

IN THE CASE OF: [REDACTED]

BOARD DATE: 21 June 2024

DOCKET NUMBER: AR20230011934

APPLICANT REQUESTS:

- reconsideration of his previous request for correction of his records to show he was advanced on the retired list in the rank/grade of captain (CPT)/O-3
- retroactive pay as a CPT/O-3
- correction of his DD Form 214 (Certificate of Release or Discharge from Active Duty) to show he retired as a 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 Correction of Military Records
 - Enclosure 1 - Army Board for Correction of Military Records (ABCMR) Decision
 - Enclosure 2 - DD Form 214, for the period ending 31 July 1999
 - Enclosure 3 - DD Form 214, for the period ending 29 December 2010
 - Enclosure 4 - October 2009 Retirement Request
 - Enclosure 5 - June 2010 Retirement Request
 - Enclosure 6 – Pre-Separation Checklist
 - Enclosure 7 - Discharge Orders
 - Enclosure 8 - Army Grade Determination Review Board (AGDRB) Decision
 - Enclosure 9 - Department of Veterans Affairs (VA) Rating Decision
 - Enclosure 10 - Retired Pay Information
 - Enclosure 11 - Self-Authored Affidavit
 - Enclosure 12 - Officer Evaluation Reports and DA Form 1059 (Service School Academic Evaluation Report)
 - Enclosure 13 - Enlisted Record Brief

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the ABCMR in Docket Number AR20210016812 on 11 October 2022.

2. The applicant, through counsel, states:

a. He previously petitioned this Board related to these corrections. In its decision, the Board determined it was in the best interest of justice to excuse his failure to timely file a petition. It also noted "if the applicant can provide a separation packet, he may resubmit his application to the board for reconsideration." In light of the additional separation documents provided as enclosures to this petition, he respectfully requests this Board continue to excuse his failure to timely file.

b. In considering whether this application should be considered as timely, he also requests the Board consider that he believed he was already on a retired list, when he first applied to the AGDRB for advancement to the highest grade held in 2019, at the earliest opportunity to do so. Following the denial, he petitioned the Board, but did not receive the Board's first decision, 30 October 2022, until late last fall. Thus this request for reconsideration falls within the one-year time limit provided in AR 15-185 (ABCMR), paragraph 2-15. It also contains facts, arguments, and evidence not included in his first petition. They therefore respectfully request the Board accept it as timely.

c. The applicant began his first period of active duty on 9 October 1984. He served as a practical nurse and Special Forces Weapons Sergeant until 31 July 1999. His service as an enlisted member lasted for 14 years, 9 months, and 22 days. He was then discharged with an honorable characterization of service having attained the rank of staff sergeant (SSG)/E-6. His attached DD Form 214 provides additional details about his decade and a half of enlisted service.

d. In 2004, he once again answered the call to serve, this time commissioning as an officer. He served as a medical-surgical nurse, earning a promotion to CPT on 1 June 2006. He served as an officer from 8 July 2004 to 29 December 2010 for a total of 6 years, 5 months, and 22 days. This brought his total time of active duty service to 21 years, 3 months, and 14 days.

e. On 20 October 2009, he, in the rank of CPT, submitted a request entitled "Voluntary Retirement With Exception to Policy for Time Submission and Active Duty Service Obligation for Critical Skills Bonus" requesting placement on the retired list. His chain of command recommended approval of the submission. In June 2010, he, in the rank of CPT, submitted a new request entitled "Unqualified Resignation with Exception to Policy for Time Submission Active Duty Service Obligation for Critical Skills Bonus."

This first line of this document states he "request[s] voluntary release from active duty...to be effective immediately for the purpose of reenlistment and retirement as a noncommissioned officer (NCO)." It stated, "I desire to tender my resignation for the purpose of reenlisting as an NCO and requesting retirement in the highest grade held." His command similarly recommended approval of this request.

f. On 8 September 2010, he, in the rank of CPT, completed a DD form 2648 (Preseparation Counseling Checklist for Active Component Service Members). In block 6, he checked that he was retiring. Despite then holding the rank of CPT, he indicated on the checklist that he was a SSG as he expected to retire at his former enlisted rank.

g. On 14 September 2010, he received discharge orders. He was discharged as a CPT and his DD Form 214 reflects a discharge for Miscellaneous/General Reasons rather than a retirement narrative.

h. In June 2019, having received thirty years of active duty service and service on the retired list, he requested the AGDRB advance him on the retired list to the grade of CPT/O-3. In September 2019, the AGDRB replied that because his Army records did not contain a DD Form 214 reflecting retirement or retirement orders, it could not consider him for advancement on the retired list. The AGDRB directed him to apply to the Board if he felt the decision was in error.

i. He then petitioned the Board. He requested that his DD Form 214, block 28, be updated to reflect his retirement status, to receive retirement orders reflecting his CPT/O-3 status, and that he be advanced on the retired list to the highest grade held, CPT/O-3. In its decision, the Board denied him relief but noted that "if the applicant can provide a separation packet, he may resubmit his application to the Board for reconsideration."

j. He currently receives service-connected disability compensation from the VA. His total combined disability is rated to 60 percent. He currently receives retirement pay as a SSG/E-6.

k. Under Title 10 USC Section 7311, "[t]he Secretary of the Army may, upon the officers' request retire a regular or reserve commissioned officer of the Army who has at least 20 years of service computed under section 7326 of this title of at least 10 years of which have been active service as a commissioned officer." AR 5600-8-24 (Officer Transfers and Discharges) paragraph 6-1a also states, "to retire in a commissioned officer grade above the warrant officer grades, an officer must generally have at least 10 years of active service as a commissioned officer."

l. Under Title 10 USC Section 7138:

Any former enlisted member of the Regular Army who has served on active duty as an officer of the Army, or who was discharged at an enlisted member to accept an appointment as an officer of the Army, is entitled to be reenlisted in the Regular Army in the enlisted grade that he held before his service as an officer, without loss of seniority or credit for service, regardless of the existence of a vacancy in his grade or of a physical disability incurred or having its inception in line of duty, if (1) his service as an officer is terminated by an honorable discharge or he is relieved from active duty for a purpose other than to await appellate review of a sentence that includes dismissal or dishonorable discharge, and (2) he applies for reenlistment within six months...after termination of that service.

m. AR 600-8-24 paragraph 3-6c, provides:

Any former enlisted member of the Regular Army on Active Duty as an officer or warrant officer (without statutory entitlement to reenlist) who is not eligible to retire as an officer or warrant officer but has sufficient creditable service to retire in an enlisted status may be enlisted for the purpose of retirement (this is not a statutory entitlement). The individual may apply for enlistment in the rank of sergeant; however, individual qualification will determine the grade to be awarded.

n. Under Title 10 USC Section 7344(a):

Each retired member of the Army covered by subsection (b) who is retired with less than 30 years of active service is entitled, when his active service plus his service on the retired list totals 30 years, to be advanced on the retired list to the highest grade in which he served on active duty satisfactorily (or, in the case of a member of the National Guard, in which he served on full-time duty satisfactorily), as determined by the Secretary of the Army.

o. AR 140-80 (AGDRB and Grade Determination), paragraph 3-2 provides additional clarification on these so-called "thirty year cases." It explains the "highest grade served on active duty is the grade to which a Soldier was actually promoted and paid pursuant to a lawful promotion." The regulation states, "[i]f the highest or intermediate grade was an officer grade, the statutory [time in grade (TIG)] requirements for that grade must also be met to be deemed satisfactory." For CPTS the TIG requirement is six months.

p. AR 15-80 goes onto explain that "[f]ormer officers who reverted to a prior enlisted...status for retirement (because they failed to satisfy the commissioned officer service requirement of Title 10 USC Section 7311 to retire as a commissioned officer) qualify for potential advancement under this procedure." It states "[i]f the AGDRB advances an applicant's grade, any increase in retired pay will be retroactive to the date of eligibility for advancement (thy is, the 30 year mark) or the date the request for advancement is received, whichever is later."

q. AR 15-80 also explains that service in the highest grade will be considered to have been unsatisfactory when:

(1) The highest grade was a result of terminal leave promotion...

(2) Reversion to a lower grade was -

- Expressly for prejudice or cause
- Owing to misconduct
- Caused by nonjudicial punishment pursuant to Uniform Code of Military Justice Article 15
- The result of the sentence of a court-martial

(3) There is sufficient unfavorable information to establish that the Soldier's service in the grade in question was unsatisfactory.

r. The applicant requests three forms of relief: 1) to be advanced on the retired list to the grade of CPT/O-3, 2) current as well as retroactive retired pay as CPT/O-3 to the date of his 2019 request to the AGDRB, and 3) appropriate corrections to his DD Form 214 to reflect that he is retired as a CPT/O-3.

s. First, he is entitled to be advanced to the grade of CPT/O-3 on the retired list. He retired in December 2010. At that time, he had a combined total of 21 years, 3 months and 14 days of total active service. Thus, 8 years, 8 months, and 14 days later, his active service plus his service on the retired list reached 30 years. He reached this mark in September 2019. He then timely applied for advancement to the AGDRB in June 2019, sever months prior to his 30 year mark (as permitted by AR 15-80).

t. He satisfies the TIG requirement for advancement to CPT, as he served for more than six months in that grade. He also satisfied all requirements for serving satisfactorily. He had no misconduct as a CPT. A review of his Army Military Human Resource Record reveals no court-martial conviction, Article 15, or unfavorable information that would qualify his service as unsatisfactory. He acknowledges that his final OER was less than ideal, however, all of his other OERs, during his time as a CPT, were excellent. He also successfully completed the Army Medical Department CPT's

Career Course in 2009. The single OER is also more than out weighted by the fact that he was suffering mightily from serious medical issues (herniated cervical disc and obstructive sleep apnea) at the time. These medical conditions, evidenced by the attached permanent profile and medical records, severely affected his well being and his work performance. Under AR 15-80, paragraph 2-4a "[m]edical reasons, which may have been a contributing or decisive factor in...substandard performance" may be considered when making a grade determination. Given that he had no misconduct, that his overall performance as a CPT was excellent, and he suffered from serious medical issues, this Board should advance him on the retired list to the grade of CPT/O-3, the highest grade at which he satisfactorily served.

u. Second, his pay must be adjusted, both going forward and retroactively. His current retired pay should be increased to reflect the grade of CPT/O-3. He should also be awarded retroactive retired pay at the grade of CPT/O-3 from September 2019 to present, as he originally applied to the AGDRB at the time of his 30 year mark and the AGDRB wrongly denied his petition.

v. Third, his DD Form 214 should be corrected to reflect his retirement status at the grade of CPT/O-3. As clearly evidenced by the documents he submitted in 2009 and 2010, his obvious intent was to resign his commission and reenlist in order to retire. This was clearly understood by his chain of command, when they recommended approval of his request. He has been receiving retired pay as SSG/E-6 since 2010, which further shows that the Army also understands him to be retired, not discharged. Thus block 23 of his DD Form 214 should read retirement. Block 25 should read AR 635-200 (Active Duty Enlisted Administrative Separation) paragraph 3-6 to reflect that he reenlisted for the purpose of retirement. Block 26 should be modified to contain an appropriate separation code to reflect retirement after 20 years. Block 28 should be modified to read retirement.

w. He requests the Board reconsider its decision in Docket Number AR20210016813. He served his country honorably for more than two decades, as a Soldier, NCO, and commissioned officer. Under the USC and Army regulations, he is entitled to the retired rank of CPT/O-3 to receive current and retroactive pay at the rank, and to have his military records corrected to so reflect.

4. The applicant provides:

a. Memorandum, subject Voluntary Retirement with Exception to Policy for Time Submission Active Duty Service Obligation for Critical Skill Bonus, 20 October 2009, states he requested to be released from active duty and assignment on 30 June 2010 and placed on the retirement list on 1 July 2010. He would have completed 20 years of active federal service on the requested retirement date. He believed he was entitled to

retire in the grade of CPT. His chain of command recommended approval of his request.

b. Memorandum, subject Unqualified Resignation with Exception to Policy for Time Submission Active Duty Service Obligation for Critical Skill Bonus, 7 June 2010, states he requested voluntary release from active duty to be effective immediately for the purpose of reenlistment and retirement as an NCO. His chain of command recommended approval of his request.

c. Orders 257-0019, published by Headquarters, Fort Stewart and Hunter Army Airfield, 14 September 2010, discharged him, in the rank of CPT, effective 29 December 2019.

d. VA rating decision, 22 May 2012, shows he had the following service connected medical conditions:

- Sleep apnea, 50 percent
- Degenerative arthritis cervical spine with disc space, 10 percent
- Left ankle sprain, 10 percent
- Gastroesophageal reflux disease, 10 percent
- Degenerative arthritis of the lumbar spine with disc space narrowing, 0 percent
- Hypertension, 0 percent
- Combined rating 60 percent

e. Letter from Defense Finance and Accounting Service, 25 July 2023, shows he is on the retired rolls and is entitled pay at the gross monthly rate of \$2,415. The letter does not indicate his retired rank.

f. Self-Authored Affidavit in support of application for correction of military record, 8 November 2021, states:

(1) He was honorably discharged from active service in the United States Army on 29 December 2010. He has a combined total of 21 years, 3 months, and 14 days total time in active service. At the time of his retirement, he was serving as a CPT/O-3.

(2) He currently receives retirement pay as a SSG/E-6 and has since his discharge on 29 December 2010. He was told he would retire as a SSG and when he reached the combined total of both active and retired duty of 30 years, he could request to be advanced to his highest grade of O-3 as outlined in AR 15-80 advancement on retirement list.

(3) He reached his 30 year mark in June 2019. He has applied to the AGDRB for assistance with this. He has never received his retirement orders and instead received discharge orders. He is seeking retirement orders as he was incorrectly classified as an unqualified resignation. He has never received any counseling or guidance whatsoever on an unqualified resignation. He is requesting retirement orders be provided to him and to be advanced to his highest grade of O-3.

g. DA Forms 67-9 (Officer Evaluation Reports (OER)) and DA Form 1059 show he was regularly rated as outstanding performance, must promote and best qualified. The OERs are available for the Board's review.

5. The applicant's service records show:

a. DD Form 214, shows he entered active duty as an enlisted Soldier on 9 October 1984, and was honorably discharged in the rank of SSG/E-6 on 31 July 1999. He completed 14 years, 9 months, and 22 days of active duty service.

b. Letter from U.S. Army Human Resources Command (HRC), 8 June 2004, appointed him as a Reserve Commissioned Officer of the Army.

c. Orders A-06-491279, published by HRC, 8 June 2004, ordered him to active duty in the rank of first lieutenant.

d. Order Number 158-009, published by HRC, 8 June 2006, promoted him to CPT effective 1 June 2006.

e. DA Form 67-9 (Officer Evaluation Report (OER)) from 5 January 2009 through 4 January 2010 shows it was referred OER. It states unsatisfactory performance do not promote and he sought to meet the bare minimum standards of a professional nurse and Army officer. He refused to the sign the OER and submit rebuttal.

f. DD Form 214, shows he was honorably discharged, in the rank of CPT, on 29 December 2010 under the provisions of AR 600-8-24, paragraph 3-5 [Unqualified Resignation], with a corresponding separation code as FND, and narrative reason for separation as miscellaneous/general reasons.

g. Letter from the AGDRB, 28 September 2019, states his AMHRR and the documents he provided were void of a DD Form 214 or retirement order reflecting retirement from active service and placement on the retired list. Without those documents, his application could not be considered for advancement on the retired list.

6. On 11 October 2022, the Board considered his request in his previous case, AR20210016813, and stated after reviewing the application, all supporting documents,

and the evidence found within his military records, the Board found that relief was not warranted. His contentions, the military record, and regulatory guidance were carefully considered. The Board noted his service records does not contain and he did not provide his request for unqualified resignation or documents showing he was counseled (or not counseled) regarding the consequences of submitting such a resignation. In the absence of his separation packet/unqualified resignation, the Board could not establish whether an error or injustice occurred and must presume administrative regularity. If he could provide a separation packet, he could resubmit his application to the Board for reconsideration.

7. By regulation, any officer on active duty may tender a resignation except when action is pending that could result in resignation for the good of the service; officer is under a suspension of favorable actions; pending investigation, under charges, or any other unfavorable or derogatory action is pending.

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 carefully considered the applicant's record of service, documents submitted in support of the petition, and executed a comprehensive review based on law, policy, and regulation. Upon review of the applicant's petition and available military records, the Board determined his record is absent evidence that shows he was retired. The evidence of record shows the applicant was honorably discharged on 29 December 2010 for miscellaneous reasons. The Board noted the applicant provided his request for unqualified resignation indicating he requested to voluntarily be released from active duty for the purpose of reenlistment and retirement as a noncommissioned officer. However, subsequent to his request and discharge from active duty, no additional orders are available in his record and were not provided by the applicant to show or properly determine if he is retired. Therefore, the Board denied relief.

2. The Board concluded that due to the applicant's status of discharge, there is no provision to allow for retroactive pay as requested by the applicant.

3. The Board determined the DD Form 214 (Certificate of Release or Discharge from Active Duty) the applicant was issued reflecting discharge accurately reflects the circumstances as they existed at the time of discharge. Therefore, the Board denied relief to amend his DD Form 214 to show he was retired.

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 amendment of the ABCMR decision rendered in Docket Number AR20210016812 on 11 October 2022.

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 3964 states:

a. Each retired member of the Army covered by subsection (b) who is retired with less than 30 years of active service is entitled, when his active service plus his service on the retired list totals 30 years, to be advanced on the retired list to the highest grade in which he served on active duty satisfactorily (or, in the case of a member of the National Guard, in which he served on full-time duty satisfactorily), as determined by the Secretary of the Army.

b. Subsection (b); this section applies to (1) warrant officers of the Army;(2) enlisted members of the Regular Army; and (3) Reserve enlisted members of the Army who, at the time of retirement, are serving on active duty (or, in the case of members of the National Guard, on full-time National Guard duty).

2. Title 10, USC, section 7344 (Higher Grade after 30 years of service) states each retired member of the Army covered by subsection (b) who is retired with less than 30 years of active service is entitled, when his active service plus his service on the retired list totals 30 years, to be advanced on the retired list to the highest grade in which he served on active duty satisfactorily (or, in the case of a member of the National Guard, in which he served on full-time duty satisfactorily), as determined by the Secretary of the Army. (b) This section applies to-

- warrant officers of the Army;
- enlisted members of the Regular Army; and
- Reserve enlisted members of the Army who, at the time of retirement, are serving on active duty (or, in the case of members of the National Guard, on full-time National Guard duty)

3. AR15-80 A grade determination is an administrative decision to determine appropriate retirement grade, retirement pay, or other separation pay. Although a lower grade determination may affect an individual adversely, it is not punitive. The AGDRB will consider each case on its own merits. Generally, determination will be based on the Soldier's overall service in the grade in question, either on active duty or other service qualifying the Soldier for service/physical disability retirement, receipt of retired pay, or separation for physical disability. Circumstances pertinent to whether such service is found satisfactory include but are not limited to the following:

- medical reasons, which may have been a contributing or decisive factor in a reduction in grade, misconduct or substandard performance
- compassionate circumstances
- lengths of TIG

- performance level, as reflected in evaluation reports and other portions of the service record that reflect performance
- nature and severity of misconduct
- the grade at which the misconduct was committed

4. AR 600-8-24 prescribes the officer transfers from active duty to the Reserve component and discharge functions for all officers on active duty for 30 days or more. It provides principles of support, standards of service, policies, tasks, rules, and steps governing all work required to support officer transfers and discharges. Paragraph 3-5 states an officer on active duty (for more than 90 calendar days) may tender a resignation under this paragraph except when action is pending that could result in resignation for the good of the service; officer is under a suspension of favorable actions, pending investigation, under charges, or any other unfavorable or derogatory action is pending.

5. Army Regulation 635-5-1 (Separation Program Designator Codes), prescribes the specific authorities (statutory, regulatory, and Department of Defense (DOD)/Army policy) and reasons for separating Soldiers from active duty. Also, it prescribes when to enter separation program designator (SPD) codes on the DD Form 214 (Certificate of Release or Discharge from Active Duty).

a. The narrative reason for separation will be entered in block 28 of the DD Form 214 exactly as listed in the tables of this regulation. No deviation is authorized.

b. Separation code FND has the narrative reason of miscellaneous/general reasons.

6. Army Regulation 635-8 (Separation Processing and Documents), prescribes the transition processing function of the military personnel system. It provides principles of support, standards of service, policies, tasks, rules, and steps governing required actions in the field to support processing personnel for separation and preparation of separation documents. It states, Block 28 of the DD Form 214 : Narrative Reason for Separation is based on regulatory or other authority and can be checked against the cross reference in AR 635-5-1.

//NOTHING FOLLOWS//