

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 30 September 2024

DOCKET NUMBER: AR20240000039

APPLICANT REQUESTS: promotion to the rank/grade of major (MAJ)/O-4.

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

- DD Form 149 (Application for Correction of Military Record)
- Applicant statement
- DA Form 4856 (Developmental Counseling Form), 28 March 2022
- DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings), 27 October 2022
- Headquarters, U.S. Army Physical Disability Agency (PDA) Memorandum - Subject: Permanent Physical Disability Retirement, 4 November 2022
- Order Number D 308-02, 4 November 2022
- Secretary of Defense Memorandum - Subject: Rescission of 24 August 2021 and 30 November 2021, Coronavirus Disease 2019 (COVID-19) Vaccination Requirements for Members of the Armed Forces, dated 10 January 2023
- Fiscal Year 2023 (FY23) Reserve Component (RC) Major Army Promotion List (APL) Promotion Selection Board (PSB) Results release dated 30 October 2023
- Order Number D 307-11, 3 November 2023

FACTS:

1. The applicant states:

a. He requests approval for the retired promotion to MAJ/O-4 based on the following information.

b. The following is a sequence of events that are for consideration of the final decision. On or about December 2020, United States Army Reserve Command issued out a mandatory order for all Reserve Soldiers to obtain records of receiving the COVID-19 Vaccine and or submit a request for exemption. He selected the religious exemption. As time went on the chain of command never approved or denied his request (March 2021), but insisted he made a choice between the following: 1. Get the Vaccine 2. Receive a General Officer Memorandum of Reprimand (GOMOR) for failure to obey a direct order and face administrative action up to and including discharge 3.

Other reason to leave the service. While waiting for a response on the religious exemption, he also requested to medically retire. His medical retirement was approved on 4 December 2022, just a few weeks later the mandatory requirement for the vaccine was lifted. He was placed on the O-4 vacancy position board (April 2022) which was never adjudicated. He was also placed on the Primary board June 2022. Had this unique sequence of events not happened he would have been promoted and remained in the United States Army Reserve (USAR).

c. Based on this timeline if he had the option to not get the vaccine without reprimand, he would have selected to stay in the USAR and would have been selected for promotion on his primary look. He was forced to decide between his medical health or his military career, he selected his health at the cost of his career. He is requesting the disability board approve his retroactive promotion to MAJ/O-4 because of these very unique and valid reasons.

2. A review of the applicant's military service records show:

a. Having prior USAR cadet service, DA Form 71 (Oath of Office - Military Personnel) shows he was appointed as a Reserve commissioned officer and executed his oath of office on 17 December 2011.

b. On 14 December 2016, the U.S. Army Human Resources Command (HRC) published Orders Number B-12-606696, which promoted the applicant to the rank/grade of captain (CPT)/O-3, effective 12 September 2016.

c. On 10 August 2018, he completed the Reserve Component Logistics Captains Career Course.

d. On 27 October 2022, DA Form 199 (Informal PEB Proceedings) shows an informal PEB found the applicant physically unfit and recommended a rating of 50 percent and that his disposition be permanent disability retirement. He concurred and waived a formal hearing of his case on 3 November 2022.

e. On 4 November 2022:

(1) The U.S. Army Physical Disability Agency (USAPDA) approved the Informal PEB Proceedings.

(2) Headquarters USAPDA advised the applicant that in accordance with the findings and recommendation of the USAPDA, he was found to have a disability and would be permanently retired with a Department of Defense disability rating of 50 percent. The attached Department of the Army Order (enclosed) announced the effective date of his retirement.

(3) Headquarters USAPDA published Order Number D 308-02, which retired the applicant for permanent physical disability, effective 4 December 2022, and placed him on the PDRL in the rank/grade of CPT/O-3, effective 5 December 2022. The order shows:

- Retirement type and allotment code: Permanent/12
- Component: USAR
- Authority: Army Regulation (AR) 635-40 (Disability Evaluation for Retention, Retirement, or Separation)
- Statute authorizing retirement: 1204 [Title 10, U.S. Code, section 1204]

3. In support of his case the applicant provides:

a. DA Form 4856 dated 28 March 2022, unsigned, showing he was counseled for declining to receive the COVID-19 vaccine on 5 November 2021. It states he was ordered to become fully vaccinated with a COVID-19 vaccine that has received full licensure from the Food and Drug Administration (FDA), in accordance with FDA-approved labeling and guidance no later than 15 November 2021. "The date by which you must receive this vaccination may be delayed based on factors such as when you speak with a military medical professional about vaccination, the availability of vaccines, and whether you submit a medical or religious exemption request. This is a lawful order. Failure to obey this order may result in punitive or adverse administrative action. Voluntary immunization with a COVID-19 vaccine under FDA Emergency Use Authorization or World Health Organization Emergency Use Listing in accordance with applicable dose requirements prior to, or after receiving this order, constitutes compliance with this order. If you believe you should be granted a medical exemption, then discuss this with your health care provider." The form shows plans of action for vaccination declination and religious exemption requests.

b. Secretary of Defense Memorandum - Subject: Rescission of 24 August 2021 and 30 November 2021, COVID-19 Vaccination Requirements for Members of the Armed Forces, dated 10 January 2023, which states, in pertinent part:

(1) On 23 December 2022, the J_ M_ I_ National Defense Authorization Act (NDAA) for FY23 was enacted. Section 525 of the NDAA for FY23 required him to rescind the mandate that members of the Armed Forces be vaccinated against COVID-19, issued in his 24 August 2021 memorandum, "Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members." The Secretary of Defense rescinded that memorandum. The Secretary of Defense rescinded his 30 November 2021 memorandum, "Coronavirus Disease 2019 Vaccination for Members of the National Guard and the Ready Reserve."

(2) No individuals "currently serving in the Armed Forces" shall be separated solely on the basis of their refusal to receive the COVID-19 vaccination if they sought an accommodation on religious, administrative, or medical grounds. The Military Departments will update the records of such individuals to remove any adverse actions solely associated with denials of such requests, including letters of reprimand. The Secretaries of the Military Departments will further "cease any ongoing reviews of current Service member religious, administrative, or medical accommodation requests solely for exemption from the COVID-19 vaccine or appeals of denials of such requests."

c. FY23 RC MAJ APL Promotion Selection Board Results release date 30 October 2023, which lists the applicant's name.

d. Order Number D 307-11 dated 3 November 2023, published by Headquarters USAPDA, which amended Order Number D 308-02 dated 4 November and changed his Retired grade of rank to O-4, vice O-3.

4. On 14 August 2024, the HRC, Chief, Officer Promotions Board Announcements, Support and Promotion Orders, provided an advisory opinion for this case and found the applicant's request does not have merit. The advisory official stated:

a. Based on a review of the information provided, our records, laws, regulations, policies, and the systems available to HRC Officer Promotions, we find that the applicant's request does not have merit.

b. It is unfortunate that our office was not informed by either the Soldiers command or the Soldier himself of such a change in his duty status to include but not limited to separations (voluntary or involuntary), retirements, or discharges (Medical Evaluation Boards or PEBs). If we were informed of such information or changes upon occurrence, it would have given us a reasonable chance to remove his name from promotion consideration and/or the promotion selection board results.

c. Prior to the convene date of the FY23, RC, MAJ APL PSB (27 February 2023) we found that the applicant was not a member on [in] the armed forces; due to his transfer to the Permanent Disability Retirement List, effective 5 December 2022. Therefore, under the laws of Title 10, United States Code (USC), section 14310 in lieu of him being considered (in error) or his name being released, he was ineligible and administratively removed from the PSB. This is not a wrongful act. Therefore, any amendments or adjustments of any documents referring the applicant to MAJ/O-4 would have been done so in error and must be rescinded.

d. In addition, we have affirmed that the applicant was identified as a candidate to the FY21, June, Position Vacancy Board that convened on 7 June 2021, however, he

was not selected. The Position Vacancy Boards for Troop Program Units (TPU) is utilized for a specific position a TPU Command is unable to fill by the Promotion Selection Board process. The need to submit an officer for a Position Vacancy Board is determined by and is at the Commanders discretion alone.

5. On 20 September 2024, the applicant responded to the HRC advisory opinion and stated:

a. He is requesting the Army Review Boards Agency (ARBA) grant his promotion to MAJ based on extenuating circumstances of COVID mandates that were rescinded December 2022. He will show that he had three (3) courses of action presented to him by his chain of command at the time for mandated vaccination. These courses of action were as follows; 1. Religious/Medical Exemption 2. Refusal with "GOMOR" and dismissal 3. Retirement (if eligible).

b. He submitted a religious exemption with private legal counsel at the beginning of 2022. He has attached that request along with some email traffic/supporting memo from the command Chaplin.

c. The chain of command never responded to his request and continued with the pressure of making him choose a different course of action as seen through counseling statements and email traffic while waiting for his religious exemption to be approved. He eventually changed his request to refusal of the vaccine and started his medical retirement process. He has provided documentation that during his medical retirement process the command was still processing him for refusal.

d. The medical retirement process was the best course of action at the time because as a 100 percent service-connected veteran, he stood to lose significant benefits if he were to be discharged with a characterization anything other than "Honorable." He would also not have made the promotion list with a "GOMOR" for refusing a direct order for the vaccine. Therefore, because of these circumstances he has had wrongdoing against his career and forced to choose between his health and forward progress. The rescinding of all negative actions and mandatory vaccine was issued weeks after his retirement order was issued. "If I had to opportunity to stop the order with that memo prior to orders being issued I would have therefore allowing my promotion to be effective."

e. He fully understands based on regulation that the timing of the release of the promotion list may exclude his eligibility for promotion, but he also believes that his specific circumstance is unique and deserves consideration of his service to the nation and to the USAR. He asks the ARBA approve his request and adjust his military records and retirement orders to reflect said promotion.

6. With his response, the applicant also provided:

a. A copy of his religious accommodation exemption memorandum from the Command Chaplain, which states, he [the chaplain] conducted a telephonic interview with the applicant on 10 March 2022 regarding his request for an exemption from immunization based on religious accommodation. The applicant demonstrated a sincerity with his held belief. The chaplain assessed that the applicant was sincere in the belief resulting in this request for religious intent.

b. Email communication during the period of March 2022 through September 2024, between the applicant, his legal counsel, and his chain of command discussing his religious exemption and counseling, scheduling an interview with the chaplain, and ARBA consideration for his request.

BOARD DISCUSSION:

After reviewing the application and all supporting documents, the Board determined relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. Based upon the available documentation showing the applicant was medical retired on 4 December 2022 (when he should have been removed from any future promotion consideration), and was not selected for promotion to MAJ until October 2023, the Board concluded there was insufficient evidence of an error or injustice warranting a correction to the applicant's rank.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

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 14310 - Removal of officers from a list of officers recommended for promotion states, under regulations prescribed by the Secretary concerned, if an officer on the reserve active-status list is discharged or dropped from the rolls or transferred to a retired status after having been recommended for promotion to a higher grade under this chapter or having been found qualified for Federal recognition in the higher grade under title 32, but before being promoted, the officer's name shall be administratively removed from the list of officers recommended for promotion by a selection board.
2. Title 10, USC, section 1204 - Members on active duty for 30 days or less or on inactive-duty training: retirement states, upon a determination by the Secretary concerned that a member of the armed forces not covered by section 1201, 1202, or 1203 of this title is unfit to perform the duties of his office, grade, rank, or rating because of physical disability, the Secretary may retire the member with retired pay computed under section 1401 of this title, if the Secretary also determines that based upon accepted medical principles:
 - The disability is of a permanent nature and stable
 - The disability must have occurred before 24 September 1996
 - The disability must not be the result of intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence
 - The member must have served at least 20 years
 - The disability must be at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination

3. Title 10, USC, section 1372 states unless entitled to a higher retired grade under some other provision of law, any member of an Armed Force who is retired for physical disability under section 1201 or 1204 of this title, or whose name is placed on the Temporary Disability Retired List under section 1202 or 1205 of this title, is entitled to the grade equivalent to the highest of the following:

- The grade or rank in which he is serving on the date when his name is placed on the temporary disability retired list or, if his name was not carried on that list, on the date when he is retired
- The highest temporary grade or rank in which he served satisfactorily, as determined by the Secretary of the armed force from which he is retired
- The permanent regular or Reserve grade to which he would have been promoted had it not been for the physical disability for which he is retired and which was found to exist as a result of a physical examination
- The temporary grade to which he would have been promoted had it not been for the physical disability for which he is retired, if eligibility for that promotion was required to be based on cumulative years of service or years of service in grade and the disability was discovered as a result of a physical examination

//NOTHING FOLLOWS//