

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 October 2024

DOCKET NUMBER: AR20230004521

APPLICANT REQUESTS: amendment of his date of rank (DOR) to captain (CPT)/O-3.

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

- DD Form 149 (Application for Correction of Military Record)
- DOR Packet:
  - National Guard Bureau (NGB) Memorandum
  - Secretary of the Army Memorandum
  - Secretary of Defense Memorandum
  - NGB Special Orders
  - Officer Record Brief
  - Department of the Army Criminal Investigation Division (USACID) Letter
  - Email correspondence

FACTS:

1. The applicant states he is asking the Board to correct his DOR due to promotion delays caused by a CID investigation looking into his participation in Army National Guard Recruiting Assistance Program.

a. The applicant affirms he served over 5 years as a second lieutenant (2LT) while he waited for an order to retain him in the Army National Guard (ARNG); his involuntary delay occurred when a Promotion Review Board (PRB) convened to consider the results of the CID investigation. Throughout this 5-year period, the applicant continued to meet the duties and responsibilities required of him as a highly qualified commissioned officer.

b. The applicant adds, under normal career growth, he should have been promoted to CPT, on 10 April 2018; he had already met all requirements for promotion by that date. He further notes that his DOR for 2LT is 9 October 2014, and the Army backdated his 1LT DOR to 9 April 2016. His current DOR for CPT is 28 September 2020. The applicant rhetorically asks, considering the Army backdated his DOR for 1LT, should not the same apply for his promotion to CPT?

2. The applicant provides documents from his service record and the following:

- Secretary of the Army memorandum, dated 7 May 2018, announcing the applicant's retention of the ARNG appointment scroll, with a recommendation for appointment to 1LT
- Secretary of Defense memorandum, dated 15 February 2019, confirming the applicant appointment as a 1LT in the ARNG
- NGB Special Orders showing the Federal Recognition of the applicant's promotion to CPT, with a DOR of 28 September 2020
- USACID letter, dated 8 November 2022, acknowledging the CID's basis for titling the applicant was insufficient; CID removed the applicant's name and identifying information from law enforcement systems, to include the Defense Clearance and Investigations Index (DCII) and the Federal Bureau of Investigation's system
- Email correspondence showing the applicant's efforts to correct his DOR

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

a. On 9 October 2014, after completing over 6 years of enlisted service in the Mississippi Army National Guard (MSARNG), the applicant executed his oath of office as a commissioned officer in the MSARNG.

b. On 27 May 2015, the applicant graduated from the Army's Engineer Basic Officer Leader Course. On 18 March 2019, NGB announced the applicant's promotion to 1LT and issued orders reflecting his DOR as 9 April 2016.

c. On 24 August 2020, a Federal Recognition Examining Board, convened by the MSARNG, determined the applicant met all criteria for promotion to CPT and was being assigned to a CPT's position; the board recommended the applicant for promotion to CPT.

d. On 5 April 2021, NGB issued a Special Order announcing the applicant's promotion to CPT, with a DOR of 28 September 2020. On 29 April 2021, MSARNG orders promoted the applicant; the orders reflected his DOR as 28 September 2020. The applicant continues his service in the MSARNG.

4. On 23 February 2024, the NGB provided an advisory opinion, recommending partial approval of the applicant's request.

a. "In July 2022, the Department of the Army (DA) CID began a thorough review of [applicant's] previously initiated investigation and allegations of criminal wrongdoing in the Army GRAP. The review determined that based upon the information available to CID there was insufficient evidence of criminal wrongdoing in the Army GRAP and

therefore CID removed [applicant's] name from all law enforcement systems, to include the DCII and the Federal Bureau of Investigation's Interstate Identification Index (III)."

b. "Upon coordination with the MSARNG, [applicant's] Federal recognition order was published, on 18 March 2019, for promotion to 1LT, with an effective date of 9 April 2016. His Commander didn't recommend him for promotion to CPT until 27 July 2020. Per NGR 600-100, CH 8 -1b: National Guard officers may be considered and found qualified for Federal recognition of their state promotion using two distinct processes: State federal recognition Boards and DA Mandatory Boards. Under either process, the precedent for an actual promotion in the Army National Guard is State assignment and appointment to the next higher grade."

c. "Selection for promotion does not automatically constitute an approved promotion action. Those that are eligible for promotion must be recommended by Commanders and approved by The Adjutant General (TAG) (emphasis added by NGB). The promotion packet should include TAG memo(randum) and the state promotion order. At the time of his recommendation by his commander, [applicant] was in the zone of consideration for the Fiscal Year 2020 (FY20) DA Board; therefore the recommendation was considered 'void.' The results of that DA board were approved on 28 September 2020, making that (the) effective date (of) his promotion date (to) CPT."

d. "Although Soldiers...eligible for promotion...must be recommended, had it not been for the CID investigation, (of) which [applicant] was ultimately cleared from any wrongdoing, (he) should have been promoted at an earlier date. For these reason(s) and (based on) coordination with the Army National Guard (ARNG) Federal recognition section, it is recommended that [applicant's] effective date and DOR to CPT be adjusted to reflect 27 September 2019."

5. On 27 February 2024, the Army Review Boards Agency (ARBA) forwarded the applicant and his counsel a copy of NGB's advisory opinion for review and comment; on 28 February 2024, the applicant stated he agreed with NGB's recommendation and had no further comments to add.

#### BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition, and executed a comprehensive review based on law, policy, and regulation. The Board majority reviewed and concurred with the National Guard Bureau's advising official finding that the applicant's promotion was delayed due to a Criminal Investigation Division investigation that resulted in insufficient findings. The applicant's selection board proceedings were approved on 28 September 2020.

Therefore, due to the delay, the Board majority recommends that the applicant's date of rank and effective date of promotion be adjusted to 27 September 2019 vice the requested date of 10 April 2018. The Board minority determined based on the delay due to the investigation, his date of rank and effective date of promotion should reflect 10 April 2018.

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 issuing the applicant a Special Order extending him Federal recognition for promotion to CPT with an effective date and date of rank as 27 September 2019, with entitlement to back pay and allowances, if applicable, as a result of this correction.
2. The Board further determined that 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 extending him Federal recognition prior to 27 September 2019.

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I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Department of Defense Instruction (DODI) 5505.07 (Titling and Indexing in Criminal Investigations), in effect at the time, prescribed policies for titling individuals in criminal investigative reports and outlined procedures for a review of such actions.

a. Paragraph 1.2 (Policy).

(1) Subparagraph 1.2a. DOD Components authorized to conduct criminal investigations will title and index subjects of criminal investigations as soon as the investigation determines there is credible information that the subject committed a criminal offense

(2) The DODI's glossary defines "credible information" as, "Information disclosed or obtained by a criminal investigator that, considering the source and nature of the information and the totality of the circumstances, is sufficiently believable to lead a trained criminal investigator to presume the fact or facts in question are true."

(3) Subparagraph 1.2d. Once the person is indexed in the Defense Central Index of Investigations (DCII), he/she will remain, even if the person is found not guilty of the investigated offense, with the following exceptions:

- Cases of mistaken identity
- Subsequent determination finds no credible information existed at the time of titling and indexing
- Judicial or adverse administrative actions will not be taken based solely on the existence of a titling or indexing record in a criminal investigation

b. Paragraph 3.3 (Correction and Expungement Procedures). When reviewing the appropriateness of a titling and indexing decision, the reviewing official will only consider the investigative information available at the time of the initial titling and indexing decision to determine whether the decision to determine if the decision was made in accordance with paragraph 1.2a above.

2. DODI 5505.07, dated 8 August 2023 and currently in effect; section 3 prescribes current correction and expungement procedures for persons titled in a DOD Law Enforcement Activity (LEA) report or indexed in the DCII. Per paragraph 1.2a, the initial decision to title and index an individual remains based on a credible information standard.

a. Paragraph 3.1 (Basis for Correction or Expungement). A covered person who was titled in a DOD LEA report or indexed in DCII may submit a written request to the responsible DOD LEA head or designated expungement officials to review the inclusion

of their information in the DOD LEA report, DCII, and other related records systems, databases, or repositories in accordance with Section 545 (Removal of Personally Identifying and Other Information of Certain Persons from Investigative Reports, the DCII, and Other Records and Databases) of Public Law 116-283 (William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021).

b. Paragraph 3.2 (Considerations).

(1) When reviewing a covered person's titling and indexing review request, the expungement official will consider the investigation information and direct that the covered person's information be corrected, expunged, or otherwise removed from the DOD LEA report, DCII, and any other record maintained in connection with the DOD LEA report when:

(a) Probable cause did not or does not exist to believe that the offense for which the covered person was titled and indexed occurred, or insufficient evidence existed or exists to determine whether such offense occurred.

(b) Probable cause did not or does not exist to believe that the covered person committed the offense for which they were titled and indexed, or insufficient evidence existed or exists to determine whether they committed such offense.

(c) Such other circumstances as the DOD LEA head or expungement official determines would be in the interest of justice, which may not be inconsistent with the circumstances and basis in Paragraphs 3.2.a.(1) and (2).

(2) In accordance with Section 545 of Public Law 116-283, when determining whether such circumstances or basis applies to a covered person when correcting, expunging, or removing the information, the DOD LEA head or designated expungement official will also consider:

(a) The extent or lack of corroborating evidence against the covered person with respect to the offense.

(b) Whether adverse administrative, disciplinary, judicial, or other such action was initiated against the covered person for the offense.

(c) The type, nature, and outcome of any adverse administrative, disciplinary, judicial, or other such action taken against the covered person for the offense.

3. DODI 1320.04 (Military Officer Actions Requiring Presidential, Secretary of Defense, or Under Secretary of Defense for Personnel and Readiness Approval or Senate Confirmation), currently in effect, prescribes policies and procedures for the scrolling of

officers recommended for promotion by promotion selection boards. It requires the Secretaries of Military Departments to forward scrolls listing the recommended officers to the President or Secretary of Defense for approval.

a. Paragraph 3 (Policy). DOD will inform the President and the Senate of adverse and reportable information relating to officers who are the subjects of military officer personnel actions in accordance with this instruction.

b. Enclosure 4 (Adverse and Reportable Information) defines adverse and reportable information as follows:

(1) Adverse information is any substantiated adverse finding or conclusion from an officially documented investigation or inquiry or any other credible information of an adverse nature. To be credible, the information must be resolved and supported by a preponderance of the evidence. To be adverse, the information must be derogatory, unfavorable, or of a nature that reflects clearly unacceptable conduct, integrity, or judgment on the part of the individual.

(2) Reportable information is information other than adverse information requested to be reported by the Senate Armed Services Committee or by any member of the Senate or is information related to alleged misconduct or impropriety, which is subject to an on-going investigative, administrative, or judicial process. Normally a nomination will be delayed pending resolution of the investigative, administrative, or judicial process

4. Army National Guard Personnel Policy Operational Memorandum (ARNG PPOM) 17-025, in effect at the time, prescribed policies and procedures pertaining to ARNG commissioned and warrant officers promotions, and the exemplary conduct screening process for the ranks of colonel and below. The exemplary conduct certification was a continuous process to ensure commissioned officers and warrant officers met the provisions of Title 10 (Armed Forces), United States Code (U.S. Code), section 3583 (Requirement of Exemplary Conduct).

a. On 18 July 2016, Secretary of the Army signed Army Directive 2016-26, which required all Army commissioned officers and warrant officers, regardless of component, to be screened for adverse and reportable information, as defined in DODI 1320.04.

b. To comply with exemplary conduct certification, State G1s and their personnel divisions conducted a limited screening of officers' and warrant officers' official military personnel file, including the Soldiers' restricted file. The Army G1, Directorate of Military Personnel Management (DMPM), conducted further screening for all officers and warrant officers recommended for promotion. Screening included any adverse/reportable information in files held by CID, the DA Inspector General (DAIG),

and the restricted portions of the Soldiers' AMHRR; also screened were any special interest lists, such as cases involving recruiter impropriety.

5. National Guard Regulation (NGR) 600-100 (Commissioned Officers Federal Recognition and Related Personnel Actions), currently in effect, states:

a. Paragraph 2-1 (Appointment). Commissioned officers of the ARNG are appointed by the States under Article 1, Section 8, of the U.S. Constitution.

(1) These appointments may be Federally recognized by the Chief, National Guard Bureau (NGB) under such regulations as the Secretary of the Army may prescribe and under the provisions of this regulation.

(2) Upon being Federally recognized, an officer of the ARNG shall be appointed as a Reserve for service as a member of the Army National Guard of the United States (ARNGUS) in the grade that he holds in the ARNG, as provided in Title 10, U.S. Code, section 12211 (Officers: ARNGUS).

b. Paragraph 2-2 (Policy). The appointment of officers in the ARNG is a function of the State concerned, as distinguished from the Federal recognition of such appointment. Upon appointment in the ARNG of a State, and subscribing to an oath of office, an individual has a State and temporary federal status under which to function. Such individuals acquire a permanent federal status when they are federally recognized and appointed as a Reserve of the Army.

c. Paragraph 8-1 (Responsibilities). The promotion of officers in the ARNG is a State function.

(1) ARNG commissioned officers selected for promotion as a Reserve commissioned officer of the Army, resulting from mandatory Department of the Army consideration, may be extended Federal recognition in the higher grade provided they meet promotion criteria. A commissioned officer who has been promoted by the State and extended Federal recognition in the higher grade will concurrently be promoted to the higher grade in the Reserve of the Army, with assignment to the ARNGUS.

(2) The date of rank is the date the officer actually is promoted to the higher grade. Officers selected for promotion are placed on a scroll for approval by the President or the Secretary of Defense; the effective date of Federal recognition date is the date the President or Secretary approves the scroll.

6. Army Regulation (AR) 15-185 (ABCMR) states the Army, by law, may pay claims for amounts due to applicants as a result of correction of military records. The ABCMR will furnish the Defense Finance and Accounting Service (DFAS) copies of decisions



potentially affecting monetary entitlement or benefits. The DFAS will treat such decisions as claims for payment by or on behalf of the applicant and settle claims on the basis of the corrected military record. The applicant's acceptance of a settlement fully satisfies the claim concerned.

//NOTHING FOLLOWS//