

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 24 October 2024

DOCKET NUMBER: AR20240000955

APPLICANT REQUESTS:

- Reinstatement as an officer in the rank of major (MAJ)/O4 effective 25 November 2020
- All back pay, allowances, entitlements, and constructive credit
- Consideration for promotion to lieutenant colonel (LTC) through a Special Selection Board (SSB) for fiscal years (FY) 2019-2023
- If retired by the Army prior to the decision of the Board, retired rank and pay adjusted in conjunction with reinstatement
- Personal appearance before the Board

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

- DD Forms 149 (Application for Correction of Military Record)
- Attorney's Brief
- Enclosure 1 - Email Correspondence
- Enclosure 2 - Mr. G-'s Duties and Organizational Overview
- Enclosure 3 - Conditions Resignation/Separation Orders
- Enclosure 4 - Retirement Request and Approval
- Enclosure 5 - Survivor Benefit Plan (SBP) Calculation
- Enclosure 6 - XVIII Airborne Corps Inspector General (IG) Correspondence
- Enclosure 7- 88th Readiness Division IG Correspondence
- Enclosure 8- U.S. Army Human Resources Command (AHRC) Response to Congressional
- Enclosure 9 - Letter from Sergeant Major of the Army (SMA) Retired (R) M- G-
- Enclosure 10 - Letter from Major General (MG) (R) B- P-, Ph.D.
- Enclosure 11 - Letter from Brigadier General (BG) H- R- (Supervisor)
- Enclosure 12 - Letter from Sergeant First Class (SFC) M- C- (Recruiter)

FACTS:

1. The applicant states the 88th Readiness Division Retirement Services Office provided erroneous and misleading advice that if he resigned his commission as an

officer, upon retirement from active duty as an enlisted member, he would retire under his former rank as a MAJ and receive retirement pay as an Army MAJ. The U.S. Army Human Resources Command (AHRC) admittedly committed an administrative error in not considering him for promotion to LTC, and this error also led to his decision to resign.

2. The applicant's attorney states, on behalf of the applicant:

a. In resigning his commission and enlisting in the Regular Army, he detrimentally relied on incorrect and misleading advice from the 88th Readiness Division Retirement Services Office. His decision to resign his commission was unknowing, involuntary, and was made with blinders on because of the negligently provided advice by the retirement career counselor. But for the involuntary resignation, he would have likely been selected for promotion to LTC. AHRC Promotion Branch committed an error when they miscoded his record and denied him a second opportunity for promotion to LTC. But for this error, he would likely not have resigned his commission.

b. This application is timely. Administrative remedies have been exhausted as the Department of the Army G1, AHRC, and the Office of the IG have directed that the Board is the correct agency to address these issues.

c. The applicant is presently serving on active duty in the U.S. Army. He is assigned to Headquarters, XVIII Airborne Corps, Fort Liberty, North Carolina. On 1 August 2024, he will be forced to retire in the rank of staff sergeant (SSG) and will receive SSG retirement pay.

d. He commissioned as an officer on 10 May 2002. On 1 December 2011, he was promoted to MAJ. At the time of resignation, he had 18.5 years of service as an officer with 16.5 years active. He completed three combat tours to Afghanistan as an officer.

e. In late 2019 and early 2020, he was a MAJ serving as the Command Administrative Officer/G-1 with the 364th Expeditionary Sustainment Command (ESC), Marysville, Washington. During that period, he began researching different retirement options. Enclosure 1 shows email correspondence where he sought advice on his retirement grade if he resigned his commission and took a voluntary reduction to SSG.

f. On or about 31 December 2019, he sent an email to the 88th Readiness Division Retirement Services Office with the subject line "High 3 Retirement Question Officer to Enlisted." He wrote:

"Hello, I have unique situation about retirement and am trying to obtain the correct answer before making an irreversible decision. I currently have 18 good years with 16 years of Active Federal Service. I am

currently a Reserve MAJ, and most likely won't see LTC. I'm contemplating resigning my commission and enlisting on active duty to get 20 [years] Active Federal Service and retire on active duty versus retiring in the Reserve as a MAJ. Am I correct in understanding that if I did enlist and retire on active duty, the pension I immediately receive would be my High 3 as a MAJ? Is there any circumstance you would not see this making sense financially over the long run?

Also, I'm not 100 percent sure how the High 3 is calculated. Is it calculated from the actual dollar amount of your High 3 you receive or the pay table base pay amount for your rank and time? If it is off the pay table, if I retire as an E6 in 2024, would I get the High 3 of an O4 for 2017-2019 or for 2022-2024?

g. On 31 December 2019, Mr. N- G- - Human Resources Specialist - informed the applicant he would be retired at the High 3 rank of MAJ. Mr. G- is a Department of the Army civilian employee employed by the 88th Readiness Division (Reserve). He served, and continues to serve, as the 88th Readiness Division's Retirement Services Chief. His duties include providing counseling services to servicemembers on retirement rights, benefits, and entitlements.

h. Mr. G- wrote:

"You are correct in thinking that you will receive the High 3 of MAJ (now that is me assuming that you have held the rank for at least 3 years). On the checklist one of the items is providing documents of the highest rank held. You would provide the documents for promotion to MAJ and then voluntary reduction to enlisted this shows them the time frame you held MAJ. In regards to the other question, when you retire and they calculate the rate based off of high 3, it will be MAJ and the last three years, even though you would be enlisted, you served so in your situation, O4 pay for 2022-2024. Hope this makes sense if you have any further questions just let us know." (Attorney's underlined emphasis added.)

i. On 17 January 2020, the applicant followed up and asked for the source of law entitling him to High 3. Mr. G- referred him to Title 10 U.S. Code (USC) section 1370. In section (b)(1) the statute states - among other things "[i]n order to be eligible for voluntary retirement under any provision of this title in a grade above the grade of captain in the Army, Air Force, Marine Corps, lieutenant in the Navy, or equivalent grade in the Space Force, a commissioned officer of the Army, Navy, Air Force, Marine Corps, or Space Force must have served on active duty in that grade for a period of not less than three years .... "

j. The applicant detrimentally relied on Mr. G-'s confusing and incorrect interpretation of Title 10 USC section 1370 in deciding to resign his commission.

k. Prior to resigning his commission, he considered many other career options such as entering the Army Guard Reserve program as an officer or regaining federal government civilian GS employment, which he had been offered in the past, and participating in the Military Buyback Program to receive retirement credit for his military service. Regardless, he had sufficient time in service to ensure he could retire from the Army as a MAJ under law and Army policy.

l. On 24 November 2020, he resigned his commission and enlisted on active duty.

m. In January 2023, he submitted a request for regular retirement with an effective date of 1 August 2024. On 31 March 2023, the request was approved. To his surprise, the retirement orders reflected the retirement rank of SSG. He has requested that the retirement orders be rescinded and is still on active duty, but faces an involuntary mandatory retirement date of 1 August 2024 regardless.

n. On 3 April 2023, he contacted his assigned Fort Liberty Retirement Services Officer Mr. L- M-. Mr. M- initially indicated that his retirement pay would be calculated using his high 36 months of base pay, while as an officer, while serving in the Regular Army from 2012 through 2015. This belief is also supported at Enclosure 5. Mr. M- used the rank of O4 to calculate his SBP base and annuity amounts. The emails at Enclosure 1 reflect that the applicant forwarded Mr. M- the advice provided by Mr. G-.

o. On 3 April 2023, Mr. M- contacted Mr. R- M- at AHRC. Mr. M- specifically asked about the high 36 calculation. Mr. D- M- - Deputy Chief, Officer Retirements and Separations - responded to the email and wrote "[r]etired pay is figure [sic] in the grade held the day before retirement."

p. The next day, the applicant was plainly upset at the negligently provided information. He emailed Mr. G- and wrote:

"I am retiring from active duty on 1 August 2024. I had previously served 17 years active federal service as an O4 in the Army, but resigned my commission to enlist as a SSG to retire on active duty in November 2020. When I inquired about this in February 2020, I was told by you I would retire as a MAJ with my pension being of the O4 pay scale from 2022-2024. Now that I've submitted my retirement packet, I'm being told differently by the Fort Bragg [sic] Retirement Service Office and Defense Finance and Accounting Service. Can you please respond with your understanding of the situation? I, obviously, would not have resigned my commission if what you told me wasn't true. Thank you."

q. Mr. G- replied that the applicant would be retired as a SSG but paid as a MAJ. Mr. G- still believes he should receive his high three pay as a MAJ.

r. On 28 April 2023, the applicant filed an IG Action Request with the XVIII Airborne Corps IG office. The IG opened a case and forwarded it to AHRC and the 88th Readiness Division Commanding General - MG M- B-. He did not provide relief but directed changes to their internal process. They advised seeking relief from the Board. They refused to provide a copy of any investigation or findings and recommendations.

s. AHRC noted an additional error raised by the evidence. Attached is a response to a Congressional Inquiry that best explains the error:

Dear Senator B-:

Thank you for your inquiry on behalf of your constituent, [the applicant], regarding his removal based on a prior Promotion Review Board (PRB), as well as not being considered as part of the eligible population for the next eligible board.

The applicant was originally recommended for promotion by the Fiscal Year (FY) 2017 Reserve Component (RC) LTC, Army Promotion List (APL), however, after carefully reviewing all matters pertaining to the PRB, the Secretary of the Army rendered a decision to remove him from the promotion list on 3 May 2018. Further, this decision constituted a first time non-select to LTC.

Based on the date he was removed from the promotion list, his next eligible board consideration to LTC was FY 2019 RC LTC APL. AHRC's records indicate he was not pulled into the eligible population to be considered in the above the zone of consideration for the FY 2019 board, and as such, his file was not considered by the voting members of the board. As a result of this administrative error, he qualifies for a SSB under the FY 2019 RC LTC APL board criteria. The reason for the SSB is based on being previously omitted from the FY 19 RC LTC APL.

t. The Army has admitted to erroneously removing him from consideration. Had he been properly consider for LTC, they believe he would have been competitive for promotion and would not have resigned.

u. Under Title 10 USC section 1552, the Secretary of military departments, acting through a board of civilians, is authorized to correct any military record necessary to correct an error or remove an injustice. Military corrections boards, such as the Army

Board of Correction of Military Records (ABCMR), possess broad equitable powers, and the legislation creating the boards is remedial in nature and should be liberally construed.

v. Corrections to military records made under section 1552 are subject to, and shall be under, "[the] procedures established by the Secretary concerned." As noted by the former U.S. Court of Claims in *Sanders v. U.S.* "Congress conferred broad powers on the Secretaries to remedy errors and injustices. Congress, in so doing, voluntarily and explicitly relinquished its authority in this area and terminated servicemen's access to Congress for correction of military records by way of private bill."

w. For this reason, the ABCMR under section 1552, has an affirmative duty to properly evaluate the nature of any error or injustice, and to take such corrective action as will appropriately and fully erase such error or compensate such injustice.

x. Indeed, as the *Haselwander* Court noted, "[t]he name of the Board - the ABCMR - speaks volumes. As the name suggests, the Board's members have the duty to [r]eview all applications that are properly before them to determine the existence of error or injustice." Thus, "[w]hen a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate."

y. Decisions of the ABCMR are, like other federal agencies, subject to review under the Administrative Procedures Act. Courts will set aside actions that are arbitrary, capricious, an abuse of discretion, or not in accordance with the law. Though boards are given unusual deference, agency decisions must be explained sufficiently to allow for effective review.

z. A basic tenet of administrative law is that agencies are not required to have regulations, but if they do have regulations, they are required to follow those regulations. *United States v. Bond* stands for the proposition that though the military has wide latitude in administrative and personnel decisions, those decisions can be challenged if there is a specific constitutional, statutory, or regulatory violation.

aa. Courts have jurisdiction over involuntary military discharges or retirement and resignations. However, voluntary separation or retirement is not justiciable and there is no relief available for a separation or retirement that is truly voluntary.

ab. Courts presume separations and retirements are voluntary, however the presumption is rebuttable by facts and circumstances. Where an applicant's retirement falls within certain circumstances, an applicant may rebut the presumption that the retirement is voluntary, and the separation becomes justiciable as being involuntary.

ac. *Nickerson* outlines several circumstances identified by the Courts where a retirement or resignation may be found involuntary:

- Duress of coercion forcing retirement or separation
- Government misrepresentation detrimentally relied upon by the servicemember
- Attempts to withdraw the retirement or separation before the effective date
- Retirement or separation under time pressure
- Mental incompetence

ad. The applicant did not resign voluntarily because he fell within government misrepresentation detrimentally relied upon by the servicemember, as he relied upon a government misrepresentation to his own detriment.

ae. Where and applicant is misled and fails to understand the effect of a decision, then the decision is involuntary. Courts use an objective reasonable person standard and if the "plaintiff exercised a free choice" to determine if a decision is voluntary. *Covington v. DHHS* states "a decision made with 'blindness on' based on...a lack of information cannot be binding as a matter of fundamental fairness and due process."

af. As in *Scharfwhere* the agency counselor there misled the applicant as to the consequences of his option retirement, here Mr. G- wrote in an email on 31 December 2019:

"You are correct in thinking that you will receive the High 3 of MAJ (now that is me assuming that you have held the rank for at least 3 years). On the checklist one of the items is providing documentation of highest rank held. You would provide the documents for promotion to MAJ and then voluntary reduction to enlisted this shows them the time frame you held MAJ. In regards to the other question, when you retire and they calculate the rate based off of high 3, it will be MAJ and the last three years, even though you would be enlisted, you served so in your situation O4 pay for 2022-2024. Hope this makes sense if you have any further questions just let us know." (Attorney's underlined emphasis added.)

ag. Mr. G- told the applicant he would remain eligible for full retirement pay as a MAJ once he reached 20 years total time. Mr. G- made a misleading statement that directly and materially affected the applicant's decision to resign his commission. Mr. G- was in a position of special knowledge and had the appearance of authority on this subject matter. The applicant did not realize he had to "stand and fight" because he innocently and in good faith believed he retained his eligibility for a full retirement as a MAJ.

ah. From Mr. G-'s advice, much like in *Scharf* where the plaintiff relied on the advice of his retirement counselor, the applicant concluded that deciding to resign his commission would not have consequences on his retirement pay. He relied upon those statements in good faith.

ai. A misleading statement does not need to be intentional for the separation to be considered involuntary, rather "the misleading information can be negatively or even innocently provided." (emphasis added by the attorney). Mr. G- counseled individuals regularly and even if he provided the misstatement negligently or even if he believed the statement to be correct, the applicant's resignation remains involuntary. The Board should not penalize the applicant for the negligence of his advisor.

aj. The errors here are substantial, significantly prejudicial, and warrant relief.

3. The applicant provides the following documents:

a. Emails, which state, in pertinent part:

(1) From Mr. G-, 31 December 2019, wherein Mr. G- states the applicant would receive the high 3 MAJ rate for 2022-2024.

(2) From Mr. M-, 3 April 2023, the applicant separated under the 2014-2015 Officer Selection Board as a MAJ with 12 years commissioned service. He is inquiring about how his retirement pay will be calculated and if the service as a commissioned officer is factored into his high 36 calculation.

(3) From Mr. D- H. M-, AHRC, 3 April 2023, retired pay is figured in the grade held the day before retirement.

(4) From the applicant to Mr. G-, 4 April 2023, wherein he states he is retiring on 1 August 2024, his years of service as a MAJ, and what Mr. G- has previously told him.

(5) From Mr. G-, 5 April 2023, the law attached to the email was for "final pay" based on if the applicant enlisted into the Army prior to 8 September 1980. He enlisted into the Army in 1998, which means he did not qualify for "final pay" he qualified for "high 3", which ended in January 2018. He would be retired as a SSG but paid as a MAJ because his highest rank held was MAJ.

(6) From Mr. G-, 5 April 2023, the SSG would not be retired as a MAJ, he would be retired as a SSG but his pay is based off the highest three years, which is MAJ.

(7) From Mr. D- H. M-, AHRC, 5 April 2023, the high 3 law does not state an enlisted member will be retired as an officer.

b. Mr. G-'s duties and organizational overview, which includes the Retirement Services Program. The entire document is available for the Board's review.

c. Personnel Action Request, 15 February 2023, shows the applicant, in the rank of SSG, requested to be released from active duty and assignment on 31 July 2024 and be placed on the retired list on 1 August 2024. He believed he was entitled to retire in the rank of MAJ. He understood AHRC would make the final determination of his retirement grade.

d. An undated SBP Retiring Soldier Counseling Statement shows his SBP amounts were calculated at MAJ with over 12 years of service as of 1 May 2015.

e. A letter from the XVIII Airborne Corps IG, 14 July 2023, states:

(1) The letter was in response to the applicant's 24 April 2023, inquiry in which he requested assistance with verifying the law and Army regulation that were applied when he resigned his commission, determining why he was never provided a second opportunity to complete for promotion to LTC, and identifying a recourse to address the consequences caused by errors made by individuals on behalf of the Army.

(2) The XVIII Airborne Corps and Fort Liberty IG's office completed a preliminary analysis and determined his high 36 average, at the time of his retirement, will be computed using only rates of basic pay applicable to months of active duty as an enlisted member and that he may apply for advancement on the retired list to the highest grade held on active duty after obtaining a total of 30 years of service. The Headquarters, Department of the Army G-1 confirmed this information and stated there was no recourse that can be granted by the Army as this rule is Federal Law. However, he could apply for administrative relief through the Board.

(3) The IG referred the matter of the inaccurate information provided to him by the 88th Readiness Division Retirement Service Office to the 88th Readiness Division IG for appropriate action. The IG referred the matter of him not being afforded a second consideration for promotion to LTC to the AHRC IG office for appropriate action.

f. Letter from Headquarters, 88th Readiness Division IG, 27 July 2023, states:

(1) The letter was in response to the applicant's request received on 22 June 2023, concerning his request for assistance regarding inaccurate retirement information provided to him by the 88th Readiness Division Retirement Services Office.

(2) The IG conducted an inquiry into his request for assistance and referred the matter to the 88th Readiness Division Commanding General for action who directed the G-1 to inquire into the issue and implement appropriate corrective measures and process changes. For issues regarding his personal retirement request he could appeal to the Board as a redress option.

g. The letter from the 88th Readiness Division IG, includes an email from the applicant, 13 September 2023, which states:

(1) Is he correct in inferring from the letter that there will be no further assistance/information coming from the 88th Readiness Division in this matter? As someone who has read/written many Congressional inquiries and responses, the response, is frankly, a non-response; it is obtuse and unsatisfactory. It states "Our command was only looking into the responses they received from the 88th Retirement Services Office" yet in the IG final response it does not speak at all of this inquiry except that it was conducted.

(2) As the party harmed, not to mention a currently serving servicemember, is he not obligated to know any information that was uncovered in the inquiry and any corrective measures and process changes implemented? He should not have to file a Freedom of Information Act (FOIA) request to learn of this information. He is directly asking the 88th Readiness Division Command Group to address the situation with him as honorable leaders in the Army are expected to do. Incidentally, he has filed a FOIA request to the Department of the Army IG on 15 August and has not heard back, not even that it was received. He filed a second request on 11 September.

(3) He implores the leaders of the 88th Readiness Division to assist him in anyway they can. He is not some naive young SSG. He is a 44 year old with 23 years of service to the Army, and if it was not for a General Officer Memorandum of Reprimand (GOMOR) put in his restricted file, when he was a young lieutenant in 2003, for being late for work because his truck broke down, he has no doubt in his his mind he would be a colonel, just like his former peers and friends. Furthermore, there is a decent chance he would be a Reserve LTC if it was not for the failures of the 88th Readiness Division's Retirement Services Officer, Mr. G's erroneous and negligent advisement to convince him to voluntarily resign his commission. His rank should not matter though.

h. Letter from AHRC, Promotions Branch, to Senator B-, 23 October 2023, states:

(1) Thank you for your inquiry on behalf of the applicant, regarding his removal based on a PRB for promotion to LTC, as well as not being considered as part of the eligible population for the next eligible board.

(2) The applicant was originally recommended for promotion by the FY 2017 RC LTC APL; however, after carefully reviewing all matters pertaining to the PRB, the Secretary of the Army rendered a decision to remove him from the promotion list on 3 May 2018. Further, this decision constituted a first time non-select to LTC.

(3) Based on the date he was removed from the promotion list, his next eligible board for consideration to LTC was the FY 2019 RC LTC APL. AHRC's records indicate he was not pulled into the eligible population to be considered in the above the zone of consideration for the FY 2019 board, and as such, his file was not considered by the voting members of the board. As a result of this administrative error, he qualifies for a SSB under the FY 2019 RC LTC APL board criteria. The reason for the SSB is based on being previously omitted from the FY 2019 RC LTC APL.

i. Letter of Recommendation for Commission and Reappointment of the applicant from SMA (R) M- G-, 13 September 2023, states:

(1) The SMA recommends the applicant be reappointed as a commissioned officer in the U.S. Army at the rank of MAJ, provided a SSB, and promoted to LTC.

(2) The SMA served with the applicant when the SMA was the Brigade Command Sergeant Major in 2012-2013, to include a combat deployment to Afghanistan in support of Operation Enduring Freedom. At the time, the applicant held the rank of MAJ and served as the Brigade S-1. As such, the SMA and applicant had daily interactions and often worked closely together to provide the best possible support to the Soldiers of the brigade.

(3) It is the SMA's first-hand knowledge and experience the applicant embodies the Army Values and is of the highest moral fibers. As a MAJ, he was a trusted advisory, a consummate professional, and one of the very best adjutant general officers the SMA served with. His performance and character completely justify his reappointment as a commissioned officer, and he is overwhelmingly deserving of being promoted to LTC.

(4) He should also be reappointed to the rank of MAJ and provided a SSB for promotion to LTC due to the material administrative errors committed by the Army. The SMA is aware of the circumstances of the applicant voluntarily resigning his commission to enlist on active duty. It is quite evident that his assigned Army Retirement Services Officer committed an egregious and material error, which prevented his consideration for promotion to LTC also directly leading to him resigning his commission. These two injustices have caused the applicant undue harm and are sufficient evidence that he should be granted full relief by the Board. It is the SMA's recommendation he be granted reappointment to his officer commission and provision of a SSB for promotion to LTC.

j. Letter of recommendation from MG (R) B- L. P-, Ph.D., states:

(1) The MG is writing in support of the applicant to have his enlistment contract revoked and his commission as an officer reappointed to his highest rank attained - MAJ. The MG has known the applicant for ten years and served as his senior rater when serving as the Forces Command Deputy Chief of Staff, G-1. The MG holds the applicant in the highest esteem and attests he honorably and satisfactorily served as a MAJ.

(2) The MG reviewed the evidence of the applicant's appeal and it is his professional opinion, having 31 years of Army Human Resources experience, that the Army committed an egregious error and that, undoubtedly, an injustice, causing long-term professional injury to the applicant, has occurred. The MG was consulted by the applicant, at the time of his decision to resign his commission for continuous service as an enlisted Soldier; the MG encouraged him to do it based on the promise, and his professional belief, that his commission would be restored immediately upon retirement and that he would retire at his highest grade attained within the Army - MAJ. This was commonplace for officers who were discharged for Reduction in Force, during the Vietnam era, so the MG did not question the credibility of this course of action. The MG further contends that Army officials and Human Resource leaders, at every level, asserted his commission would be reappointed, during the season of his retirement. Well, the season of his retirement is upon him, and he is now being told that the promise of being recommissioned was an error resulting in an injustice that he and he family should not be forced to suffer.

(3) In addition, it is the MG's professional opinion that the applicant be provided a SSB and promoted to LTC. He is, unequivocally, morally, mentally, physically, and professionally qualified to serve at the rank of LTC. As his senior rater, at the time of the minor infraction that led to the MG issuing a locally filed GOMOR, it is patently unjust that he was removed from scrolls for promotion to LTC due to being mixed up in a broader titled Criminal Investigation Division investigation. The MG attests this was not the intent of the GOMOR and the applicant absolutely deserves to be promoted to LTC.

(4) It was President Coolidge who opined that "a nation which forgets its defenders will itself one day be forgotten." The MG prays the Board will not forget its servant, the applicant, and will restore his commission and retirement at the highest grade attained.

k. Memorandum for Record from BG H- A. R-, 6 October 2023, states:

(1) The memorandum serves to summarize the BG's professional relationship with the applicant, and her recollection of events and information regarding his decision

to resign his commission. The BG also wholeheartedly supports his request to have his commission reappointed considering his potential to serve as an Army officer and the misinformation he was provided, when making significant career decisions.

(2) The BG was previously assigned as the Chief of Staff for the 364th ESC and was the applicant's direct supervisor, during the time in which he was serving as a MAJ. It was during this assignment that he voluntarily resigned his commission in 2020 to enlist on active duty. From numerous interactions the BG had with the applicant, she was aware of his intent to resign his commission as an officer so he may receive an active duty retirement pension computed from his high-36 pay as a MAJ. She was also aware that he received formal advisement from the 364th ESC's servicing Readiness Division Retirement Services Office, the 88th Readiness Division, affirming that his retirement would be calculated from his high-36 pay as an officer. She is shocked to learn that he was provided incorrect information and feels the Army has greatly disadvantaged him through this administrative error.

(3) As the applicant's supervisor, at the time he resigned his commission, the BG also verifies she did not personally counsel him on any potential loss of retirement benefits, as she was fully unaware that his retirement pay would only be calculated from his enlisted time in the Army. She also does not recall whether he was ever counseled by a career counselor or anyone in his chain of command informing him of the potential loss of retirement benefits. She believes this was an egregious error by the U.S. Army and there should be procedures in place to ensure all Soldiers are fully informed of their retirement benefits before making life changing career decisions.

(4) It is also the BG's strongest recommendation that the Board reappoint his commission and allow him to retire as an officer with full pay and benefits. She also recommends, that upon reappointment of his commission to MAJ, he be considered and selected for promotion to LTC under a SSB. He previously missed an opportunity for promotion due to an AHRC administrative error causing him to never have a second consideration for promotion. He is an exemplary and trusted officer of the highest caliber who the BG would fight to have serve under her leadership again. He is immensely deserving of the opportunity to remedy this unforeseen error, as well as the opportunity to serve as LTC.

I. Letter from SFC M- A. C-, 27 September 2023, states:

(1) The SFC serves as the recruiter who oversaw and processed the applicant's conditional release and voluntary resignation from the U.S. Army Reserve (USAR) to enlisted in the Regular Army on active duty in 2020.

(2) By discussions with the applicant throughout the process, the SFC attests that when he requested conditional release from the USAR and voluntary resignation of

his commission as an officer, it was on the condition, and his belief, that when he retired from active duty as a SSG, his Army pension would immediately be calculated using his high-36 as a MAJ as he would be entitled to retire under Title 10 USC 1370 due to him serving over 10 years as a commissioned officer and over three years as a MAJ on active duty satisfactorily. This was also what the SFC believed to be correct under law and Army policy and the belief the SFC worked under for the entire duration of the applicant's enlistment. Furthermore, the SFC can attest the applicant would not have resigned his commission and enlisted on active duty if he knew his retired pay would be computed using only his enlisted months of service and not his time as a commissioned officer.

(3) The SFC also attests that at no time, in entire process of the applicant's completing his conditional release from the USAR and enlisting on active duty, was he ever counseled or informed, verbally or written, of any exception of law or Army policy that would prevent his immediate high-36 retired pay from being calculated using his basic pay as a commissioned officer.

(4) Due to the applicant being erroneously advised by his assigned USAR retirement services officer counselor, and him solely resigning his commission on this information, while never being informed by the Army of any potential loss of retirement benefits, it is the SFC's professional belief that an administrative error has been committed by the U.S. Army and a significant injustice committed. It is the SFC's recommendation that the applicant either have his commission be reappointed in the rank of MAJ or his enlistment contract be voided so he may immediately retire as a commissioned officer upon 20 years of active federal service.

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

a. DA Form 71 (Oath of Office - Military Personnel) shows he took the oath of office as a Reserve commissioned officer on 10 May 2002.

b. Order Number 307-134, published by AHRC, 3 November 2011, shows he was promoted to the rank of MAJ effective 1 December 2011 with a date of rank of 1 December 2011.

c. DA Form 4187 (Personnel Action), 17 September 2014, states in order to receive separation pay, the applicant agrees to serve in the Ready Reserve of a Reserve component of the Armed Forces for a period of not less than three years following his separation from active duty.

d. DA Form 5691-R (Request for Reserve Component Assignment Orders), 16 December 2014 shows the applicant, in the rank of MAJ, requested assignment in the USAR for his remaining service of three years.

e. Memorandum from AHRC, 18 December 2014, subject involuntary discharge or involuntary transfer shows the separation as the result of the FY 2014 MAJ officer separation board pertaining to the applicant effective 1 May 2015 is involuntary.

f. DD Form 214 (Certificate of Release or Discharge from Active Duty), shows the applicant was honorably discharged, in the rank of MAJ, from the Regular Army on 1 May 2015. He had completed 12 years, 9 months, and 26 days of active duty service. His effective date of rank to MAJ was 1 December 2011.

g. Memorandum from AHRC, subject Appointment as a Reserve Commissioned Officer, 13 March 2015 appointed the applicant, in the rank of MAJ as a Reserve commissioned officer.

h. Memorandum from the Secretary of the Army, 3 May 2018, states effective immediately, the Secretary of the Army removed the applicant from the FY 2017, LTC Army Reserve Non-Active Guard Reserve, APL, Competitive Category, recommended promotion list. The reason for his removal was not indicated on the memorandum.

i. Request for Conditional Release, 28 February 2020, shows the applicant, in the rank of MAJ, requested a conditional release from the USAR contingent upon actual appointment or enlistment in the Regular Army. The recruiter signed the form on 3 March 2020 and the request was approved on 10 October 2020.

j. DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States) shows the applicant enlisted in the Regular Army on 25 November 2020 in the rank of SSG.

k. Orders D-12-024975, published by AHRC, 1 December 2020, honorably discharged the applicant from the USAR, effective 24 November 2020.

l. Orders 090-0269, published by Headquarters, United States Army Garrison, Fort Bragg, 31 March 2023, retired the applicant, in the rank of SSG, effective 31 July 2024 and placed him on the retired list on 1 August 2024. Retired rank and date of rank was SSG/25 November 2020. His prior rank and date of rank was MAJ/1 December 2011.

m. The applicant's service record was void of a DD Form 214 (Certificate of Release or Discharge from Active Duty) showing his enlisted service as a SSG in the Regular Army.

5. On 21 August 2024, the Team Lead, Officer Promotions, AHRC, provided an advisory opinion, which states:

a. Based on a review of AHRC's records and the information provided, they found the applicant would have been eligible for a SSB under the FY 2019, LTC, APL, as an omission due to an administrative error. The applicant was originally selected for promotion to LTC under the FY 2017 RC, LTC, APL, however due to derogatory information found in his records he went before a PRB and after reviewing the matters pertaining to the PRB, the Secretary of the Army rendered a decision to remove him from that promotion list. His records were never updated causing him to be omitted from his next eligible promotion board, which would have been the FY 2019, LTC, APL.

b. AHRC's records also indicate he was discharged from the USAR on 24 November 2020 and joined the active Army in the enlisted rank of SSG, so therefore, he would be ineligible for promotion consideration to LTC under the FY 2020 through FY 2023 promotion boards.

c. Consideration under the FY 2019 criteria can only occur as a directive from the Board due to his current status.

6. On 23 August 2024, the applicant's attorney was provided a copy of the advisory opinion to allow him the opportunity to respond. He did not respond.

7. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. 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.

#### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was warranted.

a. Reinstatement as an officer in the rank of MAJ/O-4. Deny. The Board considered the applicant's resignation to enlist in the Regular Army and his scheduled retirement date and the advising official's opinion from the U.S. Army Human Resources Command and determined by a preponderance of the evidence there was no error or injustice in the processing of the applicant's resignation and/or subsequent service.

b. Back pay, allowances, entitlements, and constructive credit. Deny. The Board determined based on the foregoing, there was no error or injustice to reinstate the applicant; therefore, constructive credit, pay, allowances, and entitlements are unwarranted.

c. Consideration for promotion to LTC through a SSB for FY 19-23. Partial. The Board determined there was an error in the applicant's consideration for LTC in FY19 and that he should have been considered; however, due to the applicant's status in the Regular Army changing in 2020, that changed his eligibility for consideration for FYs 20-

23.

d. Retired rank and pay adjusted in conjunction with reinstatement. Deny. The Board determined there was insufficient evidence to support reinstating the applicant in the rank of MAJ/O-4; therefore, his retirement by the Army based solely on this decision is premature.

2. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
XX:	XX:	XX:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by referring him to an SSG for promotion to LTC using the FY19 RC LTC APL criteria and if approved any pay and entitlements based on the correction.

X //signed// \_\_\_\_\_

CHAIRPERSON

Signed by:

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. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 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.

2. Title 10, U.S. Code, section 1552, the law which provides for the Board, states that The Secretary may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due to the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps or Coast Guard, as the case may be.

3. Army Regulation 15-80 (Army Grade Determination Review Board (AGDRB) and Grade Determinations) establishes policies, procedures, and responsibilities of the AGDRB and other organizations delegated authority to make grade determinations on behalf of the Secretary of the Army.

a. Paragraph 2-4 (Grade determination considerations) states, a grade determination is an administrative decision to determine appropriate retirement grade, retirement pay, or other separation pay. Although a lower grade determination may affect an individual adversely, such determinations under this regulation are not punitive. The AGDRB will consider each case on its own merits. Generally, determination will be based on the Soldier's overall service in the grade in question, either on active duty or other service qualifying the Soldier for retirement, receipt of retired pay, or separation for physical disability. Circumstances pertinent to whether such service is found satisfactory include, but are not limited to, the following:

(1) Length of otherwise satisfactory service in the grade in question, before and after the misconduct.

(2) Performance level, as reflected in evaluation reports and other portions of the service record that reflect performance. In reviewing these matters, the AGDRB will consider whether reporting officials were aware of the performance giving rise to the grade determination.

(3) Nature and severity of misconduct. Although the punishment an individual has received may be one factor in determining the seriousness of misconduct, the amount of punishment will not be considered in determining whether the individual has been "punished enough." Grade determinations are not considered punitive, and the

standard for grade determinations is "highest grade satisfactorily served," not whether the individual has been sufficiently punished.

(4) The grade at which the misconduct was committed.

(5) The grade at which the misconduct was addressed by proper authorities.

b. Paragraph 2-5 (Unsatisfactory service) states, service in the highest grade or an intermediate grade normally will be considered to have been unsatisfactory when:

(1) Reversion to a lower grade was —

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

(2) There is sufficient unfavorable information to establish that the Soldier's service in the grade in question was unsatisfactory. One specific act of misconduct may or may not form the basis for a determination that the overall service in that grade was unsatisfactory, regardless of the period of time served in grade. Retirement in lieu of or as the result of elimination action will not, by itself, preclude retirement in the highest grade; however, the underlying misconduct and/or substandard performance can result in a determination that service in grade was unsatisfactory.

c. Paragraph 2-6 (Service in lower grade) states, if service in the highest grade held was unsatisfactory, the Soldier can be deemed to have served satisfactorily in the next lower grade actually held, unless paragraph 2–5 applies with regard to that next lower grade.

4. Title 10, USC, section 1370 (Regular Commissioned Officers), states that in order to be credited with satisfactory service, an officer must have served in an active status for not less than 6 months. This is the minimum amount of time an officer must serve in order to have satisfactory service in the rank/grade. It does not mean that once an officer has 6 months of satisfactory service, all or part of the remainder of his or her service is necessarily determined to be satisfactory. One specific act of misconduct may or may not form the basis for a determination that the overall service in that rank/grade was unsatisfactory, regardless of the period of time served in the rank/grade.

5. Title 10, USC, Section 3911 (Twenty Years or More: Regular or Reserve Commissioned Officers) provides that the Secretary of the Army may, upon the officer's request, retire a regular or reserve commissioned officer of the Army who has at least 20 years of service computed under section 3926 of this title, at least 10 years of which

have been active service as a commissioned officer. The Secretary of Defense may authorize the Secretary of the Army, during the period specified in paragraph (2), to reduce the requirement under subsection (a) for at least 10 years of active service as a commissioned officer to a period (determined by the Secretary of the Army) of not less than eight years. The period specified in this paragraph is the period beginning on 7 January 2011, and ending on 30 September 2018.

6. Department of Defense 7000.14 (Financial Management Regulation) provides that for members who entered the military service on or after 8 September 1980, the retired pay base is generally the average of the highest three years (36 months) of basic pay the member received for any 36 months, whether consecutive or not, of active service. Section 0102 (Service Creditable for Retirement Eligibility) provides upon completion of 20 years of creditable service, a member may request to be transferred to a retired or retainer status. A regular or reserve commissioned officer may voluntarily be retired after completion of 20 years of active service, at least 10 years of which is active commissioned service.

7. Army Regulation 600-8-29 (Officer Promotions) prescribes policies, operating rules, and steps governing promotion of Army commissioned and warrant officers on the active-duty list (ADL). Chapter 6 (SSB) provides that SSBs may be convened under Title 10, USC, section 628 (SSB) to consider, or reconsider commissioned or warrant officers for promotion when HQDA determines that one or more of the following circumstances exist:

a. Administrative error (Title 10, USC, section 628(a)(1)) (SSB required) - an officer was not considered from in or above the promotion zone by a regularly scheduled board because of administrative error.

b. Material unfairness (Title 10, USC, section 628(b)(1)) (HRC discretionary).

c. An officer will not be considered or reconsidered for promotion by an SSB when the following occurs:

(1) The officer is pending removal from a promotion or recommended list and the removal action was not finalized by the SECARMY before the next selection board convened to consider officers of his or her grade.

(2) An administrative error was immaterial, or the officer, in exercising reasonable diligence, could have discovered and corrected the error in the DA Form 4037 or AMHRR. The DA Form 4037 is a summary document of information generally available elsewhere in the officer's record. It is the officer's responsibility to review his or her DA Form 4037, AMHRR, and MBF before the board convenes and to notify the board, in writing, of possible administrative deficiencies.

(3) Letters of appreciation, commendation, or other commendatory data for awards below the Silver Star are missing from the officer's AMHRR.

(4) The PSB did not see a nonmandatory DA Form 4037 submitted to HRC after the suspense established in the promotion board zone of consideration MILPER message.

(5) The PSB did not see a DA official photograph or saw an outdated DA official photograph.

(6) The PSB did not consider correspondence to the board president that was delivered to the Commanding General, U.S. Army Human Resources Command after the cutoff date for such correspondence established in the respective promotion board zone of consideration MILPER message.

8. 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. This prohibition is a statutory exemption from disclosure, as described in section 552(b)(3) of title 5. (b) Prohibited Uses of Board Discussions, Deliberations, Notes, and Records.—The discussions and deliberations of a selection board described in subsection (a) and any written or documentary record of such discussions and deliberations—

- are immune from legal process
- may not be admitted as evidence; and
- 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//