

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 April 2024

DOCKET NUMBER: AR20230007914

APPLICANT REQUESTS:

- reconsideration of her previous request to correct her records to show her date of rank (DOR) for the rank/grade of captain (CPT)/O-3 as 9 August 2017
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Orders Number 355-816, 20 December 2016
- Orders Number 0000419718.00, 28 May 2020
- Memorandum - Subject: Report of Investigation (ROI) - 1st Final Supplemental, 22 December 2022
- Criminal Investigation Division (CID) letter - Subject: ROI, 28 December 2022
- Memorandum for Record (MFR) - Subject: Delay of Promotion and Request for Promotion Backdate 9 August 2017, 13 June 2023

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20210005619 on 11 June 2021.
2. The applicant states her promotion to CPT/O-3 should be effective 9 August 2017. She was placed on a delayed promotion board to await adjudication involving a Guard Recruiting Assistant Case. The case was in her favor. If she was never involved in this investigation she would have been promoted to CPT on her original scroll on 9 August 2017. The case was in her favor, but she was not relieved from investigation until July 2022. Because the case was in her favor she was supposed to be promoted by regulation as if there was no delay. The official favorable case was not provided until July 2022. When she submitted to the ABCMR the first time her case was still open.
3. A review of the applicant's official records shows:

- a. She enlisted in the Arkansas Army National Guard (ARARNG) on 15 April 2010.
- b. DA Form 597 (Army Senior Reserve Officers' Training Corps (ROTC) Non-Scholarship Cadet Contract), dated 11 March 2011, shows she enrolled into the ROTC program at the University of Central Arkansas.
- c. DA Form 71 (Oath of Office - Military Personnel) shows she was appointed as a Reserve commissioned officer and executed her oath of office on 4 May 2013.
- d. On 3 June 2013, the Office of the Adjutant General (TAG), ARARNG, published Orders Number 154-842, which appointed the applicant in the ARNG as a 2LT, effective 4 May 2013.
- e. On 15 April 2015, TAG ARARNG published Orders Number 105-809, which promoted the applicant to the rank/grade of first lieutenant (1LT)/O-2, with an effective DOR of 4 November 2014.
- f. On 22 April 2015, the National Guard Bureau (NGB) published Special Orders Number 85, which extended Federal Recognition (FEDREC) to the applicant in the ARNG and promoted her to 1LT with an effective DOR of 4 November 2014.
- g. On 20 December 2016, TAG ARARNG published Orders Number 355-816, which promoted the applicant to the rank/grade of CPT, with an effective DOR of 19 December 2016.
- h. Memorandum, Subject: Law Enforcement Report- Final 00XX9-2013-CID0XX-045XXX-8L 1A/8L/7XX/7FXXX, dated 27 January 2017, although heavily redacted, states, in part, "On 15 November 2016, the Acting Deputy Staff Judge Advocate, ARARNG opined there was probable cause to believe the applicant committed the offenses of Larceny of Government Funds and Wire Fraud. No additional investigative efforts are required. The report is provided to the commander for consideration of action.
- i. DA Form 4833 (Commander's Report of Disciplinary or Administrative Action), dated 8 March 2017, shows the applicant was being referred for wire fraud and larceny of government funds. It also states, "AUSA...was briefed on this investigation and opined that while probable cause existed that the offenses were committed, he would decline prosecution because the offenses were outside the statutes of limitations and the individual offenses not meeting [the minimum] levels or other issues affecting prospective merit."
- j. ABCMR Record of Proceedings, Docket Number AR20210005619 lists a Memorandum for the Promotion Review Panel (PRP), Subject: Recommendation for the

Applicant, dated 6 November 2017, wherein, the applicant's commanding officer recommended her for promotion for the PRP. It states, "[Applicant] is a professional Soldier ready for promotion to CPT. She consistently strives to be the best. She continues to excel which is evident by the awards she received during the last year. She received two Army Commendation Medals while serving as Military Entrance Processing Station Operation Officer and the other while serving as the Battalion S-4. She learns quickly and is eager to achieve results. [Applicant] strives daily to live by the Army Values. She is disciplined and has high character. She is an excellent leader and a future company commander if given the opportunity. I highly recommend [applicant] for promotion to CPT. She will be a great asset to the ARARNG and the United States Army."

k. On 9 November 2017, the applicant provided a letter, Subject: Delay of Promotion and PRP Rebuttal 15-16 November 2017, dated 9 November 2017, wherein she states, in part:

(1) "I was only investigated, and nothing was proven during the questioning. I did participate in the Guard Recruiting Assistance Program and I followed all of the rules and procedures that were required. I have attached my sworn statement as well as the sworn statements of those I recruited."

(2) This CID investigation is not a reflection of my military career and paints an inaccurate picture of my character. I have been awarded multiple awards over the few years I have served. I am currently attending the Active Duty CPT Career Course for Logistics and set to graduate on 29 March 2017. I was chosen over several peers across the ARARNG to attend this course based on excellent performance throughout my career. I have never had any negative remarks on any of my permanent files outside of this CID file. Attached is my officer record brief and all of my OER's. I have also attached a letter of recommendation from my battalion commander. I am a good officer and I participated in the GRAP in good faith. This inaccurate record does not reflect my service in the ARNG. For the reasons stated above I respectfully request I be retained and promoted with the back date of 9 August 2017."

l. On 5 April 2019, a letter from the U.S. Army Criminal Investigation Command to the applicant, states, this letter is in further response to the applicant's request for release of information from the files of the U.S. Criminal Investigation Command (USACIDC) and supplements their response of 27 February 2019, and states, "This partial denial, which is made on behalf of Major General, D- G-, Commander, USACIDC, the Initial Denial Authority for USACIDC records under the Freedom of Information Act, may be appealed to the Secretary of the Army."

m. On 13 January 2020, the Secretary of the Army issued a Memorandum, Subject: ARNG FEDREC Board PRP, which states, "Effective immediately, I retain [applicant] on

the ARNG appointment scroll and recommend she be appointed to CPT in the Reserve of the Army pursuant to Title 32, United States Code (USC), section 307."

n. Secretary of Defense letter, dated 13 March 2020, shows the applicant was appointed in the ARNG to CPT.

o. On 11 June 2021, ABCMR ROP Docket Number AR20210005619 shows the applicant petitioned the ABCMR for correction of her records to show her DOR for CPT/O-3 as 9 August 2017. In pertinent part, the Board denied her request and stated:

(1) The Board noted that the Secretary of the Military Department concerned may adjust the DOR of an officer if the appointment of that officer to the higher grade is delayed by unusual circumstances.

(2) In the applicant's case, her promotion was delayed due to an investigation and the time required for the Secretary of the Army to make his decision regarding her retention on the ARNG appointment scroll. The Board carefully reviewed the available records and agreed that the circumstances that led to the delay of her promotion were not unusual. Based on a preponderance of evidence, the Board determined the applicant's DOR for CPT is not in error or unjust.

4. In support of her case the applicant provides:

a. Orders Number 0000419718.00, published by the ARARNG on 28 May 2020, which promoted the applicant to CPT, effective 13 March 2020.

b. Memorandum - Subject: Report of Investigation (ROI) - 1st Final Supplemental - 00209-2013-XXXXX-XXXXXX-8L/8L1A/7F2/XXXXX, dated 22 December 2022, which states, in pertinent part, "A subsequent review of this investigation by a CID Headquarters Review Team and Headquarters Counsel Office determined there was no probable cause to believe... [the applicant] had committed a crime because there was a misunderstanding of the contract requirements and the implementation procedures at the time of the initial work on this investigation, and that an administrative error occurred in the application of the credible information standard of DOD Instruction 5505.07 in the initial titling of... [the applicant]. Therefore, they are being deleted from the title block of this report."

c. CID letter - Subject: ROI, dated 28 December 2022, which states, this letter is in further response to her request for release of information from the files of the Department of the Army Criminal Investigation Division (DACID). The ROI 1st Final Supplemental described above was enclosed.

d. CID letter - Subject: Review of ROI 00209-2013-XXXXX-XXXXXX-8L, undated, wherein, the CID, Assistant Director, Investigations and Operations Directorate states:

(1) In July 2022, the DACID began a thorough review of investigations previously initiated and conducted into allegations of criminal wrongdoing in various Army Recruiting Assistance Programs (RAPs).

(2) "This review has determined that, based upon the information available to CID in relevant files, there is an insufficient basis upon which to title or index you [the applicant] in law enforcement databases for any offense related to RAP. As relates to subject ROI, CID has removed your name [the applicant] and identifying information from law enforcement systems, to include the Defense Clearance and Investigations Index (DCII) and the Federal Bureau of Investigation's Interstate Identification Index (III)."

e. MFR - Subject: Delay of Promotion and Request for Promotion Backdate 9 August 2017, dated 13 June 2023, wherein, she provides the background and summary of events that delayed her promotion to CPT, which resulted in her being given a DOR of in March 2020. She requests that her promotion to CPT be backdated to 9 August 2017. She also states the RAP case was founded in her favor. She was never titled, and the case was removed from her records. Her results were favorable, and she should be promoted to her original scroll date of 9 August 2017 as if there was no delay according to Army Regulation (AR) 135-155 (Army National Guard and U.S. Army Reserve Promotion of Commissioned Officers and Warrant Officers Other Than General Officers), paragraph 3-9(d).

5. On 6 March 2024, the NGB, Chief, Special Actions Branch, provided an advisory opinion for this case and recommended approval. The advisory official stated:

a. The applicant requests a DOR adjustment from 13 March 2020 to 9 August 2017 for promotion to CPT. The applicant states delay in promotion is due to a CID Army Guard Recruiting Assistance Programs (GRAP) investigation that resulted in favorable outcome.

b. The applicant states a CID investigation was done for GRAP review and concluded in July 2022 with a result of insufficient bias. The applicant states if the GRAP information was corrected by CID prior to 9 August 2017, she would not have been placed on the delayed promotion board and a promotion with the 9 August 2017 effective date would have been granted.

c. The applicant states a notification of the case closure was received in January of 2023 and the case closed favorably on 22 July 2023. The applicant references AR 135-155, paragraph 3-9(d), which states that "When an officer's promotion suspension is

closed favorably and the officer is exonerated of any wrongdoing, or a determination is made that the officer was qualified for promotion during the entire period of delay, the officer will be promoted with the same DOR, effective date (for pay and allowances), and position on the Reserve Active Status List (RASL) that the officer would have received had there been no delay".

d. The applicant declares she was in a CPT position on 9 August 2017 and waiting action from the delay promotion board which took over 2 years to complete. The applicant was removed from the original scroll while awaiting the GRAP case findings. An initial request for promotion DOR adjustment to 9 August 2017 was denied.

e. The applicant provided her CPT promotion order, CID findings notification letter, CID request for release of information from files response letter, and a report of investigation memo as supporting documents.

f. NCARNG ARNG G-1 provided an eTracker screenshot that shows 29 December 2016 packet entry. On 10 January 2017, the packet was sent back to the state for correction. On 11 January 2017, the correction was made and accepted. On 12 January 2017, the post screening was approved and approved for scrolling. On 26 January the packet was assigned a scroll and on 26 June 2017, the scroll was unassigned due to need for state correction. On 17 August 2018, the packet was removed. On 31 March 2022, the packet was archived.

g. A review of the applicant's request by the Army National Guard Federal Recognition Team shows the applicant's original scroll PL06-17 was approved and signed by the Secretary of Defense on 9 August 2017.

h. After further review of the applicant's documents provided and discussions with the NCARNG and ARNG Federal Recognition Team, it is the conclusion of this office, that the applicant's promotion was delayed due to a CID GRAP investigation which resulted in insufficient findings. This office recommends the applicant's DOR and effective date of promotion be adjusted to 9 August 2017. The ARNG Federal Recognition concurs with this recommendation and the NCARNG concurs with this recommendation.

6. On 8 March 2024, the applicant was provided a copy of the NGB advisory opinion for comments or rebuttal.

7. On 26 March 2024, she responded to the NGB advisory opinion and stated that she agreed with the advisory opinion recommendation of approval for the request of DOR adjustment from 13 March 2020 to 9 August 2017.

**BOARD DISCUSSION:**

1. 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 and standard review based on law, policy, and regulation. The Board reviewed and concurred with the National Guard Bureau's advisory finding that the applicant's promotion was delayed due to a CID investigation that resulted in insufficient findings. Therefore, due to the delay, the Board recommends that the applicant's date of rank and effective date of promotion be adjusted to 9 August 2017.
2. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

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 is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by issuing the applicant a Special Order extending her Federal recognition for promotion to CPT with an effective date and date or rank as 9 August 2017, with entitlement to back pay and allowances (if applicable) as a result of this correction.

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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. AR 15-185 (ABCMR) states that the ABCMR begins its consideration of each case with the presumption of administrative regularity. It will decide cases based on the evidence of record and it is not an investigative body. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. Paragraph 2–11 states 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. AR 135-155 (Army National Guard and Reserve - Promotion of Commissioned Officers and Warrant Officers) prescribes the officer promotion function of the military human resource support operations for officers on the RASL and U.S. Army Reserve (USAR) warrant officers.
  - a. Paragraph 3-9a (Date of rank and effective date of promotion after a delay) states, when a delay in promotion ends, the promotion orders approval authority, the Chief, Department of the Army Promotion Branch, will determine if the officer was, in fact, unqualified (as opposed to ineligible, as described in this regulation) for promotion during all or part of the delay and will adjust the DOR and effective date of promotion accordingly.
  - b. Paragraph 3-9d states, when an officer's promotion suspension is closed favorably and the officer is exonerated of any wrongdoing, or a determination is made that the officer was qualified for promotion during the entire period of delay, the officer will be promoted with the same DOR, effective date (for pay and allowances), and position on the RASL that the officer would have received had there been no delay. The Chief, DA Promotions Branch will determine, on a case-by-case basis, the adjustment to be made in the DOR and effective date of promotion.
  - c. Paragraph 3-9e provides that, the DOR and effective date of promotion may be earlier than the date of the actual order.
3. 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, U.S. Code (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.
4. Title 31, USC, section 3702, is the 6-year barring statute for payment of claims by the government. In essence, if an individual brings a claim against the government for

monetary relief, the barring statute says that the government is only obligated to pay the individual 6 years from the date of approval of the claim. Attacks to the barring statute have resulted in litigation in the U.S. Court of Federal Claims. In the case of *Pride versus the United States*, the court held that the Board for Correction of Military Records (BCMR) is not bound by the barring act, that the BCMR decision creates a new entitlement to payment and the 6 years starts running over again, and that payment is automatic and not discretionary when a BCMR decision creates an entitlement.

//NOTHING FOLLOWS//