

IN THE CASE OF: [REDACTED]

BOARD DATE: 13 March 2024

DOCKET NUMBER: AR20230005660

APPLICANT REQUESTS:

- entitlement to backpay from August 2020 to present for all missed Battle Assemblies (BA)
- entitlement to retirement points from August 2020 to present for all missed BAs
- continuance of Top-Secret security clearance
- consideration for promotion by a Special Selection Board (SSB) to prevent mandatory separation
- revocation of the Officer Evaluation Report (OER) for the period of 15 March 2020 – 4 November 2021

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

- DD Form 149 (Application for Correction of Military Record)
- DA Form 67-10-1 (Company Grade Plate (O1-O-3; WO1-CW2) OER), 15 March 2020
- DA Form 1559 (Inspector General Action Request), 17 August 2020
- Department of Defense, Office of the Inspector General letter, 1 February 2023
- Department of the Army, Inspector General Agency letter, 13 February 2023
- Email communication
- Army National Guard Retirement Points History Statement, 5 May 2023
- Email communication
- Orders Number 5691391, 14 August 2023
- United Concordia Companies (TRCARE) letter, 26 August 2023

FACTS:

1. The applicant states in pertinent part he was precluded from attending BA for 2 years due to his submitted allegation of Whistleblower Reprisal. He contests that this action left him with the inability to attend BA or attend Annual Training (AT) or obtain retirement points. He notes that this action may jeopardize his ability to maintain a Top-Secret security clearance thereby preventing him from being promoted with his peers. Further, he notes that during this period he received the worst OER of his career from an Officer (his rater) that was the subject of an IG investigation that was initiated based

upon allegations that he submitted. He views this as a conflict of interest and his leadership failed to make any attempts to address the issue. He adds that he requested to be transferred in August 2020.

2. The applicant requests to maintain and continue his Top-Secret Security Clearance. The maintenance of a Top-Secret Security Clearance is not a record correction and does not fall under the purview of the Board. The maintenance and ongoing issuance of a Top-Secret Security Clearance is a function initiated at the unit S-2. The Board will not address this portion of the applicant's request.

3. A review of the applicant's available service records reflects the following:

a. After serving as an Enlisted Soldier in the Army National Guard (ARNG), on 6 August 2011, the applicant was appointed a Reserve commission.

b. On 5 January 2012, the National Guard Bureau (NGB) issued Special Orders Number 7 AR announcing Federal recognition of the applicant's initial appointment as a Chemical Corps (CM) Officer within the [REDACTED] ARNG, effective 6 August 2011.

c. On 12 August 2014, the NGB issued Special Orders Number 225 AR announcing Federal recognition of the applicant's promotion to the rank/grade of first lieutenant (1LT)/O-2, effective 27 June 2014.

d. On 18 December 2018, the NGB issued Special Orders Number 328 announcing Federal recognition of the applicant's promotion to the rank/grade of captain (CPT)/O-3, effective 30 August 2018.

e. On or about 30 April 2019, the applicant was assigned to Headquarters and Headquarters Company, 250th Brigade Support Battalion as an Intelligence Staff Officer (S-2).

f. On 14 August 2023, the [REDACTED] ARNG issued Orders Number 5691391 reassigning the applicant to the U.S. Army Reserve (USAR) Control Group (Reinforcement), effective 1 June 2021.

g. On 16 August 2023, the NGB issued Special Orders Number 270 AR announcing the withdrawal of the applicant's Federal recognition within the [REDACTED] ARNG and transfer into the USAR, effective 1 June 2021.

h. On 27 November 2023, the [REDACTED] ARNG issued Orders Number 6655537 reassigning the applicant to the USAR Control Group (Reinforcement), effective 27 November 2023.

i. On or about 29 November 2023, the applicant was issued an NGB Form 22 (Report of Separation and Record of Service) documenting the applicant's release from the ARNG, effective 26 November 2023.

j. On 30 November 2023, the NGB issued Special Orders Number 400 AR announcing the withdrawal of the applicant's Federal recognition within the ARNG and transfer into the USAR, effective 26 November 2023.

k. On 8 December 2023, the Department of the Army Human Resources Command issued Orders Number 6767821 reassigning the applicant to the 378th Military Intelligence Battalion, effective 1 December 2023.

4. The applicant provides the following a:

a. DA Form 67-10-1, ending on 15 March 2020, reflective of an evaluation of the applicant's performance as the Battalion Physical Security Officer from 30 April 2019 – 15 March 2020 as assessed by members of his immediate leadership. The rater was Major (MAJ) [REDACTED] and the senior rater was Lieutenant Colonel [REDACTED]. The applicant was rated as "qualified" by his Senior Rater with the recommendation that he be promoted with his peers. The form does not show that the OER was referred, and the applicant did not endorse the OER.

b. DA Form 1559 dated 17 August 2020, reflective of the applicant's submitted request for assistance concerning the withholding of pay and entitlements for duty performed in the month of February 2020. The applicant alleges that MAJ [REDACTED] was responsible for this action. This document is further provided in its entirety within the supporting documents for the Board's review.

c. Department of Defense, OIG letter dated 1 February 2023, reflective of communication provided to the DAIG concerning the determination of a substantiated allegation of Whistleblower Reprisal as alleged by the applicant. The OIG directed that the applicant be informed of this decision, provided with a copy of the redacted Report of Investigation (ROI) and advised how to petition the ABCMR for further consideration of this matter.

d. Department of the Army, Inspector General Agency letter dated 13 February 2023, reflective of the applicant being advised that his allegation of reprisal under Title 10, United States Code, Section 1034 (Protected Communications; Prohibition of Retaliatory Personnel Actions) as implemented by Department of Defense Directive 7050.06 (Military Whistleblower Protection) was substantiated. The applicant was further provided with guidance on how to request relief through the ABCMR should he believe an error or injustice existed within his records.

e. Email communication regarding the applicant's concern with the actions taken in response to the substantiated IG complaint. The applicant requested clarity regarding the substantiated allegation of reprisal noting that he was not allowed to attend BA for 2 years and the ■■■ ARNG refused to assist him with resolving the issue. The applicant requested assistance with obligating the ■■■ ARNG to retroactively transfer him effective August 2020 noting that this would be the most appropriate action to later present to a promotion board when he becomes eligible for MAJ. This document is further provided in its entirety for the Board's review within the supporting documents.

f. ARNG Retirement Points History Statement dated 5 May 2023, reflective of a summary of the applicant's qualifying service performed between June 2003 – June 2023. For the period of 3 June 2020 – 2 June 2021, the applicant received 60 retirement points (16 Inactive Duty Training (IDT) points, 15 Membership points, and 29 Active Duty Training (ADT) points; 3 June 2021 – 2 June 2022, the applicant received 15 Membership points.

g. Email communication reflective of communication concerning the applicant's separation from the ■■■ ARNG and subsequent transfer into the USAR Control Group (Reinforcement) (1 June 2021) noting that his last valid pay period within the ■■■ ARNG was May 2021. The applicant contests that his intent was to be transferred directly into a unit back in August 2021, not the USAR Control Group (Reinforcement). ■■■ ARNG G-1 provides that information pertaining to a unit of assignment was not provided and therefore he was assigned accordingly. In a subsequent communication the applicant alleges that the retractive assignment to the USAR has now impacted his benefit eligibility (TRICARE). He now requests to have his USAR Control Group (Reinforcement) transfer order revoked. This document is further provided in its entirety for the Board's review within the supporting documents.

h. United Concordia Companies (TRCARE) letter dated 26 August 2023, reflective of the applicant being advised that his coverage under the TRICARE Dental Program would expire on 31 May 2021 due to a recent personnel action.

5. The applicant did not provide nor does review of his available personnel records reflect evidence of documentation precluding him from attending BA from August 2020 to present. Further, the applicant did not provide documentation of additional qualifying service performed from August 2020 to present not currently reflected on DA Form 5016 (Chronological Statement of Retirement Points). Regarding his security clearance, the applicant did not provide evidence of a DA Form 5248–R (Report of Unfavorable Information for Security Determination) or other related documents indicative of negative information presented in relation to his security clearance status.

BOARD DISCUSSION:

1. 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 record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition and available military records, the Board determined there is insufficient evidence to support the applicant's contentions for entitlement to backpay from August 2020 to present for all missed Battle Assemblies (BA). The Board found the applicant's record is absent any supporting evidence of signed DA Form 5016 (Chronological Statement of Retirement Points) verifying the applicant completed his required battle assemblies.

2. The Board determined the applicant did not demonstrate by a preponderance of evidence that procedural error occurred that was prejudicial to the applicant and by a preponderance of evidence that the contents of the OER are substantially incorrect and support revocation of the applicant's Officer Evaluation Report (OER) for the period of 15 March 2020 – 4 November 2021. Furthermore, the Board found the applicant provided insufficient evidence that support his contentions for consideration for promotion by a Special Selection Board (SSB) to prevent mandatory separation.

3. This board is not an investigative body. The Board determined despite the absence of the applicant's battle assemble records, they agreed the burden of proof rest on the applicant, however, he did not provide any supporting documentation and his service record has insufficient evidence to support the applicant contentions for entitlement to retirement points from August 2020 to present for all missed battle assemblies.

4. The purpose of maintaining the Army Military Human Resource Record (AMHRR) is to protect the interests of both the U.S. Army and the Soldier. In this regard, the AMHRR serves to maintain an unbroken, historical record of a Soldier's service, conduct, duty performance, and evaluations, and any corrections to other parts of the AMHRR. Once placed in the AMHRR, the document becomes a permanent part of that file and will not be removed from or moved to another part of the AMHRR unless directed by an appropriate authority. There does not appear to be any evidence the contested OER was unjust or untrue or inappropriately filed in the applicant's AMHRR. Therefore, relief was denied.

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.

3/19/2024

X █

 CHAIRPERSON
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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. Army Regulation (AR) 140-185 (Training and Retirement Point Credits and Unit Level Strength and Accounting Records) prescribes the types of training and activities for which retirement points are authorized and the procedures for recording retirement point credits and training for U.S. Army Reserve (USAR) Soldiers. A qualifying year of service for non-regular retired pay is a full year during which a Reserve Component member is credited with a minimum of 50 retirement points. Paragraph 2-1 (Criteria for Crediting Retirement Points) provides Soldiers may be credited with a maximum of 365 points (366 during a leap year). No more than one retirement point may be awarded for any day in which the Soldier is on active duty. A Soldier in active service may not receive retirement points for other activities performed concurrently. Soldiers are

awarded 15 membership points for each year in an active status. If a Soldier is separated or removed from an active status during a retirement year, the Soldier may be credited with a proportionate maximum number of IDT points for that year.

a. Paragraph 2–2, (Criteria for Earning Retirement Points) states retirement points may be earned by USAR Soldiers for active duty (AD), or while in an active Reserve status, for ADT, initial active duty for training (IADT), involuntary active duty for training (involuntary ADT), AT, and IDT. Types of IDT are:

- regularly scheduled unit training includes UTA, and MUTA
- Regularly Scheduled Training (RST) other than UTA/MUTA
- make up assemblies for missed UTA/MUTA due to AT
- Equivalent Training (ET) in lieu of scheduled UTA/MUTA or RST
- additional training assemblies (ATA)
- two-hour unit training assemblies
- training of individual Soldiers in non-pay status.

b. Paragraph 2–4 (Criteria for Awarding Retirement Points) states, personnel on AD, ADT, IADT, involuntary ADT, or AT are awarded 1 point for each calendar day they serve in one of these categories and may not be awarded additional points for other activities while in such status. Most types of IDT are covered by one of the following rules on required duration of IDT and calendar day limitations on points:

- one point for each scheduled 4-hour period of IDT at UTA, RST, ET, ATA, or make up assembly maximum of 2 points in 1 calendar day
- one point for each 2 hour or greater period
- two-hour aggregates of shorter periods may be used, except in the case of 2-hour unit training assembly's maximum of 1 point in 1 calendar day
- one point for each 2 hour or greater period
- two-hour aggregates of shorter periods may be used except in the case of 2-hour unit training assemblies
- award of a second point in the same day requires additional hours to bring the day's total to a minimum of 8, maximum of 2 points in 1 calendar day
- points may not be awarded under more than one of the rules above during any single calendar day
- Soldiers may not perform more than 48 BAs per fiscal year and Soldiers must perform RST within 60 days of the missed BA.

c. Paragraph 3-3b, states a DA Form 1380 will be prepared for a unit Soldier who performs equivalent training or additional training. The code "P" or "N" will be entered in item 9c before the retirement point credit. The code "P" indicates the Soldier is entitled to inactive duty pay for the duties performed; the code "N" indicates the Soldier is entitled to retirement point credit only.

2. AR 380-67 (Personnel Security Program) provides policies and procedures for access to classified information and assignment in a sensitive position. It also prescribes the investigative scope and adjudicative standards and criteria that are necessary prerequisites for such access or employment. It includes due process procedures for appealing adverse administrative actions rendered in accordance with the provisions of this regulation.

a. Chapter 7 (Issuing Clearance and Granting Access) provides the issuance of a personnel security clearance is a function distinct from that involving the granting of access to classified information. Clearance determinations are made on the merits of the individual case with respect to the subject's suitability for security clearance. Access determinations are made solely based on the individual's need for access to classified information in order to perform official duties. Only specific authorities are permitted to authorize, grant, deny or revoke personnel clearances or special access authorizations. Any commander or head of an organization may suspend access for cause when there exists information raising a serious question as to the individual's ability or intent to protect classified information, provided that the applicable procedures are complied with.

b. Paragraph 8-3 (Suspension) provides that the commander or head of the organization shall determine whether, on the basis of all the facts available upon receipt of the initial derogatory information, it is in the interests of national security to continue subject's security status unchanged or to take interim action to suspend subject's access to classified information or assignment to sensitive duties (or other duties requiring a trustworthiness determination), if information exists which raises serious questions as to the individual's ability or intent to protect classified information, until a final determination is made by the appropriate authority.

c. If the commander decides on formal suspension of access, DA Form 873 (Certificate of Clearance and/or Security Determination) will be removed from the individual's personnel file and attached to DA Form 5248-R (Report of Unfavorable Information for Security Determination) reporting the suspension to the Central Clearance Facility (CCF).

3. AR 135-155 (Army National Guard and U.S. Army Reserve Promotion of Commissioned Officers and Warrant Officers Other Than General Officers), Chapter 6 (Special Selection Boards (SSB)) provides SSBs are governed by the same instructions provided to the boards that considered or should have considered an officer for promotion. Inquiries concerning these will be addressed by the Commander, U.S. Army Human Resources Command (AHRC). SSBs are convened under Title 10, USC, section 14502 to consider or reconsider commissioned officers on the RASL for promotion when Headquarters Department of the Army determines that a qualifying

administrative or material error exist. Officers who discover that a material error existed in their file at the time they were non-selected for promotion may request reconsideration if—

- the record erroneously reflected that an officer was ineligible for selection for educational or other reasons
- one or more of the evaluation reports seen by the board were later deleted from an officer's records
- one or more existing evaluation reports as seen by the board in an officer's AMHRR were later substantively modified
- an adverse document, required to be removed from an officer's AMHRR as of the convening date of the board, was seen by the board

Reconsideration is normally not granted when the error is minor or when-

- officer is removed from a selection list after the next selection board considering the officers of his or her grade recesses
- an administrative error was immaterial, or the officer in exercising reasonable diligence, could have discovered and corrected the error or omission in the AMHRR
- the board did not consider correspondence to the board president that was delivered to the Chief, DA Promotions Branch after the cutoff date for such correspondence established in the promotion board zone of consideration message

4. AR 623-3 (Evaluation Reporting System) provides the policy and tasks for the Army's Evaluation Reporting System, including officer, non-commissioned officer, and academic evaluation reports focused on the assessment of performance and potential.

a. Paragraph 3-38 (Newly Received Favorable Information) provides that Rating officials who become aware of information that would have resulted in a higher evaluation of a rated Soldier will notify the rated Soldier of the newly received favorable information and assist the Soldier in his or her efforts to alter or remove the original evaluation report in accordance with the appeal policy. Rating officials will prepare a memorandum specifying the newly received favorable information precisely; how it was obtained, whether it was factually confirmed, and how it would change the completed evaluation had the information been known in writing the original evaluation report.

b. Chapter 4 (Evaluation Report Redress Program) provides an evaluation report submitted and accepted for inclusion in the rated Soldier's AMHRR is presumed to be administratively correct. The rated Soldier or other interested parties who know the circumstances of a rating may appeal any evaluation report they believe is incorrect, inaccurate, or in violation of the intent of this regulation. An appeal will be supported by

substantiated evidence. An appeal that alleges an evaluation report is incorrect, inaccurate, or unjust without usable supporting evidence will not be considered. The determination regarding adequacy of evidence will be made by HRC, Evaluation Appeals Branch. Claims of substantive inaccuracy or injustice will be reviewed for sufficient supporting documentation and evidence then forwarded directly to the Army Special Review Board (ASRB) for adjudication. When the board determines an evaluation report is invalid, a memorandum will be placed in the performance portion of the AMHRR declaring the period as nonrated time. In the case where a portion of an evaluation report is removed or corrected, the evaluation report will be corrected and placed in the performance portion of the AMHRR. A notation is placed at the bottom of the report to indicate the evaluation report is a "Corrected Copy."

5. AR 600-8-104 (Army Military Human Resources Records Management governs the composition of Official Military Personnel File (OMPF) and states the performance section is used for filing performance, commendatory, and disciplinary data. Once placed in the OMPF, the document becomes a permanent part of that file. The document will not be removed from or moved to another part of the OMPF unless directed by certain agencies, to include this Board.

//NOTHING FOLLOWS//