

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 22 May 2024

DOCKET NUMBER: AR20230001475

APPLICANT REQUESTS: to appeal the decision made by the Special Selection Review Board (SSRB) to deny his promotion to the rank/grade of lieutenant colonel (LTC)/O-5.

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

- DD Form 149 (Application for Correction of Military Record)
- Legal Counsel's Argument
- Summary of Creditable Adverse Information
- Texas Department of Family and Protective Services letter, 8 October 2015
- Memorandum – Subject: Request Removal of the Headquarters Department of the Army (HQDA) Flag (FA), 23 April 2017
- Orders Number B-10-706570, 11 October 2017
- Memorandum – Subject: Favorable Security Determination after Due Process, 2 March 2018
- DA Form 67-10-2 (Field Grade Plate – Officer Evaluation Report)
- Memorandum – Subject: Delay of Promotion and Referral to a SSRB, 21 June 2021
- Memorandum – Subject: Delay of Promotion and Referral to a SSRB, 26 June 2021
- Title 10, United States Code (USC), Subtitle B, Chapter: 345 Section 3583 (Requirement of Exemplary Conduct)
- Title 10, USC, Section 14502a – (Special Selection Review Boards)
- Excerpt Army Regulation (AR) 135-155 (Promotion of Commissioned Officer and Warrant Officers)
- DA Form 4856 (Developmental Counseling Form)
- Memorandum – Subject: Army Policy Implementing the Secretary of Defense Coronavirus Disease 2019 (COVID-19) Vaccination Mandate Rescission, 24 February 2023

FACTS:

1. The applicant represented by legal counsel provides that he was not promoted to LTC due to his submitted request for religious exemption pertaining to declining the

COVID-19 vaccination. Counsel contests that this is the only logical conclusion since the allegations from his ex-spouse did not prevent him from being promoted to major (MAJ)/O-4 nor did it result in the loss of his security clearance. Counsel further provides that the SSRB relied on old and thoroughly discredited allegations from his former spouse and used this as justification for red lining the applicant's promotion to LTC. It defies logic, common sense, and the fundamental principles of fairness for the applicant to be found to possess the requirement of exemplary conduct noted in his performance evaluations and then be found unfit for promotion 5-years later when the only change in his personnel record is 5-years of exemplary performance as a MAJ.

The applicant's denial of promotion to LTC was based on an accusation of sexual misconduct raised in 2015 by his ex-spouse. After being assaulted by his ex-spouse on multiple occasions, the applicant filed for divorce (August 2015). A restraining order was issued against his former spouse which ultimately resulted in their children being placed in the applicant's custody, but only after a supplemental order was issued. During this period, the former spouse had her daughter initiate an allegation of sexual misconduct against the applicant. This allegation was later dismissed by Child Protective Services as false except one of which they were unable to determine because the alleged witness refused to cooperate.

Counsel concludes that although there is no direct proof, the applicant's promotion denial came shortly after he elected to not be administered the COVID-19 as a form of reprisal. The applicant has earned his promotion to LTC as demonstrated through the presented evidence and there is no credible evidence to lawfully deny his promotion. The applicant exercised his rights to deny the COVID-19 vaccine based upon the policy in place at that time.

2. A review of the applicant's available service records reflects the following:

a. On 29 May 2004, the applicant was appointed as a Reserve commissioned Armor Officer and executed an oath of office at the rank/grade of second lieutenant (2LT)/O-1 with a subsequent call to active duty.

b. On 18 October 2005, the U.S. Army Human Resources Command (AHRC) issued Orders Number 291-127 announcing the applicant's promotion to the rank/grade of first lieutenant (1LT)/O-2, effective on with a Date of Rank (DOR) of 29 November 2005.

c. On 15 June 2007, AHRC issued Orders Number 166-079 announcing the applicant's promotion to the rank/grade of captain (CPT)/O-3, effective on with a DOR of 1 July 2007.

d. On 26 February 2010, the applicant attended and completed the Maneuver Captains Career Course.

e. On 7 June 2014, Headquarters III Corps and Fort Hood issued Orders Number 158-0125 reassigning the applicant to the U.S. Army transition point pending his release from active duty.

f. On 1 October 2014, the applicant was honorably released from active duty due to his non-selection for promotion under the provisions of Army Regulation (AR) 600-8-24 (Officer Transfers and Discharges), paragraph 2-37 and subsequently assigned to the 761st Tank Battalion as a Reserve commissioned officer.

g. On 11 October 2017, AHRC issued Orders Number B-10-706570 announcing the applicant's promotion to the rank/grade of MAJ/O-4, effective 25 September 2015.

h. On 22 July 2020, the applicant completed the Intermediate Level Education (Common Core).

3. The applicant provides the following a:

a. Summary of Creditable Adverse Information reflective of the substantiated findings of rape, pandering and sexual abuse of a child as committed by the applicant being approved on 15 November 2016. However, the DA Form 4833 (Commanders Report of Disciplinary or Administrative Action) provides that there was insufficient evidence for the offense of pandering and that the involved victim refused to cooperate for the offense of rape. It further provides that the Staff Judge Advocate opined that there was no probable cause to believe that the applicant committed the offense of sexual abuse of a child, as the elements of the offense were not met. Further, there is no evidence of any actions taken at command level present in the information provided by screening agencies. A synopsis of the case is further provided in its entirety within the supporting documents for the Board member's review.

b. Texas Department of Family and Protective Services letter dated, 8 October 2015, reflective of the Department of Family and Protective Services (DFPS) completion of their investigation of alleged abuse or neglect as reported on 24 August 2015, involving one or more children in the applicant's family. The DFPS ruled out all allegations of neglectful supervision, and two of the three allegations of sexual abuse. They were unable to determine a finding of the remaining allegation of sexual abuse due to insufficient information to conclude whether the alleged abuse or neglect did or did not occur.

c. Memorandum – Subject: Request Removal of the Headquarters Department of the Army (HQDA) Flag (FA) dated 23 April 2017, reflective of the applicant's

commanders submitted request for removal of the HQDA initiated flag for law enforcement investigation (Code M). The outcome of the investigation found that the applicant did not engage in any of the alleged misconduct. The case was closed favorably by both civilian and military law enforcement. The applicant's local flag was lifted with an effective date of 12 April 2017. The commander determined that the actions and conduct of the applicant did not violate Title 10, Section 3583 (Requirement of Exemplary Conduct), and therefore a Promotion Review Board (PRB) was not warranted.

d. Memorandum – Subject: Favorable Security Determination after Due Process dated 2 March 2018, reflective of the applicant being notified of a favorable determination being made pertaining to his security clearance.

e. DA Form 67-10-2 reflective of the applicant's professional performance as assessed by members of his immediate leadership between May 2018 – April 2022. The applicant was rated as "highly qualified" on two of the three evaluations received during this period with the remaining month being rated as "qualified" with an overall recommendation that he be promoted with his peers.

f. Memorandum – Subject: Delay of Promotion and Referral to a SSRB dated 21 June 2021, reflective of the applicant being recommended for promotion to LTC. However, his name was withheld from the promotion scroll pending review of adverse information from a military police report (15 November 2016). This information was not considered by the Promotion Selection Board (PSB). The applicant was afforded 30 days to present information pertaining to this notification.

g. Memorandum – Subject: Delay of Promotion and Referral to a SSRB dated 26 June 2021, reflective of the applicant's statement of justification pertaining to the adverse information located within his records. The applicant addresses the lifting of the adverse action flag (M) and the (F) flag (Delay of Promotion or Removal from a Selection List). The applicant recommended that the adverse information (military police documents) from his personal records be purged. The letter is further provided in its entirety for the Board members review within the supporting documents.

h. Title 10, Subtitle B, Chapter: 345 Section 3583 (Requirement of Exemplary Conduct), reflective of the expectations of all commanding officers and others in positions of authority.

i. Title 10, United States Code, (USC), Section 14502a – (SSRB), reflective of information pertaining to the purpose and intent of SSRB.

j. Excerpt AR 135-155 (Promotion of Commissioned Officers and Warrant Officers), reflective of information pertaining to pre/post board screening requirements.

k. DA Form 4856, reflective of the applicant being ordered by his commander on 15 October 2021, to become fully vaccinated with the COVID-19 vaccine. The back page of this document was not presented.

l. Memorandum – Subject: Army Policy Implementing the Secretary of Defense Coronavirus Disease 2019 (COVID-19) Vaccination Mandate Rescission, dated 24 February 2023, reflective of the Secretary of Defense rescinding the COVID-19 vaccination mandate.

4. On 18 March 2024, the AHRC, Chief, Officer Promotions-Special Actions, provided an advisory opinion recommending disapproval of the applicant's request noting that after careful consideration of all matters, on 10 March 2022, the Secretary of the Army rendered a decision to remove the applicant from the FY21 Reserve Component LTC Army Promotion List (APL), and further constituting as a non-selection. As such, based on the results of the SSRB to remove him, it is believed that the vaccine rescission mandate is not relevant to this appeal, and the Secretary of the Army's decision is final.

5. On 20 March 2024, the applicant was provided with a copy of the advisory opinion and afforded 15 days to provide comments. In response, counsel notes that the initial basis of for the applicant's request was twofold: his refusal to take the COVID-19 vaccine and a completely refuted allegation from his ex-wife that he participated in her prostitution and sexually assaulted their daughter. Counsel further argues that both events/actions were contributing factors to the outcome of the SSRB. This rebuttal is further provided in its entirety within the supporting documents for the Board member's review.

#### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition, available military records and AHRC, Chief, Officer Promotions-Special Actions advisory opinion, the Board concurred with the advising official recommendation for denial, finding adverse information during the post board screening process. The Board noted the military police report from 2015 and the conduct of the applicant who at the time was then a captain.

2. The Board found the records lacks sufficient evidence to support the applicant and his counsel's contentions stating he was not selected for promotion due to his refusal to take the COVID vaccination. During deliberation, the Board noted that official promotion

and selection boards select members for promotion based upon their performance and potential; the Board does not. The Board may refer records to appear before a special selection board (SSB) for promotion consideration when there is a clear error or injustice. The Board determined there is insufficient evidence to support an appeal regarding the decision made by the Special Selection Review Board (SSRB) to deny his promotion to the rank/grade of lieutenant colonel (LTC)/O-5. Based on the preponderance of evidence the Board determined the applicant's contentions are without merit and denied relief.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
█	█	█	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

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

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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. AR 135-155 (Promotion of Commissioned Officers and Warrant Officers) provides policy for selecting and promoting commissioned officers of both the Army National Guard of the United States (ARNGUS) and the U.S. Army Reserve (USAR), and warrant officers of the USAR.

a. Section II (Selection Board Procedures) provides that promotion advisory board/special selection boards will be convened to reconsider officers who were either improperly omitted from consideration due to administrative error, or who were non-selected for mandatory promotion as a result of material error. Special selection boards are conducted as an additional duty of regularly scheduled mandatory Reserve of the Army selection boards for the same competitive category.

b. Section III (Promotion Reconsideration Boards) provides that Officers and warrant officers who have either failed of selection for promotion, or who were erroneously not considered for promotion through administrative error may be reconsidered for promotion by either a promotion advisory board or a special selection board, as appropriate. These boards are convened to correct/prevent an injustice to an officer or former officer who was eligible for promotion but whose records:

- through error, were not submitted to a mandatory promotion selection board for consideration
- contained a material error when reviewed by the mandatory selection board

c. The AHRC, Office of Promotions will normally not determine that a material error existed if the administrative error was immaterial, or, the officer in exercising reasonable diligence, could have discovered and corrected the error or omission in the OMPF.

2. Title 10, United States Code (USC), section 14104 states, the proceedings of a selection board convened under section 14101 or 14502 of this title may not be disclosed to any person not a member of the board, except as authorized or required to process the report of the board. This prohibition is a statutory exemption from disclosure, as described in section 552(b)(3) of title 5. (b) Prohibited Uses of Board Discussions, Deliberations, Notes, and Records.—The discussions and deliberations of a selection board described in subsection (a) and any written or documentary record of such discussions and deliberations—

- are immune from legal process;
- may not be admitted as evidence; and
- may not be used for any purpose in any action, suit, or judicial or administrative proceeding without the consent of the Secretary of the military department concerned

3. Title 10, USC, section 628a (Special selection review boards) states, If the Secretary of the military department concerned determines that a person recommended by a promotion board for promotion to a grade at or below the grade of major general, is the subject of credible information of an adverse nature, including any substantiated adverse finding or conclusion described in section 615(a)(3)(A) of this title, that was not furnished to the promotion board during its consideration of the person for promotion as otherwise required by such section, the Secretary shall convene a SSRB under this section to review the person and recommend whether the recommendation for promotion of the person should be sustained. If a person and the recommendation for promotion of the person is subject to review under this section by a SSRB convened under this section, the name of the person shall not be forwarded to the Secretary of Defense, the President, or the Senate, as applicable, or included on a promotion list under section 624(a) of this title. In reviewing a person and recommending whether the recommendation for promotion of the person should be sustained under this section, a special selection review board convened under this section shall be furnished and consider any credible information of an adverse nature on the person, including any substantiated adverse finding or conclusion from an officially documented investigation or inquiry described in section 615(a)(3)(A) of this title.

//NOTHING FOLLOWS//