

IN THE CASE OF: [REDACTED]

BOARD DATE: 13 June 2024

DOCKET NUMBER: AR20230001842

APPLICANT REQUESTS: in effect,

- promotion to colonel (COL)/O-6 for retired pay and allowances
- convene a Special Selection Review Board to review his file for promotion to COL/O-6, without the unfounded derogatory information.
- reinstate his name on the promotion list scroll to COL/O-6 with Senatorial confirmation.
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Timeline, undated
- Memorandum, subject: Eligibility for Promotion as a Reserve Commissioned Officer Not on Active Duty, 21 April 2016
- Memorandum, subject: Notification of Promotion Recommendation Withheld by Secretary of the Army, 21 April 2016
- Letter, [REDACTED], 2 August 2016
- Email, Promotion Review Board (PRB) Status Update, 16 March 2018
- Email Correspondence from 30 November 2018 to 11 February 2019
- Department of Defense (DoD) Hotline Complaint, 14 February 2019
- Email from the DoD Hotline Team, 5 March 2019
- Memorandum, subject: PRB RP 1802-14, Fiscal Year (FY) 2016, COL, Army Reserve Active Guard Reserve (AGR), Army Promotion List (APL), Competitive Category, Promotion Selection Board (PSB), 11 March 2019
- Email, PRB Results, 12 March 2019
- DA Form 268 (Report to Suspend Favorable Personnel Actions (Flag)), 12 March 2019
- Letter, Office of the Inspector General (IG), 15 March 2019
- Email, G1 [REDACTED] ([REDACTED]) Army National Guard (ARNG), 20 March 2019
- Memorandum, subject: Request for Convening of a Special Selection Board and Correction of Military Record, 24 March 2019
- Email, U.S. Army Human Resources Command, IG, 28 March 2019

- Orders Number 087-1002, 28 March 2019
- Title 10, U.S. Code (USC), section 14310 (Removal of officers from a list of officers recommended for promotion), section 14311 (Delay of promotion: involuntary), and section 14502 (Special selection boards: correction of errors)
- Letter from the Criminal Investigation Division (CID), 1 December 2022

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, 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 effect:

a. He was selected for COL/O6 on the FY16 APL. Suitability screening failed due to an open Recruiting Assistance Program (RAP) investigation by the CID and his packet was sent to an Officer Review Board (ORB). The ORB referred his packet to a PRB in September 2017. He received a letter from the Secretary of the Army stating that his removal from the promotion list was due to expiration of the Promotion Eligibility Period.

b. He received a letter from CID on 1 December 2022, stating that “based upon the information available to CID in relevant files, there is an insufficient basis upon which to title or index you in law enforcement databases for any offense related to RAP.” If this determination was made at any time from 2016 to 2019 the suitability screening for promotion to COL would not have failed. The applicant contends that the ORB and PRB made decisions on his suitability for promotion with inadequate or insufficient information. Further, the review process was not conducted in a timely manner, resulting in his Promotion Eligibility Period ending.

3. The applicant provides the following:

a. A timeline which shows:

(1) In April 2016 he was selected for promotion to COL. In April 2016 the applicant was withheld from the FY16 Reserve Component (RC) COL APL PSB due to an ongoing CID investigation for the Guard Recruiting Assistance Program (GRAP). His 18-month Promotion Eligibility Period began at this time. September through December 2016, CID closed the applicant's GRAP investigation, and he was criminally founded for the following offenses: fraud, wire fraud, and theft of public money-property-records. CID took approximately 60-90 days to properly close the case. Afterwards, the results were sent to the Directorate of Military Personnel Management (DMPM) to submit for the ORB.

(2) In January 2017, the ORB referred the applicant to a PRB. Afterwards his packet was sent to the U.S. Army Human Resources Command (HRC). From February through August 2017, his packet was at a halt at HRC. From September through December 2017, the Office of the Judge Advocate General (OTJAG) provided guidance to process GRAP-PRB cases, then the ARNG Special Actions Section Chief notified HRC of the new requirements. A case manager from HRC contacted the applicant to provide instructions for his PRB process and granted him 45 days to submit rebuttal. The applicant's Promotion Eligibility Period expired and DMPM submitted a request for a 12-month extension, and it was approved with a new deadline of October 2018.

(3) In January 2018, HRC conducted the applicant's PRB. Afterwards his PRB packet was forwarded to DMPM for official staffing. DMPM staffed his PRB packet through all required HQDA offices and the Office of the Secretary of Defense (OSD), leaving Senate confirmation; however, in October 2018, his Promotion Eligibility Period expired, and no more extensions were authorized.

(4) In October 2018 his Promotion Eligibility Period expired rendering him ineligible for promotion to the rank of COL. An officer has 18 months from the Department of the Army (DA) Board Approval Date to get Senate confirmation for promotion to COL (ARNG). If the 18 months is near expiration a 12-month extension is authorized but cannot exceed 30 months. In accordance with Title 10, USC section 14310, paragraph (c), removal after 18 months, 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.

b. A memorandum dated 21 April 2016, wherein the Director, Military Personnel informs the applicant that he was selected for promotion to the rank of COL/O6, by the 2016 LTC-COL, Department of the Army Reserve Component Promotion Board.

c. A memorandum dated 21 April 2016, which states the applicant was recommended for promotion to the rank of COL/O6, however, the recommendation was temporarily withheld from nomination by the Secretary of the Army. His name was withheld based on a post board screening which identified an open CID investigation. Based on the investigation, HQDA initiated a HQDA suspension of favorable actions (FLAG) until the investigation was completed. He was informed that if the case was closed unsubstantiated, the FLAG action would be removed, and his name would go back for nomination. If the case is closed substantiated, a PRB would be conducted to review the information and reconsider his selection.

d. A letter from a Senator, dated 2 August 2016, which states she brought the information that the applicant presented to the attention of the appropriate officials at DA, she requested a review of the matter and a written response from their office, and she would contact him as soon as she had something further to report.

e. An email dated 16 March 2018, from the PRB Case Manager, Officer Promotions Special Actions, which states that as of 7 February 2018 the applicant's PRB had been held, recommendation was made and forwarded to the Director, DMPM/Army G-1 for further staffing and review before reaching the Secretary of the Army. He was informed that although they received monthly updates the status of all cases did not always change every 30 or 90 days, therefore, the applicant would not receive another notification until they received the final results of the PRB from DA, G-1.

f. Email correspondence from November 2018 to February 2019, concerning the applicant's status and promotion to COL.

g. An email dated 11 February 2019, from the Acting Director, Military Personnel, ■■■ ARNG to the ARNG HRP-R Branch Chief, which states he was previously told the applicant's PRB was approved in February 2018 and sent to DMPM. DMPM staffed it from their office to the OSD by September 2018, and then it was not able to be approved by the Promotion Eligibility Period deadline of 1 October 2018. He asked why it took DMPM over 6 months to staff it to OSD. He stated that it was critical time that caused the Promotion Eligibility Period deadline to be missed, and the system had negatively affected an outstanding officer's [applicant] career.

h. A DoD hotline complaint, dated 14 February 2019, submitted by the applicant. The complaint states that DA failed to process the PRB in a timely manner which led to his Promotion Eligibility Period lapsing, thereby making him non-promotable. He requested reinstatement on the APL LTC-COL FY16 promotion list and scroll.

i. An email dated 5 March 2019, from the DoD hotline team, which states they reviewed the information that the applicant provided and determined it was within the purview of the DA IG. The complaint was referred to IG for information and action deemed appropriate.

j. A memorandum, dated 11 March 2019, which states the Secretary of the Army removed the applicant from the FY16, COL, Army Reserve Active Guard Reserve, Army Promotion List Competitive Category recommended list, pursuant to Section 14310, Title 10, USC, Executive Order 13358, Secretary of Defense delegation to the Secretary of the Army, and Army Regulation 135-155 (ARNG and Reserve – Promotion of Commissioned Officers and Warrant Officers), paragraph 3-18. His removal was a result

of the expiration of his promotion eligibility period established by section 14310(c), Title 10, USC.

k. An email dated 12 March 2019, from Officer Promotions, Special Action, HRC to the applicant informing him of the PRB results and FLAG removal. He was informed that he would be able to re-compete for his next annually scheduled board as long as it was 30 days after the date of the Secretary of the Army memorandum.

l. DA Form 268, which shows his FLAG was removed, effective 11 March 2019. The case was closed unfavorably.

m. A letter from the Office of the Inspector General to the applicant, dated 15 March 2019, and states after careful review, the Inspector General determined that the matter that he presented was not in the purview of the Department of the Army Inspector General. He was referred to the Human Resources Officer Promotions Branch.

n. An email from G1, ■■■ ARNG to the applicant, dated 20 March 2019, which states the ARNG requested clarification to confirm if the email from HRC that was sent directly to the applicant was intended to provide exception to re-compete past his mandatory removal date (MRD). If that was not the intent, they required clarification on the latest date they could retain the applicant because he was past his MRD that reverted to 28 years. The G-1 stated that while they were seeking clarification, the applicant could voluntarily retire, or he could wait for clarification.

o. A memorandum dated 24 March 2019, wherein the applicant requested the convening of a special selection board to consider his record. HRC indicated that he was eligible to re-compete in his next annually scheduled board, but his MRD reverted to 7 June 2018, he would not be able to compete in the next regularly scheduled board proceeding.

p. An email dated 28 March 2018, from the Chief of Assistance, AHRC, IG, which states he acknowledged receipt of the referred case and provided the applicant with a case number and requested that the applicant sign the IG action request and answer standard IG questions that were provided.

q. Sections from Title 10, USC.

r. A letter from CID to the applicant, dated 1 December 2022, and states in July 2022 the Department of the Army CID began a thorough review of investigations that were previously initiated and conducted into allegations of criminal wrongdoing in various RAPs. The review determined that there was insufficient basis upon which to title of index the applicant in law enforcement databases for any offense related to RAP.

4. A review of the applicant's service record shows:

- a. He enlisted in the ARNG of the United States on 20 November 1986.
- b. Orders Number 111-7, dated 8 June 1990, issued by The Office of The Adjutant General, State of [REDACTED], discharged the applicant from the ARNG and as a Reserve of the Army, effective 7 June 1990 and appointed him as a second lieutenant (2LT) in the ARNG, effective 8 June 1990.
- c. NGB Form 22 (Report of Separation and Record of Service) shows he was honorably discharged on 7 June 1990.
- d. On 8 June 1990, he took his oath of office as a [REDACTED] ARNG Officer as a 2LT.
- e. DA Form 71 (Oath of Office) shows he took his oath of office as a Reserve Commissioned Officer on 29 March 1991, as a 2LT.
- f. He was promoted on:
 - 7 June 1993 to first lieutenant
 - 12 November 1997 to captain
 - 14 August 2003 to major
 - 27 April 2010 to LTC
- g. He was honorably discharged from the ARNG on 27 April 2019 and transferred to the Retired Reserve. His NGB Form 22 shows he served 28 years, 10 months, and 20 days during this period. He had 30 years, 5 months, and 8 days total service for retired pay.

5. The Chief, Special Actions Branch, NGB, provided an advisory opinion in this case on 7 May 2024 and recommended partial approval.

- a. In accordance with the [REDACTED] ARNG, the applicant was removed from promotion eligibility after an extended time in a withhold status. At the very least, this denial of promotion consideration forced the applicant to retire in April 2019, instead of serving until his MRD in June 2020.
- b. When the applicant was removed from the promotion list, this decision was treated administratively like a non-selection for promotion. Moving from a select status to a non-select status moved his MRD from 2020 back to 2018 and forced his immediate retirement.

c. He was identified as potentially a subject of investigations into Army Recruiting Assistance Programs in 2016 and was flagged in the Defense Clearance and Investigations Index until 1 December 2022. Having a Soldier's record and career subject to investigation for six years is an extreme punishment, especially when Army CID subsequently found insufficient cause to continue any flagging action.

d. Recommend his promotion list standing be restored and he be granted service credit from the period of his separation date of 27 April 2019 to his original MRD of 30 June 2020 to include all back pay and allowances. He was forced to retire prematurely due to an unfounded and lengthy CID investigation being of no fault of his own.

e. The ■■■ ARNG concurs with this recommendation.

6. The applicant provided a response to the advisory opinion on 15 May 2024. He stated:

a. He concurs with the NGB's proposed recommendation for remedy. If not for unfounded derogatory information used in his suitability screening, he would not have been flagged for promotion or removed from the FY16 APL O6 promotion scroll. He would have served through the balance of his updated MRD (30 June 2020) and, barring promotion, would have retired.

b. However, his promotion packet was never considered without the unfounded derogatory information provided by the CID investigation into the Recruiting Assistance Program. He fully appreciates and understand that promotions are earned and not assumed. He is firm in his belief that, barring this information, his packet would have met suitability requirements, his name would have remained on the promotion scroll, and he would have cleared Senate confirmation. Further, he believes that the ■■■ ARNG would have promoted him to COL/O-6 once a position was vacated.

c. He respectfully requests that the Review Board consider the following course of action as an additional and complete remedy: convene a Special Selection Review Board to review his file for promotion to COL/O-6 as it was in 2016 without the unfounded derogatory information provided by the CID investigation, reinstate his name on the promotion list scroll to COL/O-6 with Senatorial confirmation, and advance him to COL/O-6 for retired pay and allowances.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found partial relief is warranted. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.
2. The Board found the applicant suffered an injustice due to the amount of time it took to remove his name as the subject of an investigation into misconduct related to the Recruiting Assistance Program. Unfortunately, his removal from the recommended list was a function of law and the Board found a recommendation to reinstate him on the list would exceed the Board's authority. The Board did find, however, that referral to an SSB would be a viable solution for righting the injustice. Because he had already been selection for promotion to COL/O-6, the Board agreed it is (or should be) a foregone conclusion that he would again be recommended for promotion under the applicable criteria. The Board also concurred with the conclusion of the advisory official that the change in the applicant's MRD as a result of his circumstances constitutes an injustice.
3. Based on a preponderance of the evidence, the Board determined the following:
 - a. The applicant's record should be referred to an SSB to be considered for promotion to COL/O-6 under the applicable 2016 criteria.
 - b. As recommended by the advisory official, upon completion of the action to promote him to COL/O-6, his record should be corrected by giving him constructive service credit for the period 27 April 2019 through 30 June 2020, to include back pay and allowances.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army and Army National Guard records of the individual concerned be corrected by:

a. Referring his record to an SSB to be considered for promotion to COL/O-6 under the applicable 2016 criteria.

b. Upon completion of the action to promote him to COL/O-6, giving him constructive service credit for the period 27 April 2019 through 30 June 2020, to include back pay and allowances.

2. The Board further determined 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 any relief in excess of that described above.

X

CHAIRPERSON

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, U.S. Code, 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. Title 10, U.S. Code, section 14310 (Removal of officers from a list of officers recommended for promotion) states:

a. Removal by President —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.

d. Administrative Removal —Under regulations prescribed by the Secretary concerned, if an officer on the reserve active-status list is discharged or dropped from the rolls or transferred to a retired status after having been recommended for promotion

to a higher grade under this chapter or having been found qualified for Federal recognition in the higher grade under title 32, but before being promoted, the officer's name shall be administratively removed from the list of officers recommended for promotion by a selection board.

Continued Eligibility for Promotion —An officer whose name is removed from a list under subsection (a), (b), or (c) continues to be eligible for consideration for promotion. If that officer is recommended for promotion by the next selection board convened for that officer's grade and competitive category and the officer is promoted, the Secretary of the military department concerned may, upon the promotion, grant the officer the same date of rank, the same effective date for the pay and allowances of the grade to which promoted, and the same position on the reserve active-status list, as the officer would have had if the officer's name had not been removed from the list.

3. Army Regulation 135-155 (Army National Guard and Reserve – Promotion of Commissioned Officers and Warrant Officers), in effect at the time, prescribed policies, operating rules, and steps governing promotion of Army officers on the Reserve active status list and U.S. Army Reserve warrant officers. It states in:

a. Paragraph 3-19 (Promotion Reconsideration Boards), states 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.

(1) Special selection boards, convened under the Reserve Officer Personnel Management Act (ROPMA) on and after 1 October 1996, will reconsider commissioned officers, (other than commissioned warrant officers) who were wrongly not considered, and reconsider commissioned officers (other than commissioned warrant officers) who were considered but not selected by mandatory promotion boards that convened on or after 1 October 1996.

(2) 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.

(3) Records of officers or former officers will be referred for special selection board action when the Office of Promotions (RC) determines the following—

- An officer was eligible for promotion consideration; however, the officer's records were, through error, not submitted to a mandatory promotion selection board.
- A review of a mandatory selection board finds that an officer's records contained a material error.
- The Army Board for Correction of Military Records (ABCMR) requests such a referral.

(4) CDR, HRC, Office of Promotions (RC) (AHRC-MSL) may find that a "material error" caused the nonselection of an officer by a promotion board. That agency must first determine that there is a fair risk that one or more of the following circumstances was responsible—

- The record erroneously reflected that an officer was ineligible for selection for educational or other reasons. In fact, the officer was eligible for selection when the records were submitted to the original board for consideration.
- One or more of the evaluation reports seen by the board were later deleted from an officer's OMPF.
- One or more of the evaluation reports that should have been seen by a board (based on the announced cut-off date) were missing from an officer's OMPF.
- One or more existing evaluation reports as seen by the board in an officer's OMPF were later modified.
- Another person's adverse document had been filed in an officer's OMPF and was seen by the board.
- An adverse document, required to be removed from an officer's OMPF as of the convening date of the board, was seen by the board.
- The Silver Star or higher award was missing from an officer's OMPF.
- An officer's military or civilian educational level, including board certification level for AMEDD officers, as constituted in the officer's record (as seen by the board) was incorrect.

(5) Application for promotion reconsideration will be sent through command channels to CDR, HRC, Chief, Office of Promotions (RC), ATTN: AHRC-MSL, 9700 Page Avenue, St. Louis, MO 63132-5200.

b. Paragraph 3-22 (Correction of military records as a result of a special selection board action) - If the report of a special selection board, approved by the President, recommends for promotion to the next higher grade an officer not currently eligible for promotion, or a former officer whose name was referred to it, the SA may act through ABCMR to correct the military record of the officer or former officer to correct an error or remove an injustice resulting from not being selected for promotion by the board

which should have considered, or which did consider, the officer (10 USC 14502(e)(3)).

4. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. 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.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//