

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 8 August 2023

DOCKET NUMBER: AR20230001783

APPLICANT REQUESTS:

- Special Selection Board (SSB) for promotion consideration to the rank/grade of colonel (COL)/O-6 for administrative errors
- if selected for promotion to COL, arrears in pay from the effective date of promotion to COL
- revocation of separation or removal orders (Orders Number 063-1309)
- enrollment in Senior Service College (SSC)
- arrears in pay for retroactive promotion to lieutenant colonel (LTC), effective 18 December 2007
- record explaining the absence of lieutenant colonel (LTC) officer evaluation reports (OER)

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

- DD Form 149 (Application for Correction of Military Record)
- Self-authored Letter
- Orders Number 063-1309 Release from Active Duty (AD)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Orders Number 133-002 promotion to LTC
- DD Form 827 (Application for Arrears in Pay)
- Defense Finance Accounting Service (DFAS) online status
- DFAS Letter, 18 March 2022
- DD Form 2789 (Waiver/Remission of Indebtedness Application)
- DFAS Letter, 9 August 2022
- DFAS Letter, 12 August 2022
- DFAS Claim Submission

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), section 1552(b); however, the Army Board for Correction of Military Records

(ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant states, in his application and self-authored letter, in effect:

a. Due to the correction of administrative errors and recent back promotion to LTC, he was not considered for the selection boards to COL when he was in or above the promotion zones.

b. Army Regulation (AR) 140-10 (Assignments, Attachments, Details, and Transfers) states a Soldier's erroneous removal from active status is void. The removal orders will be revoked, and the active status confirmed to clarify the record.

c. When he was promoted retroactively, the pay for the arrears in the grade was not processed. When he queried the unit tasked with his promotion, they stated they were not responsible for pay. Title 37 USC, section 204, (Entitlement) provides that members of a uniformed service are entitled to the pay of the grade, according to years of service. To date, DFAS has provided only excuses for not paying the arrears in pay for his back-dated promotion to LTC.

d. In 2021, his ABCMR request was referred to an SSB and he was promoted to LTC effective 2007; however, the relief was not complete as the resumption of active status and the arrears in pay were not effectuated.

e. The retroactive promotion, effective 2007, corrected an administrative error yet created another administrative issue that eliminated opportunities for a fair and equitable basis for promotion selection when the mandatory promotion board convened.

f. Title 10, USC, section 628 (Special Selection Board) states in relevant part:

(1) "If the Secretary of the military department concerned determines that because of administrative error a person who should have been considered for selection for promotion from in or above the promotion zone by a promotion board was not so considered, the Secretary shall convene a SSB under this subsection to determine whether that person (whether or not then on AD) should be recommended for promotion."

(2) "A SSB shall consider the record of the person whose name was referred to it for consideration as that record, if corrected, would have appeared to the board that considered him."

g. In addition, AR 600-8-29 (Officer Promotions) promotion eligibility states, in pertinent part, "as established by the Secretary of the Army under Title 10, USC, section

619 officers must meet the following minimum Time in Grade (TIG) requirements to be considered for promotion, captain, major (MAJ) and LTC must serve at least 3 years TIG to be considered for promotion. This requirement may be waived by the Secretary of the Army only for consideration from below the zone."

h. Were it not for the administrative errors that reset the promotion to LTC from 2007 to 2012, he would have been eligible for promotion to COL below the zone in 2009, in the zone in 2010, and above the zone in 2011. He was not considered by these scheduled boards due to the administrative errors of previous boards.

i. In addition, for board consideration when convened, the opportunities for the required key duty assignments (i.e., battalion command) and additional competitive military education SSC to be competitive with his peers were not afforded to him, due to the administrative error in the promotion to LTC.

j. The selection boards are required to consider the applicant's record on a "fair and equitable basis." For promotion to COL, battalion command or centralized selection list Key Development (KD) assignments as well as SSC education are among the best qualified. But for the administrative promotion error, he would have been eligible and probably would have been selected for LTC KD assignments and education.

k. For fair and equitable consideration an appropriate nonprejudicial explanation in the record dealing with unexplained periods of LTC OERs should be placed in his record. The explanation should account for the period of the reconstructed service of non-LTC OERs from the time of the erroneous nonselection and subsequent discharge in 2008 to his return to AD status in 2013. The record should be clear that the gap in LTC OERs, KD assignments, and continued military education was not caused by any fault of his.

l. Given the SSB is convened and recommends promotion to COL, arrears in pay for the back promotion retroactive to the effective date of promotion is required to fully correct his record. Also, given the promotion, the 2015 removal, release, separation, or discharge from Reserve participation on AD status becomes void. The removal or separation orders are required to be revoked to correct the record to resume and confirm AD status.

m. The 2015 discharge was predicated on Title 10, USC, section 14507 (Removal from the Reserve Active-Status List (RASL) for years of service: Reserve LTCs and COLs of the Army, Air Force, and Marine Corps and Reserve commanders and captains of the Navy), which would be in error as it would no longer apply. To correct the record, the applicable law or statute Title 10, USC, section 14701 (Selection of officers for continuation on the RASL) states in part, "a Reserve officer who holds the

grade of COL in the Army and who is subject to separation under 14514 of this title may not be continued on the RASL beyond 35 years of commissioned service."

n. In 2012 and 2013, under Title 10, USC, section 14701 provisions, he was granted voluntary Selective Continuation extensions of his Mandatory Removal Date (MRD).

o. Upon correction of the second nonselection for promotion, which involuntarily removed him from AD status, the orders for the removal from AD status in error have yet to be revoked to correct his time-in-service record and confirm the continuous active combat status. The promotion was only a partial correction and not a true correction to the full administrative error and/or injustices in the record. The complete remedy would have corrected the second nonselection, restore him to his office or position, and returned him to the correct active status. Relief should be a complete remedy. There was a definitive failure in providing relief; the relief provided failed to correct his record.

p. AR 140-10, paragraph 7-13b (Erroneous removal from an active status), dated 16 July 2021, states: "The removal of a Soldier from active status becomes void if the removal was contrary to law. When the erroneous removal is discovered, the Soldier will be allowed to resume active participation in the Reserve. Removal orders will be revoked to clarify the record and the Soldier's active status will be confirmed.

q. In 2008, he was removed from RASL and released from AD for an erroneous second non-selection for promotion to LTC. He was actively participating in the Reserve on AD orders in a contingency operation, Operation Iraqi Freedom, on continuous back-to-back orders, based on an essential low-density skillset.

r. In 2021, after 14 years of seeking correction to the promotion error, the second nonselection was found contrary to law, and he was granted the promotion to LTC, effective 2007. Although the promotion errors causing the erroneous removal had been discovered and corrected, the erroneous removal order, release from AD, or separation from full-time active combat status has yet to be voided and corrected. A second non-selection for promotion consideration is no longer valid.

s. A correction is requested, in his military record, to revoke the removal or separation order, Orders 063-1309, dated 3 March 2008, effective 18 May 2008; to clarify his time-in-service record and confirm the resumption of his Reserve participation on active combat duty status, until returned to AD in 2013 for Operation Enduring Freedom, after the initial 2012 promotion to LTC.

t. On 13 May 2021, he was promoted to LTC, effective 8 December 2007, and he has yet to receive the pay for the grade which assigned, and duties performed.

u. Title 37, USC, section 204 states in relevant parts, a member of a uniformed service who is on AD is entitled to the basic pay of the pay grade to which assigned or distributed, in accordance with their years in service.

v. On 5 June 2005, he was activated and mobilized to Iraq until separated on 18 May 2008 for an erroneous second nonselection for promotion to LTC.

w. Upon the 2021 retroactive promotion, the unit that promoted him stated they were not responsible for paying him in that they were only tasked with the promotion. When the pay was not corrected the ABCMR mandate "to correct an error or remove an injustice" was clearly violated. The relief provided failed in fully correcting the error, and more perpetuated rather than removed an injustice.

x. On 30 June 2021, he submitted a DD Form 827 to DFAS for the back dated promotion, which was received on 3 July 2021. On 15 September 2021, he was informed the claim would take approximately 90 to 120 days for a technician to complete the case. He followed up, telephonically after 90 days, on 14 January 2022 and was informed a technician was assigned the case on 8 November 2021, and that the 120 business days would start then; not from the 15 September 2021 date which gave an approximate completion date of 4 May 2022.

y. On 18 March 2022, he was informed his case was beyond a six year statute of limitation and his claim for arrears in pay for promotion was barred from consideration. On 13 May 2022, he submitted a DD Form 2789, which was a waiver of indebtedness per the 18 March 2022 letter from DFAS. He included a response regarding the accrual period.

z. On 9 August 2022, DFAS (Waivers Branch) replied that his waiver request was beyond their purview, given he was not in debt for any pay and allowances. The waiver of indebtedness should not have been a burden placed upon someone seeking arrears in pay. It should be clear the request to resolve the issue made no sense and submitted even less. The obvious response served no purpose to reach the results and lends itself to unnecessary delay that was emotional and devastating.

aa. On 12 August 2022, DFAS (Claims Branch) replied that the arrears in pay for promotion correction was due. On 9 November 2022, telephonically, a year after the technician started working on his claim, DFAS had yet to determine how much, his status, or when he could expect to receive the arrears in pay.

bb. On 21 November 2022, he submitted a SF 1199a (Direct Deposit), a voided check, and a copy of his federal government issued military identification card to DFAS Debt and Claims Management portal. He also sent the documents by certified mail to DFAS as referenced in a letter from DFAS, dated 12 August 2022.

cc. The correction requested for the military record is for pay, benefits, entitlements, and allowances in the grade which assigned, which includes but is not limited to Title 37, USC, sections 204, 301, 305, 310, 351, 402, 403, 416, 453, as well as the Combat Zone Tax Exclusion. In addition, under the provisions of Title 5, USC, section 5596(b) and Title 28, USC, section 2412(B) the correction includes interest and attorney fees related to the arrears in pay had the administrative error not occurred.

3. A Record of Proceedings (ROP), dated 16 April 2020, for the applicant's ABCMR case, AR20190010390, shows the applicant requested validity of his military education waiver he submitted for the 2006 PSB and consideration for promotion by a SSB under the 2007, 2008, and 2009 LTC Reserve Component (RC), Army Promotion List (APL) PSB criteria. The Board unanimously denied the applicant's request. On 24 April 2020, the Deputy Assistant Secretary of the Army (DASA) (Review Boards) reviewed the applicant's application, the allied documents, and the Board's ROP and found there was sufficient evidence to provide partial relief in the applicant's case. The DASA stated, in effect:

a. The advisory opinion from the Office of the Army G-1 indicated the applicant may not have been fully apprised that he needed to re-acquire and re-submit a new education waiver for each successive PSB. The DASA also noted the Army committed an error by failing to remove, in a timely manner, a General Officer Memorandum of Reprimand from the applicant's official military personnel file performance file and placing it in his restricted file. The DASA found that this and the other evidence or error and/or injustice was sufficient to warrant partial relief.

b. The DASA directed the applicant's records be referred to an SSB under the 2007 LTC RC APL PSB criteria (and if necessary to the LTC RC SSBs for 2008 and 2009) with the applicant's SSB board file in each instance corrected to include documentation that he had a valid educational waiver effective for that particular SSB. The partial relief did not extend to an SSB beyond 2009.

c. In late 2009, the Army notified the applicant in writing that he was not selected for promotion to LTC and that he was not promoted because he failed to meet the educational requirement. The applicant was, therefore, placed on notice that he either had to get a new waiver for the subsequent promotion board or to otherwise satisfy the necessary education requirement. Consequently, the DASA's direction to provide partial relief in the case did not include referral to an SSB beyond the 2009 SSB.

d. To the extent that the applicant requested relief in excess of that, as described, the DASA concurred with the Board's findings and recommendations and denied relief. The DASA requested necessary administrative action be taken to affect the correction of records as indicated. The entire case is available for the Board's consideration.

4. The applicant's service record contains the following documents for the Board's consideration:

a. National Guard Bureau (NGB) Form 337 (Oaths of Office) shows the applicant completed the oath of office in the Missouri Army National Guard (ARNG) in the rank of MAJ on 15 June 2005 with a subsequent call to active duty in support of Operation Iraqi Freedom.

b. Memorandum, Subject: Notification of Promotion Status, dated 4 January 2007, shows the applicant, in the rank of MAJ, was not among those selected for promotion to LTC.

c. Orders Number 07-082-00018, published by Headquarters, 63rd Regional Readiness Command, dated 23 March 2007, reassigned the applicant, in the rank of MAJ, in the ARNG, effective 15 June 2005.

d. DD Form 214, shows the applicant entered AD, as a member of the ARNG, on 16 June 2005 and was honorably released on 18 May 2008 by reason of completion of required active service. He had service in Kuwait from 22 September 2005 through 26 September 2005 and service in Iraq from 27 September 2005 through 24 February 2008. He completed 2 years, 11 months, and 3 days of net AD service.

e. Memorandum, Subject: Notification of Nonselection for Promotion (1st time), dated 8 September 2009 shows the applicant, in the rank of MAJ, was not among those selected for promotion to LTC due to missing the required civilian and/or military education.

f. Orders Number B-01-200390, published by the U.S. Army Human Resources Command (AHRC), dated 23 January 2012, promoted the applicant to the rank of LTC, effective on with a date of rank of 3 January 2012.

g. Memorandum, Subject: Voluntary Selective Continuation Past MRD for the applicant, dated 17 April 2013, approved the applicant's extension of his MRD to 21 November 2014.

h. On 19 April 2013, the applicant entered active duty in support of Operation Enduring Freedom.

i. Orders Number 15-063-00008, published by Headquarters, U.S. Army Reserve Command, dated 4 March 2015, released the applicant from his current assignment due to maximum authorized years of service, effective 3 April 2015, and assigned him to the Retired Reserve.

j. DD Form 214, shows the applicant, as a member of the U.S. Army Reserve, was honorably released from active duty on 7 March 2015. He had service in Afghanistan from 29 April 2013 through 9 November 2014. He completed 1 year, 10 months, and 19 days of net AD service.

k. Orders Number 133-002, published by Headquarters, Missouri National Guard, Joint Force Headquarters, dated 13 May 2021, promoted the applicant to LTC, effective 18 December 2007.

5. The applicant provides the following documents, not previously considered, for the Board's consideration:

a. Orders Number 063-1309, published by the U.S. Army Maneuver Support Center and Fort Leonard Wood, dated 3 March 2008, released the applicant from AD, effective 18 May 2008.

b. DD Form 827, dated 30 June 2021, is a claim for arrears in pay based on his recent U.S. Army back dated promotion. On 13 May 2021, his effective date of promotion to LTC changed from 3 January 2012 to 18 December 2007. Based on the change in his promotion date, the claim for approximately \$408,000.00 was submitted for the pay grade increase in arrears, inclusive of active combat service from the corrected second non-selection for additional information.

c. DFAS Debt and Claims Management ticket, states on 15 September 2021, a case had been added to the DFAS inventory. Please allow 90 to 120 days for his case to be assigned to a technician.

d. DFAS letter, dated 18 March 2022, states they returned the applicant's claim for amounts he believed he was due from the United States along with a copy of the Barring Act of 1940. The Barring Act states a claim is barred unless such claim is received within six years after the date such claim first accrued. Since the applicant's claim for promotion date effective 18 December 2007 to the rank of LTC in the amount of \$408,000.00 accrued on 3 April 2015, and it was received more than six years after the date it accrued, it was barred from consideration by the provisions of the Barring Act.

e. DD Form 2789 dated 13 May 2022, wherein the applicant was requesting back pay for his promotion to LTC which was granted on 13 May 2021. Given the arrears in pay for back promotion he had completed a DD Form 827 on 2 July 2021.

f. DFAS letter, dated 9 August 2022, in reference to the applicant's waiver consideration request of \$508,208.00 for arrears in pay due to his retroactive promotion to LTC. The applicant's request for waiver for arrears pay is not a debt as a result of



erroneous pay or allowances. His request was beyond the purview and scope of their authority to waive the applicant's request for arrears in pay.

g. DFAS letter, dated 12 August 2022, which states they determined he was due money as a result of the correction of his military records by the Office of the Secretary of the Army, for promotion to LTC effective 18 December 2007. DFAS is required to make all payments via direct deposit. They requested the applicant provide documentation to DFAS for the direct deposit. The applicant included a printout from DFAS Debt and Claims Management showing he uploaded the requested documentation.

6. On 20 May 2023, the Chief, Officer Promotions Board Announcements, Support and Promotion Orders, AHRC, provided an advisory opinion for the Board's consideration, which states, in effect:

a. Based on a review of the information provided, AHRC records, laws, regulations, policies, and the systems available to AHRC Officer Promotions, they found the applicant's request may have merit in part. However, in lieu of the ABCMR's SSB successful outcome under the fiscal year (FY) 2007 criteria, as is, it was not within AHRC's Promotions Branch purview to produce promotion orders, during the period in which the applicant was a member of the ARNG until his transfer to the USAR on 4 May 2009 to 3 April 2015 (transfer date to the Retired Reserve).

b. Nonetheless, the applicant was past the maximum TIG as a MAJ upon the approval date of the FY07 LTC, APL ARNGUS PSB, therefore the earliest DOR that could be awarded to him is the approval date of the board, 21 December 2007.

b. If an adjustment to his current LTC DOR of 3 January 2012 is not granted, the first USAR COL, Non-Active Guard/Reserve (AGR) PSB the applicant would have been eligible for would have been the FY 2017 USAR COL, APL PSB, originally held on 29 November through 16 December 2016, had he not been transferred from the RASL to the Retired Reserve on 3 April 2015.

d. If AHRC's Promotions Branch is directed by the ABCMR to adjust his LTC date of rank to 21 December 2007, the first USAR COL, APL PSB, the applicant would be eligible for consideration as an SSB would be the FY 2011 COL, APL, Non-AGR PSB originally held 7 July through 28 July 2011. Any additional subsequent SSBs thereafter would be as determined by Officer Promotions Special Actions (unless proven otherwise eligible).

7. On 23 May 2023, the advisory opinion was provided to the applicant to allow him the opportunity to respond. On 5 June 2023, the applicant responded stating, in effect:

a. The ABCMR should reject the advisory opinion in part and accept it in part, for the following reasons.

b. The ABCMR should reject any opinion that adjustment to his current LTC DOR from 3 January 2012 should not be granted. While the applicant is not privy to the correspondence submitted by the ABCMR to AHRC requesting the advisory opinion, the focus of the advisory opinion is spent preferencing his DOR should not be adjusted as already granted. This comment is wholly irrelevant and inapposite because he was already selected for retroactive promotion by an SSB.

c. He received promotion orders, dated 13 May 2021, from the Missouri ARNG and was granted a retroactive promotion with an effective date of 18 December 2007 (not 21 December 2007), and it was acknowledged by the Chief, Officer Promotions Branch -Support of the ABCMR's SSB successful outcome under the FY 2007 criteria. The order was enclosed with his ABCMR petition. For those reasons, any part of the advisory opinion equivocating retroactive promotion should be rejected.

d. The advisory opinion starts by acknowledging the applicant's case has merit in part. Paragraph 4 goes on to state that with a backdated promotion to LTC in December 2007, he would have been eligible for the FY 11 USAR COL APL PSB. While the advisory opinion fails to mention which part of his petition has merit, based on the fact that this is the only part of the advisory opinion that provides information favorable to the applicant, it appears AHRC recognizes he would be entitled to an SSB for the FY 11 USAR COL APL PSB.

e. Indeed Title 10, USC, section 628(a)(1) states that an SSB should be convened if an administrative error prevented the servicemember from being considered. It was an administrative error that prevented his due promotion to LTC; such is why the SSB was convened, and he was properly selected for and duly granted the retroactive promotion. Also, but for the administrative error, he would have then been eligible for the FY 11 promotion board. For this reason, he respectfully requests the Board accept this part of the advisory opinion and convene an SSB for the FY 11 USAR COL, APL PSB.

f. Although not mentioned in the advisory opinion, he would also like to point out that if the SSB is convened, his record should reflect documentation regarding the retroactive promotion and an explanation as to why he would be missing LTC OERs, key duty billets, and/or military education for the newly covered period of backdated promotion.

g. He kindly reminds the Board of the other considerations of his request. In particular the revocation of separation orders.

h. Upon the successful outcome of promotion to LTC, 18 December 2007, he lawfully was no longer a two-time non-select for promotion to LTC. Therefore, his removal from active reserve participation on active-duty status was erroneous. As such, the removal and/or separation orders from active-duty need to be revoked to clarify the record and that his active duty service status be reinstated and confirmed. The regulation is clear on this point and AHRC does not provide any communication that refutes this provision of Army regulations.

i. Also, it should not need to be stipulated, but the arrears in pay should follow automatically, without the need for a separate or specific request as previously experienced. The denial of military pay without just cause and substantial evidence is a material administrative error contrary to law and a deliberate and intentional act of abuse of discretion subject to judicial review.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record that partial relief was warranted. The Board carefully considered the applicant's contentions, the military record, and regulatory guidance. Based on the documentation available for review, the Board found sufficient evidence of error or injustice to warrant a recommendation for relief by affording the applicant opportunity for consideration by a Special Selection Board.

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 Board determined the evidence presented sufficient to warrant a recommendation for some relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by:

- adjusting his LTC date of rank 21 December 2007 with all payment in arrears to be determined by DFAS
- affording him consideration for an SSB for promotion to COL O-6, and if selected allowing backpay to the date of promotion

[REDACTED]

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. Title 10, USC, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. AR 600-8-29 (Officer Promotions) prescribes the officer promotion function of the military personnel system. It provides principles of support, standards of service, policies, tasks, rules, and steps governing all work required in the field to support officer promotions. Chapter 7 provides for SSBs.

a. Paragraph 7-2 states the SSBs may be convened under Title 10, USC, section 628 to consider or reconsider commissioned or warrant officers for promotion when Headquarters Department of the Army discovers one or more of the following:

(1) An officer was not considered from in or above the promotion zone by a regularly scheduled board because of administrative error. This would include officers who missed a regularly scheduled board while on the temporary disability retired list and who have since been placed on the active duty list (SSB required).

(2) The board that considered an officer from in or above the promotion zone acted contrary to law or made a material error (SSB discretionary).

(3) The board that considered an officer from in or above the promotion zone did not have before it some material information (SSB discretionary).

b. Paragraph 7-3 (Cases not considered) states an officer will not be considered or reconsidered for promotion by an SSB when an administrative error was immaterial, or the officer, in exercising reasonable diligence, could have discovered and corrected the error in the Officer Record Brief (ORB) or Official Military Personnel File (OMPF). It is the officer's responsibility to review his or her ORB and OMPF before the board convenes and to notify the board, in writing, of possible administrative deficiencies in them.

c. Paragraph 7-11, officers who discover that material error existed in their file at the time they were non-selected for promotion may request reconsideration.

d. A special Selective Continuation (SELCON) board may be convened in accordance with Title 10 USC, section 637 for commissioned officers to consider officers for SELCON who have twice failed selection for promotion, provided the officers

would or should have been considered by a SELCON board following their second failure of selection for promotion.

3. Title 10, USC, section 628 (Special selection boards):

a. Subsection (a) (Persons not considered by promotion boards due to administrative error) states, if the Secretary of the military department concerned determines that because of administrative error a person who should have been considered for selection for promotion from in or above the promotion zone by a promotion board was not so considered, the Secretary shall convene a special selection board under this subsection to determine whether that person (whether or not then on active duty) should be recommended for promotion. (2) A special selection board convened under paragraph (1) shall consider the record of the person whose name was referred to it for consideration as that record would have appeared to the board that should have considered him. That record shall be compared with a sampling of the records of those officers of the same competitive category who were recommended for promotion, and those officers who were not recommended for promotion, by the board that should have considered him. (3) If a special selection board convened under paragraph (1) does not recommend for promotion a person whose name was referred to it for consideration for selection for appointment to a grade other than a general officer or flag officer grade, the person shall be considered to have failed of selection for promotion.

b. subsection(b) (Persons Considered by Promotion Boards in Unfair Manner) states, (1) If the Secretary of the military department concerned determines, in the case of a person who was considered for selection for promotion by a promotion board but was not selected, that there was material unfairness with respect to that person, the Secretary may convene a SSB under this subsection to determine whether that person (whether or not then on active duty) should be recommended for promotion. In order to determine that there was material unfairness, the Secretary must determine that, (A) the action of the promotion board that considered the person was contrary to law in a matter material to the decision of the board or involved material error of fact or material administrative error; or (B) the board did not have before it for its consideration material information.

4. Title 10, USC, section 14104 (Non-disclosure of board proceedings) 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.

5. AR 140-10 (Assignments, Attachments, Details and Transfers), paragraph 7-13b (Erroneous removal from an active status, states the removal of a Soldier from active status becomes void if the removal was contrary to law. When the erroneous removal is

discovered, the Soldier will be allowed to resume active participation in the Reserve. Removal orders will be revoked to clarify the record and the Soldier's active status will be confirmed.

6. Title 37 USC section 204 (Entitlement (The Military Pay Act)) states in relevant parts, a member of a uniformed service who is on AD is entitled to the basic pay of the pay grade to which assigned or distributed, in accordance with their years in service.

7. Title 10, USC, section 1552 states the Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army.

8. Title 31, USC, section 3702, also known as the Barring Statute, prohibits the payment of a claim against the Government unless the claim has been received by the Comptroller General within 6 years after the claim accrues. Among the important public policy considerations behind statutes of limitations, including the 6-year limitation for filing claims contained in this section of Title 31, U.S. Code, is relieving the Government of the need to retain, access, and review old records for the purpose of settling stale claims, which are often difficult to prove or disprove.

9. Title 10 USC, section 14507, states COLs unless continued on the RASL under section 14701 or 14702 of this title each Reserve officer who holds the grade of COL and who is not on a list of officers recommended for promotion to the next higher grade shall (if not earlier removed from the RASL) be removed from that list on the first day of the month after the month in which the officer completed 30 years of commissioned service.

//NOTHING FOLLOWS//