

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 October 2023

DOCKET NUMBER: AR20230004641

APPLICANT REQUESTS: promotion to the rank/grade of staff sergeant (SSG)/E-6.

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

- DD Form 149 (Application for Correction of Military Record)
- Orders Number 044-0601 Retirement Orders
- Physical Disability Information Report
- Enlisted Record Brief (ERB)
- DA Form 268 (Report to Suspend Favorable Personnel Actions (Flag))
- Memorandum For Record (MFR), Subject: Non-Recommendation for Service Award
- DD Form 214 (Certificate of Release or Discharge from Active Duty)

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 effect:

a. He is requesting an honorary promotion to the rank of SSG. He was not honorably promoted during his retirement due to a clerical error.

b. The unit he was assigned to put a K code flag on him by mistake. One of the clerks, who worked in the office, was an E-4 and the E-4 flagged him. He could not have been flagged at this time because he was in the Medical Evaluation Board (MEB) process and not allowed to participate in the Army Physical Fitness Test (APFT). Height and weight are usually conducted when the APFT is completed.

c. When the flag was placed on his records, his commander was not present and gave authorization for his memorandum to be signed by her office personnel. When the

flag was placed the Noncommissioned Officer (NCO) in charge failed to review the paperwork before submitting it for signature.

d. Once he learned he was flagged, he talked to his first sergeant (1SG) who removed the flag immediately. The day he signed his DD Form 214, the personnel in the retirement office did not put the rank of SSG on his DD Form 214 because they thought he was flagged. The retirement office told him to fix his DD Form 214 he would need to request corrections at a later date.

e. The corrections should be made because he was illegally flagged. He was not weighed or taped. His ERB shows he passed his APFT and height and body weight before he was flagged.

f. His unit should not have had an E-4 preparing flags for personnel. He submitted plenty of proof to show, on the day of his retirement, he was not legally flagged with a K code.

g. He served his country honorably with three combat tours to Iraq and Afghanistan. During those days, it was hard for a Soldier who fought outside the base to get to promotion boards. He was not fortunate enough to have an inside the wire job. He never said the Army owed him anything, but he worked and fought hard. He feels he needs this promotion for the sake of easing his mind.

h. He held positions higher than sergeant (SGT) positions. During his time as an NCO, he was a squad leader, platoon SGT, and acting 1SG. He asks his request to be seriously considered for his promotion to SSG and that it should have happened long ago. He has not made this request earlier because he just now located the evidence.

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

a. DD Forms 4 (Enlistment/Reenlistment Document Armed Forces of the United States) shows he enlisted/reenlisted in the Army on:

- 18 April 2006, for a period of 3 years and 2 weeks
- 14 May 2007, for a period of 6 years
- 4 May 2012, for a period of 3 years

b. Orders Number 151-10, published by Headquarters, 101st Sustainment Brigade, dated 30 May 2012, shows the applicant was promoted to the rank/grade of SGT/E-5, effective on with a Date of Rank (DOR) of 1 June 2012.

c. DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings), dated 3 January 2014 shows the board found the applicant, in the rank of SGT, physically unfit for duty, recommended a rating of 60 percent and that he be placed on the Temporary Disability Retired List (TDRL) with a reexamination in October 2014. The applicant concurred with the findings and waived a formal hearing in his case.

d. ERBs, dated 22 January 2014 and 18 April 2014, show:

(1) Section I - Assignment Data: (Overseas/Deployment Combat Duty) Flag Code KA (Adverse Action, Army Body Composition Program), Flag Start Date, 30 October 2013.

(2) Section III - Service Data - Rank SGT, DOR 1 June 2012.

(4) Section IV - Personal/Family Data - APFT May 2012, Passed, 264.

(5) Section VI - Military Education - Warrior Leader Course 2008, Combat Life Savers Course, 2006.

e. DA Form 2166-8 (NCO Evaluation Report) for the rating period 31 March 2013 through 30 March 2014, shows in Part IV (Rater) - Values/NCO Responsibilities, block c (Physical Fitness and Military Bearing) "NCO has failed to make progress in the Army Weight Control Program." The applicant signed the form on 21 March 2014.

f. DD Form 214, for the period ending 17 April 2014, shows the applicant was honorably retired, in the rank of SGT, due to disability, temporary (enhanced). He completed 8 years of active duty service.

g. DA Form 199, dated 26 March 2015, shows the PEB found the applicant physically unfit for duty, recommended a rating of 100 percent, and that he be permanently retired due to disability. The applicant concurred with the findings and waived a formal hearing of his case.

h. Orders Number D 092-38, published by the U.S. Army Physical Disability Agency, dated 2 April 2015, removed the applicant from the TDRL and placed him on the permanent retired list.

i. The applicant's service record was void of DA Forms 268 showing he was flagged or removal of a flag; evidence to show he was recommended for promotion, attended a promotion board, or was promotable at the time of his retirement; and did not show he was pending adverse action, at the time of his retirement.

4. The applicant provides the following documents, not previously considered:

a. Orders Number 044-0601, published by Headquarters, 101st Airborne Division (Air Assault) and Fort Campbell, dated 13 February 2014, which placed the applicant on the retirement list, in the rank of SGT, on 18 April 2014.

b. Physical Disability Information Report dated 13 February 2014, which shows the applicant was in the rank of SGT, had a 60 percent disability percentage, separation date of 17 April 2014, and date placed on the retired list of 18 April 2014.

c. ERB, dated 13 February 2014, which contained the identical information contained on the previously provided ERBs.

d. DA Form 268, dated 5 March 2014, which removed a Flag (Code K) effective 21 March 2014 for "other final action". The DA Form 268 was signed by the applicant's commander on 5 March 2014.

e. MFR, Subject: Non-Recommendation for Service Award, dated 21 March 2014 and signed by the applicant's commander, stating the applicant was not receiving an award due to being flagged for entrance into the overweight program.

5. On 11 July 2023, the U.S. Army Human Resources Command (AHRC), Chief, Enlisted Promotions, Promotions Branch, provided an advisory opinion, which states, in effect:

a. After review of the applicant's application for correction of military records, AHRC determined his request should be denied.

b. In accordance with Army Regulation (AR) 600-8-19 (Enlisted Promotions and Reductions), dated 30 April 2010, paragraph 1-20, Soldiers who are pending referral to an MEB would not be denied promotion, if already promotable, on the basis of medical disqualification, if they were otherwise qualified for promotion.

c. A review of the applicant's records indicated he was not in a promotable status, at the time of separation, nor was he eligible to become promotable due to a suspension of favorable actions for being enrolled in the Army Body Composition Program (ABCP). In accordance with AR 600-9 (The ABCP), paragraph 3-11a, all Soldiers found to exceed the allowable body fat standard would have a DA Form 268 initiated and will be enrolled in the ABCP. The Soldier presented no evidence that this flag was erroneous or "illegal" as he contended.

d. The ERB provided by the applicant indicated that the flag was initiated on 30 October 2013 and closed on 21 March 2014. The flag was not closed as "Z-Erroneous" but rather as "E- Other Final Action" as required by regulation, which is used

when a Soldier who was not in compliance with the ABCP subsequently met the Army body composition standards.

e. A review of the applicant's records further reveals an NCOER dated 31 March 2013 through 30 April 2014, in which it is annotated the Soldier did not meet Army height/weight standards and contained the comment "NCO has failed to make progress in the AWCP." The applicant signed the NCOER on 21 March 2014 indicating he had seen the report and the administrative date, to include the height/weight data, was correct. The applicant presented a memorandum, signed by his company commander, that he was not being recommended for an award due to being flagged.

f. Upon closure of the flag, the applicant would have been required to appear before a promotion board, be recommended for promotion, and be integrated onto the promotion recommendation roster in order to qualify for promotion upon his medical retirement. There is no indication that this occurred.

6. On 9 August 2023, the advisory opinion was provided to the applicant to allow him the opportunity to respond. On 24 August 2023, the applicant responded stating in effect the memorandum from AHRC was completely inaccurate. He sent copies of his paperwork proving he was not flagged at the time of retirement. His ERB reflected a flag for 9H, which was for medical retirement board and not for being overweight. He also submitted the form from his commander releasing the flag. At the time of retirement, he was not flagged. AHRC seemed to imply he would need to be promotable under the regular board process.

7. The applicant resubmitted his ERB, dated 13 February 2014; DA Form 268, dated 5 March 2014; and DD Form 214 for the period ending 17 April 2014, for the Board's consideration along with a self-authored letter, which states, in effect:

a. He reviewed the decision from AHRC and found their decision to be completely wrong. He asks the Board to allow him to explain. He admits he was flagged for being overweight at one time before his retirement. The flag was lifted prior to his retirement, which can be seen on the DA Form 268 provided by him and signed by his commander on 5 March 2014. He also submitted his ERB that shows he had no flag for being overweight. The only flag on his ERB is 9H for medical board retirement.

b. The letter from AHRC also states his NCOER reflected he was overweight. He does not have a copy of the NCOER. As best as he could remember, he did not recall signing an NCOER making such a statement. The last he remembers, his chain of command failed to keep his NCOER up to date.

c. The AHRC letter seemed to be talking about promotion under regular Army promotion. The applicant is asking for promotion under Title 10 USC, section 1372 that

promotes a Soldier the day of MEB retirement. The day he signed his DD Form 214, he was given the opportunity to have it corrected to show his rank as SSG. If he was to do that, he was told it would take up to 30 days for the correction. During the 30 days, he would be required to stay on post, which created a problem because he had plans to start his new life with a new job. The individual told him his other option was to have it corrected by going through the Board.

d. On a personal level, he asked that this be reviewed correctly. The way it was reviewed in the letter from AHRC was incorrect. The request means so much to him. It was more than just a promotion. To him it was setting it right in his mind and heart. During his career, he held higher positions such as Platoon SGT, acting 1SG, motor pool SGT and others. His chain of command failed him, when he was more than qualified to go to the promotion board. He heard excuses such as they were too busy getting ready for deployment and several others.

e. He deployed with the 101st Airborne Division on three deployments. He had to see his wife and daughter's tears every time he left. He promised them he would get back home. When he got home, he was messed up, going to the hospital to get surgery. He had to keep his mouth shut about the horrors he had seen. He has slept with nightmares to this day. He lived with the abuse that he endured from deployments and the failure of his chain of command. He has seen the pain his wife had to endure.

f. The reason his DD Form 214 is not correct is the sad truth, his chain of command did not care about their Soldiers. They worked them like dogs, during deployment and in garrison. You would think he was able to see his family, while he was home. The unit would work 80 plus hours per week. His chain of command did not care, the only thing they cared about was what made them look good in their peers' eyes.

g. He thanked the Board for their time and hoped the Board would fix his record.

#### 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 Board carefully considered the applicant's contentions, the military record, and regulatory guidance. Documentation shows that the applicant was not in a promotable status at the time of his separation due to suspension of favorable action as the result of having been enrolled in the ABCP. As he was not in compliance with applicable regulatory guidance regarding body composition standards, he was not eligible for consideration before a board. After due consideration of the request, the Board determined that the evidence presented does not meet the burden of proof in determining the existence of an error or injustice and a recommendation for relief is not warranted.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

The Board determined 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.

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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. 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 600-8-19 (Enlisted Promotions and Reductions), in effect at the time, prescribes the enlisted promotions and reductions function of the military personnel system. Chapter 1, paragraph 1-20 (Promotion of Soldiers in the Disability Evaluation System (DES)) states, in pertinent part, while in the DES, Soldiers are not required to meet prescribed service remaining requirements for promotion as provided for in this regulation. Per the provisions of Title 10 USC Section 1372, Soldiers on a promotion list who are retired for physical disability (Title 10, USC, sections 1201 or 1204) or who are placed on the TDRL (Title 10, USC, sections 1202 or 1205) at the time of retirement for disability will be retired for disability at the promotion list grade. The Soldier will be promoted effective the day before placement on the retired list or TDRL regardless of cutoff scores, sequence numbers, or position availability. In all cases, the Soldier must otherwise be eligible for promotion in accordance with paragraph 1-11 (the NCOES requirements in paragraph 1-28 are waived). Forward a copy of Regular Army promotion/retirement orders 10 days prior to the effective date of promotion to the following email address, [usarmy.knox.hrc.mbx.tagd-sr-enlisted-promotions@mail.mil](mailto:usarmy.knox.hrc.mbx.tagd-sr-enlisted-promotions@mail.mil) for inclusion into the total Army personnel data base (TAPDB).
3. AR 600-8-2 (Suspension of Favorable Personnel Actions (Flag), prescribes Army policy for the suspension of favorable personnel actions (Flag) function of the military personnel system. It states:
  - a. Flag code A "Adverse actions." Commanders must flag Soldiers for adverse actions.
  - b. Flag code K "Noncompliance with ABCP. The effective date of the flag is the date the Soldier was found to be in noncompliance with AR 600-8-19.
  - c. The regulation did not show a code 9H for medical board proceedings.
4. Title 10, USC, section 1372 states unless entitled to a higher retired grade under some other provision of law, any member of an armed force who is retired for physical disability under section 1201 or 1204 of this title, or whose name is placed on the TDRL under section 1202 or 1205 of this title, is entitled to the grade equivalent to the highest of the following:



- The grade or rank in which he is serving on the date when his name is placed on the temporary disability retired list or, if his name was not carried on that list, on the date when he is retired
- The highest temporary grade or rank in which he served satisfactorily, as determined by the Secretary of the armed force from which he is retired
- The permanent regular or reserve grade to which he would have been promoted had it not been for the physical disability for which he is retired and which was found to exist as a result of a physical examination
- The temporary grade to which he would have been promoted had it not been for the physical disability for which he is retired, if eligibility for that promotion was required to be based on cumulative years of service or years of service in grade and the disability was discovered as a result of a physical examination

//NOTHING FOLLOWS//