

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 24 October 2019

DOCKET NUMBER: AR20160013726

APPLICANT REQUESTS:

- a. Expungement of the Department of the Army Inspector General (DAIG) Case [REDACTED] from his official military personnel file (OMPF) and Inspector General (IG) Database of Records (IGARs).
- b. Revocation of the Secretary of the Army (SA) orders dated 10 June 2016 that directed his removal from the Fiscal Year (FY) 2014 Colonel (COL) Army Reserve Non Active Guard Reserve (AR Non-AGR), Army Promotion List (APL) Competitive Category, Promotion Selection Board (PSB).
- c. Expungement of SA memorandum dated 10 June 2016, directing his removal from the promotion list.
- d. Immediately promoting him to the rank of COL with an effective date and a date of rank of 16 August 2014.
- e. Paying him all back pay, allowances, and other benefits he is entitled to receive based on this promotion.

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- Two self-authored statements of case
- Table of Contents
- DA Form 71 (Oath of Office), dated 31 May 1990
- Orders 068-156, dated 5 May 1992
- Orders 94-020, dated 12 July 1994
- Memorandum, subject, Promotion as a Reserve Commissioned Officer of the Army, dated 23 October 2003
- Orders B-07-004697, dated 15 July 2010
- Self-authored statement
- AR 15-6 Investigation with supporting documentation
- Department of Defense (DOD) Hotline Complaint Report (HCR)/DAIG Case [REDACTED]

- Congressional Record – Senate, dated 7 May 2014
- FY14, COL, APL, AGR, Non-AGR, and Army National Guard (ARNG), PSB Results, posted 15 April 2014
- Memorandum, subject: Delay of Promotion and Referral to a PRB, dated 19 August 2015 with applicant's supporting documentation
- DAIG Letters, dated 23 April 2015 and 29 March 2016
- Six Supporting Statements
- Memorandum, subject: PRB [Applicant], dated 25 August 2015 with supporting documentation
- Memorandum, subject: PRB RP1604-07, FY 2014 COL AR Non-AGR, APL, Competitive Category, PSB, dated 10 June 2016
- Excerpts from AR 135-155 (Promotion of Commissioned Officers and Warrant Officers Other Than General Officers)
- Excerpts from Title 10, USC, section 14310
- Officer Evaluation Reports (OERs)
- DA Form 1574 (Report of Proceedings by Investigating Officers (IO)/Board of Officers) with supporting documentation
- DD Forms 214 (Certificate of Release or Discharge from Active Duty)
- Excerpts from the Manual for Courts-Martial
- Army Board for Correction of Military Records (ABCMR) Records of Proceedings (ROPs) pertaining to "other" applicants
- Department of the Army (DA) Personnel Policy Guidance for Overseas Contingency Operations
- The Defense Meritorious Service Medal Narrative
- Resume of Service Career

FACTS:

1. The applicant provides a two documents, which contain 42 pages and summarizes his case and military career. The full version of these documents is attached, as evidence, to this record of proceedings for the Board to review. The following constitutes a brief summary of the aforementioned documents:

a. On 15 April 2014, he was selected for promotion to COL and the promotion selection list containing his name was confirmed on 22 May 2014.

b. On 24 August 2015, he was notified of a delay in his promotion in order for a promotion review board (PRB) to convene and consider the results of a DAIG case, which was not considered by the promotion board.

c. On 10 June 2016, the SA directed his removal from the COL Army Promotion List

d. On 1 July 2016, he mobilized and deployed to Afghanistan.

e. He quotes Title 10, U.S. Code (USC), section 14310 and states the appointment of an officer to a higher grade may not be delayed more than 18 months after the date of which the officer would otherwise have been promoted.

f. He argues that the maximum period for his promotion delay expired on 15 February 2016 and he should have been promoted on that day with a date of rank of 16 August 2014.

g. He states the IG examining official wrongly concluded that if the applicant violated Article 107 (False Official Statement) of the Uniform Code of Military Justice (UCMJ) he automatically violated Article 133, Conduct Unbecoming an Officer and Gentleman of the UCMJ.

h. The Army Regulation (AR) 15-6 (Procedures for Administrative Investigations And Boards of Officers) investigation and the IG examining official are in direct contradiction to the applicant's brigade and division commanders.

2. The applicant also provides three ABCMR ROPs previously considered by the Board pertaining to other applicants that requested, in pertinent part: removal of a DAIG ROI; removal of a General Officer Memorandum of Record; and adjustment of the promotion effective date to COL with back pay and allowances. He further provides five supporting statements.

a. A retired lieutenant general states the single instance of adverse information in the applicant's file reflects a dubious interpretation of one event and is uncharacteristic of his sterling service. He adds the applicant has always led by force of personal example. His extraordinary dedication and brilliant talent marked every aspect of his service and positively influenced every Soldier he touched.

b. A retired major general states he has known the applicant for over 20 years and he can personally attest to his character, his abilities to perform as a senior leader in the Army, and his desire to continue to serve his nation as an Army officer. In addressing the one unfavorable action in the applicant's record, he offers that the applicant takes personal responsibility for his actions. He states the applicant's actions were not taken for any type of personal gain or advantage to him nor did his actions disadvantage any of his Soldiers.

c. A former command IG states he and the applicant's current commander strongly endorse the applicant's request to amend the substantiated determination in the DAIG Case [REDACTED]. He offers he has reviewed the records, and associated documents and believes the determination is fundamentally flawed. In his analysis, the IG did not properly apply the element of the cited Articles, and his conclusion is irreparably flawed. The AR 15-6 IO and sworn statements were consistent in identifying a lack of intent to deceive and the applicant's actions did not compromise his character as a gentleman.

d. The applicant's current supervisor provides two supporting statements in which he strongly supports the applicant's request to rescind the 10 June 2016 order removing the applicant from the 2014 COL Promotion List and expunge the IG finding from his OMPF. He adds the applicant is precisely the type of senior leader needed in the Army and our Soldiers deserve. He opines that the substantiated IG finding was unfounded and unduly prejudicial. Like the applicant's chain of command at the time of the incident, he considered the evidence and concluded that the applicant's actions did not constitute conduct unbecoming an officer.

e. A former senior legal advisor states he served with the applicant in Afghanistan. He opines the applicant's service was singularly outstanding and he demonstrated the highest integrity and judgment at all time. He adds, while he did not know the applicant at the time of the events that resulted in the substantiated IG finding, his experience serving with the applicant causes him to doubt the correctness of a finding that he [applicant] directed an NCO to falsify APFT scores with any intent to subvert the readiness system, as it would be inconsistent with his character.

3. Review of the applicant's service records shows:

a. The applicant was appointed as a second lieutenant in the Regular Army on 31 May 1990. On 21 December 1995, he was honorably released from active duty. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 5 years, 6 months, and 21 days of active duty service.

b. On 15 June 2000, he was appointed as a captain in the U.S. Army Reserve (USAR).

c. On 15 July 2010, he was promoted to lieutenant colonel (LTC) with an effective date and a date of rank of 29 June 2010 by Orders B-07-004697, issued by U.S. Army Human Resources Command (HRC).

d. On 22 February 2013, an IO was appointed to conduct an AR 15-6 informal investigation into the allegations that:

(1) Personnel from the 3rd Battalion, 518th Regiment, 2d Brigade may have used their position and access to the USAR electronic databases to enter information known to them to be false.

(2) Personnel from 3rd Battalion, 518th Regiment, 2d Brigade, may have altered the statistics and/or ranking his unit had, when compared to others within the 98th Training Division and/or 108th Training Command to commit a fraudulent act and caused the division to make decisions based on false data.

e. The IO stated:

(1) The applicant said he was attempting to develop a means (an experiment as the applicant describes it) to identify Soldiers as exempt in the Defense Training and Management System (DTMS), an electronic data base similar to the system that is used in the Medical Protection System (MEDPROS). The applicant's solution was to take Soldiers that were not completing the Army Physical Fitness Test (APFT) because they were either non-participants, on profile, or mobilized overseas and force DTMS not to count those individuals against his battalion's overall unit readiness. The applicant directed the battalion S-3 AGR Noncommissioned Officer (NCO) to enter a minimum passing APFT score for the Soldiers in each of the previously described categories, which, according to the applicant, was about 12 to 15 Soldiers, and set the date of the APFT to 1 January 2012. The applicant stated by using New Year's Day as the test date it would be obvious to anyone that the test did not really occur on that date and anyone reviewing the statistics within the DTMS "would realize the test was fictitious."

(2) The applicant also stated he directed the NCO to remove the data from the DTMS within days of input after a discussion the applicant had with his mentors. The applicant's mentors thought it was something that was needed, but this initiative would have to be implemented across a larger scale. However, in an email provided by the unit's Personnel AGR NCO, the applicant directed the S-3 AGR NCO to go into DTMS and enter the fictitious APFT dates for the Sunday of the battle assembly that was conducted on 22 January 2012. The S-3 AGR did as she was directed and she entered APFT passing scores for the 15 unit members. This data was left in the system until 22 March 2012 when a company commander within the battalion was reviewing his Leader Book and noticed that several individuals in his company who were either not present for duty or failed to take the APFT during January's battle assembly had passing APFT scores. This company commander sent an email to the S-3 and Personnel NCOs questioning the legitimacy of the passing APFT scores.

(3) After reviewing the statements and information presented to him, he opined that the applicant did not intend to willfully deceive the command by the inputting of this fictitious data. However, there were certainly other means readily available to arrive at a solution. As the former 2d Brigade Commander pointed out in his statement, "Anyone who desired to ascertain the impact of non-participants on any division readiness metrics could have easily determined the answer by using a calculator or a spreadsheet without going to the trouble of entering data in DTMS."

(4) The IO stated, in his recommendations, he believed that the entering of false data into an Army database, whatever the reasons, was wrong and should not be encouraged. The IO recommended that the applicant receive a letter of admonition from the division commander outlining the procedures established by the higher headquarters and directing he contact the headquarters prior to initiating any "creative" actions that could lead others to error based on the inaccurate information available in the databases.

- f. The division commander approved the IO's findings and recommendations.
- g. The applicant's record is void of his response to the AR 15-6 investigation or a General Officer Letter of Admonishment.
- h. DOD Hotline Completion Report (HCR)/DAIG Case [REDACTED] states, in effect, that two NCOs filed a DA Form 1559 (IG Action Request), dated 5 May 2013, with the 108th Training Command IG office noting various issues, to include the allegation of false APFT scores being recorded in the DTMS. The DOD HCR reiterates the same information contained in the AR 15-6 investigation. Additionally, the report addressed the allegation that the applicant directed a NCO to falsify APFT scores in violation of the UCMJ, Article 133, conduct unbecoming an officer and gentleman. The report reference emails, sworn statements, and screen shots of Individual Training and Readiness System (ITRS) and DTMS to support the substantiated findings. The IG Examining Official stated:
- (1) In order to be found in violation of Article 133, there are two elements that both must be met: (1) the accused did or omitted to do certain acts; and (2) under the circumstances, these acts or omission constituted conduct unbecoming an officer and gentleman.
 - (2) The applicant in his own sworn statement and emails did direct the NCOs to input false APFT scores into DTMS. He knowingly directed an action that he fully intended to occur, which was to the detriment of the good order of the unit. The data was removed per the applicant and one of the NCOs, but remained in other databases that were populated by the false data and continued to show passing scores.
 - (3) Under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentlemen. The Manual for Courts-Martial provides as an example of violation of this article as knowingly making false statements. The applicant directed the input of passing scores for Soldiers that did not deserve them and he knew them to be false.
 - (4) The applicant attempted to exempt Soldiers in DTMS in an attempt to deceive the system. His argument of determining how these "experiments" would affect the systems is weak. If a Soldier's data shows they are passing in DTMS, it will show in other databases that they passed. The preponderance of credible evidence indicates the applicant directed a NCO to falsify APFT scores in violation of the UCMJ, Article 133, conduct unbecoming an officer and gentleman.
 - (5) The AR-15-6 IO recommended the applicant be issued a General Officer Letter of Admonition and the commanding general complied with the recommendation. He also recommended the case be closed with no further action necessary.

i. The FY14, COL, APL, AGR, Non-AGR, and ARNG, Promotion Selection Board (PSB) Results, posted on 15 April 2014, show the applicant was selected below the zone for promotion to COL in the Infantry branch.

j. A DA Form 268 (Report to Suspend Favorable Personnel Actions (Flag)), dated 18 May 2015, shows the Chief, DA Promotions, HRC, initiated a flag on the applicant effective 1 May 2015. The reason cited was "elimination or removal from selection list."

k. In a memorandum, subject: Delay of Promotion and Referral to a PRB, dated 19 August 2015, The Adjutant General, HRC, notified the applicant that he was recommended for promotion to COL by the FY14, COL, APL, AGR, Non-AGR, and ARNG, PSB. However, in accordance with AR 135-155 (Promotion of Commissioned Officers and Warrant Officers Other Than General Officers), chapter 3, paragraph 3-18, his promotion was delayed due to a DAIG case, which was not considered by the promotion selection board. Therefore, his records were referred to a PRB.

l. On 19 August 2015, the applicant acknowledged receipt of the above memorandum.

m. On an unknown date, the applicant stated he received formal notification that his record would be referred to PRB. He added he reviewed the contents of DAIG Case [REDACTED] and disagreed with the IG Examining Official. He stated he did not intend to willfully deceive the command. He reiterated the information provided in the AR 15-6 and the DAIG case concerning an experimental attempt to mitigate the impact of non-participants by inputting passing APFT scores into DTMS. He stated he took full responsibility for his actions. He stated he had served honorably for over 25 years in numerous command and staff positions. He requested retention on the COL promotion list. Additionally, he provided two supporting statements from senior officers strongly recommending his retention on the list.

n. In a memorandum dated 10 June 2016, the SA directed the immediate removal of the applicant from the FY 2014 COL AR Non-AGR, APL, Competitive Category, PSB under the provisions of Title 10, U.S. Code, section 14310, Executive Order 13358, Secretary of Defense Delegation to the SA, dated 20 March 2006 and AR 135-155, paragraph 3-18.

o. On 17 June 2016, the applicant was officially notified by memorandum that under the provisions of AR 135-155, paragraph 3-18, his records were referred to a DA PRB for reconsideration of his promotion status. Subsequent to the PRB, the SA decided to remove him from the list.

p. On 20 June 2016, the Chief, DA Promotions, HRC, removed the flag imposed on the applicant, effective 10 June 2016. The reason for the removal was "case closed unfavorably."

4. On 23 May 2017, the ABCMR obtained an advisory opinion from the Chief, Officer Selection Board Policy Branch, Office of the Deputy Chief of Staff, G-1. The representative states that based on Title 10, U.S. Code, section 14310 and 14311; and AR 135-155, as cited below, the applicant is NOT entitled to administrative relief. The representative states:

a. The applicant was selected by the FY14, COL, APL, AGR, Non-AGR, and ARNG, PSB for promotion to COL, which convened on 8 January 2013 and recessed on 23 January 2014. A post-board scrub revealed an AR 15-6 investigation by the Commanding General, 98th Training Division, which substantiated the allegation that he directed a NCO to falsify APFT scores in violation of Article 133, UCMJ, conduct unbecoming an officer and a gentleman. The DAIG subsequently reviewed the investigation, approved the findings, and released the records to HRC on 8 May 2014.

b. On 7 May 2014, the United States Senate received the nomination for the applicant and on 22 May 2014 gave its advice and consent for his promotion to the grade of COL.

c. On 19 August 2015, HRC informed the applicant of the delay in his promotion due to the discovery of the substantiated DAIG investigation, which was not considered by the PSB. The applicant acknowledged receipt on 24 August 2015, and submitted a rebuttal to the information in the DAIG investigation.

d. On 28 August 2015, the applicant was referred to a PRB. The PRB was held on 21 April 2016, and on 10 June 2016, the SA directed his removal from the promotion list. Removal occurred approximately 23 months after he would have been promoted, if selected.

e. The requirements of an appointment were outlined in *Marbury v. Madison*, Title 5, U.S. Code, section 137 (1803), when the United States Supreme Court identified three requirements: (1) the President's nomination; (2) confirmation by the Senate; and (3) the President's Appointment. This situation is no different. The actions in this case were taken pursuant to Title 10, U.S. Code, sections 12203, 14310 and 14311 as cited below. Appointment to the grade of COL requires the President to nominate an officer, then forward that nomination for the advice and consent of the Senate. If the Senate confirms a nomination, the President must still appoint the officer.

f. Nothing in the statutory language provides that the President is required to appoint a candidate the President believes to be unqualified if the candidate is not affirmatively removed from the promotion list within a particular period of time. To read otherwise would be a nullity on the President's appointment power and the statutory guideline that Reserve commissioned officers are "held during the pleasure of the President." To hold the contrary would conflict with the Appointment Clause of the Constitution.

g. Although the delay in the applicant's promotion exceeded the 18 months prescribed in Title 10, U.S. Code, section 14311, the delay does not result in his promotion by operation of law. An officer's promotion cannot occur by operation of law, as all officer appointments to a higher grade are subject to the Appointments Clause of the Constitution.

5. On 14 March 2016, the applicant responded to the advisory opinion. He reiterates the information provided in his application to the Board. He states he disagrees with the G-1's conclusion that he is not entitled to the requested relief. Additionally, he states:

a. As admitted by the G-1, a substantial error of law exists because his delay in promotion exceeded the 18 months prescribed by Title 10, U.S. Code, section 14311. He added the SA is bound to adhere to all Federal laws including Title 10, and he failed to do so in his case.

b. The AR 15-6 investigation did not conclude that he violated Article 133 of UCMJ, conduct unbecoming an officer and gentleman. He quotes the IO as opining that the applicant did not intend to willfully deceive the command and recommended he [applicant] be issued a letter of admonition. Additionally, the G-1's statement that the "DAIG subsequently reviewed the investigation and approved the findings by the 98th Training Division" is materially false. The DAIG assigned a detailed IG based on a hotline call from the original complaint. Based on the information gathered by the AR 15-6 IO, the violation was substantiated.

c. In his case, the maximum period of delay in promotion tolled on 15 February 2016, 18 months from 16 August 2014. On that day, the SA had two options: (1) remove the applicant from the promotion list or direct HRC to proceed with his promotion. Under no circumstances could the SA continue to delay his promotion without violating Title 10, U.S. Code, section 14311. Contrary to the advisory opinion, the power to remove a Reserve officer from a promotion list is statutorily time limited. The authority delegated to the SA to remove him from the promotion list ceased to exist on 15 February 2016.

BOARD DISCUSSION:

1. After reviewing the application and all supporting documents and evidence, the Board found that relief was not warranted.

2. With respect to expunging the DAIG case and findings from the applicant's records and the DAIG records, the Board found, based on a preponderance of the evidence, the applicant acted with an intent to deceive when he intentionally falsified and directed others to falsify readiness data. The Board considered the evidence submitted by the applicant that he did not intend to misrepresent readiness reports and found it outweighed by the other evidence of record, specifically, the DAIG report findings. Further, the applicant stated that his intent was to make the readiness reports show a

higher readiness standing, which was false. The Board found this act in violation of Article 107 (False Official Statement), UCMJ, in that entering the false physical fitness data was designed to deceive about the true readiness status of the unit.

3. The Board also noted that the applicant previously requested the DAIG reconsider the substantiated findings that he had violated Article 133, UCMJ. The DAIG reconsidered all the evidence in the case and all the new evidence the applicant had provided. The DAIG determined there was insufficient evidence to amend the IG findings regarding the allegation that the applicant directed a Noncommissioned Officer to falsify Army Physical Fitness Test scores in violation of Article 133, UCMJ (Conduct Unbecoming an Officer and Gentleman) was substantiated and would remain substantiated in the IG database. The Board found the DAIG findings were supported by a preponderance of the evidence, and that the applicant's actions constituted conduct unbecoming of an officer.

4. The Board considered the applicant's contentions and evidence that the Board should expunge the SA memorandum removing him from the promotion list due to the IG findings and that he should be promoted to the grade of colonel (COL) as an operation of law in accordance with Title 10, U.S. Code, sections 14310 and 14311, and AR 135-155. As articulated in the 23 May 2017 advisory opinion from the Chief, Officer Selection Board Policy Branch, Officer of the Deputy Chief of Staff, G-1, outlined in Article 1 of the U.S. Constitution, and discussed in *Marbury v. Madison*, 5 U.S. 137 (1803), officer appointments must satisfy three requirements: (1) the President's nomination; (2) confirmation by the Senate; and (3) the President's Appointment. The applicant's situation is no different. The actions in this case were taken pursuant to Title 10, U.S. Code, sections 12203, 14310, and 14311. Appointment to the grade of COL requires the President nominate an officer, then forward that nomination for the advice and consent of the Senate. If the Senate confirms a nomination, an officer must still be appointed by the President. Nothing in the statutory language provides that the President is required to appoint a candidate that the President believes to be unqualified if the candidate is not affirmatively removed from the promotion list within a particular period of time. ABCMR action directing otherwise would violate the Appointments Clause of the U.S. Constitution. Although the delay in the applicant's promotion exceeded the 18 months prescribed in Title 10, U.S. Code, section 14331, the delay does not result in his promotion by operation of law. An officer's promotion cannot occur by operation of law because officer appointments to a higher grade are subject to the Appointments Clause of the Constitution. The Board upholds this determination and to grant the requested relief would be unconstitutional.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
█	█	█	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

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

REFERENCES:

1. Army Regulation (AR) 15-6 (Procedures for Investigating Officers and Board of Officers) establishes procedures for investigations and boards of officers not specifically authorized by any other directive. Paragraph 1-9c states, except as provided in paragraph 1-9d, when adverse administrative action is contemplated against an individual including an individual designated as a respondent, based upon information obtained as a result of an investigation or board conducted pursuant to this regulation, the appropriate military authority must observe the following minimum safeguards before taking final action against the individual:

a. Notify the person in writing of the proposed adverse action and provide a copy, if not previously provided, of that part of the findings and recommendations of the investigation or board and the supporting evidence on which the proposed adverse action is based.

b. Give the person a reasonable opportunity to reply in writing and to submit relevant rebuttal material.

c. Review and evaluate the person's response.

2. AR 135-155 (Promotion of Commissioned Officers and Warrant Officers Other than General Officers) prescribes policy and procedures used for selecting and promoting commissioned officers (other than commissioned warrant officers) of the ARNG and of commissioned and warrant officers (WO) of the USAR.

a. Paragraph 3-18 states the authority for the removal of a name from a promotion list rests with the President for commissioned officers (other than commissioned warrant officers). The President or their designee may remove the name of an officer in a grade above second lieutenant from a promotion list.

b. Paragraph 3-18(2) states if the SA recommends removal of the name of an officer from a selection board's report and the recommendation includes information that was not presented to the selection board, the information will be made available to the officer. The officer will be allowed a reasonable opportunity to submit comments on that information to the officials making the recommendation and the officials reviewing the recommendation.

c. Paragraph 3-18(3) states promotion advisory boards will be convened to consider the promotion status of officers who are recommended for removal from a promotion list based on physical, personal or professional disqualification. The board's recommendation for removal will be forwarded through the Deputy Chief of Staff, G-1 and the SA to the Secretary of Defense.

d. Commanders and CDR, HRC, Office of Promotions (RC) will continuously review promotion lists to ensure that no officer is promoted who has become mentally, physically, morally, or professionally disqualified after being selected.

e. The Office of Promotions (RC) will initiate and control Suspension of Favorable Personnel Action per AR 600-8-2 (Suspension of Favorable Personnel Actions (Flag)). A DA Form 268 will be prepared by CDR, HRC, Chief, Office of Promotions (RC) on favorable closing of a previous DA Form 268 that was or should have been imposed while an officer is on a promotion list or when an officer is recommended for removal.

f. Paragraph 4-11 states an officer's promotion is automatically delayed when the officer is, in pertinent part:

(1) under investigation that may result in disciplinary action of any kind being taken against them, and/or

(2) under, or should be under, suspension of favorable personnel actions.

g. A promotion will not be delayed under this paragraph unless the officer is given written notice of the grounds for delay before the intended date of promotion or as soon as possible thereafter. If promotion is delayed, the officer must be given an opportunity to make a written statement to the SA for their consideration.

h. Automatic delays under this provision will be resolved within 6 months of the date the officer would have been promoted. An officer's promotion will not be delayed more than 6 months unless the SA, or the Secretary's designee, grants a further delay. The Office of Promotions (RC) will monitor cases involving delay and will grant a further period of delay in cases involving nonpromotable overweight officers and in extraordinary cases. Additionally, a "further period of delay" is deemed to have been granted in any case that has been referred to a promotion advisory board; the delay in such cases extends until final action.

3. Title 10, U.S. Code (USC), section 12203, provides that appointments of Reserve officers in commissioned grades of lieutenant colonel and commander or below, except commissioned warrant officer, shall be made by the President alone. Appointments of reserve officers in commissioned grades above lieutenant colonel and commander shall be made by the President, and with the advice and consent of the Senate.

4. Title 10, USC, section 14310, provides for the removal of officers from a list of officers recommended for promotion. It states:

a. The President may remove the name of any officer from a promotion list at any time before the date on which the officer is promoted.

b. Removal for Withholding of Senate Advice and Consent – If the Senate does not give its advice and consent to the appointment to the next higher grade of an officer whose name is on a list of officers approved by the President for promotion (except in the case of promotions to a reserve grade to which appointments may be made by the President alone), the name of that officer shall be removed from the list.

c. Removal After 18 Months.

(1) If an officer whose name is on a list of officers approved for promotion under section 14308(a) of this title to a grade for which appointment is required by section 12203(a) of this title to be made by and with the advice and consent of the Senate is not appointed to that grade under such section during the officer's promotion eligibility period, the officer's name shall be removed from the list unless as of the end of such period the Senate has given its advice and consent to the appointment.

(2) Before the end of the promotion eligibility period with respect to an officer under paragraph (1), the President may extend that period for purposes of paragraph (1) by an additional 12 months.

(3) In this subsection, the term "promotion eligibility period" means, with respect to an officer whose name is on a list of officers approved for promotion under section 14308(a) of this title to a grade for which appointment is required by section 12203(a) of this title to be made by and with the advice and consent of the Senate, the period beginning on the date on which the list is so approved and ending on the first day of the eighteenth month following the month during which the list is so approved.

5. Title 10, U.S. Code, section 14311, provides for the involuntary delay of promotion during investigation and proceedings. Under regulations prescribed by the Secretary of Defense, the appointment of an officer to a higher grade may be delayed if, in pertinent part:

(1) an investigation is being conducted to determine whether disciplinary action of any kind should be brought against the officer, and/or

(2) substantiated adverse information about the officer that is material to the decision to appoint the officer is under review by the Secretary of Defense or the Secretary concerned.

6. The Manual for Courts-Martial governs the procedures and punishment in all courts-martial and whenever expressly provided, preliminary, supplementary, and appellate procedures and activities. "Article" refers to articles of the UCMJ. Article 133, conduct unbecoming an officer and gentleman, states, in pertinent part any commissioned officer, who is convicted of conduct unbecoming an officer and a gentleman shall be

punished as a court-martial may direct. Conduct unbecoming is defined as action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty.

7. AR 20-1 (IG Activities and Procedures), paragraph 3-11 (Factual Amendment of IG Records) states requests to amend errors such as ranks, name spellings, and the like contained in IG records. Information pertaining to requests to reconsider an IG finding, or matters of IG opinion, judgment, or conclusions, appears in paragraph 3-12 of this regulation. Persons will direct requests for the factual amendment of IG records to the authority that directed the record's creation (for example, the directing authority of an ROI) or the Inspector General, the DTIG, or the Principal Director to the Inspector General for Inspections for cases in which DAIG is the office of record. Directing authorities may amend personal information on individuals contained in the record provided that adequate documentary evidence supports the request. This amendment authority is limited to those portions of the record containing facts (for example, the spelling of a name). For changes to other parts of an IG record, see paragraph 3-12 of this regulation. Amendment requests for which the directing authority recommends denial must be supported by memoranda and forwarded to DAIG's Records Release Office. As the access and amendment refusal authority designated in AR 340-21 (The Army Privacy Program), TIG is the first official who may deny requests to amend IG records. Should the directing authority review or re-look a case and, based on new evidence, determine that a subject should be added or deleted, a function code should be changed, and/or a determination of an allegation is warranted, the directing authority must submit that request to TIG in accordance with paragraph 3-12 of this regulation.

8. AR 20-1 (Inspector General Activities and Procedures), Paragraph 3-12 (Requests for reconsideration of inspector general findings, opinions, judgments, or conclusions), states all requests to add or delete a subject, alter a function code, and/or alter an allegation determination in an IG record will be forwarded or directed to DAIG's Assistance Division (SAIG-AC) for referral to the appropriate divisions within DAIG for review prior to action by TIG, the DTIG, or the Principal Director to the Inspector General for Inspections. Only TIG may approve or disapprove requests to amend determinations in IG records. All requests to amend determinations in IG records will include one copy of the record for which the amendment is sought; any documents in support of or related to the disputed record; acknowledgement to the requester; and recommendations, with supporting rationale, concerning whether the amendment should be approved or disapproved. Requests for amendments concerning opinion,

judgment, or conclusion may be granted upon a showing of fraud, mistake of law, mathematical miscalculation, or newly discovered evidence.

9. AR 340-21 (The Army Privacy Program), paragraph 2-10 (Amendment of Records), dated 5 July 1985, states individuals may request the amendment of their records, in writing, when such records are believed to be inaccurate as a matter of fact rather than judgment, irrelevant, untimely, or incomplete. The amendment procedures are not intended to permit challenges of an event in a record that actually occurred, or to permit collateral attack upon an event that has been the subject of a judicial or quasi-judicial action. Consideration of a request for amendment would be appropriate if it can be shown that the circumstances leading up to the event recorded on the document were challenged through administrative procedures and found to be inaccurately described; the document is not identical to the individual's copy; or the document was not constructed in accordance with the applicable record-keeping requirements prescribed.

10. AR 600-8-104 (Army Military Human Resource Records (AMHRR) Management) provides policies, operating tasks, and steps governing the AMHRR.

a. This regulation states that only those documents listed in Appendix B (Documents Authorized for Filing in the AMHRR and/or iPERMS), Table B-1 (Authorized Documents) are authorized for filing in the AMHRR. Depending on the purpose, documents will be filed in the AMHRR in one of three sections: performance, service, or restricted.

b. Paragraph 3-6 (AMHRR folders) provides that the restricted section of the AMHRR is used for historical data that may normally be improper for viewing by selection boards or career managers.

NOTHING FOLLOWS