

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 3 May 2024

DOCKET NUMBER: AR20230011171

APPLICANT REQUESTS: in effect,

- set aside his Non-Judicial Punishment (NJP) under the provisions of Article 15, Uniform Code of Military Justice (UCMJ) and restoration of his rank/grade to staff sergeant (SSG)/E-6
- if relief is granted, change reason code for separation to qualify for severance pay

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

- DD Form 149 (Application for Correction of Military Record)
- Flight itinerary
- DA Form 2627 (Record of Proceedings Under Article 15, UCMJ)
- Bravo Battery, 4th Battalion (BN), 5th Air Defense Artillery (ADA) Regiment (Regmt) Memorandum for Record (MFR)
- Enlisted Record Brief (ERB)
- DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Self-authored statement

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 states in effect, he was improperly found guilty of missing movement. He was on orders for a Permanent Change of Station (PCS) to South Korea and due to report on 12 October 2021. He had a flight scheduled to depart Killeen, TX, on 11 October 2021 at 0820. Due to circumstances beyond his control, he was unable to complete movement to report on 12 October 2021. As he was not able to report to the gaining unit on the date ordered to do so, he signed back into his losing unit at Fort (Hood) Cavazos, TX. On 19 November 2021, he received an Article 15 for missing movement and was reduced in rank/grade from SSG/E-6 to sergeant (SGT)/E-5. The

reduction caused his Retention Control Point (RCP) to change to 14-years of service, due to this he was required to separate from active duty sooner than he anticipated and was denied severance pay. Upon separation from active duty, he was assigned to the U.S. Army Reserve (USAR).

3. A review of the applicant's service record shows:

a. On 1 May 2008, the applicant enlisted in the USAR Delayed Entry Program (DEP). On 9 May 2008, the applicant was discharged from the USAR DEP and enlisted in the Regular Army (RA).

b. On 11 January 2012, the applicant reenlisted in the RA for 3-years.

c. On 27 June 2013, Orders Number 178-008, issued by the 108th ADA Brigade, the applicant was promoted to the rank/grade of SGT/E-5, effective on with a Date of Rank (DOR) of 1 July 2013.

d. On 19 February 2014, the applicant reenlisted in the RA for 3-years.

e. DA Form 2166-8 (Noncommissioned Officer Evaluation Report (NCOER)) for the period of 1 July 2013 through 30 June 2014 shows the applicant's rater rated his overall potential for promotion as among the best. The applicant's senior rater rated his overall performance as "2" successful and overall potential as "1" superior.

f. DA Form 2166-8 for the period of 1 July 2014 through 30 June 2015 shows the applicant's rater rated his overall potential for promotion as marginal and commented he accepted full personal responsibility for his actions and decision whether good or bad. The applicant's senior rater rated his overall performance as "3" successful and overall potential as "3" superior. The senior rater commented to promote the applicant to SSG when slots were available; in time he may possess the potential to exceed to the next level. He also stated the applicant needed to work on his leadership and problem solving before executing duties of greater responsibilities.

g. On 6 May 2016, the applicant reenlisted in the RA for 6-years.

h. DA Form 2166-9-1 (NCOER (SGT)) for the period of 1 July 2015 through 29 June 2016 shows the applicant's rater rated his overall potential for promotion as met standard and he was capable, competent, and resourceful. The rater commented the applicant put forth adequate effort toward ensuring his duties and responsibilities met leader expectations and took responsibility for all actions. The applicant's senior rater rated his overall potential as qualified and commented the applicant accomplished tasks with some prompting. He was a sufficient NCO who will continue to service the Army in positions of greater responsibility.

i. DA Form 2166-9-1 for the period of 30 June 2016 through 29 June 2017 shows the applicant's rater rated his overall performance as met standard. The rater commented the applicant had satisfactory performance and was able to perform any mission with little oversight. The applicant's senior rater rated his overall potential as qualified and commented the applicant ranked six out of six NCOs currently rated.

j. On 3 May 2018, Orders Number 123-3104, issued by the U.S. Army Installation Management Command (IMCOM)-Pacific Region, Military Personnel Division, the applicant was assigned to Fort (Hood) Cavazos, TX, effective 10 August 2018.

k. DA Form 2166-9-1 for period of 3 September 2018 through 14 December 2018 shows the applicant's rater rated his overall performance as met standard and commented the applicant willingly took over the platoon SGT position in his absence. The applicant's senior rater rated his overall potential as highly qualified and commented with further development, mentorship and experience his potential was unlimited and promote with peers.

l. The applicant's service record is void of his promotion order to the rank/grade of SSG/E-6; however, his ERB shows his DOR as 1 January 2019.

m. DA Form 2166-9-2 for the period of 17 December 2018 through 16 December 2019 shows the applicant's rater rated his overall performance as met standard and commented the applicant was a proven professional that could execute operations outside of his military occupational specialty. The applicant's senior rater rated the applicant's overall potential as qualified and commented with further mentorship and training he had the potential to perform at positions of greater responsibility.

n. DA Form 2166-9-2 for the period of 19 December 2019 through 18 December 2020 shows the applicant's rater rated his overall performance as exceeded standard and commented he led the most tactically and technically proficient squad in the platoon. The applicant's senior rater rated his overall potential as highly qualified and commented the applicant was in the middle third of the SSG's he worked with in a 10-year career.

o. On 19 March 2021, the applicant reenlisted in the RA for an indefinite number of years. The remarks block on the DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States) stated the applicant's RCP for the rank of SSG was 31 May 2028.

p. On 3 May 2021, Orders Number L123-039, issued by Headquarters (HQs), III Corps and Fort (Hood) Cavazos, the applicant was ordered to a PCS to Korea to report between 1 and 12 August 2021. The applicant's service record is void of any evidence this order was revoked or amended.

q. The applicant's service record is void of the DA Form 2627; however, it was provided by the applicant and a summation can be read in paragraph 4b.

r. DA Form 2166-9-1 for period of 19 December 2020 through 10 December 2021 shows the applicant was rated as a platoon SGT. The applicant's rater rated his overall performance as met standard and commented he met the general expectations directed by the commander and brought innovation to the arms room. The applicant's senior rater rated his overall potential as qualified and commented he should be promoted after additional training and experience. The applicant should be able to handle additional responsibilities after some mentorship and schooling. This form shows his DOR for the rank/grade of SGT/E-5 as 19 November 2021.

s. On 8 February 2022, Orders Number 2039-002, issued by Eight U.S. Army, HQs, 35th ADA Brigade, the applicant was further assigned and would continue on PCS to Camp Carroll, South Korea, for a report date of 7 February 2022.

t. On 2 August 2022, Orders Number 214-0001, issued by HQs, U.S. Army Garrison Daegu Transition Center, the applicant was assigned to the U.S. Army transition point, effective 12 August 2022, to be released from active duty, effective 31 August 2022.

u. The applicant was honorably released from active duty on 31 August 2022 for completion of required active service and assigned to the USAR Troop Program Unit. DD Form 214 shows the applicant completed 14-years, 3-months, and 22-days. It also shows in items:

- 4a (Grade, Rate or Rank): SGT
- 4b (Pay Grade): E5
- 12i (Effective Date of Pay Grade): 19 November 2021
- 18 (Remarks): Member is entitled to no separation pay
- 21a (Member Signature): Unable to E-Sign
- 25 (Separation Authority): Army Regulation (AR) 635-200 (Active Duty Enlisted Administrative Separations)
- 26 (Separation Code): KBK
- 27 (Reentry Code): 3
- 28 (Narrative Reason for Separation): Completion of Required Active Service

v. On 29 February 2024, Orders Number 7405025, issued by the Department of the Army, the applicant was promoted to the rank/grade of SSG/E-6, effective on with a DOR of 1 March 2024.

w. The applicant's records are void of a DD Form 4 showing his subsequent enlistment in the USAR after his separation from active duty.

4. The applicant provides:

a. Flight itinerary through CWT/SATO Travel dated 28 September 2021 shows the applicant was scheduled to depart Killeen, TX, on Monday, 11 October 2021 at 0820 local for Dallas, TX, and to depart Dallas, TX, at 1050 local the same day. He was scheduled to arrive at Seoul Incheon International Airport on 12 October 2021 at 1515 local.

b. DA Form 2627 shows the applicant accepted NJP under the provisions of Article 15, UCMJ, for through his neglect missed movement that was required in the course of duty to move.

(1) His punishment included:

- reduction in rank/grade to SGT/E-5
- forfeiture of \$1,803.00 pay per month for 2-months, suspended to be remitted if not vacated on or before 18 January 2022
- 30-days extra duty
- 30-days restriction, suspended to be remitted if not vacated on or before 18 January 2022
- Oral reprimand

(2) The applicant appealed the findings of the proceedings and submitted additional matters. On 30 December 2021, his brigade commander denied his appeal citing the Article 15 proceedings were conducted in accordance with the applicable law and regulations. The applicant's appeal was based on a legal error in the Article 15. During the second part of the Article 15 proceedings the battalion commander stated his decision was based on his perception of the applicant's past performance and not on the evidence of the case.

(3) Due to lack of qualified personnel assigned to his unit, the applicant was required to hold the duties and responsibilities of Platoon SGT, Squad Leader, and Armorer simultaneously which had a negative impact on his overall performance. Each of these positions required a Soldier's full time attention.

(4) If the Article 15 would not be overturned, he proposed an alternative punishment. He proposed the entire punishment be suspended for 6-months and he be reassigned to another unit within the battalion.

(5) The applicant was scheduled to PCS to Korea on 12 December 2021 and if the sentence would not be suspended, he would require an additional deferment.

c. Bravo Battery, 4th BN, 5th ADA Regmt, MFR, Subject: Service Member Missed PSC Flight, dated 12 January 2022, states the applicant was scheduled to depart for Korea on 11 October 2021; however, he was unable to travel due to weather delays out

of Killeen, TX, and he would miss his connecting flight. The applicant missed his 12 December 2021 report date due to the command team being notified on 16 December 2021 of an approved deferment of his orders. The applicant requested a 60-day deferment of his orders for a report date of 12 February 2022.

d. ERB dated 30 January 2022 shows the applicant's DOR for the rank/grade of SSG/E-6 as 1 January 2019.

e. Self-authored statement which states, on 11 October 2021, the applicant missed his flight from Killeen, TX, due to a flight delay which would cause him to miss his connecting flight in Dallas, TX. Once he realized he would not be able to meet his report date, he made every effort to request assistance by contacting the airlines and the Army Emergency help line and was told they could not help him. He then informed his chain of command of the situation.

(1) His battery commander intended for him to continue his travel to South Korea as soon as possible but the commander was ordered by the battalion commander to stop the travel. The battalion commander initiated Article 15 proceedings. During the proceedings the battalion commander would not listen to reason and stated the Article 15 was about his performance but would not specify what performance.

(2) The applicant appealed the Article 15 to the brigade commander and attempted to use the open-door policy to speak with him. The brigade executive officer kept making excuses regarding his request. After he completed his punishment of extra duty, he was told by his battery command team, the brigade commander already made his decision. The applicant advised them, he still wanted to utilize the open-door policy which was arranged by his First Sergeant (1SG).

(3) The applicant and his platoon leader attended the meeting and were able to convince the brigade commander something was not right with his case. The brigade commander seemed highly motivated to look into his case and promised he would speak with the applicant's chain of command. The applicant left the meeting thinking he had a good chance to get things worked out. However, he found out the brigade commander's inquiry stopped with the battalion commander.

(4) The applicant finally arrived in Korea on 7 February 2022 and after he was assigned to his unit, the 1SG sent him to the promotion board and was placed on the promotion recommended list. He made every effort to earn more promotion points but unfortunately the cut off score did not fall in his favor and was separated because he reached his RCP.

BOARD DISCUSSION:

1. The applicant's contentions, the military record, and regulatory guidance were carefully considered. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted.
2. On the surface it appears the applicant received overly harsh punish for failing to catch a flight due to weather. However, after looking deeper, the Board realized the applicant waited for 2 days to notify his chain of command and tried to fix the problem himself.
3. The applicant's nonjudicial punishment under the provisions of Article 15, Uniform Code of Military Justice should stand. The Board did not see any error or injustice.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	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.

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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. 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. AR 27-10 (Military Justice) in effect at the time, prescribes the policies and procedures pertaining to the administration of military justice and implements the Manual for Courts-Martial, United States, 2019 (MCM), and the rules for courts-martial (RCMs) contained in the MCM. Paragraph 3-28 (Setting aside and restoration), setting aside and restoration is an action whereby the punishment or any part or amount, whether executed or unexecuted, is set aside and any rights, privileges, or property affected by the portion of the punishment set aside are restored. NJP is "wholly set aside" when the commander who imposed the punishment, a successor-in-command, or a superior authority sets aside all punishment imposed upon an individual pursuant to UCMJ, Article 15. In addition, the imposing commander or successor in command may set aside some or all of the findings in a particular case. If all findings are set aside, then the UCMJ, Article 15 itself is set aside and removed from the Soldier's records. The basis for any set-aside action is a determination that, under all the circumstances of the case, the imposition of the UCMJ, Article 15 or punishment has resulted in a clear injustice. "Clear injustice" means that there exists an unwaived legal or factual error that clearly and affirmatively injured the substantial rights of the Soldier. Clear injustice does not include the fact that the Soldier's performance of service has been exemplary subsequent to the punishment or that the punishment may have a future adverse effect on the retention or promotion potential of the Soldier. The Soldier's uncorroborated sworn statement will not constitute a basis to support the setting aside of punishment. The power to set aside an executed punishment and to mitigate a reduction in grade to a forfeiture of pay, absent unusual circumstances, will be exercised only within 4-months after the punishment has been executed. When a commander sets aside any portion of the punishment after 4-months from the date punishment has been executed, a detailed addendum of the unusual circumstances found to exist will be attached to the form containing the set-aside action.
3. Military Personnel Message Number 22-274 Temporary Change to Retention Control Points (RCP) for Enlisted Soldiers Serving in the Regular Army (RA)/USAR and Army National Guard (ARNG) Active Guard/Reserves (AGR) Title 10 Programs dated 22 June 2022, applies to Soldiers in the rank of Private through Master Sergeant/First Sergeant serving in the Regular Army, USAR and ARNG who are serving under the AGR program and who have a contractual expiration term of service dates between the effective date of the MILPER message through 30 September 2023. Soldiers must be

otherwise fully eligible for retention and Soldiers who volunteer and are approved for continued service are authorized to serve to the higher ETP RCP listed below:

a. Army Retention Control Points-

Rank	Current RCP (total active service in years)	Temporary ETP RCP (total active service in years)
PVT-PFC	5	7
CPL/SPC	8	12
CPL(P)/SPC(P)	10	12
SGT include promotable	14	16
SSG	20	22
SFC	24	26
MSG/1SG	26	28

b. Soldiers must initiate a request to serve to the higher RCP and be approved for continued service.

4. AR 635-5-1 (Separation Program Designator (SPD) Codes), prescribes the specific authorities, reasons for separating Soldiers from active duty, and the SPD codes to be entered on DD Form 214 (Certificate of Release or Discharge from Active Duty). Table 2-3 (SPD codes applicable to enlisted personnel), Code KBK (Completion of Required Active Service) a voluntary discharge.

5. AR 635-200 (Active Duty Enlisted Administrative Separations), prescribes policies and standards to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons.

a. Paragraph 4-2 (Discharge or release from active duty upon termination of enlistment and other periods of active duty or active duty for training), d. Active duty Soldiers not at their RCP that fulfill their enlistment contract and a commander denies extension or reenlistment on active duty because non-retention is in the best interest of the Army will be discharged or released from active duty at their ETS.

b. Paragraph 4-3 (Counseling required for certain retirement-eligible personnel), e. The following information will be provided to the Soldier during the counseling session.
(3) Soldiers who exceed RCP as a result of reduction in grade must retire or separate

no earlier than 90 days or no later than 180 days after the effective date of the reduction in grade.

6. AR 601-280 (Army Retention Program) in effect at the time, prescribes criteria for the Army Retention Program and sets forth policies and command responsibilities for immediate continued service of enlistment of Soldiers currently serving in the Regular Army (RA) and enlistment and/or transfer and assignment of Soldiers processing from the RA to the Reserve Components (RCs) of the Army.

a. Paragraph 3-8 (Qualification of a Soldier for reenlistment), a (2) Soldiers may serve in the Regular Army up to their RCP or age 60, whichever occurs first.

b. Paragraph 3-15 (Noncommissioned Officer (NCO) Career Status Program), b. Soldiers on NCO career status will be allowed to serve until the applicable retention control point for their rank. If promoted, the Soldier is then permitted to serve to the retention control point for their new rank. Soldiers will not be allowed to exceed the retention control point by more than 1-month. The ETS date established by the new retention control point will supersede the reenlistment term length based on the current DD Form 4.

c. Paragraph 3-15, d. (Reductions in rank), Soldiers on NCO career status who are reduced in grade or removed from the centralized promotion list and exceed the applicable retention control point as a result of reduction in rank or removal from the promotion list will be separated not earlier than 90-days or later than 180-days after the effective date of the reduction in rank or removal from promotion list.

7. Department of Defense Instruction 1332.29 (Involuntary Separation Pay Non-Disability) states full payment of non-disability involuntary separation pay is authorized to Service members of the Active and Reserve Components who are involuntarily separated from Active Duty (AD)/Active Service (AS) and who meet each of following five conditions:

a. The Service member has completed at least 6 years, but fewer than 20 years, of AD/AS. For Reserve Service members, 6 years of continuous AD/AS must have preceded immediately before separation. A period of AD/AS is continuous if any break in military service does not exceed 30 days.

b. The Service member's separation is characterized as "honorable" and none of the conditions in Paragraph 3.4. apply (separation at service members own request, declines Reserve service at separation, released for training, eligible for retired pay, performance, misconduct, or other disciplinary reasons)

c. The Service member is being involuntarily separated by the Military Service

concerned through either the denial of reenlistment or the denial of continuation on active duty or in an active service status, under one of the following specific conditions:

(1) The Service member is fully qualified for retention, but is denied reenlistment or continuation by the Military Service concerned. This includes a Service member who is eligible for promotion as established by the Secretary of the Military Department concerned but is denied reenlistment or continuation on AD/AS by the Military Service concerned under established promotion or high year of tenure policies.

(2) The Service member is fully qualified for retention and is being involuntarily separated under a reduction in force by authority designated by the Military Service concerned as authorized pursuant to Title 10, USC.

8. Title 10 USC, section 1174, dated 14 September 1981 states, a regular enlisted member of an Armed Force who is discharged involuntarily or as the result of the denial of the reenlistment of the member and who has completed six or more, but less than 20, years of active service immediately before that discharge is entitled to separation pay. As a condition of receiving separation pay, a person otherwise eligible for separation pay shall be required to enter into a written agreement to serve in the Ready Reserve or a Reserve component for a period not less than three years following the persons discharge or release from active duty.

//NOTHING FOLLOWS//