

IN THE CASE OF: [REDACTED]

BOARD DATE: 13 June 2024

DOCKET NUMBER: AR20230010143

APPLICANT REQUESTS: in effect, reconsideration of the decision to overturn the Board's recommendation in Docket Number AR20200008569.

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

- Applicant's Statement in lieu of DD Form 149 (Application for Correction of Military Record)
- Statement from CW5 [REDACTED] (Retired), 29 July 2023
- Attorney invoices, various dates

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 AR20200008569 on 11 May 2021.

2. The applicant states:

a. In response to memorandum ABCMR Docket Number AR20200008569 dated 23 April 2023 and memorandum dated 20 April 2023, Subject: ABCMR Record of Proceedings for applicant, AR20200008569, the following information is provided:

(1) Memorandum dated 9 August 2023 from CW5 [REDACTED] retired, former Command Chief Warrant Officer for [REDACTED] Army National Guard ([REDACTED] ARNG).

(2) Invoices from her attorneys substantiating the delay in providing documents under Freedom of Information Act (FOIA) for inclusion in her ABCMR. This delay suggests that there was a potential for validation of the injustices outlined in her ABCMR and further validated by the Board itself. The 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 when the organization responsible for the injustice failed to provide documentation in a timely manner.

(3) She would like to draw the Board's attention to the fact that the ABCMR finding in subparagraph o., stated the significance of a minority board member and utilizes the combined conjunction "and/or" to indicate the substantial difference between a female applicant and a minority applicant.

b. The majority members of the ABCMR recommended partial relief based on the injustices they determined were sufficient to grant that relief. She finds it difficult to understand how the ABCMR could render a 15 page detailed finding and that the Deputy Assistant Secretary of the Army (DASA) (Review Boards (RB)) could then overturn their recommendation and find insufficient evidence to approve the Board. Based on the above, she requests approval of the ABCMR board members findings of partial relief.

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

a. Having previous service as an enlisted Soldier for more than 10 years within the Army National Guard (ARNG), on 29 April 1995, Special Orders Number 45 AR issued by the National Guard Bureau (NGB), extended Federal Recognition (FEDREC) to the applicant for her initial appointment at the rank of Warrant Officer One (WO1), effective 3 March 1995.

b. On 16 October 1995, the [REDACTED] ARNG published Orders Number 197-001, which ordered the applicant to Full Time National Guard Duty, effective 16 October 1995.

b. On 6 March 1997, Special Orders Number 45 AR issued by the NGB, the applicant was extended FEDREC of her promotion to the rank of CW2, effective 3 March 1997 as a 420A (Human Resources Technician).

d. On 25 January 2002, Special Orders Number 25 AR issued by the NGB extended FEDREC to the applicant for her promotion to the rank of Chief Warrant Officer (CW3), effective 3 March 2002.

e. On 11 January 2007, Special Orders Number 7 AR extended FEDREC to the applicant for her promotion to the rank of Chief Warrant Four (CW4), effective 3 March 2007.

f. On 19 August 2011, the applicant completed the Warrant Officer Senior Staff Course.

g. On 16 September 2013, the Joint Force Headquarters of the [REDACTED] ARNG published Orders Number 259-002, which released the applicant from active duty and placed her on the retired list, effective 31 August 2014, in the rank of CW4. At the time of separation, the applicant had obtained 30 years, 4 months, and 8 days of creditable

service for pay purposes and 25 years, 4 months, and 20 days under Title 10, United States Code, section 1405.

h. On 31 August 2014, the applicant was retired. Her DD Form 214 (Certificate of Release or Discharge from Active Duty) item 4a (Grade, Rate or Rank) shows CW4 and item 12i (Effective Date of Pay Grade) shows 3 March 2007.

4. On 11 May 2021, ABCMR Docket Number AR20200008569 shows a majority of the board members voted to grant partial relief of the applicant and counsel's request(s). It also states:

a. After reviewing the application and all supporting documents, the Board found that partial relief was warranted. The Board carefully considered the applicant's contentions, military record, and regulatory guidance. Although evidence available for review indicates that the ■■■ ARNG performed due diligence to have minority representation serve on the board but none held a higher rank than the applicant. Two members noted the efforts of the ■■■ ARNG but determined that ensuring fairness of the process outweighed that effort. One Board member found insufficient evidence of procedural error during the promotion board process to warrant reconsideration for promotion by a Special Selection Board (SSB).

b. Based on the preponderance of the documentation available for review, the Board determined the evidence presented was sufficient to warrant a recommendation for partial relief. As a result, the Board recommended that the applicant be afforded reconsideration of her promotion to CW5 before an SSB.

c. Nevertheless, the Board further determined the evidence presented insufficient to warrant a portion of the requested relief. As a result, the Board recommended denial of so much of the application that pertained to:

- reinstatement into the ■■■ ARNG in the rank of CW5
- entitlement to all back pay and allowances

5. The entire 15-page ABCMR Record of Proceedings for Docket Number AR20200008569 with supporting documents can be reviewed in its entirety within the support documents.

6. On 20 April 2023, the DASA Review Boards reviewed the evidence presented, findings, conclusions, and Board member recommendations. Based upon the findings outlined within National Guard Bureau advisory opinion, he found insufficient evidence of an error or injustice. Therefore, he overturned the Board's recommendation. The application submitted by the applicant through counsel was denied.

7. In support of her reconsideration the applicant provides:

a. A statement from CW5 [REDACTED] (Retired) dated 29 July 2023, which states:

(1) She was the Command Chief Warrant Officer (CCWO) for the [REDACTED] ARNG from September 2005 through December 2011. She has known the applicant throughout her career as a 420A in the [REDACTED] ARNG.

(2) The [REDACTED] ARNG has always strived to have proper representation for all CW5 boards (to include promotion potential, Active Guard/Reserve (AGR) selection and Selective Retention) in accordance with current regulations and Standard Operating Procedures (SOPs). To ensure the proper inclusion of ethnic minority representation, she brought in CW5s from other States to sit on her promotion boards in order to make sure that minority females or males received due process. She was previously assigned as the Officer Branch Chief and AGR Manager and in both assignments, she ensured that we [the [REDACTED] ARNG] followed our Promotion Boards regulations and SOPs and also to followed Equal Opportunity (EO) requirements.

(3) The applicant was always professional, and her integrity was beyond reproach. CW5 (Retired) [REDACTED] was very disturbed by what transpired with her promotion and ultimate non-retention by the SRB. She was very disturbed by what she saw as unfair treatment to the applicant. The individual that replaced CW5 [REDACTED] was an Aviator and was very vocal that he must be her replacement. The Chief of Staff at the time was also an Aviator and made her aware of his opinion that an Aviator should be the next CCWO. Politics are politics and hidden agendas happen all the time, unfortunately. Additionally, the applicant was not the only ethnic minority that was subject to non-retention by the SRB. A Chief Warrant Officer Four (CW4) was also released from his position and was a senior 920A that should have been retained.

(4) She hopes that the Board will reconsider the findings of the ABCMR and grant the relief to allow the applicant to be considered by Special Selection Board (SSB) for promotion to CW5. If the Board needs any further clarification, please contact her on her cell phone at [REDACTED]

b. Attorney invoices, various dates, substantiating the delay in providing documents under FOIA for inclusion in her ABCMR. This delay suggests that there was a potential for validation of the injustices outlined in her ABCMR and further validated by the Board itself.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found relief is warranted.
2. The Board concurred with the findings of the panel that previously considered the applicant's case that the evidence indicates the applicant may not have had full and fair consideration when being considered for promotion to CW5. Based on a preponderance of the evidence the Board determined the applicant's records should be referred to an SSB to be considered for promotion to CW5.

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 and Army National Guard records of the individual concerned be corrected by referring her records to an SSB to be considered for promotion to CW5.

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. Army Regulation (AR) 135-155 (Promotion of Commissioned Officers and Warrant Officers other than General Officers) Chapter 2-12 (Consideration or Promotion to CW5) provides that selection boards will convene at the discretion of the Secretary of the Army and normally in conjunction with the annual Chief Warrant Officer Three and CW4 mandatory consideration boards. The boards will consider promotion of the best qualified U.S. Army Reserve CW4's who are in an active status for CW5 vacancies.

a. The Secretary of the Army –

- Prescribes the minimum Time in Grade (TIG) required for consideration
- Prescribes the maximum number of Warrant Officers to be selected by specialty
- Announces the zone of consideration and specialties to be considered
- Requires that the selection lists be prepared and announced by specialty
- Requires completion of the Warrant Officer Senior Staff Course (WOSSC) before promotion

b. Paragraph 3-8 (Composition of Selection Boards) provides each selection board will have at least one minority as a voting member. At least one female officer will be appointed as a voting board member whenever there are females being considered.

c. Paragraph 3-19 (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 SSB, as appropriate. SSB's, convened under the Reserve Officer Personnel Management Act (ROPMA) on and after 1 October 1996, will reconsider commissioned officers, (other than commissioned warrant officers) who were wrongly not considered and reconsider commissioned officers (other than commissioned warrant officers) who were considered but not selected by mandatory promotion boards that convened on or after 1 October 1996. 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 or contained a material error when reviewed by the mandatory selection board. The ABCMR may also request such a referral.

2. National Guard Regulation (NGR) 600-101 (Warrant Officers Federal Recognition and Related Personnel Actions) provides that whenever possible board membership should include a minority group or female officer when considering minority group or female applicants. The State's board manager will coordinate prior to establishing a board with ARNG Human Resources for procedural instructions when a State does not have ready availability to a minority group or female officer.

3. NGR 600-21 (EO Program in the ARNG) provides that the objective of the EO is to formulate, direct, and sustain a comprehensive effort that ensures fair treatment of all Soldiers based solely on merit, fitness, and capability that supports readiness.

4. Title 10, U.S. Code, section 1552 states the Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice.

5. Title 31 U. S. Code, section 3702, also known as the barring act, prohibits the payment of a claim against the Government unless the claim has been received by the Comptroller General within 6 years after the claim accrues. Among the important public policy considerations behind statutes of limitations, including the 6-year limitation for filing claims contained in this section of Title 31, U. S. Code, is relieving the government of the need to retain, access, and review old records for the purpose of settling stale claims, which are often difficult to prove or disprove.

//NOTHING FOLLOWS//