

IN THE CASE OF: [REDACTED]

BOARD DATE: 14 March 2024

DOCKET NUMBER: AR20230008215

APPLICANT REQUESTS THROUGH COUNSEL:

- retroactive promotion to the rank/grade of major (MAJ)/O-4 with an appropriate effective Date of Rank (DOR) consistent with selection for MAJ in the fiscal year (FY) 2017 (FY17) MAJ, Army Nurse Corps (AN) Promotion Selection Board (PSB)
- to be granted constructive active duty service to reach 3 years time in grade as a MAJ and retired in the rank of MAJ
- to be awarded back pay and retired pay as appropriate based on her promotion to the rank of MAJ
- any other appropriate relief

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

- DD Form 149 (Application for Correction of Military Record)
- Counsel's supplement statement
- U.S. Army Human Resources Command (HRC) Memorandum - Subject: Delay of Promotion and Referral to a Promotion Review Board (PRB), 4 March 2019
- HRC Memorandum - Subject: Notification of Mandatory Removal Date (MRD) due to Non-Selection for Promotion, 6 July 2020
- DD Form 214 (Certificate of Release or Discharge from Active Duty), ending on 31 January 2021
- Army Board for Correction of Military Records (ABCMR) Record of Proceedings (ROP), Docket Number AR20200003972, 29 April 2021
- HRC letter to applicant removing General Officer Memorandum of Reprimand (GOMOR), 3 February 2023

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 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. Counsel states:

a. The applicant was selected for promotion to MAJ in the FY17 MAJ AN PSB. Prior to her promotion, she was issued a GOMOR on 20 March 2018. The GOMOR resulted in a PRB. She was removed from the FY17 promotion list by the PRB. Ultimately, she retired in the rank/grade of captain (CPT)/O-3 after being twice non-selected for promotion to MAJ. The GOMOR was subsequently removed from her official record by the ABCMR in Docket Number AR20200003972 because it was determined to be substantively incorrect. The applicant would have been promoted to MAJ in the FY17 PSB if the GOMOR had not been in her record. Relief is warranted.

b. A clear injustice occurred where the GOMOR caused the applicant's removal from the promotion list for the FY17 PSB, but where the GOMOR is now shown to be substantively incorrect and has been removed from her record entirely. Accordingly, the applicant would have been promoted in the FY17 PSB and would have obtained at least three years time in grade for retirement in the rank of MAJ but for the substantively incorrect GOMOR in her record. Now that the GOMOR has been removed, she must be promoted retroactively. For the above stated reasons, the requested relief is warranted.

2. A review of the applicant's official records show the following:

a. Having prior Regular Army enlisted service, DA Form 71 (Oath of Office - Military Personnel) shows she was appointed in the Regular Army as an Army Nurse Corps commissioned officer and executed an oath of office on 4 October 2007.

b. On 29 March 2011, HRC published Orders Number 088-013, which promoted the applicant to the rank of CPT effective on with a DOR of 15 March 2011.

c. DA Form 1059 (Service School Academic Evaluation Report) shows the applicant attended and completed the Army Medical Department (AMEDD) Captains Career Course from 5 January 2017 through 10 March 2017.

d. On 20 March 2018, the Commanding General, Headquarters, 21st Theater Sustainment Command reprimanded the applicant in writing for engaging in a prohibited relationship with an enlisted Soldier and stated:

(1) During June 2017, she began an adulterous inappropriate relationship with a married Noncommissioned Officer (NCO). She exchanged messages with this NCO in which she said, "the sex is amazing" and "I am horny," and discussed the apparent frustration over a lack of prophylactics. She knew this person was both married and an enlisted member of the Army, as evidenced by her own statements during the referenced exchanges.

(2) He was extremely disappointed by her gross indiscipline and poor professional judgement. By knowingly engaging in an inappropriate relationship with a married enlisted Soldier, she exhibited a wanton disregard for the Army Values.

(3) This reprimand was imposed as an administrative measure under Army Regulation 600-37 (Unfavorable Information) and not as punishment under Article 15, Uniform Code of Military Justice.

e. On 8 May 2018, after careful consideration of the circumstances of the misconduct and all matters submitted by the applicant in defense, the Commanding General, Headquarters, 21st Theater Sustainment Command, directed permanently filing the GOMOR in the applicant's Army Military Human Resource Record (AMHRR).

f. On 11 June 2019, the Department of the Army Suitability Evaluation Board (DASEB) denied the applicant's request for removal of the GOMOR from her AMHRR. The DASEB found that the evidence presented did not clearly and convincingly establish that the GOMOR under consideration was untrue or unjust, and as a result, the presumption of regularity applied. Therefore, by unanimous vote, the DASEB determined the overall merits of the case did not warrant the requested relief. The Board further directed the decision memorandum be filed in the applicant's AMHRR, and the appeal documentation be filed in the restricted section of the applicant's AMHRR.

g. On 2 October 2019, the Secretary of the Army removed the applicant from the FY17 MAJ, AN Corps Promotion List, pursuant to Title 10, USC, Section 629, Executive Order 12396, and Army Regulation (AR) 600-8-29 (Officer Promotions), paragraph 8-1b.

h. On 31 January 2021, DD Form 214 shows the applicant was retired in the rank of CPT by reason of "Non-Selection, Permanent Promotion." She completed 13 years, 3 months, and 27 days net active service with 6 years, 8 months, and 8 days total prior active service.

i. On 29 April 2021, ABCMR Docket Number AR20200003972 shows the Board voted unanimously to remove the GOMOR from the applicant's AMHRR. The Board determined the evidence presented was sufficient to warrant a recommendation for relief. The applicant and her counsel had demonstrated by a preponderance of evidence that an error occurred that was prejudicial to the applicant. It did appear to be evidence the contested GOMOR was unjust or untrue or inappropriately filed in the applicant's AMHRR.

j. On 3 February 2023, HRC notified the applicant that her records had been corrected by removing the GOMOR and DASEB documents from her AMHRR.

3. The applicant provides through counsel:

a. HRC Memorandum - Subject: Delay of Promotion and Referral to a PRB, dated 4 March 2019, which notified the applicant that her promotion would be delayed based on receiving a GOMOR dated 20 March 2018, which included an AR 15-6 Investigation and supporting documents that were identified in the post selection screening.

b. HRC Memorandum - Subject: Notification of MRD due to Non-Selection for Promotion dated 6 July 2020, which shows the applicant was notified that she was not selected for promotion by the FY20, MAJ, AN Corps, Army Medical Service Corps, Army Medical Specialist Corps, and Army Veterinary Corps, PSB, convened pursuant to Title 10, USC, Section 611(a). Pursuant to Title 10, USC, Section 632(a)(2) and (3), she had to be removed from the Army no later than the first day of the seventh month from the approval of the board's report, unless on this date she was within two years of qualifying for retirement. The applicant's MRD was established as 31 January 2021, which allowed her to be retained on active duty for retirement.

4. On 2 October 2023, the Chief, Officer Promotions-Special Actions, HRC, provided an advisory opinion for this case and stated:

a. Based on a review of their records and the information that was furnished to this office through this request, the applicant may be eligible for a Special Selection Board (SSB) under the FY20 Active Component (AC) MAJ Army Medical Department (AMEDD), Army Nurse Corps (AN) Promotion Selection Board (PSB), based on the ABCMR directive to remove of the GOMOR from her file.

b. Their records indicate that based on the date of removal from the FY17 AC MAJ AMEDD by the Secretary of the Army, the applicant's next eligible board would have been the FY20 AC MAJ AMEDD. If granted SSB, recommend ABCMR direct SSB under the FY20 board criteria, and if recommended for promotion by that SSB, further stipulate a request for the Secretary of the Army that the officer be awarded the original date of rank based on the FY17 selection.

5. On 3 October 2023, the applicant's counsel responded to the advisory opinion and stated:

a. The applicant requested promotion to the rank of MAJ with a DOR consistent with her selection for promotion in the FY17 MAJ selection board. She also requested back pay and retirement as a MAJ with all rights and benefits she would have received if she had been promoted. The basis of that request was that in the FY17 MAJ Promotion board, she was selected for promotion, but later removed from the list unjustly. The basis of removal from the FY17 promotion list was a GOMOR that was filed in her AMHRR after her selection for promotion to MAJ but before her actual promotion. This

Board previously (in a separate case) removed the GOMOR as an injustice due to the GOMOR containing false information.

b. The advisory opinion recommends reconsidering applicant for promotion with the criteria for the FY20 MAJ promotion board. The advisory opinion makes this recommendation because that was the first board in which Applicant was considered for promotion to MAJ following her removal from the FY17 promotion list.

c. While the applicant appreciates the favorable recommendation of the advisory opinion, the opinion misses the context of the removal of the GOMOR. She does not need to be reconsidered for promotion – she was already selected in the FY17 MAJ board. The only reason she did not promote was because of the PRB that removed her from the list due to the GOMOR. Without the GOMOR, she would have promoted following her selection on the FY17 board. Now that the GOMOR has been shown to be untrue and unjust, the promotion removal action should be undone, and applicant promoted without the unnecessary step of reconsideration by a special selection board.

d. That said, if this Board is unwilling to automatically promote applicant in the FY17 MAJ promotion board (as she was already selected during that board), then reconsideration as per the advisory opinion via SSB is appropriate.

#### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found partial relief is warranted.
2. The Board found the removal of the applicant's GOMOR sufficient as a basis for referring her record to an SSB. The Board also concurred with the relief proposed by the advisory official, noting that a selection by an SSB under the FY20 AC MAJ AMEDD criteria with a stipulation that her date of rank be equivalent to the date of rank she would have had based on her FY17 selection would have the desired effect. Based on a preponderance of the evidence, the Board determined the applicant should be given the relief proposed by the advisory official.

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 records of the individual concerned be corrected by:

    a. Referring her record to an SSB to be considered for promotion under the FY20 AC MAJ AMEDD criteria.

    b. If selected for promotion by an SSB, assigning her an effective date of rank equivalent to the date of rank she would have had based on her FY17 selection for promotion to MAJ with payment of any retroactive pay and allowances she is due and correction of her retired grade.

2. The Board further determined 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 any relief in excess of that described above.

6/25/2024

X

CHAIRPERSON

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 600-8-29 (Officer Promotions), Chapter 6 (Special Selection Boards) states SSBs are governed by the same instructions provided to the boards that considered or should have considered an officer for promotion. In pertinent part:

a. Paragraph 6-2 (Purpose of boards) provides that, SSBs may be convened under Title 10, USC, Section 628 to consider or reconsider commissioned or warrant officers for promotion when Headquarters Department of the Army (HQDA) determines that one or more of the following circumstances exist: (1) Administrative error (10 USC 628(a)(1)) (SSB required). (2) Material unfairness (10 USC 628(b)(1)) (HRC discretionary).

b. Paragraph 6-4 (Notification) provides that, HRC will send written notification to an officer slated for consideration by a SSB at least 30 days before the board convenes. Notification will be sent to the officer's official military email account.

c. Paragraph 6-5 (Convening special selection boards) provides that, SSBs will normally be convened within 120 days after a case is approved for consideration. Authority to approve cases for referral to an SSB is delegated to the Commanding General, HRC, or his or her designee, or the Army Review Boards Agency. The same SSB may not consider an officer for the same grade under two successive boards' criteria.

d. Paragraph 6-10 (Effect of selection for promotion) provides that, Officers selected for promotion by an SSB will, as soon as practicable, be appointed to that grade in accordance with Title 10, USC, Section 624, or, in the case of a warrant officer, of Title 10, USC, Section 578, Subsection (c). An officer appointed to the next higher grade as the result of the recommendation of an SSB will have the same date of grade, the same effective date for the pay and allowances of that grade, and the same position on the active duty list (ADL) as the officer would have had if he or she had been recommended for promotion to that grade by the board which should have considered, or which did initially consider, him or her. In the case of an officer who is not on the ADL when appointed to the next higher grade, placement on the ADL pursuant to the preceding sentence will be only for purposes of determination of eligibility of that person for consideration for promotion by any subsequent SSB.

2. 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, 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.

3. The ABCMR may correct an officer's date of rank/effective date of rank when a proper appointment has already occurred. Title 10, USC, sections 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.

4. Title 10, USC, section 1552 states the Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his/her or another's service in the Army.

//NOTHING FOLLOWS//