

IN THE CASE OF: [REDACTED]

BOARD DATE: 14 December 2023

DOCKET NUMBER: AR20230003480

APPLICANT REQUESTS: in effect,

- retroactive appointment to the rank of first lieutenant (1LT) with an effective date of rank (DOR) of 1 July 2014
- subsequent regulation time-in-grade promotions to the rank of captain (CPT) effective 1 January 2015, major (MAJ) effective 1 January 2019, and lieutenant colonel (LTC) effective 1 January 2023
- or convene a Special Selection Board (SSB) for consideration for subsequent regulation time-in-grade promotions to the rank of CPT effective 1 January 2015, MAJ effective 1 January 2019, and LTC effective 1 January 2023
- other relief deemed proper based on the circumstances presented
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Amendment to Previous Request dated 10 August 2023
- Data Supporting Previous Request Memorandum dated 14 August 2023
- Federal Recognition Board Results dated 23 May 2023
- U.S. District Court Order dated 19 July 2023
- Motion Hearing Transcript (29 pages) dated 14 July 2023
- Army Officer Time in Grade Requirements Extract
- Initial Application Request includes 21 Tabbed Attachments

FACTS:

1. The applicant states in his initial application to the Army Board for Correction of Military Records (ABCMR) submitted on 19 February 2023, he requested the Secretary of the Army convene an SSB on his behalf. Subsequent to that request, he was selected by the JAG accessions board and was commissioned as a first lieutenant on 23 May 2023.

2. On 16 August 2023, the applicant was notified by the Army Board for Correction of Military Records (ABCMR) that a review of his service record indicated he had been commissioned in the Judge Advocate General's (JAG) Corps as a first lieutenant (1LT) in the Army National Guard (ARNG). In light of the information, the ABCMR sought information regarding the applicant's initial requests. The applicant provided an email response the same day and indicated he desired to continue with his application and while he had been commissioned, the circumstances and reasons for his original application remained valid. He believed it was essential to pursue them to their conclusion. Given his current commission in the ARNG, he did not seek assessment into the active component. Additionally, he provided supplemental materials to provide a comprehensive understanding of his position and the reasons behind his continued pursuit of the application.

3. The applicant provides:

a. An amendment to his prior request, dated 10 August 2023, which states in part, on 14 July 2023, he appeared before a judge who recognized the significant delays in his commissioning as a 1LT and the impact the delay had on potential subsequent promotions. While the court acknowledged the service he had provided to the Army, it also noted that they did not have the authority to recommend retroactive appointment or time-in-grade promotions. However, the judge strongly urged the Army to consider such requests given the unique circumstances of his case. In light of the U.S. District's order, he wishes to amend his initial application and requests retroactive appointment to rank of 1LT with an effective date of July 1, 2014, and subsequent regular time-in-grade promotions to the rank of CPT, MAJ, and LTC with respective effective dates of January 1, 2015, January 1, 2019, and January 1, 2023; or adjustment of the effective date of his appointment to 1LT to July 1, 2014 and for a SSB to be convened to consider subsequent regular time-in-grade promotions to the rank of CPT, MAJ, and LTC with respective effective dates of January 1, 2015, January 1, 2019, and January 1, 2023; and/or any other relief deemed proper based on circumstances. It has been a lengthy and challenging journey to secure justice and recognition for his years of loyal service to the Army. The U.S. District Court's order reinforces the significance of his case and the need for rectification. He respectfully requests the ABCMR consider his amendment and provide a recommendation consistent with justice, equity, and the Court's consideration.

b. A memorandum, dated 14 August 2023, which indicates the purpose is to seek redress for the injuries he endured due to the military's unconstitutional and discriminatory HIV policy, which wrongfully precluded his advancement in the JAG Corps. The court already determined that he had been wronged and indicated that he was entitled to relief. As the body constitutionally designated to provide such relief, he urged the ABCMR to retroactively grant him appointment and the subsequent time-in-grade promotions he would have received in a normal JAG Corps career.

(1) The discriminatory policy that denied his rightful career progression is the proven wrong. The resulting disparity between his current rank and the position he would have attained, but for the policy, is the resultant injury. The court has identified the ABCMR as the entity to decide the appropriate remedy. It is upon this precept that the ABCMR was founded – to ensure that those who serve their country receive justice and fairness.

(2) The applicant provides the below “calculating progression,” further noting it is inequitable for the military to assume his potential mediocrity.

Assuming my appointment in July 2014:

- *Appointed as a First Lieutenant.*
- *Promotion to Captain six months later.*
- *Promotion to Major four years thereafter.*
- *Promotion to Lieutenant Colonel another four years on.*

Given the cited statistics:

- *1 LT to CPT: 100%*
- *CPT to MAJ: 80%*
- *MAJ to L TC: 70%*

**Using these rates, a simple calculation confirms the likelihood of a center-mass officer achieving the rank of Lieutenant Colonel:*

$$100 \times 1.0 \text{ (1 LT to CPT)} \times 0.8 \text{ (CPT to MAJ)} \times 0.7 \text{ (MAJ to L TC)} = 56\%$$

**This figure, being greater than 50%, reasonably establishes that an average center-mass officer would attain the rank of Lieutenant Colonel within the specified timeframe.*

(3) The applicant concludes he established a wrong, illustrated the injury stemming from this wrong, and the Court recognized his entitlement to relief. It is upon the ABCMR to ensure justice is served. Given the data, he beseechs the Board to make his appointment retroactive and award him the subsequent promotions he would have meritoriously earned. In doing so, the ABCMR would be upholding the very principles of justice and fairness that our military stands to defend.

c. A Joint Forces Headquarters, ██████████ National Guard memorandum shows on 23 May 2023, the ██████████ Army National Guard (█████ ARNG) convened a Federal Recognition Board (FRB) to determine whether the applicant met the requirements for Federal Recognition. The FRB President and Board Members determined that the applicant met all federal recognition requirements to be appointed to the rank of 1LT/O2 as a 27A - JAG Officer.

d. In the U.S. District Court for the [REDACTED], dated 19 July 2023, the following was ordered, adjudged, and decreed:

(1) The Secretary of Defense is enjoined from instituting any Selective Retention Board or other proceeding to separate [applicant] involuntarily from military service.

(2) Plaintiff [applicant] sought the Court's assistance in getting the Special Selection Board ("SSB") to consider his request for "retroactive appointment and the appropriate time-in-grade promotions." [Dkt. No. 372-1] at 2. That part of his Motion could not be granted because defendants' year-long delay in approving his commission to First Lieutenant rendered plaintiff ineligible to apply to the SSB when he did. Moreover, because he will not be eligible to apply for promotion to Captain until he has been a Lieutenant for a year, the delay in commissioning him has further delayed his ability to qualify for promotion.

(3) The Court recognizes that it does not have the authority to order the defendants [Secretary of Defense] to evaluate [applicant's] request for retroactive appointment to account for unconstitutional rejection of his 2013 application to commission as 1LT in the [REDACTED] National Guard Judge Advocate General Corps; however, if [applicant] does refile a request to have his appointment to 1LT made retroactive and to receive the appropriate promotions, the Court would urge the defendants to give that request very serious consideration.

(4) This officer has provided a great service to the Army not just through his years of military service, which included two tours overseas, but by courageously fighting in court to correct an outdated, unconstitutional policy that needed to be abandoned. His record of loyal service since 2013, despite being denied a promotion for which he was fully qualified, should support appropriate time-in-grade promotions.

e. A transcript (29 pages) for the motions hearing held on 14 July 2023 at the U.S. District Court, [REDACTED].

f. An extract from Part-Time Commander.com, "Army Officer Time in Grade Requirements," outlines promotion eligibility requirements for active duty, Reserve, and Army National Guard Officers.

g. The applicant's initial application request remains attached with all enclosures and tabbed for reference. The statement provided details the sequence of events that led to his request to the ABCMR:

(1) He graduated from law school in 2011 and was selected as an alternate to be appointed to the active duty Judge Advocate General's (JAG) Corps. He was guaranteed appointment in the JAG Corps for the U.S. Army Reserve or the National

Guard; however, he was precluded from accepting that commission due to a required deployment to Kuwait/Iraq in May of 2011.

(2) He returned from deployment in 2012, passed the bar exam, and moved to [REDACTED] to take a position with the federal government. Shortly after arriving in [REDACTED] he was interviewed and selected for a position in the legal services office supporting the Director of the Army National Guard and asked to apply for a commission. Had that commission been granted, he would have started in the position in Summer 2014; however, his application was denied because he was HIV-positive.

(3) He exhausted all possible avenues through the military chain of command by submitting requests for a waiver and an exception to policy through the National Guard Bureau (NGB), Headquarters of the Department of the Army (HQDA), the U.S. Department of Defense (DoD), and the Army Board for Correction of Military Records (ABCMR) before he was forced to challenge the military's policy in federal court.

(4) In April of 2022, the U.S. District Court for [REDACTED] struck down the military's HIV policies as a violation of the equal protection clause of the U.S. Constitution. However, since a federal court cannot order the military to grant a commission, the judge instead ordered "that the Secretary of the Army rescind her decision denying [applicant's] application to commission in the Judge Advocate General's Corps for the [REDACTED] National Guard and reevaluate that application."

(5) The applicant states it was a bittersweet victory and when he initially applied, he had every intention of finishing out his military career in the JAG Corps and retire as a commissioned officer. However, by the time the Court decided his case, he had already received his twenty-year service letter and he believed the opportunity had long since passed.

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

a. He enlisted in the Regular Army on 12 September 2000. He was awarded military occupational specialty (MOS) 11B, Infantryman.

b. His DA Form 2-1 (Personnel Qualification Record) shows he served in Alaska from 2 June 2001 through approximately 1 June 2004.

c. Orders 190-0006, dated 9 July 2003, released the applicant from active duty with an effective date of 18 July 2003. His terminal date of Reserve obligation was scheduled to end on 16 August 2008.

d. He was honorably released from active duty on 18 July 2003. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 2 years, 10 months, and 7 days of active service. He attained the rank of specialist (SPC)/E-4.

e. He enlisted in the [REDACTED] Army National Guard ([REDACTED] ARNG) on 23 July 2003.

f. He entered active duty on 1 March 2006. He served in Afghanistan as an Infantryman from 15 June 2006 to 2 June 2007. He was honorably released from active duty on 28 June 2007. His DD Form 214 shows he completed 1 year, 3 months, and 28 days of active service.

g. He entered active duty on 24 May 2011 in support of Operation Enduring Freedom. He served in Kuwait from 2 July 2011 through 21 March 2012.

h. He was honorably released from active duty on 13 May 2012. His DD Form 214 shows he completed 11 months and 20 days of active service.

i. The Joint Forces Headquarters, [REDACTED] National Guard memorandum (Notification of Eligibility for Retired Pay for Non-Regular Service (20-Year Letter)), 25 October 2002, states the applicant completed the required years of qualifying service and was eligible for retired pay upon application at age 60. His eligibility was based his NGB Form 23A, Army National Guard Current Annual Statement.

j. Orders 0004870745.00, dated 26 May 2023, separated the applicant from the [REDACTED] ARNG with an effective date of 23 May 2023. Orders 0004870745.01, dated 2 June 2023, amended the effective date of Orders 0004870745.00 to read 22 May 2023.

k. Orders 0005170554.00, dated 25 June 2023, rehired the applicant in the [REDACTED] ARNG with an effective date of 23 May 2023.

l. Orders 146-009, dated 26 May 2023, appointed the applicant as a commissioned officer in the Army National Guard in the rank of first lieutenant (1LT) in the Judge Advocate branch. He executed an oath of office on the same day.

m. Orders 0005170553.00, dated 25 June 2023, assigned the applicant as a judge advocate to the [REDACTED] ARNG Element, Joint Forces Headquarters, [REDACTED].

n. An NGB Form 23A, dated 25 June 2023, provides a summary of the applicant's points earned towards retirement and status during periods of service.

5. A decision was rendered in ABCMR Docket AR20160013555, dated 16 August 2018, the Board denied the applicant's request for an exception to Army Regulation 600-110 for direct commission in the ARNG.

a. The Board found Army Regulation 600-110 provides that HIV infected personnel are not eligible for appointment or enlistment in the Active Army, ARNG, or U.S. Army Reserve in accordance with DODI 6485.01.

b. Current DOD policy prohibits persons with laboratory evidence of HIV infection for appointment, enlistment, pre-appointment, or initial entry training for military service. Although the ABCMR may grant exceptions to existing Army policy in order to correct errors or injustices, it lacks any authority to grant exceptions to existing DOD policy. To provide the relief the applicant seeks, the ABCMR would necessarily have to act in contravention of existing DOD policy.

6. By regulation (AR 15-185), an applicant is not entitled to a hearing before the ABCMR. Hearings may be authorized by a panel of the ABCMR or by the Director of the ABCMR.

7. The ABCMR may not appoint an officer to a higher grade. That authority is reserved for the President and has not been delegated below the Secretary of Defense.

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 that, but for the prohibition on commissioning individuals with HIV, the applicant would have been appointed as a commissioned officer in the ARNG when he initially applied to do so in 2014. The fact that the prohibition has been struck down has created an injustice. While this Board is limited in the extent to which it can go to remedy the injustice, the Board found it would be appropriate to recommend all possible action be taken within the Secretary of the Army's authority. This Board cannot promote an officer. However, the Board can recommend changing the applicant's date of rank for 1LT to 1 July 2014 and referring his records for review by an SSB for promotion to any subsequent grades he became eligible for based on the corrected date of rank for 1LT. The Board determined these actions should be taken in the interest of justice.

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:

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:

- changing his effective date of rank for 1LT to 1 July 2014
- referring his records for review by an SSB to be considered under the applicable criteria for promotion to any subsequent grades he became eligible for based on the corrected date of rank for 1LT

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.

2/15/2024

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. 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.

2. The ABCMR may not appoint an officer to a higher grade. That authority is reserved for the President and has not been delegated below the Secretary of Defense.

3. Army Regulation 135-100 (Appointment of Commissioned and Warrant Officers of the Army) prescribes policy and procedures for the appointment of commissioned and warrant officers in the Army National Guard of the United States (ARNGUS) and the United States Army Reserve (USAR).

a. If the applicant is otherwise qualified, The Judge Advocate General (TJAG) has the discretion to authorize the applicant's appointment in the JAGC, with the condition that:

- Company grade officers complete The Judge Advocate Officer Basic Course within 12 months of the date of appointment.
- Field grade officers complete The Judge Advocate Officer Advanced Correspondence Course within 30 months of the date of appointment.
- Reserve officers under conditional appointments must not fail to satisfy the educational requirements of (a) or (b) above. Failure will result in the termination of the appointment unless an extension is granted. TJAG may grant an extension to the time periods in (a) or (b) on a showing of good cause.
- Extension will be for a specific period designated by TJAG. The extension will operate to continue the conditional appointment. The appointment will be terminated for failure to complete the education requirement within the extension period (AR 135-175, para 4-4a(18)).

b. Date of rank.

(1) The date of rank of an officer commissioned in the Reserve of the Army and

assigned to the JAGC is the date of appointment. The DOR will further be backdated by the period of commissioned service credit awarded under a above. This is in excess of that amount used to establish the officer’s appointment grade.

(2) The DOR of a JAGC Reserve officer ordered to AD and placed on the ADL may be adjusted under AR 600–20, chapter 6.

4. Army Regulation 135-155 (Promotion of Commissioned Officers and Warrant Officers Other than General 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. Paragraph 2-5 (Eligibility for consideration) to be eligible for consideration for promotion to the next higher grade, an ARNGUS or USAR officer must have continuously performed service on either the Reserve Active Status List or the Active Duty List (or a combination of both lists) during the 1– year period ending on the convening date of the promotion board, and must meet the time in grade requirements in tables 2-1 or 2-3, as appropriate. ARNGUS and USAR officers will be considered for promotion in their competitive category only: Army Promotion List (APL, to include Judge Advocate); Chaplains (CH); Army Nurse Corps (AN); Dental Corps (DC); Medical Corps (MC); Medical Service Corps (MS); Army Medical Specialist Corps (SP); and Veterinary Corps (VC).

b. Paragraph 2-10 states, mandatory selection boards will convene each year. These boards will consider ARNG and USAR officers for promotion to CPT through LTC. These boards will consider officers for promotion without regard to vacancies in the next higher grade.

c. Table 2-1 (Time in Grade Requirements commissioned officers, other than commissioned warrant officers) states:

<i>From</i>	<i>To</i>	<i>Minimum Years in Lower Grade</i>	<i>Maximum Years in Lower Grade</i>
O2 (1LT)	O3 (CPT)	2	5
O3 (CPT)	O4 (MAJ)	4	7
O4 (MAJ)	O5 (LTC)	4	7

d. Table 2-2 (Military Educational Requirements commissioned officers, other than warrant officers) states:

<i>From</i>	<i>To</i>	<i>Requirements</i>
1LT	CPT	Resident officer basic course. (See notes 2, 5, 6, 7, 8)
CPT	MAJ	Any officer advanced course. (See notes 5 and 8)

MAJ	LTC	Fifty percent of the Command and General Staff Officers College.
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⁵JAGC officers appointed with military education stipulations of AR 135-100 will be considered educationally qualified for mandatory promotion consideration if progressing satisfactorily per AR 27-1. This note does not apply for position vacancy promotion consideration.

e. Paragraph 4-21 (Effective Dates) the effective date of promotion may not precede the date of the promotion memorandum. When an officer does not meet the qualifications for promotion, the effective date of promotion will not be earlier than the later date all qualifications are met. In no case, will the DOR or effective date of promotion be earlier than the date the board is approved, or, if required, the date of Senate confirmation.

5. Department of Defense Instructions 1310.01 (Rank and Seniority of Commissioned Officers) states the Secretary of the Military Department concerned may adjust the DOR of an officer, except a general or flag officer, appointed to a higher grade under Title 10, USC, sections 624(a) or 14308(a) if the appointment of that officer to the higher grade is delayed by unusual circumstances. The Secretary of the Military Department concerned must determine that the unusual circumstance caused an unintended delay in processing or approval of the selection board report or promotion list in order for an officer's DOR to be adjusted.

6. Title 10, United States Code, section 14104 (Nondisclosure 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. 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

7. National Guard Regulation 600-100 (Commissioned Officers Federal Recognition and Related Personnel Actions) provides procedures for processing all applications for federal recognition, waivers, and requirements for appointment.

a. A commissioned officer will be considered for promotion by a DA mandatory selection board, in their competitive category as a Reserve commissioned officer of the Army, when the officer meets minimum TIG requirements prescribed for the zone of

consideration. Consideration for promotion by a DA mandatory selection board will occur during the year prior to the year the officer reaches maximum TIG. The provisions of AR 135-155 will apply.

b. An officer identified as erroneously omitted by a mandatory selection board or whose record contained a material error (as defined by AR 135-155) when reviewed by the mandatory selection board can request a SSB. Requests for SSB consideration will be forwarded through the officer's State/Territory OPM to NGB/DA Boards (ARNG-HRP) at ng.ncr.ngb-arng.mbx.arng-hrp-r-da@army.mil.

c. Paragraph 8-15 states time in grade for mandatory consideration for promotion is as follows:

Grade	Maximum Time in Grade in Lower Grade
1LT to CPT	5 years
CPT to MAJ	7 years
MAJ to LTC	7 years
LTC to COL	6 years*

//NOTHING FOLLOWS//