

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 September 2024

DOCKET NUMBER: AR20230004113

APPLICANT REQUESTS: His date of rank (DOR) and effective date of rank to major in the Army National Guard, be corrected to 16 June 2022 the date of his state promotion with back pay and allowances.

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

- DD Form 149 (On line application)
- Recommendation for Award 25 August 2021
- Duty assignment - 10 September 2021
- Memorandum for Record (MOR) - State Promotion - 6 July 2022
- Special Orders 78AR (FedRec) - 28 February 2023
- James M. Inhofe National Defense Authorization Act for Fiscal Year 2023

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:

a. He is an Active Guard Reserve (AGR) Soldier on full-time duty with the [REDACTED] Army National Guard ([REDACTED] ARNG). He was promoted by the state to Major (O-4) on 16 June 2022; however, due to the excessively long and delayed Federal Recognition (FedRec) process, he did not receive FedRec and pay as a Major (O-4) until 17 February 2023. The eight (8) month delay resulted in lost wages totaling over \$5,600. (\$700 per month x 8 months).

b. Additionally, the delay denied him qualifying rated time in his current key developmental (KD) assignment, and will delay his eligibility for promotion to Lieutenant Colonel (O-5).

c. He has performed in a Major (O-4) AGR position his entire time as a commissioned officer (21 March 2013 through the present). Initially as the Comptroller for the 20th Special Forces Group (Airborne), and now as the Deputy Division Chief – Training for the ■■■ ARNG. Both positions are O-4 KD assignments for AGR officers that require a significant sacrifice of time and energy.

d. Per the National Defense Authorization Act for Fiscal Year 2023 Section 513 in the event of State promotion with an effective date before 1 January 2024, the effective date of the promotion concerned may be adjusted to a date determined by the Secretary concerned, but not earlier than the effective date of the State promotion.

3. With prior enlisted Army National Guard (ARNG) service, the applicant became a full time Army Guard Reserve (AGR) on 16 June 2005. The applicant was discharged from the ARNGUS (enlisted) on 20 March 2013 and appointed a second lieutenant in the ■■■ ARNG Quartermaster Corps on 22 March 2013.

4. As a captain the applicant was awarded the Meritorious Service Medal with his departure from the 20th Special Forces Group on 25 August 2021.

5. The applicant assumed the duties of the Deputy Division Chief for the ALNG, Army Element, Joint Force Headquarters in the rank of captain on 1 October 2021.

6. On 6 July 2022, the State ARNG published orders promoting the applicant to major in the ARNG effective and with a date of rank as 16 June 2022.

7. On 28 February 2023, the NGB published Special Orders Number 78 AR extending the applicant Federal recognition for promotion to MAJ with an effective date and date of rank as 17 February 2023.

8. Following announcement of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, regarding backdating the effective date of rank for officers in the National Guard due to undue delays in Federal recognition, the NGB published Special Orders Number 128, adjusting the applicant's effective date of promotion and date of rank to MAJ from 17 February 2023 to a more reasonable date of 27 October 2022.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The evidence of record shows the State ARNG issued an order on 6 July 2022 promoting the applicant to MAJ on 16 June 2022. His promotion packet was staffed through his State to the NGB for scrolling. However, there was a delay in the processing of his

promotion. The NGB ultimately issued him federal recognition order promoting him to MAJ with an effective date and date of rank as 17 February 2023. After the 2023 NDAA was announced, the NGB recognized the delay and adjusted the applicant's promotion to MAJ from 17 February 2023 to 27 October 2022. The Board found such adjustment reasonable and in line with an average of 100 to 120 days to process a similar promotion. Therefore, given that the NGB has already issued him an order amending his date of rank and effective date of promotion, the Board determined no further correction is warranted.

BOARD VOTE:

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

BOARD DETERMINATION/RECOMMENDATION:

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

9/9/2024

X [Redacted Signature]

CHAIRPERSON

[Redacted Title]

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. The authority granted by Title 10, U.S. Code, Section 1552 (Correction of Military or Naval Records) is not unlimited. The ABCMR has the authority to correct only Army records. The Board has no authority to correct records created by the Department of Defense, other branches of the Services, Department of Veterans Affairs, or any other governmental agency. In the case of actions, they are State not Federal actions and primarily under the total control of the State Adjutant General. The ABCMR may only recommend possible actions.
3. On 13 August 2018, the National Defense Authorization Act of Fiscal Year 2019 (NDAA FY19) was enacted by Congress. It amended 10 U.S.C. § 14308(f) by adding a paragraph regarding the Secretary of the military department's authority to adjust effective dates of promotion when there was an undue delay in extending federal recognition in the next higher grade. The effective date of promotion could be adjusted to a date determined by the Secretary concerned, but not earlier than the effective date of the State promotion. However, the NDAA FY19 expressly stated the amendment shall take effect on 13 August 2018 (the date of enactment) and "shall apply with respect to promotions of officers whose State effective date is on or after that date."
4. Title 10 USC 624 and 741 provide for situations in which properly appointed officers are provided "backdated" dates of rank and effective dates to remedy errors or inequities affecting their promotion. The authority to remedy these errors or inequities is given to the Service Secretaries.
5. Title 10, section 14308(f) (Effective date of promotion after Federal Recognition), states the effective date of a promotion of a reserve commissioned officer of the Army or the Air Force who is extended Federal recognition in the next higher grade in the Army National Guard or the Air National Guard under section 307 or 310 of title 32 shall be the date on which such Federal recognition in that grade is so extended.
6. National Guard Regulation (NGR) 600-100 provides procedures for processing applications for Federal Recognition. Paragraph 10-15b states that temporary Federal Recognition may be granted by an FRB to those eligible when the board finds that the member has successfully passed the examination prescribed herein, has subscribed to the oath of office, and has been appointed by a state order for assignment to a position vacancy in a federally recognized unit of the ARNG. The FRB will forward the NGB

Form 89 and allied documents to The Adjutant General. When the member is favorably recommended, The Adjutant General will endorse the packet to the NGB. If the member meets the qualifications and requirements for Federal Recognition, the Chief NGB extends permanent Federal Recognition to the member in the grade and branch in which the member is qualified.

7. DODI 1310.01 (23 August 2013) provides that a Service Secretary may "adjust the date of rank of an officer ... appointed to a higher grade ... if the appointment of that officer to the higher grade is delayed by unusual circumstances."

a. What constitutes "unusual circumstances" will, generally, be for the Board to determine based on the available evidence, which often includes an advisory opinion.

b. There may be cases (specifically correction of constructive credit that affects original appointment grade) where relief is not possible because an appointment to a higher grade has not yet occurred. In those cases, the Board should be advised of the limits of its authority. The Board may also be advised that the applicant can submit a request for reconsideration after he or she has been appointed to a higher grade.

8. The Under Secretary of Defense for Personnel and Readiness issued guidance to DRBs and BCM/NR on 25 July 2018, regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, Boards shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

//NOTHING FOLLOWS//