



DEPARTMENT OF THE ARMY
BOARD FOR CORRECTION OF MILITARY RECORDS
1901 SOUTH BELL STREET, 2ND FLOOR
ARLINGTON, VA 22202-4508

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 31 January 2008
DOCKET NUMBER: AR20070011420

I certify that hereinafter is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in the case of the above-named individual.

[REDACTED]

Director
Analyst

The following members, a quorum, were present:

[REDACTED]

Chairperson
Member
Member

The Board considered the following evidence:

Exhibit A - Application for correction of military records.

Exhibit B - Military Personnel Records (including advisory opinion, if any).

THE APPLICANT'S REQUEST, STATEMENT, AND EVIDENCE:

1. The applicant requests, in effect, that DA Form 268 (Report to Suspend Favorable Personnel Actions [FLAG]), dated 24 April 1992, be removed from his official military personnel file (OMPF). His second request, in effect, is correction of a DA Form 78 (Recommendation for Promotion of Officer), dated 28 August 1992, which shows an incorrect social security number and contains false statements in the Remarks Section. Finally, the applicant indicated in his application that he desires a personal appearance before a Board.
2. The applicant states, in pertinent part, that while reviewing his OMPF on 14 April 2007 he discovered that his electronic record contained the FLAG. He states he was never notified of this action and that he assumes that the FLAG was the result of a false allegation and that it was filed while pending an investigation. He further states that he was not charged with a crime and that all allegations were effectively dropped on 19 June 1992. He continued to state, in effect, that the DA Form 78, which is filed in his OMPF, has a false social security number and that it contains false allegations that prevented him from being promoted.
3. The applicant provides copies of the FLAG, the DA Form 78, and a self-authored personal statement in support of this application.

CONSIDERATION OF EVIDENCE:

1. Records show the applicant enlisted in the United States Army Reserves (USAR) on 18 September 1986 for the delayed entry program. On 20 March 1987, he entered the Regular Army. He attend basic and advanced individual training and was awarded military occupational specialty (MOS) 67U (Medium Helicopter Repairer). He served continuously until 8 May 1990, when he was honorably discharged to accept an appointment as a warrant officer. He accepted his USAR appointment as a warrant officer on 9 May 1990. He was awarded MOS 152G0 (Attack Helicopter Pilot).
2. On 23 April 1992, a FLAG was initiated for adverse action under the classification of "Non-Transferable." The FLAG was signed by a commissioned officer in the rank of first lieutenant in the position of battalion adjutant.
3. On 9 May 1992, the applicant was promoted to Chief Warrant Officer Two (CW2) per Orders Number 105-228, dated 14 April 1992, published by Headquarters, 10th Mountain Division (Light Infantry). On this date, the applicant

was not in a promotable status as favorable personnel actions had been suspended on 23 April 1992.

4. On 22 May 1992, the applicant signed DA Form 67-8 (Officer Efficiency Report) which shows the OER was an annual report for the period 21 May 1991 to 20 May 1992. The report was referred to the applicant for derogatory information. The rater stated, the applicant "committed a crime at the end of the rating period. Despite his deep regret for the incident, his integrity and ethical standards must be questioned." The senior rater did not recommend promotion and stated the applicant should be considered for elimination.

5. On 29 August 1992, the brigade commander concurred with the applicant's subordinate commanders who did not recommend him for promotion to CW2. The applicant's DA Form 78 shows in the Remarks Section, the entry, in effect, that the applicant was given an Article 15 for shoplifting in the Fort Drum Exchange and this demonstrated deficiency in judgment and brought into question his suitability for promotion.

6. The DA Form 78 shows the applicant's social security number as "XXX-XX-
[REDACTED] The applicant's OMPF contains a copy of the applicant's social security card which shows the applicant's correct social security number as "XXX-XX-
[REDACTED]

7. On 7 September 1992, the applicant submitted a rebuttal statement to his senior rater for the referred OER with the ending date of 20 May 1992. He stated, in effect, that the statements made in regards to him committing the crime of shoplifting was unproven derogatory information. He stated, "I was not officially charged with any crime until 19 June 1992, therefore [the allegation] was not within my rating period." There is no evidence that the applicant appealed this OER.

8. On 25 December 1992, he was released from active duty for failure of selection for promotion. His characterization of service was honorable. The DD Form 214 he was issued shows in Item 4a (Grade, Rate or Rank) the entry "WO1" and 4b (Pay Grade) the entry "W1."

9. On 25 February 2007, the North Carolina Army National Guard (NCARNG) Recruiting Station conducted a police records check that shows that the applicant had no police or juvenile records to include minor traffic violations and that he was not currently undergoing court action.

10. On 22 March 2007, he enlisted for 3-years in pay grade E-5 in the NCARNG.

11. Records show there are no documents in the available OMPF to show that the FLAG was removed. The records show no acceptance of nonjudicial punishment under the provisions of Article 15, Uniform Code of Military Justice (UCMJ), nor is there a record of court-martial or a letter of admonishment or reprimand. The derogatory information filed in the applicant's OMPF is the referred OER with ending date 20 May 1992.

12. The applicant provided a self-authored chronological statement that shows the following sequence of events:

a. On 22 April 1992, the applicant was questioned in regards to a shoplifting incident at the Fort Drum Army and Air Force Exchange Service (AAFES) by a military police officer in the presence of his unit commander. The military police officer stated, in effect, that AAFES security personnel had surveillance videotaped evidence showing the applicant had stolen an item that same day. The military police officer said no charges would be filed pending an investigation.

b. On 24 April 1992, the company commander initiated a FLAG without the applicant's knowledge.

c. On 22 May 1992, he received an annual OER with statements that alleged he had committed a crime.

d. On 19 June 1992, a hearing was held with the Post Commanding General, AAFES security personnel, military police personnel, a lawyer representing the applicant, and the applicant's chain of command, which was represented by the unit executive officers. The results of the hearing were that all pending charges for petit theft from the Fort Drum AAFES were dropped.

e. On 19 June 1992, the Squadron Commander met with the applicant after the hearing and stated, in effect, that regardless of the outcome of the accusation the applicant was guilty and not fit to remain on active duty or in the Army. The applicant asserts that the Squadron Commander stated he would do whatever it took to end the applicant's career.

f. On or about 1 August 1992, the applicant states, in effect, that his Squadron Commander told him and a group of his peers that Department of the Army would be offering early release from active duty incentives if they wished to get out voluntarily or that this select group would be forced out involuntarily.

g. On 28 August 1992, the applicant's chain of command to the brigade level endorsed DA Form 78 and stated that they did not recommend the applicant for promotion. The applicant alleges that the signature of the brigade commander was forged.

h. In September 1992, he states that his rank, CW2, was taken from him, that he would not be permanently promoted to CW2, and that he would be discharged from the Army.

i. On 25 October 1992, he received discharge orders and out-processed from the Army on 24 December 1992.

j. In 2005, he requested copies of his official records. He states the FLAG and DA Form 78 were not in the documents sent to him from St. Louis.

k. In March 2007, while reviewing his OMPF with the assistance of the unit training noncommissioned officer at his NCARNG unit he found the FLAG and DA Form 78.

13. Army Regulation 600-8-2 (Suspension of Favorable Personnel Actions) states, in pertinent part, that a FLAG will be initiated for adverse actions to include charges, restraint, or when investigations are initiated against a Soldier and that the FLAG will be removed when the Soldier is released without charges, charges are dropped, or punishment is completed. For Soldiers who are punished under the provisions of Article 15, UCMJ, the FLAG will be removed upon the completion of punishment to include any term of suspension. For Soldiers who receive memorandums of admonition, censure, or reprimand not administered as nonjudicial punishment, the FLAG will be removed upon completion of document filing instructions.

14. Army Regulation 624-100 (Promotion of Officers on Active Duty) states, in pertinent part, that an officer's promotion is automatically delayed, therefore, an officer is not promoted (in spite of the publication of promotion orders) when under investigation that may result in disciplinary action of any kind being taken against him, under proceedings that may result in administrative elimination or discharge and when under or should be under, suspension of favorable personnel actions. A warrant officer not selected for promotion to CW2 will be released from active duty within 90 days of the promotion review authority's decision that the recommended officer not be promoted. Once the promotion review authority decides to deny the officer's promotion, that decision will not be changed unless the warrant officer is within 2 years of retirement eligibility from active federal service.

15. Army Regulation 600-8-104 (Military Personnel Information Management/Records) prescribes the policies governing the OMPF, the Military Personnel Records Jacket (MPRJ), the Career Management Individual File, and Army Personnel Qualification Records. Paragraph 2-4 of this regulation states that once a document is placed in the OMPF it becomes a permanent part of that file and will not be removed from that file or moved to another part of the file unless directed by the proper authorities listed in the regulation. Table 2-1 of this regulation pertains to the composition of the OMPF, which states that data, forms or official documents that pertain to the permanent or temporary promotion status to include promotion nonselection will be filed in the general administration section of the Soldier's performance fiche.

16. Army Regulation 15-185 (Army Board for Correction of Military Records) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the Army Board for Correction of Military Records (ABCMR). Paragraph 2-9 contains guidance on the burden of proof. It states, in pertinent part, that the ABCMR begins its consideration of each case with the presumption of administrative regularity that is that what the Army did was correct. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

17. Paragraph 2-11 contains guidance on ABCMR hearings and it states that applicants do not have a right to a hearing before the ABCMR. The ABCMR may, in its discretion, hold a or request additional evidence or opinions when it is deemed necessary, and the Director of the ABCMR may grant a formal hearing whenever justice requires.

DISCUSSION AND CONCLUSIONS:

1. The applicant contends that the FLAG should be removed from his OMPF as charges for petit theft were dropped during a hearing with the post commanding general. He further contends that DA Form 78 should be removed from his record, that this form contains an incorrect social security number, and a false statement.

2. Based on the evidence in the applicant's OMPF and governing Army regulations, the FLAG should be removed from his OMPF. A FLAG was initiated for adverse actions, but was not removed as required upon completion of the investigation, release without charges, or the dropping of the charges. The applicant was discharged honorably for failure for selection of permanent

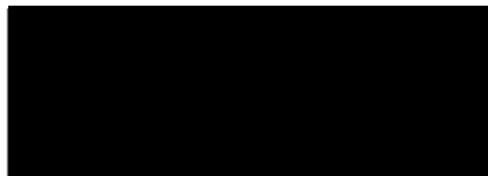
promotion. Therefore, the FLAG, which was nontransferable, should have been removed upon completion of the initial investigation or conclusion of punishment, but prior to his honorable discharge.

3. The applicant was in a nonpromotable status on 9 May 1992, the effective date of his promotion orders to CW2, for his records where in a suspension of favorable personnel actions, effective 23 April 1992. The chain of command did not recommend promotion and the promotion review authority concurred with the subordinate commanders on 28 August 1992. Therefore, DA Form 78 was completed in accordance with applicable regulations and will remain as is filed in the applicant's OMPF. The Board does acknowledge that the applicant's SSN is incorrect on DA Form 78. However, the typographical error does not necessitate the correction of this particular form, as the applicant's standard name line is correct.

4. The applicant contends that the DA Form 78 contained false statements. The burden of proof to support this allegation rests with the applicant. He has failed to provide sufficient and substantiating of evidence to support his contention that the DA Form 78 contained false statements or that an error or injustice occurred.

5. Further, there is insufficient evidence to support a conclusion that a formal hearing is necessary to serve the interest of justice in this case.

BOARD VOTE:

	GRANT FULL RELIEF
	GRANT PARTIAL RELIEF
	GRANT FORMAL HEARING
_____	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined that the evidence presented was sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by expunging his OMPF of the DA Form 268 dated 24 April 1992.

2. The Board further determined that the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to correcting the applicant's social security number on DA Form 78 and then removal of DA Form 78 from his OMPF.

