one line in a six-page argument [*16] and, as noted above, was not a request for the panel to punish appellant for an act of which he was acquitted. Likewise, even were we to assume that assistant trial counsel argued for a sentence of four years confinement for one specification of maltreatment,

appellant stood convicted of several other charges and specifications, and the maximum confinement authorized for all of these convictions was eighteen years, well above the four years requested by assistant trial counsel. Moreover, defense counsel argued that the panel should "take your four months back" and sentence appellant to four months confinement. The panel's sentence to confinement of 180 days reflects that they agreed with defense counsel's views. *See Baer, 53 M.J. at 238* ("In view of the relative lightness of the sentence which appellant received, we believe that his substantial rights were not materially prejudiced by the imperfections in his sentencing hearing."). Thus, "[e]ven assuming a deliberate strategy to indulge in improper argument," assistant trial counsel's "effort to 'cultivate a severe sentence did not bear fruit.'" *Id.* (quoting *United States v. Ramos, 42 M.J. 392, 397 (C.A.A.F. 1995)*. Any conceivable [*17] error here is certainly not severe. *See generally Fletcher, 62 M.J. at 184-85*.

The military judge did not issue any curative instructions specifically relating to these alleged errors. *See generally id. at 185*. However, the military judge did give proper sentencing instructions at the close of evidence. Specifically, she informed the panel that "the maximum punishment that may be adjudged in this case [was] reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 18 years, and a dishonorable discharge," and she gave the panel the standard instructions that appellant was to be "sentenced only for the offenses of which he has been found guilty," and that they should adjudge "a single sentence for all offenses of which [appellant] has been found guilty."

Finally, the evidence supporting appellant's sentence was strong and any potential improper comment was "surrounded by powerful and proper sentencing argument." *Frey, M.J. , 2014 CAAF LEXIS 534, *17*. As assistant trial counsel argued: "[H]e broke that girl. He tore her down, he destroyed her spirit, keeping her in isolation, under surveillance, oppressive, extreme--he was aggressive and flat-out vulgar towards [*18] that girl--that junior enlisted service member for 120 days." Despite the fact that he was a cadre member charged with training AIT students, appellant sent SPC AJ thousands of texts, many of which were vulgar, grossly inappropriate, unprofessional, and sexually explicit. He followed SPC AJ everywhere she went, to the point that she stopped working out, stayed inside, and felt she constantly had to look for him so she could know where he was and whether he was watching her. These texts and phone calls led to appellant's unwanted attention toward SPC AJ at the FTX site when he would get her alone so he could touch her or try to kiss her. By this point, SPC AJ testified that she simply resigned herself to this treatment saying that "[a]s a female in the military, I thought you just deal with it until you get away and you hold it off the best you can because sexual harassment happens all the time." In addition, appellant compounded his misconduct when he lied to his first sergeant about his "relationship" with SPC AJ, and when he willfully violated the no contact order issued by his company commander by immediately contacting SPC AJ and telling her to lie to the commander and the first [*19] sergeant when asked about his behavior.

As in *Halpin* and *Frey*, the "'weight of the evidence amply supports the sentence imposed by the panel'" and thus, appellant "has failed to demonstrate he was not sentenced on the basis of evidence alone." *Frey, M.J. , 2014 CAAF LEXIS 534, *16* (quoting *Halpin, 71 M.J. at 480*). Appellant faced a sentence to, *inter alia*, eighteen years confinement and a dishonorable discharge. He was sentenced to, *inter alia*, only 180 days confinement and a bad conduct discharge. Accordingly, we also find no material prejudice to appellant's substantial rights.

Finally, we have also considered "the cumulative impact" of all alleged improper arguments and alleged elicited improper testimony in the context of the trial as a whole, and find that the first and third *Fletcher* factors weigh so heavily in favor of the government that we are confident appellant was sentenced on the basis of the evidence alone. *See Halpin, 71 M.J. at 480.*

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Senior Judge LIND and Judge KRAUSS concur.

Appendix 2

Army Regulation 600–37

Personnel—General

Unfavorable Information

Headquarters
Department of the Army
Washington, DC
19 December 1986

UNCLASSIFIED

SUMMARY of CHANGE

AR 600-37
Unfavorable Information

This revision -

- Redesignates chapter 5, Responsibilities, as chapter 2, and changes the numbers of chapters 2 through 4 to 3 through 5.

- Deletes authority for MACOMs to establish suitability evaluation boards for the purpose of determining the disposition of unfavorable information (chap 2).

- Authorizes officers frocked to brigadier general to issue and direct fiing of administrative letters of reprimand (chap 3).

- Authorizes enlisted supervisors to issue letters of reprimand, but restricts filing (chap 3).

- Requires that documents that serve as the basis for letters of reprimand be referred to the recipient (chap 3).

- Deletes portions pertaining to the use of unfavorable information in various files for the purpose of considering bars to favorable personnel actions (chap 4 and 5).

- Further defines the organization and procedures of the DA Suitability Evaluation Board with respect to the filing of unfavorable information in the OMPF (chap 6).

- Further defines the procedures to appeal for the removal of unfavorable information from the OMPF (chap 7).

- Sets forth (chap 7) new information to supplement AR 27-10 with respect to petitioning for the transfer of records of nonjudicial punishment to the restricted portion of the OMPF on the basis - -

  --Intent having been served.

  --Being in the best interests of the Army.

- Deletes chapter 8.

- Corrects errors in para 3-4d(1) stated in the ERRATA sheet dated 1987.

Headquarters
Department of the Army
Washington, DC
19 December 1986

*Army Regulation 600–37

Effective 20 January 1987

Personnel—General

Unfavorable Information

By Order of the Secretary of the Army:

JOHN A. WICKHAM, JR.
General, United States Army
Chief of Staff

Official:

R. L. DILWORTH
Brigadier General, United States Army
The Adjutant General

History. The original form of this regulation was published on 19 December 1986. Since that time, an errata sheet was issued in 1987 to amend errors in the original text. This UPDATE printing incorporated all of those changes directly into the body of text. Because the structure of the entire revised text has been reorganized, no attempt has been made to highlight changes from the earlier regulation dated 15 November 1980.

Summary. This regulation prescribes policies and procedures regarding unfavorable information considered for inclusion in official personnel files.

Applicability. This regulation applies to all officer and enlisted personnel in the Active Army, Army National Guard (ARNG) and the U.S. Army Reserve (USAR).

Proponent and exception authority. Impact on New Manning System. This regulation does not contain information that affects the New Manning System.

Army management control process. This regulation is subject to the requirements of AR 11–2. It contains internal control provisions but does not contain checklists for conducting internal control reviews. These checklists are being developed and will be published at a later date.

Supplementation. Supplementation of this regulation and establishment of forms other than DA forms are prohibited without prior approval from the Office of the Deputy Chief of Staff of Personnel, HQDA (DAPE–MPO), WASH DC 20310–0300.

Interim changes. Interim changes to this publication are not official unless they are authenticated by The Adjutant General. Users will destroy the interim changes on their expiration dates unless sooner superseded or rescinded.

Suggested improvements. The proponent agency of this regulation is the Office of the Deputy Chief of Staff for Personnel. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms direct to HQDA (DAPE–MPO), WASH DC 20310–0300.

Distribution. This issue is distributed in accordance with DA Form 12–9A–R requirements for 600-series publications. The number of copies distributed to a given subscriber is the number of copies requested in Block 382 of the subscriber's DA Form 12–9A–R. AR 600–37 distribution is A for the Active Army, ARNG, and USAR. Existing account quantities will be adjusted and new account quantities will be established upon receipt of a signed UPDATE subscription form from the publications account holder.

Contents (Listed by paragraph and page number)

*This regulation supersedes AR 600–37, 15 November 1980.

UNCLASSIFIED

Contents—Continued

Chapter 1
General

1–1. Purpose

a. This regulation sets forth policies and procedures to—

(1) Authorize placement of unfavorable information about Army members in individual official personnel files.

(2) Ensure that unfavorable information that is unsubstantiated, irrelevant, untimely, or incomplete is not filed in individual official personnel files.

(3) Ensure that the best interests of both the Army and the soldiers are served by authorizing unfavorable information to be placed in and, when appropriate, removed from official personnel files.

b. This regulation also outlines primary staff responsibility for the following (and comparable) offices at all table of organization and equipment and table of distribution and allowances staff levels:

(1) Major commands.

(2) Office, Deputy Chief of Staff for Personnel (ODCSPER).

(3) Department of the Army (DA) Suitability Evaluation Board (DASEB).

(4) Office, Assistant Chief of Staff for Intelligence (ACSI).

(5) HQDA Staff agencies.

(6) Law enforcement, personnel security, and intelligence agencies.

1–2. References

Related publications are listed in appendix A.

1–3. Explanation of abbreviations and terms

Abbreviations and special terms used in this regulation are explained in the glossary.

1–4. Objectives

Objectives of this regulation are to—

a. Apply fair and just standards to all soldiers.

b. Protect the rights of individual soldiers and, at the same time, permit the Army to consider all available relevant information when choosing soldiers for positions of leadership, trust, and responsibility.

c. Prevent adverse personnel action based on unsubstantiated derogatory information or mistaken identity.

d. Provide a means of correcting injustices if they occur.

e. Ensure that soldiers of poor moral character are not continued in the Service or advanced to positions of leadership, trust, and responsibility.

Chapter 2
Responsibilities

2–1. Major commanders

Major commanders will—

a. Ensure that subordinate commanders concerned are properly informed and take actions prescribed in chapters 4 and 5 of this regulation with reference to unfavorable information concerning members of their commands.

b. Refer cases to the DASEB, when, because of unusual circumstances or complexities, unfavorable information of a serious nature concerning members or former members of their commands cannot properly be acted upon in accordance with their authority.

2–2. Deputy Chief of Staff for Personnel

The DCSPER will—

a. Establish the DASEB as a continuing board under the supervision of the Director of Military Personnel Management (DMPM), ODCSPER, to make determinations about—

(1) The filing of unfavorable information in the OMPF.

(2) Removing information under appeal and petition procedures in chapter 7.

b. Monitor DASEB membership and appoint a president as required.

c. Prescribe policies governing operations of the DASEB.

d. Approve, disapprove, refer to higher authority, or direct proper action on all adverse DASEB determinations concerning the filing of unfavorable information in a soldier's OMPF. Also, the DCSPER is authorized to direct similar actions on all other DASEB determinations as deemed proper (ensuring compliance with para 3–6).

e. Monitor and coordinate all DASEB activities not otherwise prescribed.

Note.

The DMPM, ODCSPER, is delegated authority to act on behalf of the DCSPER for the responsibilities in *b* through *e* above, and to further delegate elements of this authority other than that approving the filing of unfavorable information in a soldier's OMPF.

2–3. Department of the Army Suitability Evaluation Board

The DASEB—

a. When cases are referred for deliberation, determines whether unfavorable information should be filed in the performance portion of the OMPF. After deliberation, the DASEB may also recommend whether or not separation or elimination action should be initiated.

b. Initiates flagging action under AR 600–31 pending a final decision on the proposed filing of unfavorable information in the OMPF.

c. Recommends to the DMPM, ODCSPER, the filing of unfavorable information in cases in which the recipient has not satisfactorily explained that information after being given an opportunity to do so. The DASEB will not recommend filing of unfavorable information that has not been referred to the recipient, even if such filing would be otherwise permissible under this regulation.

d. Reviews and evaluates evidence presented to support appeals for removing unfavorable information from the performance portion of the OMPF.

e. Revises, alters, or removes from the OMPF unfavorable information covered by this regulation that is determined upon appeal to be unjust or untrue, in part or in whole (see chap 7).

f. Transfers from the performance to the restricted portion of the OMPF those administrative letters of reprimand, admonition, or censure that are determined upon appeal to have served their intended purpose, when such transfer would be in the best interest of the Army. Transfer of such letters is subject to stipulations noted in paragraph 7–2*b*(1), (2), (3), and (4).

g. Transfers from the performance to the restricted portion of the OMPF records of nonjudicial punishment (Article 15) that are determined upon petition to have served their intended purpose when such transfer would be in the best interest of the Army. Transfer of such records is subject to stipulations noted in paragraph 7–2*c*(1) and (2).

2–4. Assistant Chief of Staff for Intelligence

ACSI will—

a. Ensure that the U.S. Army Intelligence and Security Command (USAISC) provides assistance needed by the DASEB by making files available as required.

b. Set forth procedures to release information from intelligence and personnel security files to commanders and the DASEB.

2–5. Army Staff agencies

Army Staff agencies will—

a. Screen official records continuously for suitability information and refer cases that they are unable to resolve to the DASEB.

b. Take action needed to carry out the DASEB or DCSPER decision on cases that have been reviewed or referred to them by higher authority.

2–6. Law enforcement, personnel security, and intelligence agencies

Agencies responsible for releasing information from intelligence, personnel security, and investigative files will act under the procedures governing the use of investigative records outlined in this regulation. (AR 190–45, AR 340–21, AR 381–45, AR 40–66, and AR 40–400 also apply.)

a. Law enforcement agencies will (according to chapter 5 of this regulation, AR 190–45, and AR 195–2)—

(1) Advise the DASEB (or other proper HQDA adjudicating agency), upon request, when unfavorable information provided for criminal justice action exists on an individual.

(2) Provide file copies (or extracts thereof) to these requesters, as appropriate.

(3) Ensure that the decisions of adjudicating agencies relative to information provided are attached to the file report.

b. Commander, U.S. Army Central Personnel Security Clearance Facility (CCF) will (under chap 3 of this regulation and AR 604–5)—

(1) Advise the DASEB (or other proper HQDA adjudicating agency) regarding unfavorable information or cases of denial or revocation of security clearance involving senior enlisted (E6 or above), commissioned, or warrant officer personnel.

(2) With the exception of U.S. Army Investigative Records Repository (USAIRR) dossiers, provide file copies or information to major commanders, the DASEB, or other HQDA adjudicating agencies when requested. USAIRR dossiers may be requested by the above agencies in accordance with AR 381–45.

(3) Provide Notification concerning all cases of denial or revocation of security clearance involving senior enlisted (E6 or above), commissioned, or warrant officer personnel to the proper personnel management agency at the U.S. Army Military Personnel Center (MILPERCEN), the U.S. Army Reserve Personnel Center (ARPERCEN), or the National Guard Bureau (NGB).

(4) Ensure that unfavorable information received after review by an adjudicating agency is identifiable for later review.

Chapter 3
Unfavorable Information in Official Personnel Files

3–1. General

a. Personnel management decisions will be based on the following:

(1) Review of official personnel files.

(2) The knowledge and best judgment of the commander, board, or other responsible authority. (Both favorable and unfavorable information regarding the soldier concerned will be considered.)

b. Personnel decisions that may result in selecting soldiers for positions of public trust and responsibility, or vesting such persons with authority over others, should be based on a thorough review of their records. This review will include an appraisal of both favorable and unfavorable information available.

3–2. Policies

a. Except as indicated in paragraph 3–3, unfavorable information will not be filed in an official personnel file unless the recipient has been given the chance to review the documentation that serves as the basis for the proposed filing and make a written statement, or to decline, in writing, to make such a statement. This statement may include evidence that rebuts, explains, or mitigates the unfavorable information. (See para 3–6.) The issuing authority should fully affirm and document unfavorable information to be considered for inclusion in official personnel files.

Note.

Note. The privileged and confidential nature of information in inspector general IG records requires special attention. Provisions for requesting access and use of IG reports are addressed in AR 20–1.)

b. Unfavorable information filed in official personnel files must meet Privacy Act standards of accuracy, relevance, timeliness, and completeness. (See AR 340–21.) Access to official personnel files will be granted to the person concerned under AR 340–21.

c. Unfavorable information that should be filed in official personnel files includes indications of substandard leadership ability, promotion potential, morals, and integrity. These must be identified early and shown in those permanent official personnel records that are available to personnel managers and selection board members for use in making such personnel decisions as described in paragraph 3–1*b*. Other unfavorable character traits of a permanent nature should be similarly recorded.

d. Unfavorable information that has been directed for filing in the restricted portion of the OMPF may be considered in making determinations under this regulation.

e. Refusal to consent to a polygraph examination will not be recorded in official personnel files.

3–3. Filing of information exempt from the referral procedure

The following information may be filed in the performance portion of the OMPF without further referral to the recipient:

a. Records of courts-martial, court-martial orders, and records of nonjudicial punishment under the Uniform Code of Military Justice (UCMJ), Article 15. (See AR 27–10 and AR 640–10.)

b. Proceedings of boards of officers, if it is clear that the recipient has been given a chance to present evidence and cross-examine witnesses in his or her own behalf.

c. Completed investigative reports. These include criminal investigation reports (or authenticated extracts) that have resulted in elimination or disciplinary action against the person concerned. When it is not practical to include the entire report (or an extract), the investigative report will be referenced.

d. Records of civilian convictions (to include the record of arrest), or extracts thereof, authenticated by civilian authorities. However, records consisting solely of minor traffic convictions are not to be filed in the OMPF.

e. Officer and enlisted evaluation reports. Administrative processing and the appeal of evaluation instruments are governed by AR 623–1, AR 623–105, and AR 623–205. Filing of evaluation instruments is governed by AR 640–10.

f. Other unfavorable information of which the recipient had prior official knowledge (as prescribed by para 3–6) and an adequate chance to refute. The notation "AR 600–37 complied with"will be entered below the filing authority on such unfavorable information.

g. Internal staff actions and working papers within and among personnel management offices and personnel decision makers at HQDA. (Applies to the Career management individual file (CMIF) only according to AR 640–10.)

3–4. Filing of nonpunitive administrative letters of reprimand, admonition, or censure in official personnel files

a. Filing in the military personnel records jacket (MPRJ). Authority to issue and direct the filing of letters of reprimand, admonition, and censure in the MPRJ (after referral to the person concerned according to para 3–6) is outlined in (1) and (2) below. If filing is intended for the MPRJ, the letter need not be referred to a higher authority for review.

(1) Authority to issue and direct the filing of such letters in the MPRJs of enlisted personnel is restricted to the recipient's immediate commander (or a higher commander in his or her chain of command), school commandants, any general officer (to include those frocked to the rank of brigadier general) or an officer exercising general court-martial jurisdiction over the recipient. Immediate supervisors of enlisted personnel also have authority to issue letters of reprimand; but only if serving in one of the capacities listed above may they also direct filing in the MPRJ.

(2) Authority to issue and direct the filing of such letters in the MPRJ of commissioned officers and warrant officers is restricted to—

(a) The recipient's immediate commander or a higher level commander in the chain of command (if such commander is senior in grade or date of rank to the recipient).

(b) The designated rater, intermediate rater, or senior rater under the officer evaluation reporting system (AR 623–105).

(c) Any general officer (to include one frocked to the rank of brigadier general) who is senior to the recipient or an officer who exercises general court-martial jurisdiction over the recipient.

(3) A letter designated for filing in the MPRJ only may be filed for a period not to exceed 3 years or until reassignment of the recipient to another general court-martial jurisdiction, whichever is sooner. Such a letter will state the length of time it is to remain in the MPRJ.

(4) Statements furnished by the recipient following referral under paragraph 3–6 will be attached to the letter for filing in the MPRJ.

b. Filing in OMPF. A letter, regardless of the issuing authority, may be filed in the OMPF kept by MILPERCEN, ARPERCEN, or the proper State Adjutant General (for Army National Guard personnel) only upon the order of a general officer (to include one frocked to the rank of brigadier general) senior to the recipient or by direction of an officer having general court-martial jurisdiction over the individual. Letters filed in the OMPF will be filed on the performance portion (P-fiche). The direction for filing in the OMPF will be contained in an endorsement or addendum to the letter. A letter to be included in a soldier's OMPF will—

(1) Be referred to the recipient concerned for comment according to paragraph 3–6. The referral will include reference to the intended filing of the letter.

(a) This referral will also include and list applicable portions of investigations, reports, and other documents that serve, in part or in whole, as the basis for the letter, providing the recipient was not previously provided an opportunity to respond to information reflected in that documentation. Additionally, documents, the release of which requires approval of officials or agencies other than the official issuing the letter, will not be released to the recipient until such approval is obtained.

(b) Statements and other evidence furnished by the recipient will be reviewed and considered by the officer authorized to direct filing in the OMPF. This will be done before a final determination is made to file the letter. Should filing in the OMPF be directed, the statements and evidence, or facsimiles thereof, may be attached as enclosures to the basic letter.

(c) If it is desired to file allied documents with the letter, these documents must also be referred to the recipient for comment. This includes statements, previous reprimands, admonitions, or censure. Allied documents must also be specifically referenced in the letter or referral document. Care must be exercised to ensure additional unfavorable information is not included in the transmittal documentation unless it has been properly referred for comment.

(2) Contain a statement that indicates it has been imposed as an administrative measure and not as a punishment under UCMJ, Article 15.

(3) Be signed by (or sent under the cover or signature of) an officer authorized to direct such filing.

(4) Be forwarded for inclusion in the performance portion of the OMPF only after considering the circumstances and alternative nonpunitive measures. Minor behavior infractions or honest mistakes chargeable to sincere but misguided efforts will not normally be recorded in a soldier's OMPF. Once placed in the OMPF, however, such correspondence will be permanently filed unless removed through the appeal process. (See chap 7.)

(5) Also be filed in the MPRJ. Such copy will remain in the MPRJ so long as the letter remains filed in the performance fiche of the OMPF.

c. Decisions against filing letters in the OMPF. If the general officer (or general court-martial authority) elects not to place the letter in the OMPF, the correspondence will be returned to the person writing the letter. That soldier will advise the recipient of the letter of the decision not to file the letter in the OMPF. The letter may, however, still be

directed for filing (by proper authority) in the recipient's MPRJ. (See *a*above.) The specific period of time for which the letter will remain in the MPRJ will be specified.

d. Circumstances affecting the imposition or processing of administrative letters of reprimand.

(1) When a soldier leaves the chain of command or supervision after a commander or supervisor has announced the intent to impose a reprimand, but before the reprimand has been imposed, the action may be processed to completion by the losing command.

(2) When the reprimanding official leaves the chain of command or supervision after stating in writing the intent to impose a reprimand, his or her successor may complete appropriate action on the reprimand. In such cases, the successor should be familiar with relevant information about the proposed reprimand.

(3) When a former commander or supervisor discovers misconduct warranting a reprimand, an admonition, or censure, he or she may—

(a) Send pertinent information to the individual's current commander for action.

(b) Personally initiate and process a letter of reprimand, admonition, or censure as if the former command or supervisory relationship continued. In such cases, further review (if needed) will be accomplished in the recipient's current chain of command. Officials should consider the timeliness and relevance of the adverse information before taking administrative action at the later date.

e. Reprimands and admonitions imposed as nonjudicial punishment (UCMJ, Article 15) These are governed by AR 27–10, chapter 3.

f. Change from enlisted to officer status.

(1) If a status change from enlisted to commissioned or warrant officer was approved *on or after 16* December 1980—

(a) Letters of reprimand, admonition, or censure received while in an enlisted status which are filed in the performance portion of the OMPF will be moved to the restricted portion of the OMPF.

(b) Letters filed in the MPRJ will be removed.

(2) If a status change from enlisted to commissioned or warrant officer was approved *on or before 15* December 1980 *and the individual so requests*—

(a) Letters of reprimand, admonition, or censure received while in an enlisted status which are filed in the performance portion of the OMPF will be moved to the restricted portion of the OMPF.

(b) Letters filed in the MPRJ will be removed.

(3) Requests under (2) above will not be a basis for reconsideration by a special selection board.

3–5. Anonymous communications

Anonymous communications will not be filed in a soldier's MPRJ, OMPF, or CMIF unless, after investigation or inquiry, they are found to be true, relevant, and fully proven or supported. If not exempted under paragraph 3–3, the information must be referred to the soldier according to paragraph 3–6 before such information is filed in the MPRJ, OMPF, or CMIF.

3–6. Referral of information

a. Except as provided in paragraph 3–3, unfavorable information will be referred to the recipient for information and acknowledgment of his or her rebuttal opportunity. Acknowledgement and rebuttal comments or documents will be submitted generally in the following form:

(1) "I have read and understand the unfavorable information presented against me and submit the following statement or documents in my behalf:"

(2) "I have read and understand the unfavorable information presented against me and elect not to make a statement."

b. If a recipient refuses to acknowledge the referral of unfavorable information, the reprimanding official will prepare the following statement: "On (date), (name) has been presented with the unfavorable information and refuses to acknowledge by signature." The letter can then be directed for filing per paragraph 3–4.

Chapter 4
Unfavorable Information in Intelligence and Personnel Security Files

4–1. Unresolved unfavorable information

This chapter sets forth provisions for disposition of unresolved unfavorable information in intelligence and personnel security files.

CERTIFICATE OF FILING AND SERVICE

I certify that the original was filed electronically with the Court at efiling@armfor.uscourts.gov on this 17th day of May, 2017 and contemporaneously served electronically and via hard copy on appellate defense counsel.

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