

IN THE CASE OF: [REDACTED]

BOARD DATE: 13 March 2024

DOCKET NUMBER: AR20230008616

APPLICANT REQUESTS: retroactive promotion to the rank/grade of captain (CPT)/O-3.

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

- DD Form 149 (Application for Correction of Military Record)
- Brief in Support of Application for Discharge Upgrade
- DD Form 4 (Enlistment/Reenlistment Document – Armed Forces of the U.S.), 31 July 2002
- Degree Verify Certificate
- Certificate, [REDACTED] – School of Health Sciences, 12 September 2006
- Memorandum – Subject: Appointment as a Reserve Commissioned Officer of the Army Under Title 10, United States Code (USC) 12201 and 12203, 7 August 2009
- Certificate of Training
- DA Form 67-9 (Officer Evaluation Report (OER)), 21 March 2012
- Memorandum – Subject: Options Upon Non-Selection for Promotion After Second Consideration, 19 October 2012
- Orders Number 13-081-00021, 22 March 2013

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 represented by legal counsel states in pertinent part, he was discharged in 2013 due to being non-selected for promotion to CPT on three different occasions. The applicant contests that he served honorably for the entirety of his career and continuously took courses to advance his skills. He notes that he has not had any incidences of misconduct and has always received praise from his raters as evidenced by his consistent recommendation for promotion. The applicant argues that his chain of command failed to provide him with a meaningful opportunity to overcome whatever

perceived deficiencies preventing him from being promoted. He intended to make a career out of the Army and due to the premature ending of his career his life has been adversely affected. This document is further provided in its entirety for the Board's review within the supporting documents.

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

a. On 31 July 2002, the applicant enlisted into the U.S. Naval Reserve.

b. On 12 September 2006, the applicant was awarded a Bachelor of Science degree as a Physician Assistant (PA) and subsequently licensed as a PA on or about 5 October 2006.

c. On 7 August 2009, the applicant was appointed a Reserve commission at the rank of first lieutenant (1LT)/O-2 to serve as a PA (65D) within the U.S. Army Reserve (USAR).

d. On 21 March 2011, the applicant completed the Reserve Component Basic Officer Leader Course.

e. On 22 March 2013, Headquarters, U.S. Army Reserve Command (USARC) issued Orders Number 13-081-00021 discharging the applicant from the USAR due to being a 3x Non-Selection for promotion to CPT, effective 1 April 2013.

4. The applicant provides the following a:

a. Certificate of Training, reflective of the applicant's completion of several continuing education requirements to include the Care Provider Support – Sustainment training, Combat Casualty Care course, Advance Trauma Life Support course etc.

b. DA Form 67-9, ending on 21 March 2012, reflective of the applicant's performance of duty during the period of 22 March 2011 – 21 March 2012 as assessed by members of his immediate leadership. The applicant was rated as "center mass" and the best qualified in comparison to the other four officers that the senior rater evaluates.

c. Memorandum – Subject: Options Upon Non-Selection for Promotion After Second Consideration dated 19 October 2012, reflective of the applicant being advised of the options afforded to him after being non-selected on 2 separate occasions. The applicant was advised that due to this non-selection it was mandatory for him to be released from an active status. He was given a suspense of 18 December 2012 to respond to this letter.

5. On 2 November 2023, the USARC, Chief, Military Personnel Division, provided an advisory opinion recommending denial of the applicant's request noting that the applicant was non-selected for promotion to CPT during the Fiscal Year (FY) 2011, 2012 and 2013 Headquarters Department of the Army Reserve Component CPT Army Medical Department (AMEDD) Promotion Selection Boards. These boards used the best-qualified method of selection, as prescribed in Department of the Army Memorandum 600-4, Appendix A, Section 111, to select and recommend officers in each competitive category. The selection rate for Army Reserve non-Active Guard/Reserve AMEDD officers was 49 percent for FY11, 31 percent for FY12 and 36 percent for FY13. In accordance with the governing regulation, a 1LT who failed to be selected for promotion to CPT for the second time, and whose name is not on a list of officers recommended for promotion, will be removed from an active status no later than the first day of the seventh month after the month in which the final approval authority approves the report of the board which considered the officer for the second time unless the officer can be credited with 18 or more but less than 20 years of qualifying service for retired pay. According to available records, the applicant did not qualify for retention in the Army Reserve under this provision.
6. On 15 November 2023, the applicant was provided with a copy of the advisory opinion and afforded 15 days to provide comments.
7. In response to the advisory opinion, counsel argues that the opinion failed to address the applicant's exemplary duty performance and absence of misconduct. Further, the applicant was not counseled on areas that he could improve upon which would constitute a deprivation of any meaningful opportunity to improve in areas perceived to be deficient. This document is further provided in its entirety for the Board's review within the supporting documents.

#### 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 through counsel 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 through counsel of the applicant's petition, available military record and , USARC, Chief, Military Personnel Division advisory opinion, the Board determined concurred with the advising official recommendation for denial finding the promotion selection boards used the best-qualified method of selection, as prescribed in Department of the Army Memorandum 600-4, Appendix A, Section 111, to select and recommend officers in each competitive category. The Board noted official promotion and selection boards select members for promotion based upon their performance and potential; the Board does not.

2. The Board determined the applicant nor his counsel demonstrated by a preponderance of evidence that procedural error occurred that was prejudicial to the applicant and by a preponderance of evidence that the proceedings for selection to CPT are substantially incorrect. Furthermore, the applicant requests retroactive promotion to O-3/CPT). However, the ABCMR lacks the authority to promote officers. To do so would violate the Appointments Clause of the United States Constitution. As such, the Board determined it has no authority to grant the specific relief requested by the applicant. Therefore, relief is 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

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. Army Regulation 135-155 (Army National Guard and U.S. Army Reserve Promotion of Commissioned Officers and Warrant Officers Other Than General Officers) Chapter 2 (Promotion Eligibility and Qualification Requirements) provides that to be eligible for consideration for promotion to the next higher grade, an ARNGUS or USAR officer must have continuously performed service on either the Reserve Active Status List (RASL) or the Active Duty List (ADL) (or a combination of both lists) during the 1– year period ending on the convening date of the promotion board, and must meet the Time in Grade (TIG) requirements in tables 2-1. Table 2-1 (TIG requirements commissioned officers, other than commissioned warrant officers) provides that a 1LT must have minimum of 2 years TIG as a 1LT to be eligible for promotion to CPT.

a. Paragraph 2-1- (Mandatory Selection Board) provides that mandatory selection boards will convene each year. These boards will consider ARNGUS and USAR officers on the RASL for promotion to CPT through LTC. First consideration for promotion will occur well in advance of the date the officer will complete the TIG requirements in tables 2-1. Officers who were not selected for promotion on the first consideration, and who remain in an active status, will be reconsidered by the next board considering their grade and/or branch.

b. Section III (Promotion Reconsideration Boards) provides Officers and warrant officers who have either failed of selection for promotion, or who were erroneously not considered for promotion through administrative error may be reconsidered for promotion by either a promotion advisory board or a special selection board, as appropriate. These boards are convened to correct/prevent an injustice to an officer or former officer who was eligible for promotion but whose records –

- through error, were not submitted to a mandatory promotion selection board for consideration
- contained a material error when reviewed by the mandatory selection board

c. Nonselection by a special selection board will be considered a failure of selection for promotion if the officer, or former officer through administrative error, had not been considered for selection for promotion by the appropriate regularly convened mandatory board. Nonselection by a special selection board of an officer or former officer who was a previous failure of selection by a mandatory board will be considered confirmation of

the action of the regularly convened board. Such an officer or former officer will not incur an additional failure of selection for promotion from the action of the special selection board.

d. Paragraph 4-33 (Action Resulting from Non-Selection) provides a 1LT on the RASL who has failed of selection for promotion to CPT for the second time and whose name is not on a list of officers recommended for promotion to CPT, will be removed from active status not later than the first day of the seventh month after the month in which the final approval authority approves the report of the board which considered the officer for the second time unless the officer can be credited with 18 or more but less than 20 years of qualifying service for retired pay. USAR officers will be transferred to an inactive status if the Secretary of the Army determines that the officers have skills which are required to meet mobilization needs; to the Retired Reserve or discharged.

//NOTHING FOLLOWS//