

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 July 2024

DOCKET NUMBER: AR20230014504

APPLICANT REQUESTS: reconsideration of his previous request for consideration for promotion to sergeant first class (SFC) for the years 1996 to 2001 using the criteria for the 1995 promotion board.

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

- DD Form 149 (Application for Correction of Military Record)
- Brief in Support of Application for Review by the Army Board for Correction of Military Records (ABCMR)
- Exhibit A - DD form 214 (Certificate of Release or Discharge from Active Duty)
- Exhibit B - Memorandums Performance of Applicant
- Exhibit C - ABCMR Case AC98-8074
- Exhibit D - Performance Records
- Exhibit E - Memorandum Retention of Applicant
- Exhibit F - DA Forms 2823 (Sworn Statement)
- Exhibit G through Exhibit K - DA Forms 2166-7 (Noncommissioned Officer Evaluation Report) NCOER
- Exhibit L - Memorandum Commendation for Excellence in Physical Fitness
- Exhibit M - Memorandum Recommendation to Lift Department of the Army (DA) Bar to Reenlistment
- Exhibit N - Department of Defense Instruction (DoDI) 1020.03 (Harassment Prevention and Response in the Armed Forces)
- Exhibit O - Department of Defense Directive (DoDD) (Military Whistleblower Protection)
- Exhibit P - Memorandum Concerning Medical Condition of Applicant
- Exhibit Q - Commendations
- Exhibit R - Memorandum for Support of Applicant
- Exhibit S - Letter of Appreciation
- Exhibit T - Memorandum for Support of Applicant
- Exhibit U - Letter to Chief of Staff of the Army

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 AR20060009111 on 23 January 2007.

2. The applicant defers to his attorney. The applicant's attorney states on the application and brief in support of application:

a. The applicant was impermissibly retaliated against by his chain of command while stationed in Riyadh, Saudi Arabia. Said retaliation and resulting bar to reenlistment prohibited him from being promoted over the last years of his service. He further argues that he was erroneously flagged because of the now-defunct and inaccurate body fat composition "tape test". Accordingly, he humbly requests reconsideration for promotion to SFC.

b. Because he was not promoted as a direct result of the discrimination and retaliation he faced at the hands of his chain of command, his current records constitute an error or injustice. Furthermore, he was also denied promotion in part due to the woefully inaccurate body fat composition tape test used by the Army, during 1995 through 2000. Said tape test is no longer used. Because he was denied promotion due to an outdated and inaccurate test, his records constitute an error or injustice.

c. The applicant asserts that the Army made an unjust and unfair error in denying his promotion to SFC. Had the Army acted correctly, at that time, he would have been promoted to the rank of SFC and pay grade E-7 before retiring from the military.

d. In support of his application, he has included supporting documents for the Board's consideration as previously listed on the Record of Proceedings.

e. The applicant enlisted in the U.S. Army on 22 September 1980 and served his country as a Soldier for over 20 years before retiring from the military on 31 December 2000, at Fort Hood, Texas. Throughout his career, he earned over nine medals and awards for his service and was deployed overseas for over a year. In addition to awards and medals, he also received commendation for his exemplary performance, of note is the commendation he received on 13 September 1990. In the memorandum, he was commended for his score of 289 on the Army Physical Fitness Test (APFT). The commandant of the U.S. Army Noncommissioned Officer (NCO) Academy wrote that his "performance [was] a sure indicator of [his] dedication to physical fitness and his own wellbeing, plus that of the Soldiers put in [his] charge."

f. In addition to the commendation for exemplary physical fitness, he also received a memorandum praising his performance as a Security Platoon Sergeant for Bravo

Battery, 1-7 Air Defense Artillery (ADA). In this memorandum Captain (CPT) J- B- wrote, "Overall, [the applicant's] performance in relation to Bravo Battery has been outstanding. His professionalism has shown through in all aspects of my contact with him. I am completely confident in his ability to provide excellent security to my tactical site and would rely upon him in any situation."

g. Shortly after receiving that memorandum from CPT B- in January 1995, his military career was tarnished when he was erroneously flagged for being overweight, even though he was waived from Army Regulation 600-9 (The Army Body Composition Program) for medical reasons. As a result of the erroneous flag, he was barred from reenlistment and denied a promotion to pay grade E-7. At the same time, he witnessed many higher ranking Soldiers who should have been flagged as overweight themselves continue to be promoted and advanced within the Army.

h. The applicant being flagged for his weight coincided with a period of misunderstanding shared between him and his commanding officer. In 1995, he was assigned go Bravo Battery, 4th Battalion, 3rd ADA Task Force. Issues with his leadership began to arise when he was assigned to duty in Riyadh, Saudi Arabia. While stationed in Riyadh, he, as well as his subordinate officers, faced a barrage of harassment, discrimination, racism, and overall lack of attention to subordinate morale from his chain of command. In particular, his strict adherence to Army regulation and policy gained him no favors from his direct superiors, CPT H- and First Sergeant (1SG) S-.

i. While stationed in Riyadh, he experienced regular harassment and discrimination due to the color of his skin. The racially discriminatory harassment he faced in Riyadh culminated in him noticing that 1SG S- would frequently display a noose in his sleeping quarters. The continuous racial discrimination and harassment he faced forced him to submit an informal complaint up the chain of command related to 1SG S-'s display of a deeply racist symbol. Being of African American decent, he felt as though his superiors did not have his best interest in mind. Above all, he feared he could not fully trust his chain of command.

j. Following his informal complaint related to 1SG S-'s noose display, he faced severe retaliation from his chain of command. Of utmost importance to his present application is CPT H-'s voluntary decision to telephone his 1995 promotion board to inform them he was overweight and thus could not qualify for an award and/or promotion for the year of 1995. CPT H-'s unwarranted and retaliatory actions have resulted in him receiving a bar to reenlistment as well as his inability to receive the promotions and awards to which he was entitled.

k. Prior to CPT H- calling and informing his promotion board he had been flagged for being overweight, he was diagnosed with hypersensitivity pneumonitis. His diagnosis

required him to take prednisone, a drug that carries a common side effect of drastic weight gain. Because of his medical and prescription history, he was waived from the standards imposed on servicemembers by AR 600-9. Ultimately, his 10 August 1998 bar to reenlistment was raised and he was allowed to reenlist until he retired from the Army on 31 December 2000 with twenty years and three months of service and an honorable discharge.

l. Regardless of whether his August 1998 bar to reenlistment was lifted, CPT H-'s efforts to retaliate against him have permanently tarnished his otherwise exemplary service record. His history of service and dedication to the Army and his subordinates is evidenced by the vast number of statements that have been provided in favor of him by his fellow servicemembers including subordinates, peers, and superiors. Moreover, his NCOERs ranging from 1993 to 1998 establish that his superiors rendered nothing but shining reviews of his performance as an Army NCO.

m. However laudatory the statements of his fellow servicemembers were, he had faced an uphill battle following CPT H-'s improper reporting of his weight to his 1995 promotion board and eventual bar to reenlistment. Prior to the year 1995, he was a caring leader who strived for nothing but the best for, and from, his troops. He even received praise for his physical fitness on multiple occasions. Following the year 1995, he never received an unsatisfactory NCOER. Rather, he was showered with praise from his rater and senior rater. In the year 1995, CPT B- D- penned a memorandum stating he had 'done more to make [his] battery a success than any other Soldier.' Awards, Certificates of Achievement, and additional memoranda of support submitted by his fellow servicemembers and chain of command evidencing his years of meritorious service and character have been provided for the Board's consideration.

n. The failure of the Army to consider him for promotion over the years of 1995 through 1997 is certainly the product of his inappropriately issued bar to reenlistment and surrounding efforts to fight said bar to reenlistment. It is difficult to understand why a staff sergeant (SSG), showered with praise from his subordinates and superiors alike, is not considered for promotion over the final six years of his exemplary service. Because CPT H-'s inappropriate retaliation against him and resulting bar to reenlistment have tarnished his record and essentially made it impossible to be considered for promotion to pay grade E-7, his current military records constitute an error and/or injustice with respect to his rank achieved, while in service and at retirement.

o. His tumultuous relationship with his superiors was not a private affair. Sworn statements drafted by his subordinates illustrate his unit was often treated differently than other units stationed in Riyadh. His direct subordinate, Private First Class S- stated, "the command of Bravo Battery, 4-3 Air Defense has been out to get [the applicant]", and "[the applicant's] platoon [is] seen as a marked platoon of sorts, which is extremely detrimental to his platoon's morale". Sergeant R- stated in his sworn

statement, "I believe that certain individuals within the Bravo Battery are putting blame off on others in order to cover themselves. I believe [the applicant] is a scapegoat for faults committed by other[s]." The statements of his fellow Soldiers, offered in support of him, only go to show he was singled out and discriminated against by his chain of command due to his race, while serving in Riyadh.

p. After being denied a promotion, he tried to correct this injustice by submitting an application requesting promotion to pay grade E-7 under the 1995, 1996 and 1997 promotion criteria. In response, the Board denied the portion of the application pertaining to the 1996 and 1997 criteria but agreed to consider him for promotion under the 1995 criteria. According to the record, on 14 October 1998, his records were considered by a special selection board (SSB), but he was not chosen for promotion. He once again tried to correct the injustice in 2007 by applying for a promotion to pay grade E-7. This application was denied.

q. He now applies to the Board with new knowledge gleaned from the Army enactment of Article 132, Uniform Code of Military Justice (UCMJ), and its prohibition of retaliation within the Army. He also comes to the Board because of an announcement in June 2023 that the Army would now assess body fat by measuring the waist only. Prior to the filing of the attached DD Form 149, he was unknowledgeable regarding the Army's policy of rooting out retaliation based on protected disclosures of harassment within the Army, he was also unaware of the inaccuracies of the tape test that caused his flag, and now understands that he is among the Soldiers who were wrongly denied promotions because of the inaccurate tape test.

r. He asserts that, because of the unlawful retaliation he faced at the hands of his chain of command, while stationed in Riyadh, Saudi Arabia, he was wrongfully prohibited from being considered for promotion over the last six years of his career. Accordingly, his current military records constitute an error and/or injustice. Because of his commanding officer's retaliatory and improper communications to his 1995 promotion board and resulting bar to reenlistment have essentially made it impossible for him to be promoted past his retirement rank of SSG/E-6 for the rest of his active duty career. His failure to be considered for awards and promotions through years 1996 through 2000 continue to constitute an injustice perpetrated against him by the Army he served so honorably and with great enthusiasm. Moreover, because the erroneous bar to reenlistment has essentially caused him to be continuously overlooked for awards and promotion, the failure to earnestly consider him for promotion or retirement award continues to be an error. Because his military records currently constitute an error and/or injustice, he respectfully requests that his records be amended and he be considered for promotion to the rank of SFC/E-7 during the years of 1996 through 2000.

s. He further attests that the tape test method used by the U.S. Army to calculate his body fat composition in 1995 was inaccurate. The tape test's inaccuracy led to his

being improperly flagged for being overweight and was also incorrectly documented on his NCOERs. This erroneous flag and negative comments on his NCOERs ensured the denial of his promotion to pay grade E-7. This action is therefore unjust because it was based on a level of body fat percentage determined by a method with a large margin of error. He asserts the test was in error as applied to him. Further, he asserts that it was well known in the Army in the 1990s that there were numerous Soldiers, many of whom were higher ranking, that should not and would not objectively pass the Army tape test, yet they continued to be promoted and serve in the Army. The Army's actions in treating him differently than many similarly situated Soldiers is unjust and unfair.

t. His military records constitute an error or injustice because the retaliatory actions taken by his chain of command prohibited him from being promoted or awarded for the remainder of his service. Over the past 23 years, the manner in which the U.S. Army treats discriminatory, harassing, and hostile behavior towards servicemembers has been drastically reformed. During his active duty service, servicemembers were not offered protection from retaliation based on protected disclosures to the chain of command. Now, Article 132 of the UCMJ explicitly protects Soldiers who submit formal and informal complaints pertaining to harassment, discrimination, and the like. His failure to be considered for promotion during the years 1996 through 2000, when compared with his exemplary service records, indicates that the retaliation faced by him at the hands of his chain of command was the direct cause of his continuous passing over for promotion and award. Without his erroneous bar to reenlistment preventing awards and promotions, he never stood a chance at receiving the promotions and awards he deserved. Now, he requests that this Board order an SSB so that he may be considered for promotion to the rank of SFC without the sort of discrimination he faced during his time on active duty.

u. Pursuant to Title 10 U.S. Code (USC) 932 and Article 132, UCMJ:

[a]ny person subject to this chapter who, with the intent to retaliate against any person for reporting or planning to report a criminal offense, or making or planning to make a protected communication, or with the intent to discourage any person from reporting a criminal offense or making or planning to make a protected communication (1) wrongfully takes or threatens to take an adverse personnel action against any person; or (2) wrongfully withholds or threatens to withhold a favorable personnel action with respect to any person shall be punished as a court-martial may direct.

Furthermore, DoDI 1020.03 section 1.2 has made it clear that "[t]he Department [of Defense] does not tolerate or condone harassment." DoDI 1020.03 Section 1.2(3) goes on to dictate that "violations of this instruction may constitute violations of the specific

articles of Chapter 47, Title 10 USC, also known and referred to in this issuance as the 'UCMJ' and may result in administrative or disciplinary action."

v. With regard to harassment, DoDI 1020.03 Section 3.1 states:

Harassment may include offensive jokes, epithets, ridicule or mockery, insults or put-downs, displays of offensive objects or imagery, stereotyping, intimidating acts, veiled threats of violence, threatening or provoking remarks, racial or other slurs, derogatory remarks about a person's accent, or displays of racially offensive symbols. Types of harassment include, but are not limited to discriminatory harassment, sexual harassment, hazing, bullying, and stalking.

Section 3.2 of DoDI 1020.03 goes on to state that retaliation:

Encompasses illegal, impermissible, or hostile actions taken by a servicemember's chain of command, peers, or coworkers as a result of making or being suspected of making a protected communication in accordance with DoDD 7050.06. Retaliation for reporting a criminal offense can occur in several ways, including reprisal. Investigation of complaints of non-criminal retaliatory actions other than reprisal will be processed consistent with service-specific regulation.

Lastly, DoDI 1020.03 Section 3.4 defines reprisal as "taking or threatening to take an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, for making, preparing to make, or being perceived as making or preparing to make a protected communication." For the Board's convenience, a true and exact copy of DoDI 1020.03 has been provided for the Board's consideration.

w. DoDD 7050.06 provides further clarification of what is considered a protected communication under Title 10 USC 932. In the glossary of DoDD 7050.06, a chart illustrating the classification of protected communications illustrate exactly what may be considered protected under Title 10 USC 932. The chart declares "Any communication in which a servicemember communicates information that he or she reasonably believes evidences: a violation of law or regulation, including a law or regulation prohibiting rape, sexual assault, or other sexual misconduct in violations of section 920 through 920(c) of reference (c) (articles 120 through 120(c) of the UCMJ), sexual harassment, or unlawful discrimination." Though DoDD 7050.06 dictates that the communication must be lawful, the directives goes on to state that the communication will not lose its protected status 'because the communication was not in writing.' Moreover, DoDD 7050.06 further indicates that a communication is protected when it is

made to "any person or organization in the chain of command." For the Board's convenience, a true and exact copy of DoDD 7050.06 has been provided for the Board's consideration.

x. Here, the applicant's disagreement with his battery commander and 1SG, as well as CPT H-'s knowingly erroneous and retaliatory reporting of his weight, has resulted in his failure to be considered for promotions following his deployment to Riyadh. As stated, his tumultuous relationship with 1SG S- and CPT H- began when he saw that the 1SG had a noose displayed in his quarters. Pursuant to DoDI 1020.03 Section 3.1, displays of such racially charged objects, such as a noose, is the exact type of discriminatory harassment that the Army stands against. Distraught that his chain of command would display such a racist and demeaning object, he made an informal complaint to his chain of command. Pursuant to DoDD 7050.06, policy, which did not exist at the time of his deployment to Riyadh, his complaint to his chain of command relating to 1SG S-'s racist and discriminatory conduct should have been met with protection and investigation rather than retaliation against him.

y. Rather than investigating his claims of racial discrimination and harassment, his command ignored his request. Because Article 132, UCMJ was yet to be enacted by the Army, he had no shield to protect him from the fallout of his informal complaint about obvious racism in his unit. Following his informal complaint, CPT H-, in protecting 1SG S-, retaliated against him by calling the board considering his 1995 promotion to SFC, and erroneously reported he could not be promoted due to incompliance with AR 600-9. In looking at the laudatory reviews by his subordinates and superiors, it does not take mental gymnastics to understand he was on the fast track to promotion. It is also clear that after CPT H- erroneously reported him for being overweight, when it was known by CPT H- that he was waived from AR 600-9 requirements due to his medical condition. His record reveals he was never earnestly considered for promotion or award again.

z. Because he made an informal complaint, little evidence exists to point to the wrongdoing of CPT H- and 1SG S-. However, statements provide by his subordinates provide a glimpse into the discrimination and maltreatment he and his battery faced at the hands of CPT H- and 1SG S-. Furthermore, statements and memorandums provided by his highly decorated superiors provide a look into his integrity and dedication to the U.S. Army. When one looks at his exemplary record of service, it is easy to understand that discrimination, retaliation, and Army politics rather than any performance related metric were the determining factors of the Army's unjust failure to promote him further than the rank of SSG.

aa. Because he was continuously overlooked for promotion following CPT H-'s discriminatory and retaliatory actions, even in the face of years of honorable service and laudatory comments by superiors, his current military record contains an error and/or injustice. Until he is considered for promotion to SFC, his military records will continue

to exist in error, an error that continues to unfairly exact injustice upon him. Only when his exemplary record is reviewed without the cloud of an erroneously and retaliatory issued bar to reenlistment will he receive the justice he deserves.

ab. His military records constitute an error or injustice because the tape tests that resulted in his bar(s) to reenlistment were woefully inaccurate. For approximately 30 years, the Army has used a cheap, quick, one size fits all tape test to calculate body fat percentage. The Army continues to use the tape test today, however, the procedure and standards used to administer the test have dramatically changed in response to long held beliefs that the Army test it used in 1995 does not accurately reflect a Soldier's physical fitness level. Accuracy in measuring body fat is essential, as any member of the Army knows, that a Soldier flagged for being overweight from the test cannot reenlist, is not eligible for promotion, may be barred from leadership positions, cannot attend schools, and may face administrative separation.

ac. The first amendment to the standard tape test occurred in 2002 - only two years after he retired. The DoD issued instruction number 1308.03 which cancelled the previously used 1995 version titled DoD Physical Fitness and Body Fat Programs Procedures. The new instruction announced that, "All DoD Components shall measure body fat using only the circumference based method," and specified that for males the "neck circumference and abdominal circumference at the navel," were to be used to measure body fat. Conversely, from 1995 through 2002, male body fat percentage was calculated by measuring the neck and waist or abdomen.

ad. The option to measure the waist versus the abdomen certainly leads to a significant variation in results. In other words, some Soldiers passed the test because one area was chosen to be measured instead of the other, and some failed the test for the same reason. The applicant's promotion to pay grade E-7 should not have been contingent on which area of his body was measured by the grader on the specific day he was tested.

ae. The 2002 standardization of how the tape test is administered did not silence critics claiming the test continued to be inaccurate, many of whom are servicemembers themselves. In 2016, Major (MAJ) F- H- called out the Army for relying on a test with such a wide margin of error. Having seen the inconsistencies first hand as a commander, MAJ H- stated, "A few [Soldiers] literally perplexed me as to how they possibly measured too heavy for service...I counseled several with heart felt sincerity to seek legal recourse and fight their recommended discharge at the highest level." MAJ H- continued by asking this rhetorical question: "Why are we still using tape measures, the erroneous human eye, and pencil and paper when most of us keep a super computer on our nightstand or in our pocket capable of so much more precision?"

af. In the article, MAJ H- referenced a 2013 tape test study conducted by Military Times. In the study, ten active duty troops were taped and then put in a hydrostatic "dunk tank," considered to be one of the best methods for calculating body fat. Not once did the tape test results match the dunk tank results. The tape test was wrong every time, and in nine out of ten cases, the tape test indicated that the Soldier's body fat percentage was higher than it actually was. The test revealed differences between scores from 66 percent at the worst and 12 percent at the best. Additional studies have concluded the margin of error in administering the tape test to be +/- 14 percent.

ag. His promotion to the rank of SFC should not have failed based on a test proven to be inaccurate. It is fundamentally unfair and unjust for the Army to knowingly allow an inaccurate test to have such negative repercussions on Soldiers' careers that it would result in a Soldier, like the applicant, to be passed over for promotion when he otherwise would have been promoted.

ah. The Army again responded to concerns that the tape test is inaccurate in 2021, when they conducted a new study. The results of that study culminated in the recent June 2023 announcement that the Army will now assess body fat by measuring the waist only. This is an extreme deviation from the 1995 height-weight measurement standards. The applicant recently learned of the Army's June 2023 tape test announcement.

ai. He was in the Army for fifteen years before he was flagged as being overweight. Before then, he had received a commendation from the commander of the United States Army NCO Academy at Fort Bliss, Texas on 13 September 1990, who stated in a memorandum, "Your score of 280 (out of a highest possible score of 300) on the Army Physical Fitness Test (APFT) has set the standard for peers and subordinates alike. Your performance is a sure indicator of your dedication to physical fitness and your well-being, plus that of the Soldiers put in your charge." As such, this indicates that not only did he never have an actual issue with being overweight, prior to 1995, but he was also so committed to physical fitness that he "set the standard" for Soldiers to emulate through his personal conduct by excelling on the APFT.

aj. He does not argue that the Army should be retroactive and apply today's standards to 1995. Rather, he asserts that after 15 years of exemplar fitness, one tape test that has since been proved to be inaccurate, should not prevent him from being promoted to the rank of SFC.

ak. His performance, as documented in his NCOERs, should have resulted in his selection for promotion to SFC. These included rater comments that he was "among the best...at his best under pressure, never met a task too difficult...takes charge and gains maximum productivity from Soldiers, a true leader and motivator...promote immediately; will make a superb Bradley Stinger Fighting Vehicle Platoon Sergeant." Further, his

senior rater rated his performance and potential as both 1/5 (best possible ratings) on his NCOER with through dates from November 1996 through March 1997. Similarly his NCOER with through dates of April 1996 through October 1996 rater comments included "dedicated professional, possess unlimited potential...demonstrates unprecedented dedication to mission accomplishment...promote to SFC at earliest opportunity." His senior rater rated his performance and potential as both 1/5 (best possible ratings).

al. The U.S. Army's failure to promote him to the rank of SFC is unjust as the facts and supporting documents indicate that he should have been promoted. He was denied a promotion because he was erroneously flagged for being overweight as the result of a test that has since been proven inaccurate. He should have never been flagged because he was medically waived from the standards put forth by AR 600-9. Moreover, his flagging exists as the product of him being unlawfully retaliated against by his chain of command. Because he stood against the discriminatory and racially charged displays he experienced in Riyadh, he was barred from promotion past the rank of SSG.

am. A Soldier with his background and dedication to the U.S. Army should not be prohibited from moving up in rank due to unlawful retaliation from his chain of command. Furthermore, a Soldier with an honorable career, such as the applicant, should not be denied a promotion based on a test with a proven margin of error of +/- 14 percent. These errors and injustices have prevented him from properly being recognized for his honorable service to the U.S. Army. Accordingly, the attorney humbly asks the applicant's records be amended so that he may rightfully be considered for promotion to SFC by a standby advisory board.

3. The applicant provides the following documents:

a. Memorandums performance of the applicant:

(1) From his commander, 30 January 1995, states the applicant quickly assimilated his Soldiers in the battery and assumed the security mission. He was able to respond to all of the battery needs and trained his Soldiers. Upon arrival in Riyadh, Saudi Arabia, he studied the current guard force procedures and thoroughly trained his subordinates in those procedures. Overall, his performance had been outstanding. The entire memorandum is available for the Board's review.

(2) From his executive officer, 31 January 1995, states the applicant assumed the responsibility as Task Force security element for Bravo Battery, understanding all that was conferred to him. His technical/tactical knowledge, command leadership ability, and professionalism when communicating with leaders and subordinates alike was pivotal to a successful field training exercise. The entire memorandum is available for the Board's review.

(3) From his 1SG, 31 January 1995, states the applicant's performance of duty had been nothing less than outstanding. His willfulness to support and learn the battery operation was shown by asking questions and reacting to war time situations. He was the type of NCO that could be counted on along with his platoon. The entire memorandum is available for the Board's review.

(4) From a CPT, 30 January 1995, whose observation of the applicant showed he was nothing but the utmost professional. He placed top emphasis of responsibility for his arms room. The entire document is available for the Board's review.

(5) Self-Authored MFR duties and responsibilities, 30 January 1995, he was appointed as battery armorer. All sensitive items were accountable with no discrepancies. He was in charge of the training and integration of Soldiers into South West Asia. He was also responsible for the transportation of the guard force to site, insuring all Soldiers understood their duties and responsibilities. The entire MFR is available for the Board's review.

b. ABCMR case AC98-08074, wherein he requested to be promoted to SFC under 1995, 1996, and 1997 promotion criteria. The Board recommended he be reconsidered for promotion to SFC under the 1995 promotion criteria; if selected, promoting him effective the date he would have been promoted if he had been selected by that year's regularly convened promotion board; and if selected, paying him the difference in pay the back dated promotion would necessitate.

c. DA Form 4856 (General Counseling Form), 26 August 1998, which states the Department of the Army (DA) imposed a bar to reenlistment on him under the qualitative management program (QMP). He concurred with the counseling and signed the form.

d. MFR from the Chief, Adult Chronic Care Clinic, retention of applicant, 2 September 1998, states:

(1) The applicant was notified he would be released from active duty due to the result of a QMP board. In the opinion of the author, that was a mistake. The applicant should be allowed to remain on active duty.

(2) He had been undergoing treatment for reactive pneumonitis which was diagnosed in November 1996. He began raising homing pigeons in 1993. His diagnosis was most likely related to his contact with these pigeons; subsequently he stopped raising them. His weight gain, during this time frame, was directly caused by the illness as well as because the lung disease caused inability to exercise, which led to weight gain and the medication this disease was treated with also caused weight gain, which had necessitated a temporary profile limiting his participation in physical training. The

author considered this to be the primary reason for the applicant's inability to meet height and weight standards.

(3) His medical condition was temporary and he had made remarkable improvement. His weight had dropped from 246 pounds to 204 pounds. In April 1998, he also passed an alternate event APFT.

(4) He was a hard working Soldier who wanted to remain on active duty. He had the opportunity to undergo a medical evaluation board for his medical condition but chose not to, as he wanted to continue service his country.

(5) He had made motivated efforts to overcome his medical condition and the author requested his records be relooked and he be considered for retention. The U.S. Army would lose a tremendous asset if he was released from active duty.

e. DA Forms 2823 (Sworn Statement) on behalf of the applicant regarding his command being "out to get him" and their platoon being marked because of it. The statements are available for the Board's review.

f. MFR from his commander, Recommendation to lift the DA bar to reenlistment, 22 November 1996, states:

(1) In June 1995, the commander was contacted by the command sergeant major (CSM) regarding the applicant's height and weight. At the time, the SFC promotion board was considering him for promotion, and they wanted to verify his weight.

(2) The applicant was enrolled in the weight control program, consulted with nutritional and dietary counselors, and began a structured physical training program. He spent several months at Grafenwoehr and many more months at the Combat Maneuver Training Center, and his efforts met with mixed results.

(3) Throughout this period both the 1SG and commander monitored his progress, but became concerned when the results did not meet their expectations. He was directed to undergo medical screening, and in November 1996, he was diagnosed as having hypersensitivity pneumonitis.

(4) His hypersensitivity pneumonitis reduced his cardiovascular endurance by 50 percent, however, his efforts had been nothing short of spectacular. He had done more to make the battery a success than any other Soldier.

(5) In view of his medical condition, superb duty performance, and dedication to the U.S. Army, the commander strongly recommended the bar to reenlistment be

removed. He also recommended the applicant's promotion packet be reexamined, and he be selected for promotion.

g. DoDI 1020.03 (Harassment Prevention and Response in the Armed Forces), 8 February 2018, states the DoD does not tolerate or condone harassment. Harassment jeopardizes combat readiness and mission accomplishment, weakens trust within the ranks, and erodes unit cohesion. Harassment is fundamentally at odds with the obligations of servicemembers to treat others with dignity and respect. The entire document is available for the Board's review.

h. DoDD 7050.06, (Military Whistleblower Protection), 17 April 2015, states members of the military service are free to make protected communications. No person will restrict a servicemember from making lawful communications to a Member of Congress or an inspector general. The entire document is available for the Board's review.

i. Memorandum of support from the battalion CSM, states during the applicant's time as a platoon sergeant, his platoon was always squared away. He seemed to be in three or four places at one time, always taking care of his Soldiers' welfare and anything the task force asked of him. He was an outstanding NCO. He had the respect and admiration of his Soldiers. The CSM would want the applicant on his team in peacetime or wartime. He recommended the applicant not only be retained on active duty but to be promoted to SFC.

j. Memorandum of support from a master sergeant (MSG) regarding lifting his bar to reenlistment. The applicant was one of most professional NCOs the MSG had the pleasure to work with. He had proven to be tactically and technically proficient and quick to take charge in the absence of key leadership. He was very reliable requiring no supervision when given a task to accomplish. He was respected by his peers and subordinates. The MSG would be proud to serve with him anytime and anywhere should the need arise.

4. The applicant's service record contains the following documents:

a. DD Forms 4 (Enlistment/Reenlistment Document Armed Forces of the United States) shows he enlisted in the Regular Army and entered active duty on 22 September 1980. He remained in the Regular Army through immediate reenlistments.

b. Orders 32-43, published by Headquarters, 2d Armored Division, 18 February 1987 promoted the applicant to SSG effective 18 February 1987.

c. DA Forms 2166-7 (NCOERS) show he was rated, in the rank of SSG, as:

(1) From June 1988 to December 1988, success in competence, leadership, training, and responsibility and accountability. He was rated excellence in physical fitness and military bearing. His rater rated his overall potential as fully capable and his senior rater rated him 2 of 5 in overall performance and 2 of 5 in overall potential.

(2) From January 1989 to December 1989, he was rated excellence in all categories. His rater rated his overall potential as among the best and his senior rater rated him 1 of 5 in overall performance and in overall potential stating uniquely qualified.

(3) From January 1990 to July 1990, he was rated excellence in competence, physical fitness and military bearing, and training. He was rated as success in leadership and responsibility and accountability. His rater rated his overall potential as among the best and his senior rater rated him 2 of 5 in overall performance and 1 of 5 in overall potential.

(4) From August 1990 to July 1991, he was rated excellence in competence, leadership and responsibility and accountability. He was rated as success in physical fitness and military bearing and training. His rater rated his overall potential as among the best and his senior rater rated him 1 of 5 in overall performance and in overall potential stating promote immediately to SFC.

(5) From August 1991 to November 1991, he was rated excellence in competence, leadership, training and responsibility and accountability. He was rated as success in physical fitness and military bearing. His rater rated his overall potential as among the best and his senior rater rated him 1 of 5 in overall performance and in overall potential stating unlimited potential, promote to SFC immediately.

(6) From December 1991 to July 1992, he was rated excellence in competence. He was rated as success in physical fitness and military bearing, leadership, training and responsibility and accountability. His rater rated his overall potential as among the best and his senior rater rated him 1 of 5 in overall performance and in overall potential stating promote to SFC now.

(7) From August 1992 to November 1992, he was rated excellence in competence, leadership, and training. He was rated as success in physical fitness and military bearing and responsibility and accountability. His rater rated his overall potential as among the best and his senior rater rated him 2 of 5 in overall performance and 1 of 5 in overall potential.

(8) From December 1992 to October 1993, he was rated excellence in competence and training. He was rated as success in physical fitness and military bearing, leadership, and responsibility and accountability. His rater rated his overall

potential as among the best and his senior rater rated him 2 of 5 in overall performance and 1 of 5 in overall potential stating promote ahead of peers.

(9) From November 1993 to October 1994, he was rated excellence in competence and training. He was rated as success in physical fitness and military bearing, leadership, and responsibility and accountability. His rater rated his overall potential as among the best and his senior rater rated him 1 of 5 in overall performance and in overall potential.

(10) From November 1994 to October 1995, he was rated excellence in competence. He was rated as success in physical fitness and military bearing, leadership, training, and responsibility and accountability. His rater rated his overall potential as fully capable and his senior rater rated him 2 of 5 in overall performance and in overall potential stating promote immediately.

(11) From November 1995 to March 1996, he was rated excellence in competence and training. He was rated as success in physical fitness and military bearing, leadership, and responsibility and accountability. His rater rated his overall potential as among the best and his senior rater rated him 1 of 5 in overall performance and in overall potential stating promote to SFC.

(12) From April 1996 to October 1996, he was rated excellence in training and responsibility and accountability. He was rated as success in competence, physical fitness and military bearing, and leadership. His rater rated his overall potential as fully capable and his senior rater rated him 1 of 5 in overall performance and in overall potential stating promote to SFC at earliest opportunity.

(13) From November 1996 to March 1997, he was rated excellence in competence and leadership. He was rated as success in physical fitness and military bearing, leadership, training, and responsibility and accountability. His rater rated his overall potential as among the best and his senior rater rated him 1 of 5 in overall performance and in overall potential stating promote immediately.

(14) From April 1997 to March 1998, he was rated success in competence. He was rated as needs some improvement in physical fitness and military bearing. He was rated as excellence in leadership, training, and accountability and responsibility. His senior rater rated his overall potential as fully capable. His senior rater did not meet the minimum qualifications to rate him.

(15) From April 1998 to March 1999, he was rated success in competence, leadership, training, and responsibility and accountability. He was rated as needs some improvement in physical fitness and military bearing. His rater rated his overall potential

as fully capable and his senior rater rated him 2 of 5 in overall performance and in overall potential.

(16) From April 1999 to February 2000, he was rated success in competence, leadership, training, and responsibility and accountability. He was rated as needs some improvement in physical fitness and military bearing. His rater rated his overall potential as fully capable and his senior rater rated him 2 of 5 in overall performance and in overall potential.

d. Memorandum DA Imposed Bar to Reenlistment Under QMP, 10 August 1998, informed the applicant the calendar year 1998 SFC selection board determined he was barred from reenlistment.

e. Memorandum, 31 March 1999, informed the applicant his appeal to his bar to reenlistment was approved and the bar was removed.

f. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was honorably transferred to the U.S. Army Control Group (Retirement), in the rank of SSG, on 31 December 2000. He had completed 20 years, 3 months, and 9 days of active duty service.

g. The applicant's service record was void of DA Forms 268 (Report to Suspend Favorable Personnel Action) for being overweight.

h. The applicant's service record was void of information showing he was considered for or denied promotion to SFC from 1996 through 2000.

i. The applicant's service record is void of documentation showing an informal or formal complaint regarding his chain of command.

j. The applicant's service record is void of any derogatory information.

5. On 23 January 2007, the Board responded to the applicant's request to be promoted to SFC in AR20060009111. The Board determined that the evidence did not demonstrate the existence of a probable error or injustice. Therefore, they determined the overall merits of the case were insufficient as a basis for correction of the records of the individual concerned. His request was denied.

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 and counsel contend that the applicant was singled out and encountered discrimination, which affected and/or denied promotion consideration and opportunities.

a. The evidence shows he entered active duty on 22 September 1980, and he was promoted to SSG/E-6 in May 1986. The applicant was enrolled in the Army Weight Control Program and was barred from reenlistment in 1996. In 1997, he was selected for separation under the QMP; however, following his appeal of the DA Bar to Reenlistment, the decision to separate him was overturned. He was ultimately retired on 31 December 2000 in the grade of SSG/E-6 after completing 20 years, 3 months, and 9 days of active duty service.

b. In April 1998, the applicant requested promotion reconsideration to SFC/E-7 under the 1995, 1996, and 1997 promotion criteria. On July 29, 1998, the Board denied that portion of his application pertaining to promotion under 1996 and 1997 criteria. However, the Board recommended that his records appear before a standby advisory board (STAB) (special selection board) under the criteria used by the 1995 SFC/E-7 promotion selection board. In October 1998, the applicant's service record was considered by a STAB under the 1995 criteria. He was not select for promotion.

c. He is now requesting reconsideration of his previous request for consideration for promotion to SFC under the criteria of 1996 through 2000. Based on his statement, the Board noted that it appears that he is asking for E-7 promotion reconsideration for the years 1996 through 2000, using the 1995 criteria, rather than the respective criteria originally designated for, and used by each of the E-7 promotion boards convened in those years.

d. Soldiers are selected for promotion to SFC by a centralized DA Promotion Selection Board, based on the best qualified as determined through the collective best judgment of the promotion board members. The regulation governing promotions provides guidance on the processing of STAB requests. It states, in part, that STABs are convened to consider records of those Soldiers whose records were not reviewed by a regular board, or whose records were not properly constituted, due to material error, when reviewed by the regular board. While the Board noted the applicant's contention regarding being unfairly treated by his unit, neither the applicant nor his counsel provided evidence of a material error. Therefore, the Board determined his request for a STAB is unsupported by the evidence.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

Recon Deny 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 AR20060009111 on 23 January 2007.

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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, U.S. Code, 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 (AR) 15-185 (ABCMR), states that the ABCMR begins its consideration of each case with the presumption of administrative regularity. It will decide cases based on the evidence of record and it is not an investigative body. The applicant has the burden of proving an error or injustice by a preponderance of the

evidence. Paragraph 2–11 states that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

3. AR 600-8-19 (Enlisted Promotions and Reductions), in effect at that time, prescribes the enlisted promotions and reductions function of the military personnel system. In pertinent part:

a. Paragraph 1-28 (Suspension of favorable personnel action) states, suspension of favorable personnel actions (FLAGS) will be initiated on Soldiers not in good standing as prescribed in AR 600-8-2. Field commanders (CDRs) are responsible for initiating FLAGS for command-initiated removals from a Headquarters, Department of the Army (HQDA) list. The U.S. Army Human Resources Command (HRC-Alexandria (AHRC-MSP-E) will prepare a DA Form 268 (Report to Suspend Favorable Personnel Action) for HQDA initiated removals, when the decision is made to refer a case to the Standby Advisory Board (STAB). Failure to initiate a suspension of favorable personnel action, however, does not invalidate referral of the action to the STAB or subsequent actions relating to the recommendation of removal.

b. Section III – Task: Processing Promotion List Results and Orders, paragraph 4-12 (Rules) states, (1) Battalion Human Resources will notify Soldier of procedures used to request consideration or reconsideration by the STAB, if appropriate. (2) Documents reflecting a change in a Soldier's promotable status and or promotion "PRMOS" must be forwarded immediately to HRC-Alexandria (AHRC-MSP-E). (3) Monthly HRC-Alexandria enlisted promotion orders must be screened to ensure promotable Soldiers designated by sequence number memorandum were promoted. (4) DOR will be the effective date of promotion. If the promotion was delayed due to an administrative error, the DOR will be the effective date that the promotion should have occurred. (5) Documents supporting amendment, revocation, or late promotion orders must be received by HRC–Alexandria, by the end of each month for actions to be included in the promotion orders booklet to be mailed during the following month.

c. Section V – Task: Processing Removal from a Centralized Promotion List, paragraph 4-16 (Rules) states in –

(1) Paragraph 4-16a (Rules for administrative removals), CDRs will promptly forward documentation to Commander, HRC-Alexandria, pertaining to Soldiers on a HQDA recommended list who are in one or more of the categories listed in paragraph 4-16a(2). HRC–Alexandria will delete, without further board action, the name of any Soldier from the recommended list who — Is ineligible to reenlist due to a Declination of Continued Service Statement, AWOL, confinement, local bar, qualitative management program, or court-martial conviction; was considered in error (no exception authorized); and was recommended by an approved reduction board to be removed from a promotion list.

(2) Paragraph 4-16b (Rules for processing command-initiated removals), (a) Any CDR in the Soldier's chain of command may recommend that a Soldier's name be removed from a HQDA recommended list at any time. The recommendation for removal must be fully documented and justified. DA Form 268 will be initiated at this time. (b) When recommending a Soldier for removal, CDRs will evaluate circumstances to ensure that all other appropriate actions have been taken (training, supervision, and formal counseling have not helped) or the basis for considering removal is serious enough to warrant denying the individual's promotion. (c) Recommendation may be submitted for substandard performance. (d) Removal actions, to include rebuttal, will be processed in accordance with steps in table 4-4. (e) The removal action will be submitted for review through command channels to the CDR having General Court-Martial Convening Authority (GCMCA) or the first general officer in the chain of command having a staff judge advocate on his or her staff. (f) Recommendation may be disapproved at any level of command. The disapproval will be returned through command channels to the originator with the reason for disapproval. (g) All actions will be forwarded to HRC-Alexandria in duplicate and will include a copy of his/her Personnel Qualification Record, and DA Form 268. (h) HRC-Alexandria will notify the appropriate CDR of the results and recommendations of the STAB.

d. Paragraph 4-18 (Removals from a centralized promotion list by Headquarters, Department of the Army) states, HRC-Alexandria will continuously review promotion lists against all information available to ensure that no Soldier is promoted where there is cause to believe that a Soldier is mentally, physically, morally, or professionally unqualified to perform duties of the higher grade.

e. Paragraph 4-19 (Appeals of removal from a centralized promotion list) states, (1) a Soldier who is removed from a promotion list may appeal that action only in limited circumstances. HRC-Alexandria will take final action on any appeal. (2) Soldiers may appeal a removal action when the underlying basis of the removal is subsequently determined to be erroneous. The subsequent determination must be based on facts that were not available or reasonably discoverable at the time of the original action or at the time that the Soldier was notified of the removal action. An appeal may also be submitted for other compelling reason(s). (3) Appeals must be referred through command channels, to include GCMCA, to Commander, HRC-Alexandria.

4. AR 600-8-2 (Suspension of Favorable Personnel Actions (Flags)) in effect at the time states Suspension of favorable personnel actions is mandatory when an investigation (formal or informal) is initiated on a soldier by military or civilian authorities. Flags are classified into the two categories described below, depending upon the specific action or investigation. a. Non-transferable. The flag may not be transferred to another unit (except where consistent with paragraph 1-15). b. Transferable. The flag may be transferred to another unit. A non-transferable flag is required when an investigation or

charges have been imposed against the service member. Remove the flag when the Soldier is released without charges, charges have been dropped, or punishment is completed. Memorandums of admonition, censure, or reprimand not administered as nonjudicial punishment. Remove the flag upon completion of filing instructions. However, a flag for a Soldier on a HQDA promotion list (officer promotable to O-3–O-6, warrant officers promotable to CW3–CW5, and enlisted Soldiers promotable to E-7–E-9) who is flagged for one of these memorandums can only be removed by HQDA. Promotion or reevaluation for promotion is prohibited by a flag.

//NOTHING FOLLOWS//