

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 August 2024

DOCKET NUMBER: AR20230013206

APPLICANT REQUESTS: in effect, reconsideration of his previous request to backdate his Date of Rank (DOR) for major (MAJ)/O-4 to 1 July 2018 versus 1 July 2020 and paid the back pay and allowance due for the backdated DOR.

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

- Self-authored letter for reconsideration
- Assistant Secretary of the Army Manpower and Reserve Affairs (ASA, M and RA) Memorandum, Subject: Updated Guidance Regarding the Department of the Army Photograph and Use of Race, Ethnicity, and Gender Identifying Data in Assignment and Slating Processes
- U.S. Army Human Resources Command (HRC) Memorandum, Subject: Special Selection Board Results (SSB RS2203-16) Fiscal Year 2018 (FY18), Major (MAJ), Judge Advocate, Army Reserve-Active Guard/Reserve (AR-AGR) Promotion Selection Board (PSB)

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 Numbers AR 20180016270 on 20 September 2020 and AR20230001639 on 6 September 2023 the Board found that relief was not warranted.

a. he Board 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 of the applicant's petition, available military records and U.S. Army Human Resources Command (HRC) Officer Promotions Special Actions correspondence, the Board concurred with the HRC finding that the applicant's overall records as compared with those of his contemporaries did not reflect as high a potential as those selected. The Board agreed official promotion and selection boards select members for promotion based upon their performance and potential; the Board does not. The Board may refer records to appear before a SSB for promotion consideration when there is a clear error or injustice.

b. The Board agreed the request for relief has no merit as the available evidence does not clearly indicate that the conditions for referring the applicant to an SSB was met. Therefore, the Board denied relief to amend the previous Board's decision.

2. The applicant states in effect, the previous ABCMR decision failed to address the fact his Department of the Army (DA) Photo and incorrect Officer Record Brief (ORB) was included in his board file which would have entitled him to a new PSB. Also, in the Board's decision it failed to mention whether the SSB had actually viewed the board files of any of the other officer whom he competed against.

a. In the Board decision it was stated he was reconsidered for promotion by the SSB for promotion to MAJ under the FY18 criteria. That is not what the regulation requires, the regulation stated the SSB must remove the DA photo and must correct the initial error(s) even for the SSB held in 2022 for the 2018 PSB. The fact the board acknowledged the DA photo was not removed and the incorrect ORB was included would entitle him to another SSB. The Board members should know the rules before making a decision.

b. Second, when the Board concluded his overall record was compared with the records of his contemporaries it reflected his potential was not as high as those selected was completely incorrect. This is contrary to the Supreme Court's decision regarding discrimination. Under the board's premise, anyone would be able to use bigotry to prevent certain candidates from being promoted. Then any organization which decides to only hire whites or only men would say they hired these people simply because they were the best. The Board failed to review the records of the other candidates, who happened to be less experienced than him, but were promoted clearly because they were not black. None of them had court-martial or combat experience. Instead, the Board took the cowardly way out by stating there was insufficient evidence to support his contention. It was clear the stated reason for his non-selection for promotion was a pretext for a racially discriminatory decision by the selection board. He would like for the Board to identify what qualifications the other captains who stayed at home while he was deployed had that he did not. The Board's decision in his case will promote discrimination in the Army because all a bigot sitting on the board has to state when denying a promotion is, it can be presumed one person was not as qualified as another or the board instructions directed the board members not to discriminate and therefore it was impossible for them to do so.

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

a. The applicant's service record is void of an Officer Record Brief or Automated Record Brief.

b. With prior U.S. Army Reserve (USAR) enlisted service, the applicant was ordered to active duty for training on 5 November 2008 to attend the Officer Candidate Course. He was honorably released from active duty on 18 February 2009. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 3 months and 14 days of active service.

c. On 19 February 2009, the applicant executed his oath of office and was appointed a Reserve commissioned officer in the rank/grade of second lieutenant (2LT)/O-1 in the Signal Corps.

d. On 25 February 2009, Orders Number 09-056-00018, issued by Headquarters (HQs), U.S. Army Reserve Command, honorably discharged the applicant from the USAR, effective 18 February 2009, to accept a commission in the USAR.

e. On 4 March 2009, Orders Number C-03-904358, issued by the U.S. Army Human Resources Command (HRC), assigned the applicant to a USAR Troop Program Unit (TPU), effective 19 January 2009.

f. The applicant's DD Form 214 shows the applicant was ordered to Active Duty for Training (ADT), effective 5 April 2009. He was honorably released from ADT, effective 26 August 2009. He completed 4 months and 22-days of active service.

g. On 11 February 2010, the applicant executed his oath of office and was appointed a Reserve commissioned officer in the rank/grade of first lieutenant (1LT)/O-2 in the Judge Advocate General Corps.

h. On 11 February 2010, Orders Number C-02-002295, issued by HRC, the applicant was assigned to a USAR TPU, effective 11 February 2010.

i. The applicant's DD Form 214 shows he was ordered to ADT to complete the Judge Advocate General Officer Basic Course, effective 4 July 2010. He was honorably released from active duty, effective 29 September 2010. He completed 2 months and 26 days of active service.

j. On 2 May 2011, Orders Number 11-122-00103, issued by HQs, 81st Regional Support Command, assigned the applicant to the USAR Control Group (Reinforcement), effective 2 May 2011.

k. On 16 May 2011, Orders Number A-05-110088, issued by HRC, ordered the applicant to active duty for Contingency Operation for Active Duty Operational Support (CO-ADOS), effective 21 May 2011.

l. On 11 October 2011, Orders Number C-10-113788, issued by HRC, assigned the applicant to a USAR TPU, effective 1 November 2011.

m. On 1 November 2011, the applicant was promoted to the rank/grade of captain (CPT)/O-3.

n. On 12 April 2012, Orders Number A-04-206814 issued by HRC, the applicant was retained on active duty to participate in the Reserve component warriors in transition medical retention processing program for completion of medical evaluation, effective 12 April 2012.

o. On 11 June 2012, Orders Number A-06-210479, issued by HRC, the applicant was retained on active duty to participate in the Reserve component warriors in transition medical retention processing program for completion of medical care and treatment, effective 12 June 2012.

p. On 15 August 2012, Orders Number 228-2222, issued by HQs, U.S. Army Maneuver Center of Excellence, the applicant was released from active duty, effective 16 September 2012, and assigned to the USAR Control Group (Reinforcement).

q. On 16 September 2012, the applicant was honorably released from active duty DD Form 214 shows the applicant completed 1-year, 3-months, and 26-days of active service.

r. The applicant's DD Form 214 shows he was ordered to active duty in support of Operation Enduring Freedom, effective 2 June 2013. He was honorably released from active duty on 2 June 2014. He completed 1-year of active service.

s. On 13 November 2014, Orders Number R-11-493646, issued by HRC, the applicant was ordered to active duty in an Active Guard/Reserve (AGR) status, effective 2 March 2015 for a 3-year active duty commitment.

t. On 18 December 2015, the applicant achieved course standards for the Judge Advocate Advanced Course during the period of 7 through 18 December 2015.

u. On 14 December 2016, Orders Number R-12-694062, issued by HRC, the applicant was ordered to active duty in AGR status, effective 17 July 2017.

v. On 21 July 2020, Orders Number B-07-004714, issued by HRC, the applicant was promoted to the rank/grade of MAJ/O-4, effective on with a DOR of 1 July 2020.

4. The applicant provides:

a. ASA (M&RA) Memorandum signed 19 October 2020, Subject: Updated Guidance Regarding the DA Photo and Use of Race, Ethnicity, and Gender Identifying Data in Assignment and Slating Processes stated on 26 June 2020, the Secretary of the Army directed the removal of the photo and redaction of race, ethnicity and gender data from selection board officer and enlisted record briefs. It also stated supplemental guidance was published expanding the prohibition on the use of race, ethnicity and gender data.

(1) The guidance stated in effect that DA photos would not be a part of the board file for promotion and selections boards, nor would it be used for the selection process pertaining to assignments, training, education or command. It further stated that race, ethnicity and gender data on the officer or enlisted record brief would be redacted as part of the board file for all promotion and selection boards.

(2) Because the physical fitness score cards contain gender information it would not be included in the promotion and selection board files. However, for assignment and slating processes outside the promotion or selection board Army components may use race, ethnicity and gender data so leaders can consider the information as they build teams from the diverse talent seeding to serve in the Army and the diverse talent found in the Army.

b. HRC Memorandum, Subject: SSB Results FY18 MAJ JA, AR-AGR, PSB, dated 3 August 2022, stated the applicant was reconsidered for promotion by the DA SSB to MAJ under the FY18 criteria, but unfortunately, he was not selected for promotion. The reason for his non-select was not known because of statutory requirements prevent the disclosure of board proceedings to anyone who was not a sworn member of the aforementioned board. It could only be concluded that the SSB determined that his overall record, when compared with the records of his contemporaries, did not reflect as high a potential as those selected. There was no appeal process for a non-selection; it is the final adjudication of his case. With confidence, the applicant received a fair and equitable consideration by the SSB; however, if he continued to believe and can prove he was treated unfairly, he could elect to contact the Army Review Boards Agency with substantial evidence proving an injustice.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The applicant was promoted to major with an effective date and date of rank of 1 July 2020. He requests to backdate his promotion date to 1 July 2018.

a. The applicant was not selected by the FY18 RC AGR/Non-AGR), MAJ Judge Advocate General Corps Competitive Categories, Promotion Selection Board (PSB).

The reasons for his non-selection for promotion are unknown because statutory requirements prevent the disclosure of board proceedings to anyone outside the promotion board members in question. He previously applied for an SSB under the FY18 criteria, but HRC denied him relief because he failed to show material evidence that an error existed in his board file. He had previously viewed and certified his board file on 8 February 2018. He also appealed to this Board contending he was not selected because of his race and national origin. The Board denied him relief.

b. In January 2020, HRC informed him that his record would be reconsidered for promotion by an SSB under the criteria and instructions established for the FY18 MAJ, JAG, AR-AGR regularly constituted PSB. His board file will be constructed as it should have appeared on the convene date of the board. The only documents that would be available for the board to view will be in accordance with the Military Personnel MILPER message announcement(s) for that particular board. He was reconsidered for promotion by the SSB to MAJ under the FY18 criteria, but he was not selected for promotion. Again, the reason for his non-selection is unknown. The SSB determined that his overall records as compared with those of his contemporaries did not reflect as high a potential as those selected. He requested the Board's reconsideration for an SSB to correct the error of his non-selection for promotion due to his DA Photograph and his incorrect ORB was included in his board file and contended that they were included in error and against Army Regulation. However, the Board again denied him relief.

c. Officers are selected for promotion by promotion boards, based upon their performance and potential; not by the ABCMR. If the Board finds an error or injustice, it may correct the record by referring an officer's record to an SSB provided the criteria for the SSB is met. One of the criteria for an SSB is a finding of material error. The Board thoroughly reviewed and determined that his request for relief has no merit as the available evidence does not clearly indicate that the conditions for referring the applicant to an SSB was met. The Board found no material error. Therefore, the Board determined relief is not warranted.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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| : | : | : | 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 to amend the decision of the ABCMR set forth in Docket Number AR20180016270 on 20 September 2020 and AR20230001639 on 6 September 2023.

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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, United States Code (USC), section 14308 (Promotions: how made), (c) (Date of Rank), (1)The DOR of an officer appointed to a higher grade under this section is determined under section 741 (d)(2) of this title. (2)The DOR of an officer appointed to a higher grade may be adjusted in the same manner as an adjustment may be made under section 741 (d)(4) of this title in the DOR of an officer appointed to a higher grade under section 624(a) of this title. In any use of the authority under the preceding sentence, subparagraph (C) (ii) of such section shall be applied by substituting "reserve active-status list" for "active-duty list". (3) Except as provided in paragraph (2) or as otherwise specifically authorized by law, a reserve officer is not entitled to additional pay or allowances if the effective date of the officer's promotion is adjusted to reflect a date earlier than the actual date of the officer's promotion.

2. Title 10 USC, section 741 (Rank: commissioned officers of the armed forces), (d) (2) Except as otherwise provided by law, the DOR of an officer who holds a grade as the result of a promotion is the date of his appointment to that grade. (4) (A) The Secretary concerned may adjust the DOR of an officer appointed under section 624(a) of this title to a higher grade if the appointment of that officer to that grade is delayed from the date on which (as determined by the Secretary) it would otherwise have been made by reason of unusual circumstances (as determined by the Secretary) that cause an unintended delay in: (i) the processing or approval of the report of the selection board recommending the appointment of that officer to that grade; or (ii) the processing or approval of the promotion list established on the basis of that report. (8) The adjusted DOR applicable to the grade of an officer under subparagraph (A) shall be consistent: (i) with the officer's position on the promotion list for that grade and competitive category when additional officers in that grade and competitive category were needed; and (ii) with compliance with the applicable authorized strengths for officers in that grade and competitive category. (C) The adjusted DOR applicable to the grade of an officer under subparagraph (A) shall be the effective date for: (i) the officer's pay and allowances for that grade; and (ii) the officer's position on the active-duty list.

3. Army Regulation AR 135-155 (Promotion of Commissioned Officers and Warrant Officers Other Than General Officers), in effect at the time, prescribes policy and procedures used for selecting and promoting commissioned officers (other than commissioned warrant officers) of the Army National Guard of the United States (ARNGUS) and of commissioned and warrant officers (WO) of the USAR. This regulation supports the objectives of the Army's officer promotion system that provides for career progression based on recognition of an officer's potential to serve in positions of increased responsibility.

a. Paragraph 3-16 (Selection board recommendations), a. Promotion selection board will do the following:

- base their recommendations on impartial consideration of all officers eligible for
- consideration as instructed in the Memorandum of Instruction (MOI)
- keep confidential their reasons for recommending or not recommending any
- officer considered
- for commissioned officers use one of the following methods of selection as
- directed by the MOI:

(a) For all other grades except CW3 and CW4 when the maximum number of officers to be selected, as established by the Secretary of the Army (SA), equals or exceeds the number of officers above, in, and below the promotion zone. Although the law requires that officers (other than warrant officers) recommended for promotion be "best qualified" for promotion, when the number to be recommended equals the number to be considered an officer who is fully qualified for promotion is also best qualified for promotion. Under this method, a fully qualified officer is one of demonstrated integrity, who has shown that he or she is qualified professionally and morally to perform the duties expected of an officer in the next higher grade. The term "qualified professionally" means meeting the requirements in a specific branch, functional area, or skill. (b) The "best qualified" method when the board must recommend fewer than the total number of officers to be considered for promotion. However, no officer will be recommended under this method unless a majority of the board determines that he or she is fully qualified for promotion. As specified in the MOI for the applicable board, officers will be recommended for promotion to meet specific branch, functional area or skill requirements if fully qualified for promotion.

b. Paragraph 3-19 (Promotion Reconsideration Boards), a. 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. (2) SSBs, convened under the Reserve Officer Personnel Management Act 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 do not reconsider officers who were not considered or not selected by mandatory promotion boards that convened before 1 October 1996. b. Promotion advisory boards/SSBs will convene as noted in paragraph 3-5. c. These boards are convened to correct/prevent an injustice to an officer or former officer who was eligible for promotion but whose records: (1) Through error, were not submitted to a mandatory promotion selection board for consideration. (2) Contained a material error when reviewed by the mandatory selection board. h. Non-selection by a SSB 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. Non-selection by a SSB 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 SSB.

c. Paragraph 3-22 (Correction of military records as a result of a SSB action), If the report of a SSB, approved by the President, recommends for promotion to the next higher grade an officer not currently eligible for promotion, or a former officer whose name was referred to it, the SA may act through the ABCMR to correct the military record of the officer or former officer to correct an error or remove an injustice resulting from not being selected for promotion by the board which should have considered, or which did consider, the officer.

d. Paragraph 4-15 (Date of Promotion), Procedures in section IV will be followed for officers who delay promotion. Follow the procedures in this section in computing effective promotion dates for all other RC commissioned officers serving on the RASL and WOs do not antedate effective dates of promotion unless required by law. a. Except as noted in subparagraph c below, or in parts of this regulation, the effective date of promotion for commissioned officers (except commissioned warrant officers) may not precede the date on which the promotion memorandum is issued. Do not issue the promotion memorandum before the date the promotion board results are approved and confirmed by the Senate (if required).

e. Paragraph 4-21 (Effective Dates), d. Promotion of AGR officers. AGR officers selected by a mandatory board will be promoted provided they are assigned/attached to a position in the higher grade. An AGR officer who is selected for promotion by a mandatory promotion board, but who is not assigned/attached to a position in the higher grade will be promoted on the date of assignment/attachment to a higher graded position or the day after release from AGR status. The DOR will be the date the officer attained maximum time in grade or the date on which assigned/attached to a position in the higher grade, whichever is earlier.

4. Title 10, USC, section 14104 (Nondisclosure of board proceedings) states the proceedings of a selection board convened under section 14101 or 14502 of this title may not be disclosed to any person not a member of the board, except as authorized or required to process the report of the board. The discussions and deliberations of a selection board described in subsection (a) and any written or documentary record of such discussions and deliberations--(1) are immune from legal process; (2) may not be admitted as evidence; and (3) may not be used for any purpose in any action, suit, or judicial or administrative proceeding without the consent of the Secretary of the military department concerned.

//NOTHING FOLLOWS//