ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [redacted]

BOARD DATE: 6 November 2024

DOCKET NUMBER: AR20240001646

APPLICANT REQUESTS: through counsel

1. Reconsideration of his previous request to promote the applicant to the rank/grade of private (PV2)/E-2 with applicable back pay and allowances, effective 29 March 2018.

2. As a new request, to promote the applicant to the rank/grade of private first class (PFC)/E-3 instead of PV2/E-2 as a matter of equity.

3. A personal appearance before the Board.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:
Counsel letter in leu of DD Form 149 (Application for Correction of Military Record)

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 AR20180013978 on 15 August 2019
- Docket Number AR20220004476 on 16 February 2023
- Docket Number AR20230012106 on 23 November 2023

2. Counsel states in part:

a. The Defense Finance and Accounting Service (DFAS) Office of the General Counsel has thumbed a nose at both this Board and the Court of Appeals for the Armed Forces and its decision in Howell v. United States, 75 M.J. 386, 391 (C.A.A.F. 2016). Its memorandum (attached) refuses to implement this Board's previous decision to grant the applicant monetary relief. This Board should therefore grant the applicant clemency against the sentence to confinement he already served, which would result in a monetary award equal to the amount this Board already determined he should receive.

b. Following a remand from the Court of Federal Claims, this Board determined that the applicant had been the victim of an injustice. In its decision on 16 February 2023 (AR20220004476), this Board determined that he "should have been paid at the grade of Master Sergeant (MSG)/E-8 during the period that started with his release from confinement on 11 January 2018 and ended on the date the second adjudged punitive reduction to private (PVT)/E-1 became effective (29 March 2018)." This Board specifically found that "The Board found the rationale articulated in Howell more persuasive than DFAS's policy, which is articulated in a letter authored by [Mrs. J- R-], a DFAS attorney. Consequently, the Board finds that a preponderance of the evidence indicates that the applicant should have received pay and allowances at the grade of MSG/E-8 from his date of release from confinement on 11 January 2018 until and through 28 March 2018. As directed by this Board's decision, the applicant promptly submitted the required documentation to DFAS. On 12 October 2023, Mrs. J- R- emailed counsel for the government. In it, she indicated that DFAS would not comply with this Board's decision because of DFAS's continued preference for decisions of the Court of Federal Claims over the decisions of the military courts, despite the fact that Howell is a more recent decision interpreting the Uniform Code of Military Justice (UCMJ).

c. Calculations: The time between 11 January 2018, the date of release from confinement, and 29 March 2018, the date on which the reduction became effective as a result of re-hearing, is 77 days. The applicant incorrectly received base pay at the E-1 rate under the 2018 pay table ($1638.30/month). This Board found that he should have received pay at the E-8 rate during this time ($5,471.70/month for a servicemember with 23 years of service). This is a base pay monthly difference of $3833.40 ($5471.70-$1638.30). The daily base pay difference is $3833.40/30 = $127.78. Additionally, the applicant received Basic Allowance for Housing (BAH) at the Fort Hood E-1 With Dependents rate of $1083/month. The BAH With Dependent rate for an E-8 in 2018 was $1365/month. This is a $282.00 difference per month ($1365-1083), or a $9.40 difference per day ($282/30). There was therefore a $137.18 ($127.79 + $9.40) difference per day between the Base Pay and BAH which he received and that to which this Board determined him to be entitled. The total deficiency is therefore $10,562.86 ($137.18 x 77 days).

d. An E-1's monthly pay rate in 2018 was 1638.30. An E-1's daily pay rate in 2018 was $54.61 ($1638.30/30 days). An E-1's monthly BAH With Dependent was $1083. An E-1's daily BAH was therefore $36.10 ($1083/30 days). An E-1 therefore received $90.71 in daily pay and housing allowance ($54.61 daily pay + $36.10 daily BAH). Therefore, this Board should grant to the applicant clemency in the form of reducing his sentence to confinement by 120 days ($10,562.86 total owed/$90.71 daily E-1 pay and allowances) (result rounded up). This would result in a pay and allowances credit to him of approximately the same amount as if he had been paid as an E-8 between

11 January 18 and 29 March 18 and would correct the injustice which this Board has already identified.

e. Retroactive Promotion: This Board is also considering for a second time on remand whether to retroactively promote the applicant to E-2. The Court of Federal Claims has indicated that he almost is certainly entitled to a retroactive promotion to E-2 as a matter of law. As a matter of equity, this Board could promote him to the retired grade of E-3 instead of E-2 as a means of correcting the injustice from the underpayment following his release from confinement.

f. To be clear, the proposed credit does not mean that the applicant leaves confinement early – he already served the full sentence to confinement, including the 120 days in question. It merely provides the means to give him the relief to which this Board has already determined he is entitled. Counsel is available to personally appear before the Board, should this Board determine that such an appearance would be beneficial to its consideration of this matter.

3. On 17 May 1994, the applicant enlisted in the Regular Army and served continuously until his length of service retirement.

a. On 21 July 2011, Orders Number 202-12 issued by the U.S. Army Human Resources Command, Fort Knox, KY, promoted the applicant to the rank/grade of MSG/E-8, effective on with a date of rank of 1 August 2011.

b. On 12 February 2015, he was arraigned by General Court-Martial convened by the Commander, Headquarters, III Corps and Fort Hood, TX, and was tried for violating the UCMJ. The court found him guilty of the following charges;

(1) Charge I, Article 120. Plea: Not Guilty. Finding: Guilty.

(a) Specification 1: Did, in Alabama, between on or about 1 June 2008 and on or about 30 June 2008, engage in a sexual contact, to wit: touching of K.G.'s genitalia with his finger, a child who had not attained the age of 12 years. Plea: Not Guilty. Finding: Not Guilty.

(b) Specification 2: Did, in Alabama, on diverse occasions, between on or about 1 October 2007 and on or about 23 July 2009, take indecent liberties in the physical presence of S.W., a female under 16 years of age, not the wife of the accused, by communicating the words: to wit: that [Applicant] would drop Ms. W. off at a strip club called Teasers, that she could work there and get money, and that [Applicant] would watch her, or words to that effect, with the intent to arouse, appeal to, and gratify the sexual desire of [Applicant]. Plea: Not Guilty. Finding: Guilty.

(c) Specification 3: Did, in Alabama, between on or about 1 October 2007 and on or about 23 July 2009, take indecent liberties in the physical presence of S.W., a female under 16 years of age, not the wife of the accused, by communicating the words: to wit: asking whether Ms. W. shaved her vagina, or words to that effect, with the intent to arouse, appeal to, and gratify the sexual desire of [Applicant]. Plea: Not Guilty. Finding: Guilty.

(d) Specification 4: Did, in Alabama, between on or about 1 October 2007 and on or about 23 July 2009, take indecent liberties in the physical presence of S.W., a female under 16 years of age, not the wife of the accused, by rubbing and touching Ms. W.'s thigh with his hand, with the intent to arouse, appeal to, and gratify the sexual desire of [Applicant]. Plea: Not Guilty. Finding: Not Guilty.

(e) Specification 5: Did, in Alabama, between on or about 1 October 2007 and on or about 23 July 2009, take indecent liberties in the physical presence of S.W., a female under 16 years of age, not the wife of the accused, by communicating the words, to wit: asking Ms. W. what sexual acts she has performed and engaged in, or words to that effect, with the intent to arouse, appeal to, and gratify the sexual desire of [Applicant]. Plea: Not Guilty. Finding: Guilty.

(f) Specification 6: Did, in Alabama, between on or about 1 November 1994 and on or about 1 January 1996, rape V.C. Plea: Not Guilty. Finding: Not Guilty.

(g) Specification 7: Did, in Alabama, between on or about 15 April 2008 and 17 June 2010, engage in sexual contact with Ms. C.H., to wit: push his penis on her buttocks, by causing bodily harm upon her: to wit: an offensive touching. Plea: Not Guilty. Finding: Not Guilty.

(h) Specification 8: Did, in Alabama, between on or about 15 April 2008 and 17 June 2010, engage in sexual contact with Ms. C.H., to wit: wrongfully push his penis on her buttocks, and such sexual contact was without legal justification or lawful authorization and without the permission of Ms. C. H. Plea: Not Guilty. Finding: Not Guilty.

(2) Charge II: Article 128. Plea: Not Guilty. Finding: Guilty.

(a) Specification 1: Did, in Alabama, between on or about 1 October 2007 and on or about 23 July 2009, unlawfully rub and touch S.W., a child under the age of 16 years, on the thigh with his hand. Plea: Not Guilty. Finding: Guilty.

(b) Specification 2: Did, in Alabama, between on or about 1 October 2007 and on or about 23 July 2009, unlawfully touch S.W., a child under the age of 16 years, on the body with his hands. Plea: Not Guilty. Finding: Dismissed. (On 15 November 2016,

United States Army Court of Criminal Appeals dismissed Specification 2 of Charge II.)

(c) Specification 3: Did, in Alabama, between on or about 15 April 2008 and 1 June 2010, unlawfully touch Ms. C.H. on her buttocks with his penis. Plea: Not Guilty. Finding: Not Guilty.

(3) Charge Ill: Article 134. Plea: Not Guilty. Finding: Guilty.

(a) Specification 1: Did, in Alabama, between on or about 15 April 2008 and on or about 15 June 2010, wrongfully ask Ms. S.W., a player under 18 years of age on his soccer team that he was coaching, about her sexual experiences, what sexual acts she had done, told her she had a nice body, and make other sexual comments to her, making her uncomfortable, which conduct, under the circumstances, was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces. Plea: Not Guilty. Finding: Dismissed. (On 12 December 2017, United States Court of Appeals for the Armed Forces dismissed Specification 1 of Charge Ill.)

(b) Specification 2: Plea: Did, in Alabama, between on or about 15 April 2008 and on or about 15 June 2010, ask females under the age of 18, to be his friend on Facebook, send messages on Facebook to females under the age of 18, and make inappropriate comments to females under the age of 18, without their parents knowledge or permission, which conduct, under the circumstances, was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces. Not Guilty. Finding: Dismissed. (On 15 November 2016, United States Army Court of Criminal Appeals dismissed Specification 2 of Charge Ill.)

(c) Specification 3: Did, in Alabama, between on or about 15 April 2008 and on or about 15 June 2010, orally communicate to Ms. C.H., certain indecent language, to wit: that she had a nice ass, or words to that effect, which conduct, under the circumstances, was to the prejudice of good order and discipline and was of a nature to bring discredit to the armed forces. Plea: Not Guilty. Finding: Guilty.

(d) Specification 4: Did, in Alabama, between on or about 15 April 2008 and on or about 15 June 2010, say to Mrs. C.H., that she had a nice ass, or words to that effect, which conduct, under the circumstances was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces. Plea: Not Guilty. Finding: Dismissed. (On 15 November 2016, United States Army Court of Criminal Appeals dismissed Specification 4 of Charge Ill.)

(e) Specification 5: Did, in Alabama, between on or about 15 April 2008 and on or about 10 July 2008, tell Ms. M.M., while she was assisting him with his soccer team, while she was under 18 years of age, that he and his wife were swingers,

meaning [Applicant] and his wife were conducting sexual acts with others at the same time, which conduct, under the circumstances, was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces. Plea: Not Guilty. Finding: Dismissed. (On 12 December 2017, United States Court of Appeals for the Armed Forces dismissed Specification 5 of Charge Ill.)

(4) Additional Charge I: Article: 128. Plea: Not Guilty. Finding: Dismissed. The Specification: Did, in Alabama, between on or about 1 June 2006 and on or about 1 September 2007, unlawfully grab B.R., a child under the age of 16 years, on her pants with his hands. Plea: Not Guilty. Finding: Dismissed. (On 15 November 2016, United States Army Court of Criminal Appeals, conditionally upon final judgement, dismissed The Specification of Additional Charge I.)

(5) Additional Charge II: Article 134. Plea: Not Guilty. Finding: Guilty.

(a) Specification 1: Did, in Alabama, between on or about 1 June 2006 and on or about 1 September 2007, commit an indecent assault upon B.R., a person not his wife, by grabbing her pants with his hands trying to open them, with intent to gratify his lust and sexual desires, and that said conduct was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces. Plea: Not Guilty. Finding: Dismissed. (On 15 November 2016, United States Army Court of Criminal Appeals, conditionally upon final judgement, dismissed Specification 1 of Additional Charge II.)

(b) Specification 2: Did, in Alabama, between on or about 1 June 2006 and on or about 1 September 2007, commit an indecent act upon the body of B.R., a female under 16 years of age, not the wife of the accused, by placing his hands upon the top of her pants trying to open them and saying to her that he would not let her leave the room until she showed him some part of her body, after locking the hotel room door, with intent to arouse, appeal to and gratify the lust, passion and sexual desires of the accused, and that said conduct was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces. Plea: Not Guilty. (At the original trial, after pleas, but before findings, the Military Judge granted the Defense's motion to dismiss the language "and saying to her that he would not let her leave the room until she showed him some part of her body".) Finding: Guilty.

c. The Court found him guilty of:

- Indecent liberties of a female under 16 years of age (four specifications)
- Unlawfully rub or touch a child under the age of 16 years of age
- Orally communicate certain indecent language
- Commit and indecent act upon a female under the age of 16 years of age

d. The court sentenced him to reduction to the lowest enlisted grade of E-1, confinement for 55 months, forfeiture of all pay and allowances.

4. On 15 November 2016, the U.S. Army Court of Criminal Appeals dismissed Specification 2 of charge 2 and Specifications 2 and 4 of charge 3; conditionally dismissed the Specification of the additional charge and Specification 1 of additional charge 2; affirmed the remaining charges and reassessed the sentence affirming only so much of the sentence as applied to confinement for seven years and eight months, forfeiture of all pay and allowances, and reduction to the rank/grade of PVT/E-1.

5. On 12 December 2017, the U.S. Court of Appeals for the Armed Forces affirmed in part and reversed in part and authorized a rehearing on specification 1 of charge 1 (touching the genitalia of a child who had not attained the age of 12 years) and a sentence rehearing on the affirmed findings of guilty as to specifications 2,3, and 5 of charge 1. Specification 1 of charge 2; Specification 3 of charge 3 and the Specification of additional charge 2. approved and ordered the sentence executed. The applicant was credited with 1,465 days of confinement against the sentence of confinement. The portion of the sentence extending to confinement had already been served. All rights, privileges, and property of which the applicant had been deprived by virtue of the findings of not guilty of specification 1, charge 1 on retrial are restored.

6. On 30 September 2018, the applicant was retired from active duty by reason of sufficient service for retirement. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows in item 4a (Grade, Rate or Rank) PV1, item 12i (Effective Date of Pay Grade) shows 29 March 2018, item 29 (Dates of Time Lost During this Period) shows 10 January 2014 through 11 January 2018.

7. On 16 February 2023, in ABCMR Docket Number AR20220004476 the Board found:

a. That the applicant should have been paid at the grade of MSG/E-8 during the period that started with his release from confinement on 11 January 2018 and ended on the date the second adjudged punitive reduction to PVT (E-1) became effective (29 March 2018). Although the advisory opinion from Army G-1 emphasizes DFAS's policy of not paying a Soldier's pay and allowances at the Soldier's previous pay grade when released from confinement and awaiting re-hearing, the Board is persuaded that the Court of Appeals for the Armed Forces' (CAAF) opinion in United States v. Howell provides better authority on this issue. In Howell, CAAF found that if an accused is released from confinement and is awaiting rehearing, "his pay status should be the same as if he had never been tried in the first instance." Because it was decided by CAAF, the holding in Howell applies to all of the armed services, and not just the Army. The Board found the rationale articulated in the Howell opinion more persuasive than DFAS's policy, which is articulated in a letter authored by Ms. J.- R.-, a DFAS attorney. Consequently, the Board finds that a preponderance of the evidence indicates that the

applicant should have received pay and allowances at the grade of MSG/E-8 from his date of release from confinement on 11 January 2018 until and through 28 March 2018.

b. Regarding the applicant's contention that he should have been promoted from the rank of E-1 to E-2 prior to his September 2018 retirement, the Board finds that relief is not warranted. The Board is persuaded by the advisory opinion submitted by Army G-1 and concurs with that opinion. Additionally, the Board is persuaded that, except for the "punishment phase" reason, each of the reasons Army G-1 advanced for denying the applicant's request provides a separate and sufficient reason for denying the applicant's request. The Board found that the company commander's alleged failure to counsel the applicant about his decision to remove the applicant from the promotion list did not negate, undermine, or render ineffective the removal action itself. Even assuming, for argument, that the company commander failed to counsel the applicant about the removal, the Board found no authority (and the applicant has cited no authority) that directs the remedy for such a failure is to undo the removal action. The Board also found that the applicant was not prejudiced by the company commander's alleged failure to counsel him. The applicant, in 2018, was a seasoned Soldier with almost two decades of military experience. He must have known, or should have known, the reason why the company commander removed him from the promotion list (i.e., the applicant's proven proclivity for serious sexual misconduct, including sexual misconduct involving minors.) Consequently, the Board considers the company commander's error in this regard (assuming it occurred) to be harmless.

8. On 28 November 2023, in ABCMR Docket Number AR20230012106 the Board found:

a. After considering the all the evidence and considering the U.S. Court of Federal Claims 23 August 2023 Memorandum Opinion remanding this case to the ABCMR, the ABCMR must find the relief is warranted. The applicant is a former Regular Army service member who, while serving in the rank/grade of MSG/E-8, was convicted by General Court-Martial in January 2014. The court sentenced him to confinement, forfeiture of pay and allowances, and rank reduction. Under appellate review, both the U.S. Army Court of Criminal Appeals and the Court of Appeals for the Armed Forces reviewed his Court-Martial conviction and affirmed, in part, the findings. Portions of his conviction and his sentence were set aside, and he was ordered to be re-tried. He was released from confinement in or around December 2017 and was returned to duty pending re-trial. The applicant was re-tried on remand in March 2018 by a military judge sitting as a General Court-Martial. Following his retrial, he was resentenced based on its outcome. He was retired from the Army on 30 September 2018, in the rank/grade of PVT/E-1.

b. The applicant's criminal misconduct while a serving as a senior Noncommissioned Officer does not lend itself to equitable consideration on his behalf.

Moreover, the ABCMR is disappointed that the applicant's chain of command did not take appropriate action in 2018 to prevent the applicant's automatic promotion to E-2, e.g., initiating administrative separation action immediately after the applicant's 15 March 2018 Court-Martial rehearing. The factual background of this case leads the ABCMR to believe that the applicant's command improperly allowed a flag to remain imposed against him subsequent to 2 April 2018. Additionally, the ABCMR was unable to find a regulatory provision that would have made the applicant ineligible for automatic promotion between 2 April 2018 and 12 July 2018 (the date the applicant's retirement was approved). The ABCMR also finds that sufficient time existed to automatically promote the applicant during the relevant time period. Consequently, the ABCMR must find that error occurred when the applicant was not automatically promoted to E-2 prior to his 30 September 2018 retirement. Given that the applicant was properly flagged until 2 April 2018, the ABCMR estimates that the applicant should have been automatically promoted about 4 – 6 weeks after that date. Thus, the ABCMR finds that the applicant should have been automatically promoted to E-2 on 1 May 2018.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's counsel (hereinafter "counsel") requests that this Board grant clemency in the form of reducing the applicant's confinement term. Counsel does not contend that the confinement term adjudged against the applicant is too harsh relative to the confining offenses or that the applicant has demonstrated meritorious post-conviction behavior so commendable that clemency had been "earned." Instead, counsel contends that clemency in the form of a confinement term reduction should be awarded as a contrivance to evade DFAS's decision to not pay the applicant E8 pay during the interim between his 11 January 2018 release from confinement and the date the second adjudged punitive reduction to PVT (E1) become effective (29 March 2018). It should be noted that the ABCMR has already granted relief regarding this issue. (See the ABCMR's previous stated in a previous decision at AR20220004476).

2. The Board finds that the applicant should have been paid at the grade of MSG (E-8) during the period that started with his release from confinement on 11 January 2018 and ended on the date the second adjudged punitive reduction to PVT (E-1) became effective (29 March 2018). Although the advisory opinion from Army G-1 emphasizes DFAS's policy of not paying a Soldier's pay and allowances at the Soldier's previous pay grade when released from confinement and awaiting re-hearing, the Board is persuaded that the Court of Appeals for the Armed Forces' (CAAF) opinion in United States v. Howell provides better authority on this issue. In Howell, CAAF found that if an accused is released from confinement and is awaiting rehearing, "his pay status should be the same as if he had never been tried in the first instance." Because it was decided by CAAF, the holding in Howell applies to all of the armed services, and not just the Army. The Board found the rationale articulated in the Howell opinion more persuasive than DFAS's policy,

which is articulated in a letter authored by Ms. J.R., a DFAS attorney. Consequently, the Board finds that a preponderance of the evidence indicates that the applicant should have received pay and allowances at the grade of MSG (E-8) from his date of release from confinement on 11 January 2018 until and through 28 March 2018.

3. This Board acknowledges that DFAS has indicated that it will not pay the applicant in accordance with ABCMR's previous decision. However, DFAS is part of DOD, which is an authority superior to the Department of the Army (DA). Consequently, it appears the applicant's dispute is with DOD and not DA. In accordance with the applicant's request, this Board considered granting clemency in the form of a reduction in the applicant's confinement term. However, the applicant does not assert that his good behavior, good works, or otherwise commendable conduct warrants favorable clemency consideration. Nor does he assert that the confinement term is harsh relative to the seriousness of the confining offenses. Instead, and as previously discussed, the applicant requests that clemency be granted as an artifice to elude DFAS's refusal to disburse E-8 pay to the applicant for the relevant time period. The Board finds that granting relief in this manner is an imprudent use of its equitable authority. Consequently, the Board finds that the applicant has failed to demonstrate by a preponderance that clemency is warranted. Therefore, relief is denied.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
[redacted]	[redacted]	[redacted]	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board found 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 AR20180013978 on 15 August 2019
- Docket Number AR20220004476 on 16 February 2023
- Docket Number AR20230012106 on 23 November 2023

[redacted]

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 (AR) 600-8-19, (Enlisted Promotions and Reductions) (25 April 2017):

a. Paragraph 1-7(c) authorizes commanders to promote Soldiers to the ranks of specialist (SPC) and below.

b. Paragraph 1-8 (c)(1) states the U.S. Army Human Resources Command (unit CDR for troop program unit (TPU), except Soldiers on initial active duty for training (IADT)) will—(1) Automatically promote Soldiers to the ranks of private enlisted two (PV2), PFC, and SPC upon attainment of the required time in service (TIS) and time in grade (TIG) requirements established in this regulation. Unit CDRs will take action to promote all other Soldiers on an individual basis.

c. Paragraph 1-9 b states Company, troop, battery, and separate detachment CDRs are authorized to promote Soldiers to the ranks of PV2, PFC, and SPC. Regular Army CDRs will promote Soldiers serving on active duty during IADT.

d. Paragraph 1-10 states a Soldier specialist through MSG are nonpromotable to a higher rank within 12 months following a court-martial conviction. A Soldier is denied

favorable personnel actions under the provisions of AR 600-8-2. Failure to initiate a DA Form 268 does not affect the Soldier's nonpromotable status if circumstances exists that requires imposition of a favorable personnel action under the provisions of AR 600-8-2

e. Paragraph 1–27 (25 April 2017), Counseling of Soldiers not recommended for Promotion. First-line leaders will formally counsel Soldiers, in writing, who are eligible for promotion to PV2 through SSG without a waiver (fully qualified) but not recommended for promotion. Counseling will take place initially when the Soldier attains eligibility, and at least every 3 months thereafter, and include information as to why the Soldier was not recommended and what the Soldier can do to correct deficiencies or qualities that reflect a lack of promotion potential.

f. Paragraph 2-3, Processing Enlisted and Promotions to Private E-2, Private First Class and Specialist, Rules:

g. The AAA–117 for the Regular Army, the Enlisted Promotion Application for the USAR, and DA Form 4187 or promotion orders for the ARNG are the official instruments used by CDRs to recommend Soldiers for promotion to SPC and below. When the CDR denies promotion, he or she may promote the Soldier on the next automated enlisted advancement report, provided the Soldier is otherwise qualified in accordance with paragraph 1–10.

h. Promotions to PV2, PFC, and SPC will be made automatically by the eMILPO (RA) and the Regional Level Application Software (RLAS) (USAR) or immediately with promotion orders (ARNG) for posting to the automated personnel file and/or the master military pay file. ARNG and USAR Soldiers on IADT will not be promoted to SPC unless concurrence is obtained from the Soldier's RC unit. DA Form 4187 or promotion orders will be used for all USAR Soldiers and all ARNGUS Soldiers awaiting initial military training (special promotions and split training option-phase II) and all promotions for Soldiers in a Title 10 status (including mobilization). DA Form 4187 will not be used for other automatic promotions. ARNG Soldiers are not required to be MOS qualified for promotion through SPC.

i. Eligibility criteria for automatic (RA and USAR) or immediate (ARNG) promotion to PV2, PFC, and SPC will be as follows:

(1) Promotion to PV2 is 6 months TIS.

(2) Promotion to PFC is 12 months TIS and 4 months TIG.

(3) Promotion to SPC is 24 months TIS and 6 months TIG.

(4) Soldiers must meet eligibility criteria in paragraph 1–10.

(5) Any Soldier previously reduced (for misconduct, inefficiency, or cause) must be fully qualified (without a waiver) for promotion to the next higher rank.

j. If a CDR elects not to recommend a Soldier for promotion on the automatic promotion date, the CDR must annotate "NO" on the AAA–117 (RA) or GRA–PO1 (Advancement Eligibility Status Roster) (USAR), then the CDR (or BN HR) must prepare a DA Form 4187 denying the promotion. A DA Form 268 will be submitted no later than the 20th day of the month preceding the month of automatic promotion. The first-line leader must counsel the Soldier, using DA Form 4856 (Developmental Counseling Form). The DA Form 4187 and the DA Form 4856 must be attached to the enlisted advancement report before it is forwarded to the BN S1 HR specialist. The BN S1 HR specialist must submit a Flag transaction in the personnel system to block the promotion as described below.

2. Title 10, United States Code, section 1552 states the Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. The Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for 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 the claimant on account of his or another's service in the Army.

3. AR 15-185 (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 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.

//NOTHING FOLLOWS//